

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

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## Summary

*The eventful defeat of the Kenya African National Union political party in the 2002 general elections ushered in a new era for Kenya. With the change of regime an opportunity for transitional justice presented itself. A task force established by the Minister for Justice and Constitutional Affairs advised that there was a need for transitional justice. However, given the political differences among the political elite, this path of transitional justice proved not to be as easy as contemplated. The report and recommendations by the task force were shelved and the sentiments revived only in the aftermath of the December 2007 election violence. The period after the election violence witnessed the establishment of the Kenya National Dialogue and Reconciliation Committee which became the avenue through which the government and the opposition discussed an agenda for power sharing as well as specific issues in need of reform. The KNDRC adopted various measures to deal with the country's political crisis. These included a review of the Constitution; the investigation of the root causes of the violence; the setting up of a Truth, Justice and Reconciliation Commission; the need to establish a Commission of Inquiry into the Post-Election Violence; and numerous institutional reforms. This article investigates the necessity and utility of the various ongoing transitional justice initiatives. In particular, the article undertakes an assessment of prosecution and non-prosecutorial mechanisms of transition as well as the constitutional review process.*

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Other key issues arising from this discourse which the article attempts to address are whether Kenya is a society in transition, the influence of the volatile political context currently obtaining in Kenya on transitional justice efforts; and Kenya's legal obligations on the subject of transitional justice.

## 1 Introduction

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 ...<sup>1</sup>

Recently, societies around the world have been overthrowing oppressive, tyrannical and autocratic regimes and moving towards democratic rule.<sup>2</sup> Emerging post-conflict societies ponder over at least three critical questions.<sup>3</sup> First, how do they hold past autocratic regimes accountable? Second, how could emerging democracies be consolidated? Finally, how do they deal with the victims of the abuses of past regimes?

The evolution of the concept 'transitional justice' in the twenty-first century could, therefore, have supplied such 'new democracies' with pertinent panacea. Modern or democratic transitional justice:<sup>4</sup>

... 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.

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.<sup>5</sup> This list is, however, not exclusive and exhaustive. Neither are there

<sup>1</sup> C Offe & U Poppe 'Transitional justice in the German Democratic Republic and in unified Germany' in J Elster (ed) *Retribution and reparation in the transition to democracy* (2006) 239.

<sup>2</sup> Eg, in the 1980s, Argentina, Bolivia, Brazil, Mexico, Chile and Uruguay embraced different forms of transition to democracy; so did Asia, East/Central Europe and Africa.

<sup>3</sup> Z Miller 'Effects of invisibility: In search of the "economic" in transitional justice' (2008) 2 *The International Journal of Transitional Justice* 266-299.

<sup>4</sup> P van Zyl 'Promoting transitional justice in post-conflict societies' 209 [http://www.dcaf.ch/\\_docs/Yearbook2005/Chapter10.pdf](http://www.dcaf.ch/_docs/Yearbook2005/Chapter10.pdf) (accessed 8 October 2009).

<sup>5</sup> Van Zyl (n 4 above) 209.

hard and fast rules to determine which society is ready for transitional justice.

A number of states on the African continent have variously experimented with transitional justice. The Republic of South Africa,<sup>6</sup> Rwanda,<sup>7</sup> Chad,<sup>8</sup> Sierra Leone,<sup>9</sup> Nigeria,<sup>10</sup> Ghana,<sup>11</sup> Zimbabwe<sup>12</sup> and Liberia<sup>13</sup> 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.<sup>14</sup> Some countries, such as Liberia, Sudan, Mozambique and Angola, have dealt with the question of justice by deciding (expressly or otherwise) to avoid it,<sup>15</sup> while others, such as the Democratic Republic of Congo (DRC) and Burundi,<sup>16</sup> have introduced piecemeal transitional justice legislation or amnesty laws. Still, other states have had failed attempts at transitional justice. Uganda for example, established a Truth Commission,<sup>17</sup> the upshot of which has been described as irrelevant.<sup>18</sup> The latest attempt at transitional justice on the continent is underway in the Republic of Kenya, which is the focus of this contribution.

The current section is an introduction to the article. The second section answers the question as to whether Kenya is a society in transition and lays down the general political context currently prevailing

<sup>6</sup> Promotion of National Unity and Reconciliation Act 34 of 1995.

<sup>7</sup> Established by Law 03/99 of 12 March 1999.

<sup>8</sup> The Commission was established on 29 December 1990 to investigate crimes committed during the eight-year rule of Hissein Habre.

<sup>9</sup> Established by the TRC Act 4 of 2000.

<sup>10</sup> 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.

<sup>11</sup> Established in 2002 to investigate human rights violations for the period from 6 March 1957 to 6 January 1993.

<sup>12</sup> 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.

<sup>13</sup> Established by President Ellen Johnson-Sirleaf on 22 June 2006 to investigate human rights abuses that occurred between 1979 and 2003.

<sup>14</sup> Sierra Leone adopted the Special Court established by the Statute of the Special Court of 2002. In Rwanda the International Criminal Tribunal for Rwanda (ICTR) was established. This was complimented by *Gacaca* (traditional) tribunals, and national courts.

<sup>15</sup> All these countries offered blanket amnesties to all violators. See eg art XXXIV of Liberia's Comprehensive Peace Agreement, signed on 18 August 2003.

<sup>16</sup> The two signed peace agreements which embodied transitional mechanisms of amnesty and TRCs: DRC, Global and Inclusive Agreement on Transition, signed 17 December 2002 and Burundi, Arusha Peace and Reconciliation Agreement, signed 28 August 2000.

<sup>17</sup> The Commission was mandated to investigate human rights violations by state forces that occurred from Uganda's independence in 1962 up to January 1986, when Museveni came to power (excluding abuses by Museveni's rebel forces).

<sup>18</sup> M Mutua 'Beyond Juba: Does Uganda need a national truth and reconciliation process?' (2007) 13 *Buffalo Human Rights Law Review* 20.

in Kenya. The section concludes by interrogating Kenya's legal obligation on the subject of transitional justice. Section three undertakes an in-depth critical analysis of prosecution as one of the transitional justice mechanisms to be undertaken by Kenya. Section four assesses the efficacy of non-prosecutorial mechanisms of transitional justice. This analysis will, however, be limited to the Truth, Justice and Reconciliation Commission (TJRC) and its related themes on reparation, truth telling and reconciliation. Section five discusses the constitutional review process and the eventual promulgation of a new constitution. Finally, conclusions are reached.

## 2 Background to the article

In the general elections of December 2002 Kenyans voted out the Kenyan African National Union (KANU),<sup>19</sup> which had governed the country since independence in 1963. The Jomo Kenyatta regime, which took power upon independence, became increasingly corrupt and authoritarian.<sup>20</sup> At the time of his death in 1978, Kenyatta had crafted a state characterised by personal rule, nepotism, public theft and gross violations of human rights.<sup>21</sup> Of this regime, a report has observed thus:<sup>22</sup>

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-centralised, authoritarian republic, reminiscent of the colonial state ...

