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## Lessons to Be Learned: An Analysis of the Final Report of Kenya’s Truth, Justice and Reconciliation Commission

### Introduction

The Truth, Justice and Reconciliation Commission (TJRC) presented its much-delayed Final Report to the Kenyan Parliament in May 2013.<sup>1</sup> Unfortunately, its afterlife has proven to be almost as controversial as the commission was during its mandate.

Allegedly, the report had been altered before it was publicly presented, raising issues about the integrity of both the report and the conduct of some commissioners. The National Assembly recently amended the Truth, Justice and Reconciliation Act, which created the TJRC, to give itself powers to “consider” the report and oversee the implementation of the recommendations it contains.<sup>2</sup> It would be hugely regrettable if the National Assembly were to alter the report in any way—as well as a breach of the Constitution and the TJRC Act, a violation of the integrity of the report, and a unique occurrence in the history of truth commissions.<sup>3</sup> Yet, given the potentially incriminatory information contained in the report, it is not surprising that some powerful actors would want to tamper with the report or have it rejected entirely.

The TJRC Report is in some ways a fair reflection of the mandate and the commission itself. It has many imperfections but also some positive points. It stands as an official record of the state’s complicity in serial human rights violations, a state whose institutions are frequently exposed as corrupt and in callous disregard of the fundamental human rights of citizens. Given this, it is incumbent on all of those engaged in promoting the truth and the rule of law in Kenya to read it carefully.

There are many lessons to be learned from Kenya’s difficult experience of truth seeking. Among the commission’s positive achievements is the treatment of children as both a special group of victims and as participants in the TJRC process. The commission also paid specific attention to sexual and gender-based violence and its impact on women, making some excellent analysis of particularly notorious violations of human rights. Direct testimony and public hearings also added a human dimension to accounts of violations.

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<sup>1</sup> The Truth, Justice and Reconciliation Commission of Kenya, “The Final Report of the TJRC” (2013) [hereinafter TJRC Report], [www.tjrkenya.org/index.php?option=com\\_content&view=article&id=573&Itemid=238](http://www.tjrkenya.org/index.php?option=com_content&view=article&id=573&Itemid=238)

<sup>2</sup> “No.6 of 2008,” Kenya Law (2008), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TruthJusticeandReconciliationCommissionAct\\_.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TruthJusticeandReconciliationCommissionAct_.pdf) See also “Kenya Gazette Supplement No. 178 (Acts No. 44),” Kenya Law (2013) [http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2013/TruthJusticeandReconciliation\\_Amendment\\_Act2013.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2013/TruthJusticeandReconciliation_Amendment_Act2013.pdf) The act of “considering the report” is now being taken to mean that the National Assembly will have the power to amend the report and/or alter its contents.

<sup>3</sup> See the National Assembly debate on its role in considering the report and amending it, [www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-5th-december-2013-at-2.30pm?searchterm=TJRC](http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-5th-december-2013-at-2.30pm?searchterm=TJRC), 98–100. See also [www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-28th-november-2013-at-9.00a.m](http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-28th-november-2013-at-9.00a.m)

Less positive, the commission failed to shed light on some egregious conducts, like extrajudicial executions. Further, some parts of the report represent not much more than a reference to or a synthesis of previously published reports. Additionally, the effectiveness of the TJRC's outreach operation has been called into question. One poll indicated that 67% of Kenyans did not know about the contents of the TJRC Report or the controversy surrounding the alleged alteration of the land chapter. Nevertheless a majority of Kenyans (approximately 54%) support the release of the report and call for the implementation of the recommendations.<sup>4</sup> While it is difficult to extrapolate too much from limited polling numbers conducted using different methods, the lack of outreach may be understandable given the commission's over-ambitious mandate, which seemed to have given little thought to the body's capability to investigate and address such a lengthy period of time (nearly 45 years) with relatively few resources under conditions of high political tension.

## Background

Kenya's December 2007 presidential and parliamentary elections were followed by a period of political violence and unrest (post-election violence or PEV), when candidates on both sides of the political divide claimed victory and allegations of electoral fraud ensued. Tensions erupted into riots, fighting, acts of rape and assault, and bloodshed. It is estimated that 1,100 people died during the crisis and over 600,000 people were displaced from their homes.