President Daniel Moi succeeded Kenyatta.<sup>23</sup> At best, Moi's regime can be described as a perfection of Kenyatta's. Through the government and KANU, President Moi exercised extensive control over civic groups, trade unions, the press, the legislature and the judiciary.<sup>24</sup> Political murder, politically-instigated 'ethnic clashes', detention without trial, arbitrary arrests, torture, false and politically-motivated charges of opponents became part of state objectives.<sup>25</sup>

Upon the change of regime in 2002, an opportunity for transitional justice presented itself. The Minister for Justice and Constitutional

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<sup>19</sup> Kenya holds its presidential, parliamentary and civic elections every five years. Following the re-introduction of multiparty democracy in 1992, Kenya has held four general elections: in 1992, 1997, 2002 and 2007.

<sup>20</sup> Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission chaired by Prof Makau Mutua, 26 August 2003, 9.

<sup>21</sup> As above.

<sup>22</sup> n 20 above, 19-20.

<sup>23</sup> Moi took over power in 1978 in a peaceful transition following the presidential elections that were held within 90 days of Kenyatta's death.

<sup>24</sup> n 20 above, 20.

<sup>25</sup> As above.

Affairs (Minister) appointed a Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (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 past regimes following which it was to make recommendations to the Minister as to whether the establishment of a TJRC was necessary for Kenya.<sup>26</sup> The Task Force advised that there was a need for transitional justice, and that the TJRC was one way of achieving this objective.<sup>27</sup> The report and its recommendations were, however, shelved and the sentiments only revived in the aftermath of the December 2007 election violence.

Following the announcement 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.<sup>28</sup>

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 Kofi Annan. Annan and a panel of other eminent African personalities mediated the process.<sup>29</sup> On 14 February 2008, the KNDRC adopted a resolution establishing a TJRC as a measure to deal with the country's political crisis:<sup>30</sup>

We recognise 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.

The KNDRC also agreed to the establishment of a Commission of Inquiry into the Post-Election Violence (CIPEV).<sup>31</sup> 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, to prepare a report with its findings and to make a recommendation for redress or any legal measures that could be taken.<sup>32</sup>

Subsequently, CIPEV was established.<sup>33</sup> According to its findings, more than 1 000 people succumbed to the violence and not less than

<sup>26</sup> n 20 above.

<sup>27</sup> n 20 above, 28.

<sup>28</sup> 'Kibaki won fair and square' *The Sunday Standard* 13 January 2008 34.

<sup>29</sup> The other panelists included Benjamin Mkapa, Graca Machel and Jakaya Kikwete.

<sup>30</sup> 'Agreement on agenda item three: How to resolve the political crisis' KNDRC (2008) 3.

<sup>31</sup> 'Agreement on CIPEV' KNDRC (2008) 1.

<sup>32</sup> As above.

<sup>33</sup> Kenya Gazette Notice 4473 vol cx-no.4 of 23 May 2008.

500 000 were displaced.<sup>34</sup> 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 emphasised.<sup>35</sup>

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

Indeed, the violence, the negotiation of peace and the assemblage of a Government of National Unity (GNU)<sup>36</sup> created a 'constitutional moment' which could bring far-reaching changes. 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.<sup>37</sup> However, analysts continue to doubt that the moment is ripe for transitional justice measures.<sup>38</sup> It is often alleged, for instance, that the perpetrators of the post-election violence occupy prestigious and strategic positions in the GNU.<sup>39</sup> Pundits also argue that a reconciliatory spirit is yet to be attained,<sup>40</sup> as the Kenyan nation remains ethnically polarised.

### 3 Kenya as a state in transition

Having sketched the background, the question as to whether Kenya would be considered a state in transition is considered. This is done by identifying the various prerequisites of transitional justice in the situation in Kenya.

A state could be said to be in transition when it has experienced a regime that massively violates the rights of its citizens, when 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 democratise its future. These attempts may, however, take numerous forms: TRCs; amnesties; prosecutions; purges; institutional reforms; constitutional amendments; and the like.

The question as to whether a country is in transition, therefore, is answered in terms of history and context. A historical narrative of

<sup>34</sup> CIPEV Report (2008) Part IV.

<sup>35</sup> n 34 above, 472-475.

<sup>36</sup> As part of the peace process, KNDRC established a GNU. This was achieved through the signing of the National Accord and Reconciliation Act of 2008.

<sup>37</sup> n 30 above.

<sup>38</sup> O Ambani 'Conditions are hardly right for transitional justice' *Daily Nation* 7 September 2009.

<sup>39</sup> 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* 2.

<sup>40</sup> Ambani (n 38 above) 10.

the post-independence regimes in Kenya perhaps corresponds to the definition of a country in transition. During the Kenyatta regime, the political murders of ethno-political opponents became a state objective. For example, the disposal of JM Kariuki in 1975,<sup>41</sup> the assassination of Tom Mboya in July 1969<sup>42</sup> and the public shooting of the radical Pio Gama Pinto<sup>43</sup> characterised 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 Argwings Kodhek.<sup>44</sup> The banning of opposition parties like KPU in 1969 was followed by the arbitrary arrest and detention of all its political leaders, including Shikuku, Seroney, Anyona and Mwaithaga; all typical of this epoch.<sup>45</sup> The irregular allocation of land and the embezzlement of government funds were yet other common phenomena of this era.<sup>46</sup>

Under Moi, 'theft' of public land increased.<sup>47</sup> Inter-ethnic violence sanctioned by the state left thousands of people dead and others displaced.<sup>48</sup> 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).<sup>49</sup> In 1983, the government adopted a policy of 'detention without trial' under which several people, especially political opponents, were arrested and subjected to detention under torture.<sup>50</sup> Hideous economic crimes were the order of the day.<sup>51</sup> The famous Goldenberg scandal and the Anglo leasing scandal caused large sums of money to disappear.

The Kibaki regime began by finalising the famous Anglo leasing scandal.<sup>52</sup> It perpetrated yet another scandal that has come to be known as the grand regency scandal. Moreover, the extensive abusive use of

<sup>41</sup> J Lonsdale 'Moral and political argument in Kenya' in B Berman *et al* (eds) *Ethnicity and democracy in Africa* (2004) 91.

<sup>42</sup> G Muigai 'Ethnicity and the renewal of competitive politics in Kenya' in G Glickman (ed) *Ethnicity, conflict and democratisation* (1995) 171.

<sup>43</sup> R Ajulu 'Thinking through the crisis of democratisation in Kenya: A response to Adar and Murunga' (2000) 4 *African Sociological Review* 137.

<sup>44</sup> Ajulu (n 43 above) 141.

<sup>45</sup> As above.

<sup>46</sup> Muigai (n 42 above) 171.

<sup>47</sup> Lonsdale (n 41 above) 92.

<sup>48</sup> Report by the National Christian Council of Kenya 'The cursed arrow: Contemporary report on the politicised 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).

<sup>49</sup> Ajulu (n 43 above) 143.

<sup>50</sup> As above.

<sup>51</sup> C Odhiambo-Mbai 'The rise and fall of the autocratic state in Kenya' in W Oyugi *et al* (eds) *The politics of transition in Kenya: From KANU TO NARC* (2003) 65.

<sup>52</sup> See generally M Wrong *It's our turn to eat* (2009).

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 were wounded by the police.<sup>53</sup> 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),<sup>54</sup> one of its major findings is documented as follows:<sup>55</sup>

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.

The murder of Dr Odhiambo-Mbai – a constant critic of the Kibaki administration – and the public shooting of four human rights activists by police officers<sup>56</sup> have left questions regarding a respect for human rights by the Kibaki regime.

The massive human rights violations characterising the post-independence regimes, coupled with the violence of 2007, paved the way for the country to embrace a transitional justice process. Indeed, the current government has adopted the Truth, Justice and Reconciliation Act (TJR Act), establishing a TJRC as well as making attempts towards prosecution of alleged wrongdoers. It is clear that Kenya is a society in transition.

It is, however, instructive that certain commentators on the subject emphasise the need for a change of regime or guard as a precursor to transitional justice.<sup>57</sup> The situation obtaining in Kenya (in which there has been no real regime change) has certainly not evaded criticism. According to Ambani:<sup>58</sup>

Kenya is not experiencing a transition, and it is not about to ...The Kenya[n] 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.

Although this reasoning may appear sound as a political theory, it is typical of 'radical idealism'. Conversely, the realist would argue that legal steps are necessary to precede political transformation.<sup>59</sup> This

<sup>53</sup> n 34 above, 335 342-343.

<sup>54</sup> KNCHR 'Follow-up Report on Extra Judicial Killings and Disappearances' August 2008.

<sup>55</sup> As above.

<sup>56</sup> 'Activists die with a heavy heart' *Daily Nation* 6 March 2009.

<sup>57</sup> F Aolain & C Campbell 'The paradox of transition in conflicted democracies' (2005) 27 *Human Rights Quarterly* 172.

<sup>58</sup> Ambani (n 38 above) 10.

<sup>59</sup> R Teitel *Transitional Justice* (2000) 1.



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, a change of regimes does not relieve (the Kenyan) government's human rights duties and obligations.<sup>60</sup> 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 fulfil its obligations – whether within a transitional justice setting or otherwise.

### 3.1 Kenya's political context

Kenya's transitional justice is not to be dispensed in a vacuum – it is to be achieved within a political context. The current political milieu may 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'.<sup>61</sup> 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 larger tribes (Luo and Kikuyu) coalescing around KANU, and the smaller tribes under the umbrella of Kenya Africans Democratic Union (KADU).<sup>62</sup> With KANU emerging as the winner, the then President, Kenyatta, hastened to create what Asingo describes as neo-patrimonialism (personal rule).<sup>63</sup>

The patron-client political ties that later emerged from this leadership was soon to steer an authoritarian state<sup>64</sup> that entrenched a culture of nepotism, public theft and autocracy amidst horrendous abuses of human rights.<sup>65</sup> Leys captures this sad epoch in a most humorous way:<sup>66</sup>

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.

<sup>60</sup> *Velasquez-Rodriguez v Hondarus* IACHR, judgment of 29 July 1988 (*Velasquez-Rodriguez case*) para 184.

<sup>61</sup> G Musila 'Federalism and the ethnicity question in Kenya' in G Mukundi (ed) *Ethnicity, human rights and constitutionalism in Africa* (2008) 63.

<sup>62</sup> D Kadima 'The article of party coalitions in Africa' in D Kadima (ed) *The politics of party coalitions in Africa*, (2006) 191.

<sup>63</sup> P Asingo 'The political economy of transition in Kenya' in Oyugi *et al* (n 51 above) 19.

<sup>64</sup> Asingo (n 63 above) 20.

<sup>65</sup> Odhiambo-Mbai (n 51 above) 51. See also Mutua (n 20 above) 9.

<sup>66</sup> C Leys *Underdevelopment in Kenya: The political economy of neo-colonialism* (1975) as cited in Odhiambo-Mbai (n 51 above) 64.

Upon his death, Kenyatta was succeeded by the then Vice-President, Moi. Moi's regime confirmed the delusion 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.<sup>67</sup> Not only was allegiance to KANU made a precondition to participate in Kenyan politics, this era was also marked by a curtailment of fundamental rights, such as the curtailment of freedom of association and assembly; political murder; torture of political opponents; detention without trial; arbitrary arrest and detention; rape; extra-judicial police executions; as well as impunity, corruption and national decay.<sup>68</sup> Even with the re-introduction of multi-party democracy in 1992,<sup>69</sup> Moi continued to cling onto power and to govern with an iron fist, giving Kenya that which Mbai depicts as the character of an 'autocratic multiparty state'.<sup>70</sup>

The significance of subsequent elections in 1992 and 1997 was undermined by similar trends of ethnic affiliations coupled with armed inter-ethnic clashes.<sup>71</sup> Initially perceived to have been 'ethnicity proof', the 2002 elections turned out to be yet another ethnic ploy. Even though the then opposition party, the National Rainbow Coalition (NARC), which won the election had a reform based ideology,<sup>72</sup> analysts had earlier on warned that this was yet another super alliance of ethnic groups. Of this election, Mbai writes:<sup>73</sup>

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.

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.<sup>74</sup> 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.<sup>75</sup> That efforts were underway to immediately consolidate a new

<sup>67</sup> Kenya was a *de jure* one-party state from 1982 to 1992.

<sup>68</sup> Asingo (n 63 above) 22.

<sup>69</sup> Moi succumbed to pressure from the civil society, religious groups and the opposition, leading to a repeal of sec 2A of the Constitution.

<sup>70</sup> Odhiambo-Mbai (n 51 above) 52.

<sup>71</sup> Asingo (n 63 above) 28. Ethnic civilian militia groups coalesced around ethnic tribes like *Mungiki*, *Kamjesh*, *Jeshi la mzee* and *Jeshi la kingole* played an instrumental role in this political violence. See also P Wanyande 'The politics of alliance building in Kenya: The search for opposition unity' in Oyugi *et al* (n 51 above) 145.

<sup>72</sup> 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.

<sup>73</sup> Odhiambo-Mbai (n 51 above) 92.

<sup>74</sup> As above.

<sup>75</sup> Wanyande (n 71 above) 151.

kind of autocracy after this election can thus not be overemphasised. 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 marshalled 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.<sup>76</sup>

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 and economic inequalities may have played a role in this violence, the role played by ethnic differences was most dominant. An independent observer has analysed this incident:<sup>77</sup>

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.

Despite it being referred to as a government of national unity, ethnicity remains a key factor to almost every political decision made by the government.<sup>78</sup> A member of cabinet once commented:<sup>79</sup>

For a long time we have laboured 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.

This comment summarises and posits the political context. 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.

Clearly, Kenya needs a respite. It is, however, still unclear as to whether it will get it. The emotionally-based desire for revenge, the need to shun current political opponents, the urge to secure key

<sup>76</sup> Musila (n 61 above) 63-64.

<sup>77</sup> International Crisis Group, Africa Report 137, 21 February 2008 cited by B Ongaro & O Ambani 'Constitutionalism as a panacea to ethnic divisions in Kenya: A post-2007 election crisis perspective' in Mukundi (n 61 above) 24.

<sup>78</sup> Report on the Skewed Government Appointments in Kenya' presented to the 9th Parliament in June 2007.

<sup>79</sup> K Murungi *The East African Standard* 22 November 1998 cited in F Jonyo 'The centrality of ethnicity in Kenya's political transition' in Oyugi *et al* (n 51 above) 159.

political positions that safeguard political survival in the next general elections of 2012, and the quest to protect political sycophants, can be said to be stronger than the desire to carry out 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 begin the process of transitional justice. This might just be the trigger that catapults transitional justice.