The Kenya National Dialogue and Reconciliation process that followed the violence resulted in the adoption of a number of political settlements, including one to establish a Truth, Justice and Reconciliation Commission (TJRC Agreement). This agreement, endorsed by Parliament, led to the enactment of the Truth, Justice and Reconciliation Act (TJR Act), which created an official body to inquire into historical injustices and to propose sustainable solutions, like redress for victims.<sup>5</sup>

The TJRC was initially given a two-year mandate, which was extended three times. Its final report was not handed over to the president until May 21, 2013, three weeks after its operations had officially ended.<sup>6</sup>

The TJRC's operations were carried out in a highly charged political atmosphere. While the commissioners were writing their final report, Kenyans were debating a new draft constitution (passed in 2010),<sup>7</sup> and engaging in electoral campaigns ahead of the general elections held in March 2013. The state of wrangling within the commission; the refusal of its discredited chairperson, Ambassador Bethuel Kiplagat, to step down; and indictments of senior government officials and politicians by the International Criminal Court all meant that the truth-seeking process would be significantly ignored in the national discourse. The TJRC's refusal to release its final report prior to the 2013 elections cast further doubts on its credibility and that of the overall truth-seeking endeavor.

## Ambassador Kiplagat and the TJRC Process

At the root of many negative assessments of the commission's work is the controversy surrounding Kiplagat's conduct. If the commission goes on to enjoy any respect or make an impact it will be in spite of the chairperson, not because of him. Criticism of his aptitude for the position included calls to step down from Archbishop Desmond Tutu, the request for court orders

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4 Ipsos Synovate Kenya, "Political Barometer Survey" (7/10/2013), [www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Ipsos%20Synovate%20Polls\\_SPEC\\_Barometer\\_July\\_2013.pdf](http://www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Ipsos%20Synovate%20Polls_SPEC_Barometer_July_2013.pdf). See also South Consulting Political context for Implementation of the TJRC Report presented at ICTJ's Open Forum on the Implementation of the TJRC Report, July 5, 2013, Serena Hotel.

5 The agreement was adopted by Parliament and led to the passage and enactment of the Truth Justice and Reconciliation Act (TJR Act). The Act received Presidential Assent on November 28, 2008, and came into operation on March 17, 2009. The Commission was gazetted on July 22, 2009 (Gazette Notice No. 8737). See [www.dialoguekenya.org/index.php/agreements.html](http://www.dialoguekenya.org/index.php/agreements.html) and [http://kenyalaw.org/KenyaGazette/view\\_gazette.php?title=3224](http://kenyalaw.org/KenyaGazette/view_gazette.php?title=3224)

6 See [www.statehousekenya.go.ke/news/may2013/2013210503.htm](http://www.statehousekenya.go.ke/news/may2013/2013210503.htm)

7 Committee of Experts, Draft Constitution (2010), [www.kenyaconsulatela.com/2-o/constitution.pdf](http://www.kenyaconsulatela.com/2-o/constitution.pdf)

preventing him from entering the commission's offices, and allegations and counter-allegations leading to considerable embarrassment for the TJRC. The commission has earned the notorious distinction of casting doubt on the integrity of its own chairperson in its final report. Kiplagat's performance throughout long parts of the commission's mandate turned the process into a farce. Indeed, one part of the TJRC Report reads:

When the Commissioners paid a courtesy visit to the Kenya Defence Forces (KDF) a presentation [on the Wagalla Massacre] had been prepared for us. Ambassador (Bethuel) Kiplagat (the TJRC Chairman), then left the room with the officer in charge to have a private conversation, after which the presentation was cancelled.<sup>8</sup>

Kiplagat did profound damage by denying an important national truth-seeking process a fundamental ingredient for its success: credibility. ICTJ's experience indicates that while there is no magic recipe for a successful truth commission, the reputable composition and unimpeachable conduct of commissioners are necessary conditions *sine qua non*.

### Controversy Regarding the Land Chapter

Soon after the commission handed over its Final Report, three international commissioners—the late Ambassador Berhanu Dinka, Justice Gertrude Chawatama, and Ronald Slye—protested in an unofficial dissenting opinion, charging that government officials from the Office of the President had meddled in the commission's affairs.<sup>9</sup> They stated that the Kenyan commissioners had been coerced into giving an advance copy to the president and were required to alter paragraphs in Volume IIB, the Land Chapter, to diminish allegations of illegal conduct against former President Jomo Kenyatta and his family.<sup>10</sup> Because the alleged alterations took place after the legal tenure of the TJRC had ended and without the consent of all of the commissioners, they breached the TJRC mandate and eroded the credibility of the full report.<sup>11</sup>

## The Final Report

### Volume I: Summary of the Commission Report

Volume I of the TJRC Report offers an account of the commission's tenure, explaining the antecedents and nature of the commission, the commissioners' interpretation of their mandate, their methodology, and the organizational difficulties that the TJRC faced regarding the suitability of Kiplagat. The aggregated picture presented in Volume I is one of political and financial neglect, internal confrontation, and litigation.