#### 4 Kenya's legal obligations under national and international law to institute a transitional justice process

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 fail to point out precisely what the law requires.<sup>80</sup> Although there is clarity on some of the basic rules relating to international crimes and state responsibility to provide remedies for human rights abuses, there has been a lack of clarity as to which remedies should be used. Even as international human rights law bestows a discretion upon states as regards the measures to be undertaken in protecting human rights in the domestic sphere,<sup>81</sup> for its part, international criminal law limits the jurisdiction of international criminal tribunals to five crimes deemed to be of an international nature.<sup>82</sup> These crimes do not, however, protect the victims of past human rights violations. For example, past crimes which inform the objectives of the transitional process in Kenya are not confined to acts of a criminal nature but take a myriad forms of detestable gross human rights violations.<sup>83</sup> Some of these acts are neither recognised by the international criminal justice system nor mentioned by conventional or international customary law.

However, as Dinstein observes:<sup>84</sup>

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 [is] subjected to international obligations in the matter.

<sup>80</sup> D Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2551.

<sup>81</sup> Art 1 African Charter, art 2 ICCPR, art 2 ICESCR and art 2 CEDAW. It is noteworthy that Kenya has ratified all these conventions.

<sup>82</sup> Art 5 of the Rome Statute defines these crimes as genocide, crimes against humanity, and war crimes.

<sup>83</sup> nn 41-51 above.

<sup>84</sup> Y Dinstein *International criminal law* (1985) 225 as cited in Orentlicher (n 80 above) 2552.

According to Aldana-Pindell, the right of access to justice, the right to a fair trial and the right to an effective remedy oblige states to prosecute.<sup>85</sup> Similar sentiments have indeed been echoed in the interpretation of international human rights treaties by various international oversight bodies.<sup>86</sup>

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 recognised as criminal under either domestic or international law.

While the obligation to prosecute under international human rights treaties is implied, Kenya has an express mandate under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>87</sup> and the Rome Statute of the International Criminal Court (Rome Statute)<sup>88</sup> to undertake prosecution with respect to conduct prohibited under respective treaties. Under the 'principle of complementarity'<sup>89</sup> enshrined in the latter, national courts have a primary obligation to undertake prosecutions and the jurisdiction of the International Criminal Court (ICC) is only triggered when the state is either 'unwilling'<sup>90</sup> or 'unable'<sup>91</sup> 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.<sup>92</sup> It can, therefore, be argued that these prohibitions import a duty on the state to prosecute such violations whenever they occur and also to offer appropriate remedies to the victims.

Besides, the Constitution of Kenya guarantees its citizens the protection of their fundamental rights and freedoms.<sup>93</sup> Thus, Kenya has a legal obligation, emanating from her national law, international

<sup>85</sup> R Aldana-Pindell 'In vindication of justiciable victims' rights to truth and justice for state-sponsored crimes' (2002) 35 *Vanderbilt Journal of 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' unpublished LLM dissertation, University of Pretoria, 2004 17.

<sup>86</sup> General Comment 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para 18. See also *Velasquez Rodriguez* case para 174.

<sup>87</sup> 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.

<sup>88</sup> Ratified and domesticated by Kenya via the International Crimes Act Cap 16 of 2008.

<sup>89</sup> Preamble para 6 and art 1 Rome Statute.

<sup>90</sup> Defined under art 17(2)(a) of the Rome Statute.

<sup>91</sup> Art 17(3) of the Rome Statute establishes a specific criterion of determining inability.

<sup>92</sup> T Meron *Human rights and humanitarian norms as customary law* (1989) 210 as cited by Orentlicher (n 80 above) 2582.

<sup>93</sup> Secs 70-86 Constitution of Kenya.

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

## 5 Case for prosecution

Teitel acknowledges that:<sup>94</sup>

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.

Indeed, many scholars agree with this school of thought. Orentlicher notes that laying bare the truth about past violations and condemning them through prosecution deter potential law breakers and inoculate the public against future temptation to be complicit in state-sponsored violence.<sup>95</sup> She further observes that societies scourged by lawlessness need only look at their past to discover the roots of impunity.<sup>96</sup> According to Osiel, the staging of the human drama of mass atrocities in a courtroom can have a cathartic effect on society.<sup>97</sup> 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’.<sup>98</sup>

The consolidation of a young democracy, writes Huyse, is yet another cardinal role played by prosecutions.<sup>99</sup> The enforcement of the law through prosecution not only legitimises the new government, but also fosters respect of democratic institutions.<sup>100</sup> Taking their cue from this, CIPEV was convinced that the instrumental role played by trials was indispensable for Kenya’s democratic transition. This is echoed in its recommendations that underscore the need for the establishment of a special tribunal to eradicate impunity.<sup>101</sup>

The importance of fighting impunity in any nascent democracy like Kenya cannot be underestimated. As correctly pointed out by the UN,

<sup>94</sup> Teitel (n 59 above).

<sup>95</sup> Orentlicher (n 80 above) 2542.

<sup>96</sup> As above.

<sup>97</sup> M Osiel *Mass atrocity, collective memory and the law* 15-22 as cited by J Rowen ‘Social realities and philosophical ideals in transitional justice’ (2008) 7 *Cardozo Public Law, Policy and Ethics Journal* 98.

<sup>98</sup> Van Zyl (n 4 above) 210.

<sup>99</sup> L Huyse ‘Justice after transition: On the choices successor elites make in dealing with the past’ (1995) 20 *Law and Social Inquiry* 55.

<sup>100</sup> Orentlicher (n 80 above) 2543.

<sup>101</sup> n 34 above, 472.

impunity is one of the most important ingredients of future genocide.<sup>102</sup> It is, therefore, important that Kenya deals with its past now or prepare for grimmer days in the future. Yet, prosecution efforts have thus far proved to be quite controversial in Kenya's transition. They have often threatened to politically divide GNU factions amidst reported attempts by PNU to 'own' and 'shape' the transitional process, especially the prosecution.<sup>103</sup> Besides, while there is general consent among Kenyans that justice through prosecutions is needed, this has often taken on an ethnic dimension whenever alleged perpetrators are mentioned. These perpetrators, who frequently are politicians and business people, scuttle back to their ethnic backyards for support against the 'witch-hunting' prosecution of their ethnic communities.

Prosecution efforts, therefore, have been muddled with the politics of ethnicity and the suspicion of political opponents amidst outrageous proposals by government to have the TJRC undertake prosecution.<sup>104</sup> Nevertheless, the fundamental role that a prosecution is bound to play in Kenya's transition process cannot be underestimated. Not only would it lessen the deep-rooted culture of impunity, but it could potentially eliminate the reigning sense of betrayal and illegitimacy of the current government and its institutions.

### 5.1 Prosecution through the International Criminal Court

Failure to enact the statute enabling the operations 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.<sup>105</sup> Indeed, following failed attempts at passing the law, Anan referred an 'envelope' containing a list of ostensible perpetrators to the prosecutor of the ICC on 9 July 2009.<sup>106</sup> This step excited the Kenyan population.<sup>107</sup> Understandably, this euphoria was informed by previous quests to rid the state of the deep-rooted culture of impunity and the fear of possible manipulation of the special tribunal, given the apparent ethnic and political tensions. For the most part, this euphoria was largely misinformed on the legal consequences of Annan's submission. With local newspaper carrying sensational titles such as 'Ocampo takes over Kenya's cases',<sup>108</sup> the majority of the

<sup>102</sup> Office of the Special Adviser of the UN Secretary-General on the Prevention of Genocide: Analysis framework <http://www.un.org/preventgenocide/adviser> (accessed 23 November 2010).

<sup>103</sup> G Musila 'Options for transitional justice in Kenya: Autonomy and the challenge of external prescriptions' (2009) *International Journal of Transitional Justice* 40.

<sup>104</sup> K Some 'Raila breaks ranks with cabinet over The Hague trials' *Daily Standard* 26 September 2009.

<sup>105</sup> n 34 above, 473.

<sup>106</sup> 'Panic as Kenya poll chaos case handed to ICC' *Daily Nation* 9 July 2009.

<sup>107</sup> 'It's The Hague, Kenyans tell violence suspects' *Daily Nation* 18 July 2009.

<sup>108</sup> 'Deadline expires, Ocampo takes over Kenya's case' *Daily Standard* 1 October 2009.

Kenyan population was misled into believing that the ICC was soon instituting prosecution of those mentioned. Three cardinal questions emerge from this discourse: Does the referral by Annan trigger the jurisdiction of the ICC? Was 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 referral by a state party;<sup>109</sup> referrals by the UN Security Council;<sup>110</sup> and on the prosecutor's own initiative.<sup>111</sup> Evidently, the transmission by Annan of the 'envelope' does not fall within any of these criteria. At best, therefore, Annan's submission may be classified as part of the information upon which the prosecutor may initiate investigations and subsequent prosecutions. Indeed, on 26 November 2009, the prosecutor filed a request for authorisation of an investigation into the situation in Kenya pursuant to article 15 of the Rome Statute.

Even though the prosecutor has taken up the matter and indictments are soon to be issued, the hurdle of a 'lack of sufficient evidence' must, nonetheless, be surmounted. The CIPEV report had already acknowledged that the evidence collected may indeed not meet the standards required of international crimes.<sup>112</sup> This was further noted by the Pre-Trial Chamber of the ICC when it sought additional information from the prosecutor.<sup>113</sup> This was in relation to the state and/or organisational policy under article 7(2)(a) of the Rome Statute and the issue of admissibility within the context of the situation in Kenya.<sup>114</sup> Even though the Pre-Trial Chamber eventually authorised the prosecutor to commence investigations into the Kenyan situation on 31 March 2010,<sup>115</sup> Judge Hans-Peter Kaul, in a dissenting opinion, underscored the insufficiency of evidence in the matter.<sup>116</sup> Besides, with the passing of the new Constitution, calls from the government for the ICC to quit the Kenyan probe and to allow the new judicial structures created under the new Constitution to deal with it are burgeoning.<sup>117</sup> The ICC prosecutor must therefore address the issue.

It is instructive to further note failed attempts at establishing a local tribunal to conduct prosecution as well as efforts to prosecute through national courts. As regards the special tribunal, the Special Tribunal for

<sup>109</sup> Art 14 Rome Statute.

<sup>110</sup> Art 13 Rome Statute.

<sup>111</sup> Art 15 Rome Statute.

<sup>112</sup> n 34 above, 17.

<sup>113</sup> ICC Pre-Trial Chamber II, Decision on the Situation in Kenya; Public decision requesting clarification and additional information, ICC-01/09-15

<sup>114</sup> n 113 above, 4

<sup>115</sup> Pre-Trial Chamber II Decision on the Situation in Kenya; decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya

<sup>116</sup> n 115 above, 10; Hans-Peter Kaul J's dissenting opinion

<sup>117</sup> L Barasa *Sunday Nation* 19 September 2010.



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 was shot down by Parliament.<sup>118</sup> These efforts finally came to naught. In a bid to secure a functional prosecutorial outfit in Kenya's transitional process, civil society organisations (CSOs) drafted yet another Bill (CSOs Bill). The latter bill was never tabled in Parliament.

Even though the 'principle of complementarity' underscores the primacy of national courts in conducting prosecutions, Kenya's national courts, under the old constitutional dispensation, had never been perceived as ideal for domestic trials of the crimes committed in the 2007 election violence. Courts belong to 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'.<sup>119</sup> The diminished confidence in the judiciary was shown when the ODM presidential candidate, Raila Odinga, publicly declined to have the disputed elections of 2007 resolved by local courts.<sup>120</sup> This sentiment 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.<sup>121</sup>

On 30 July 2009, for the first time, cabinet contemplated the option of ordinary courts to prosecute in the transitional process.<sup>122</sup> This move could only be read with disdain and suspicion as 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 the South African *locus classicus*, the TRC instituted charges of contempt of court against former president PW Botha.<sup>123</sup> The trial court found Botha in contempt for refusing to testify and sentenced him to one year in prison or a fine of \$1 600.<sup>124</sup> However, despite the coherent and lucid arguments put forward by the Commission on appeal, Botha was released on technical grounds.<sup>125</sup> Similarly, attempts to prosecute the former Minister of Defence, Magnus Malan, for murder faltered when the local court found him

<sup>118</sup> On 12 February 2009 and in March 2009.

<sup>119</sup> n 34 above, 460.

<sup>120</sup> 'Breaking Kenya's impasse: Chaos or courts? Africa policy brief' Africa Policy Institute 3, as cited in Ongaro & Ambani (n 130 above) 29.

<sup>121</sup> n 34 above, 461.

<sup>122</sup> 'President Kibaki's statement' *The Standard* 30 July 2009.

<sup>123</sup> Truth and Reconciliation Commission of South Africa Report Vol 1 ch 7: Legal challenges.

<sup>124</sup> As above.

<sup>125</sup> As above.

and all his 15 co-defendants not guilty.<sup>126</sup> This caused relief to many who refused to apply for amnesty despite the possibility of national prosecution.<sup>127</sup>

In Rwanda, where transitional prosecution was initially confined to the ordinary justice system, there were problems. The prosecutions conducted by ordinary courts have been criticised as having offered selective justice.<sup>128</sup> The atrocities committed by the Rwandan Patriotic Front (RPF)<sup>129</sup> 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.<sup>130</sup> Attempts to deal with impunity stemming from the complexities of using domestic courts are manifested by the utilisation of 'universal jurisdiction laws' in prosecuting former RPF commanders. For example, on 6 February 2008, a Spanish court issued arrest warrants for 40 RPF soldiers.<sup>131</sup> This included 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 travels in Germany and is in detention awaiting trial in France.

The transitional government of Ethiopia, which has so far charged 5 000 individuals of the previous repressive regime under Mengistu Haile-Mariam, has been characterised by abuses of due process.<sup>132</sup> For instance, detainees are held without trial for long periods. Although most detainees were arrested by 1991, it was not until December 1994 that trials began.<sup>133</sup> Besides, several defendants have been tried and sentenced to death penalties in their absence.<sup>134</sup> All this happened amidst concerns about the competence and impartiality of the judiciary and the fact that Ethiopian criminal procedure does not conform to international standards.<sup>135</sup>

<sup>126</sup> C Sriram *Confronting past human rights violations: Justice vs peace in times of transition* (2004) 158.

<sup>127</sup> P Hayner *Unspeakable truths; Facing the challenge of truth commissions* (2001) 43.

<sup>128</sup> B Ingelaere *The Gacaca courts in Rwanda: Traditional justice and reconciliation after violent conflict: Learning from African experiences* (2008) 45.

<sup>129</sup> A Tutsi-dominated force exiled in Uganda but later defeated the government forces in 1994 and established the current government.

<sup>130</sup> Ingelaere (n 126 above) 45.

<sup>131</sup> <http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/080208-Rwanda-indictment-redirected> (accessed 6 October 2009).

<sup>132</sup> S Ratner *et al Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy* (2009) 193.

<sup>133</sup> As above.

<sup>134</sup> AI Ethiopia 'Accountability past and present: Human rights in transition' 4 (April 1995).

<sup>135</sup> Ratner *et al* (n 132 above) 194.

## 6 Case against prosecution

Analysts of the Kenyan transitional processes have often criticised attempts at prosecution on two grounds. In the first place, it is argued that Kenya is ethnically polarised and unstable, hence the already fragile social fabric may be fractured further by prosecution of past violations.<sup>136</sup> In the second place, prosecution is at odds with the political realities in two cardinal ways. One, the political elites responsible for Kenya's transition seem to be less enthusiastic about the process. They themselves are likely perpetrators.<sup>137</sup>

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.

In addition, the political class seems to be preoccupied with a fierce power struggle as the 2012 general elections advance, rather than seeking transitional justice. Competing notions within the political class are apparent. While some politicians perceive prosecution as a mechanism to rid them of 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 a general agreement on the need to deal with past atrocities, the political class is suffocating prosecution efforts.

## 7 Case for a Truth, Justice and Reconciliation Commission

Given that prosecution can only be a partial response to past human rights violations, there is a need for supplementary mechanisms such as TRCs. The fundamental role played by TRCs in any transitional society undergoing democratic transformation cannot be overstated. Not only do they lay bare the violations of the past, but they also give an opportunity to the government, citizens and perpetrators to acknowledge the wrongfulness of these actions.<sup>138</sup> TRCs, writes Mutua, play a large role to cleanse the past and effect moral reconstruction and reconciliation after truth and justice.<sup>139</sup>

Given the less controversial nature of the TJRC in the Kenyan context, there seems to be little 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

<sup>136</sup> Ambani (n 38 above) 10.

<sup>137</sup> As above.

<sup>138</sup> Van Zyl (n 4 above) 211.

<sup>139</sup> Mutua (n 18 above) 29.

functional TJRC.<sup>140</sup> This goodwill informed the establishment of a TJRC on 22 July 2009. While the TJRC remains a widely accepted idea, some controversial issues emerged from this discourse, in respect of the TJRC's relationship with the prosecuting outfit, the capacity of the TJRC to realise its objectives, its independence, efficiency and impartiality.

## 7.1 Critique of the Truth, Justice and Reconciliation Act

### 7.1.1 Positive aspects of the Act

The TJR Act<sup>141</sup> is a product of the the 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; to identify the victims of these violations and make appropriate recommendation for redress; to identify alleged perpetrators and recommend their prosecution; to inquire into the irregular and illegal acquisition of public land; to inquire into the causes of ethnic tensions; and to promote healing, reconciliation and co-existence among ethnic communities.<sup>142</sup>

A number of provisions embodied in the Act are encouraging in so far as foretelling an effective TJRC is concerned.<sup>143</sup> First, gender equity is apparent in the appointment of commissioners.<sup>144</sup> Second, the enormous powers of the Commission guarantee its independence. It is bestowed with 'all powers necessary for the execution of its functions'.<sup>145</sup> These include investigatory powers, issuance of summonses, and requests for the assistance of the police, making recommendations on reparation policies, and other policy reform areas.<sup>146</sup>

Third are provisions on budgetary control. The Act establishes a TJRC Fund to be administered by the Secretary.<sup>147</sup> These monies are appropriated from the consolidated fund, grants, gifts or donations.<sup>148</sup> All payments in respect of the expenses incurred are made out of this fund.<sup>149</sup> These provisions minimise the chances of political influence as would have been the case were the Commission's budgetary control under central government.

<sup>140</sup> G Musila 'A preliminary assessment of the Kenyan Truth, Justice and Reconciliation Commission Bill 2008' (2008) 5 *African Renaissance* 3.

<sup>141</sup> Act 6 of 2008.

<sup>142</sup> Secs 5 & 6, TJR Act.

<sup>143</sup> AI 'Truth, justice and reparation: Establishing an effective truth commission' 11 June 2007.

<sup>144</sup> Sec 10.3 & first schedule sec 7.

<sup>145</sup> Sec 7 TJR Act.

<sup>146</sup> Secs 7(1) & (2) 6l TJR Act.

<sup>147</sup> Sec 44(1) TJR Act.

<sup>148</sup> Sec 44(2) TJR Act.

<sup>149</sup> Sec 44(3) TJR Act.

Fourth, the Act guarantees the implementation of the Commission's recommendations in relation to its institutional arrangement, mechanisms and frameworks necessary for the implementation of its decisions.<sup>150</sup> 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.<sup>151</sup> The implementation committee is bestowed with supervisory powers over the implementation process.<sup>152</sup> This is a break from local tradition where recommendations of related commissions were not implemented. The proscription by the Act of amnesty for genocide, crimes against humanity, and gross violations of human rights, including extra-judicial executions, enforced disappearances, rape and torture is yet another provision that ensures adherence to international standards.<sup>153</sup>

### 7.1.2 Negative aspects of the Act

Five distinct aspects of the Act raise concerns:

#### *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 prosecuting outfit is not clear. While the Commission is expected to investigate and make recommendations for the prosecution of those responsible for human rights and economic rights violations,<sup>154</sup> the Act guarantees absolute confidentiality of information received by it in form of evidence,<sup>155</sup> confessions or admissions.<sup>156</sup> 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,<sup>157</sup> this in itself can defeat the mandate of the Commission. It can deter alleged perpetrators from co-operating with the Commission for fear of giving self-incriminating evidence, which evidence is vital if the Commission is to live up to its objectives.

Related to this is a situation where the defence may seek to rely on the evidence adduced before the TJRC to attack the credibility of a particular witness before the adopted tribunal. The question that arises

<sup>150</sup> Sec 48(2) TJR Act.

<sup>151</sup> Sec 49 TJR Act.

<sup>152</sup> As above.

<sup>153</sup> Sec 34(3) TJR Act.

<sup>154</sup> Secs 6(f) & (k)(ii) TJR Act.

<sup>155</sup> Sec 24(3) TJR Act.

<sup>156</sup> Sec 36(9)(c) TJR Act.

<sup>157</sup> *Al Kenya Concerns about the TJRC Bill (2008)* 6.

is whether the prosecuting authority will be compelled to rely on the evidence adduced before the TJRC, especially where a witness before the adopted tribunal makes a contradictory statement to that made before the TJRC.

#### *Defective selection process*

Of greater concern is the manner in which the six commissioners to the TJRC were appointed. Preceding their appointment by the President, the commissioners were selected and recommended to the National Assembly by a selection panel comprised of various religious groups, professional bodies and civil society.<sup>158</sup> However, the manner in which most of these organisations were chosen onto the selection panel has been lamented.<sup>159</sup> This procedure, according to Amnesty International (AI), does not guarantee independence, impartiality and competence.<sup>160</sup> This is due to a lack of a broad-based consultation forum, not only with all the civil society organisations but also the victims, human rights defenders and concerned Kenyans.<sup>161</sup>

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 Chairperson of the Commission has been criticised for having been an obedient senior civil servant of the Moi regime which perpetrated horrendous human rights violations.<sup>162</sup> This demonstrates a lack of public confidence in the Commission, hence unclenching its public credibility. The likelihood of these compromising the effective functioning of the Commission is not remote.

#### *Witness protection*

The Act lacks a long-term witness protection mechanism. Witness protection under the Act is limited to holding proceedings *in camera* and non disclosure.<sup>163</sup> Even though the Witness Protection Act (WPA)<sup>164</sup> provides for long term witness protection mechanisms – such as the establishment of a new identity, relocation, accommodation, transportation, financial assistance, counselling and vocational training of the witness<sup>165</sup> – the fact that the Attorney-General has the sole discretion of deciding who to include in the programme and what protection

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<sup>158</sup> Sec 9 TJR Act.

<sup>159</sup> AI (n 157 above) 7.

<sup>160</sup> AI (n 157 above) 6.

<sup>161</sup> As above.

<sup>162</sup> M Mutua 'An open letter to the vice-chair Betty Murungi' *Daily Nation* 8 August 2009.

<sup>163</sup> Sec 25 TJR Act.

<sup>164</sup> Act 16 of 2006 TJR Act.

<sup>165</sup> Sec 4 TJR Act.

measures to be undertaken,<sup>166</sup> leaves the success of such a programme questionable, especially where the protection of witnesses against the government is desired. According to Ndubi, this arrangement lacks credibility and independence as ‘those who are supposed to protect the witnesses are the ones the witnesses are likely to testify against’.<sup>167</sup>

Although the government may have decided to use the WPA at the TJRC,<sup>168</sup> the possibility remains that the TJRC can develop an internal mechanism as did the South African Truth and Reconciliation Commission. 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 is, however, instructive that the WPA is currently being updated by Parliament to have it removed from the Attorney-General’s office and to create an independent Witness Protection Agency.<sup>169</sup>

### *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 realised within the lifespan of the TJRC which is stipulated to be two years.<sup>170</sup> This broad mandate is to a large extent a duplication of the mandate of previous investigatory commissions whose reports have never been implemented.<sup>171</sup> Similar fears have been expressed by the UN:<sup>172</sup>

The mandate of the TJRC needs to be comprehensive but narrow enough to be manageable in time and scope. The Commission’s 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.

This large mandate is entrusted to just nine 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 the labour disputes after realising that 9 000 out of 10 000 complaints received were based on labour complaints.<sup>173</sup>

<sup>166</sup> Secs 4 & 5 TJRC Act.

<sup>167</sup> ‘Will witness protection law work?’ *The Standard* 26 July 2009.

<sup>168</sup> ‘Witness protection law to be used in post-poll trials’ *The Standard* 25 September 2009.

<sup>169</sup> ‘House to amend witness Act’ *Daily Nation* 18 October 2009.

<sup>170</sup> Sec 20 TJRC Act.

<sup>171</sup> Musila (n 140 above) 42-43.

<sup>172</sup> Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008 17 <http://www.responsibilitytoprotect.org/files/OHCHR%20Kenya%20Report.pdf> (accessed 10 October 2009).

<sup>173</sup> Hayner (n 127 above) 69.

To avoid such an eventuality, 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, an amnesty committee and a reparation and rehabilitation committee.<sup>174</sup> 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 300 professionals.<sup>175</sup> Given that the Kenyan process is still unfolding, it is important that the TJRC learns from good examples abroad for its internal structure. Whatever structure is adopted, the TJRC should work towards efficiency recognising the limited timeframe within which it can realise its broad mandate.

### *Challenge of apportioning criminal liability*

Borrowing from South African legislation, the TJR Act bestows unto the TJRC the function of 'identifying the wrongdoers'.<sup>176</sup> 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.<sup>177</sup> 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 polarised and politically strained like Kenya, such naming is most likely to have a damaging effect.

As a *caveat*, procedural safeguards such as those adopted by the South African TRC must be guaranteed. First is the requirement to notify beforehand those bound to be mentioned by the report to show cause why they should not be mentioned.<sup>178</sup> Hayner, however, points out that such a process ought to be less rigorous than that of a criminal trial.<sup>179</sup> Second is the need to interpret the intent of the language in the mandate.<sup>180</sup> Given that the TJR Act guarantees legal representation to those who appear before it,<sup>181</sup> one would assume that human rights issues have been contemplated under the Act.

<sup>174</sup> Chs 3, 4 & 5 Promotion of National Unity and Reconciliation Act 34 of 1995, Republic of South Africa.

<sup>175</sup> Hayner (n 127 above) 41.

<sup>176</sup> Sec 6(b) TJR Act; sec 4(a)(iii) of the Promotion of National Unity and Reconciliation Act 34 of 1995,

<sup>177</sup> J Zalaquett *Report of the Chilean National Commission on Truth and Reconciliation* xxxii.

<sup>178</sup> Hayner (n 127 above) 123.

<sup>179</sup> Hayner (n 127 above) 129.

<sup>180</sup> Hayner (n 127 above) 123.

<sup>181</sup> Sec 28 TJR Act.



## 7.2 Foreseen challenges to the Truth, Justice and Reconciliation Commission

It is premature 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 to them whenever they arise. The first possible challenge is in relation to the mandate of the TJRC which covers a time period of 45 years. In terms of evidence, there is a good likelihood of documentary evidence being altered, the death of vital witnesses and memory loss.

Moreover, given the current volatile political context in Kenya, the second probable challenge might arise if the whole transitional process becomes ethnicised. This implies that the TJRC may not receive cooperation, not only from civil society but also from some ethnic groups who may perceive themselves as being victimised 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 focused on the next general elections and 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 beforehand, the TJRC is certainly going to be devoid of political support.

Co-operation of alleged wrongdoers with the TJRC process is dependent 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.<sup>182</sup> The latter 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.<sup>183</sup> This is defeating of the TJRC's mandate according to which investigations into gross human rights violations extend to the period of time protected by the said law. These possible contestations do not, nonetheless, downplay the importance attached to the TJRC in Kenya's transitional process.

## 7.3 Reparations

Reparation for victims of past human rights violations have been categorised into five forms: restitution, compensation, rehabilitation, satisfaction and guarantee for non-repetition.<sup>184</sup> Restitution is the restoration of an individual to the position held before the human rights

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<sup>182</sup> Cap 34 Laws of Kenya.

<sup>183</sup> Sec 3 Indemnity Act.

<sup>184</sup> AI (n 143 above) 3.

abuses. This is most effective where the wrongdoers 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.<sup>185</sup> This compensation should be proportionate to the harm suffered.<sup>186</sup> Likewise, rehabilitative measures such as medical care, respect for and non-discrimination against victims must be guaranteed by the government.<sup>187</sup> According to Armstrong and Ntegeye, reparations can also include symbolic measures like apologies, monuments and days of commemorations.<sup>188</sup>

In order to enable the TJRC to make viable recommendations on reparations, the TJRC ought to engage in an extensive collection of views.<sup>189</sup> These views should then inform the TJRC's recommendations. However, the TJR Act provides for only two instances when the TJRC may recommend reparation: after recommending amnesty and after an individual victim has submitted an application for reparation.<sup>190</sup> Clearly, the individualisation 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 underestimated. For instance, there is a likelihood of the victims under the Kenyatta regime 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 recognisable.

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<sup>185</sup> See discussion on state obligation in part 2.

<sup>186</sup> AI (n 143 above) 10.

<sup>187</sup> Sec 25(7) TJR Act.

<sup>188</sup> A Armstrong & G Ntegeye 'The devil is in the details: The challenges of transitional justice' (2006) 6 *African Human Rights Law Journal* 16.

<sup>189</sup> AI (n 143 above) 38.

<sup>190</sup> Secs 41 & 42.

## 7.4 Reconciliation

Reconciliation 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.<sup>191</sup> 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 TJR Act.<sup>192</sup> Public hearings stipulated under the Act are designed to provide victims and perpetrators with a forum for reconciling with each other.<sup>193</sup> 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 the alleged perpetrators will avail their co-operation 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 doubtful whether this category of victim is willing to undergo a reconciliatory process. Their suffering must be relieved first for there to be an effective reconciliation process. As correctly diagnosed in Sierra Leone, reparations are a pertinent prerequisite of reconciliation.<sup>194</sup> Thus, with specific reference to a 'guarantee of non-repetition' as a form of reparation, the TJRC needs to assure the victims that they will not fall victim again of similar atrocities in future. The TJRC, therefore, needs to work towards promoting institutional and constitutional reform mechanisms.<sup>195</sup> Only with such reparatory assurances will the TJRC be able to achieve effective reconciliation.

## 7.5 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 past human rights violations.<sup>196</sup> This right has been presented by the Inter-American Court on Human Rights (Inter-American Court) as a free-standing remedy in itself (besides reparations and prosecutions

<sup>191</sup> Mutua (n 18 above) 24.

<sup>192</sup> Sec 6(s) TJR Act.

<sup>193</sup> Secs 5(g), (h) & (i) TJR Act.

<sup>194</sup> Sierra Leone TRC Report Vol 1 10.

<sup>195</sup> AI (n 143 above) 12.

<sup>196</sup> IACHR *Ellacuria v El Salvador* Case 10488 of 1999 (*Ellacuria* case). See also HRC *Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v Uruguay* (Communication 107/1981) para 14.

of at least the most serious crimes).<sup>197</sup> It entails information as to the causes, reasons, the condition and circumstances of the violations and the identification of the wrongdoers,<sup>198</sup> and the whereabouts of loved ones who have disappeared.<sup>199</sup>

This has multi-faceted goals. According to Tutu, the truth forms a basis for reconciliation.<sup>200</sup> It may also be used to sanction the wrongdoers for prosecution or for political and moral reconstruction of the state.<sup>201</sup> Truth, writes Henken, has a deterrent effect on the perpetrators.<sup>202</sup> To achieve these objectives, it is important that any TRC is independent, impartial and effective. Perhaps the Kenyan TJRC can learn from the South African TRC. The latter Commission has been criticised for establishing selective truths or succumbing to political pressures. As Hayner notes:<sup>203</sup>

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 criticised by human rights organisations for not issuing a subpoena against the minister of Home Affairs and Inkatha Freedom Party President Mangosuthu Buthelezi for fear of possible violence.

Mamdani has further criticised the South African TRC for producing a 'diminished truth'.<sup>204</sup> 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 but must establish as much 'full truth' as possible. This can be achieved in two 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, and economic, social and cultural. Failure to do so will certainly compromise its ability to create a holistic account of the truth and will violate 'the right to truth' of the victims, their families and the society at large.

<sup>197</sup> *Ellacuria* case (n 196 above).

<sup>198</sup> AI (n 143 above) 6.

<sup>199</sup> Art 32, Additional Protocol I to the 1949 Geneva Conventions.

<sup>200</sup> Truth and Reconciliation Report of SA (1999) 17.

<sup>201</sup> Mutua (n 18 above) 24.

<sup>202</sup> A Henkin 'State crimes: Punishment or pardon' in NJ Kritz (ed) *Transitional justice* (1995) 184 186, as cited by J Sarkin & E Daly 'Too many questions, too few answers: Reconciliation in transitional societies' (2003) 35 *Columbia Human Rights Law Review* 666-667.

<sup>203</sup> Hayner (n 127 above) 42.

<sup>204</sup> M Mamhood 'A diminished truth' in W James & L van de Vijver (eds) *After the TRC: Reflections on truth and reconciliation in South Africa* (2001) 58.

## 8 The constitutional review process

As noted above, the KNDRC, in agenda 4, agreed on the need for comprehensive constitutional reforms as an inevitable transitional measure. Given the contentious nature of prosecution and the political uncertainty over the TJRC, constitutional reforms appear to have won the most political support of all the transitional mechanisms. This goodwill first saw the enactment of two critical Acts: the Constitution of Kenya Review Act (2008) and the Constitution of Kenya (Amendment) Act (2008). While the latter sought to entrench the political agreements arrived at in the KNDRC in the Constitution, the former sought to facilitate the completion of the constitutional review process. The Constitution of Kenya Review Act, 2008,<sup>205</sup> provided the legal framework through which Kenya recently attained her new Constitution.

With the draft Constitution attaining landslide approval in the 4 August 2010 referendum, followed by the official promulgation of the new law on 27 August 2010, Kenya ushered in a new constitutional dispensation. The enactment of the new Constitution will definitely inform numerous other transformation processes. To begin with, the Constitution embodies institutional reforms. It revitalises key institutions of state so that, in the end, Kenya may boast an independent judiciary,<sup>206</sup> an accountable police service,<sup>207</sup> a more participatory government structure exemplified by devolved governance<sup>208</sup> and a vibrant Bill of Rights containing, amongst others, socio-economic rights over and above the traditional civil and political rights.<sup>209</sup> Provision is also made for minority groups such as women, children and persons with disabilities and older members of society.<sup>210</sup> The Constitution entrenches a national human rights institution – the Kenya National Human Rights and Equality Commission.<sup>211</sup> An attempt is further made to constitutionally entrench the rule of law as well as separate government functions together with a system of checks and balances. Checks on the executive were conspicuously lacking under the old order.

## 9 Conclusion

This contribution assessed the various transitional justice initiatives in Kenya as keys for democratic transformation. It was pointed out that fragile ethnic and political tensions characterising Kenya continue

<sup>205</sup> Ch 9 Laws of Kenya.

<sup>206</sup> Arts 159-162 Constitution of Kenya.

<sup>207</sup> Arts 243-247 Constitution of Kenya.

<sup>208</sup> Ch 11 Constitution of Kenya.

<sup>209</sup> Art 43 Constitution of Kenya.

<sup>210</sup> Arts 53-57 Constitution of Kenya.

<sup>211</sup> Art 59 Constitution of Kenya.

to undermine prosecution efforts and that impunity remains a core problem.

It was pointed out that the legal framework upon which the probable prosecutorial outfit and the TJRC are structured has certain in-built weaknesses. Besides, the credibility of the TJRC has gradually weakened due to unanswered questions of transparency, independence and competence.

Transitional justice has proved indispensable for countries emerging from past human rights violations and autocracies or conflict and which are struggling towards democracy. Kenya is 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 wrongdoers and redress for victims.

The government has been responsive and has since adopted numerous transitional initiatives. Key among these are 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 hampered by ethnic politics. Even though the matter has been taken over by the prosecutor of the ICC, the focus on the forthcoming elections of 2012 has robbed the prosecution mechanism of the much-needed political will to drive the transitional process. Moreover, 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 offer the much-needed co-operation to the prosecutor of the ICC in facilitating his subsequent investigations.

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