The report identifies that the commission had an over-ambitious mandate. To address the 45-year interval of time specified in the legislation (1963–2008), the commission adopted a strategy of focusing on certain historical junctures where spasms of violence had taken place. It also adopted a flexible interpretation of the window of time under investigation, looking into incidents and issues that predated the start of its mandated investigation period.

### Volume IIA: Violations of Bodily Integrity

As a composite account of the dynamics and factors in Kenya that nurtured an environment under which violations and injustices thrived, Volume IIA is meant to be the heart of the re-

<sup>8</sup> TJRC Report, Volume IIA, 317, [www.tjrkenya.org/images/documents/TJRC\\_report\\_Volume\\_2A.pdf](http://www.tjrkenya.org/images/documents/TJRC_report_Volume_2A.pdf)

<sup>9</sup> Nzau Musau, "How TJRC Land Chapter was Censored," *The Star*, June 4, 2013, [www.the-star.co.ke/news/article-122777/how-tjrc-land-chapter-was-censored](http://www.the-star.co.ke/news/article-122777/how-tjrc-land-chapter-was-censored)

<sup>10</sup> Ibid. See also International Commission of Jurists Kenya, "KTJN press release on the TJRC report and dissenting opinion," June 13, 2013, [www.icj-kenya.org/index.php/media-centre/press-releases/20-press-statement/532-ktjn-press-release-on-the-tjrc-report-and-dissenting-opinion](http://www.icj-kenya.org/index.php/media-centre/press-releases/20-press-statement/532-ktjn-press-release-on-the-tjrc-report-and-dissenting-opinion)

<sup>11</sup> Nzau Musau, "How TJRC Land Chapter was Censored," *The Star*, June 4, 2013. The Kenyan commissioners deny that they were forced to alter parts of the report. They have explained that such alterations were undertaken in the day-to-day writing of the report, a position not shared by the international commissioners.

port. It focuses on major violations of the right to bodily integrity that were committed during the period of time under investigation by the truth commission.

For analytical purposes, the commission divided the period into four distinct eras, corresponding to the four political administrations that governed the country during that time: the British colonial era (1895–1963), the presidency of Jomo Kenyatta (1963–1978), the presidency of Daniel Arap Moi (1978–2002), and the presidency of Mwai Kibaki (2002–2008). The commission found that during all four periods the government was responsible for numerous gross violations of human rights, including torture, political assassinations, arbitrary arrest and detention, illegal and irregular acquisition of land, economic crimes, grand corruption, extrajudicial execution, sexual violence, looting and burning of property, and enforced disappearances.

The TJRC Report documents violations perpetrated during the Shifta War in the Northern Frontier District from December 1964 to 1968. For example, during the war residents of Northern Kenya were interred in camps where many suffered serious human rights violations and death. The military implemented a scorched-earth policy and destroyed between 70 to 90 percent of livestock, including camels and sheep—condemning affected nomadic communities to poverty.

The TJRC Report also documents sexual violations perpetrated by military and police personnel against women in the northern part of Kenya, but notes, however, that cultural norms prevented the commission from obtaining a full account of these crimes. Communities in affected villages in Northern Kenya, such as Isiolo, Mandera, and Garrisa, continue to suffer post-traumatic stress as a result of violations perpetrated during the war. Hundreds of people died as a direct result of indiscriminate killings and other violations,<sup>12</sup> while others died as a result of a lack of treatment. Some victims were left permanently displaced.

The report names senior military personnel as being involved in gross human rights violations and in some instances rank-and-file officers who were involved in atrocities. Direct identification of an alleged perpetrator is an exception, rather than a rule. For example, the report names army commanders such as Major General Joseph Ndolo and Major General Jackson Mulinge as persons probably most responsible for the violence during the Shifta War. The commission made a good attempt to uncover the command structure of military and police formations accused of various atrocities, yet it failed to consistently uncover the entire command structure, not just during this conflict but also during a number of other conflicts and atrocities that are documented in the report. In fact, during a debate in the National Assembly on amendments to the TJRC Act, an adversely mentioned person, Hon. Joseph Nkaisery, faulted the commission for naming him as a possible perpetrator in the Lotirir Massacre without naming his superiors.<sup>13</sup> Nkaisery alludes to the fact that because he could not have undertaken the operation on his own, his superiors should have been named as well.<sup>14</sup>

The report identifies several pre-independence massacres, such as the Kedong Massacre, the Giriama Massacre, the Kolowa Massacre (Pokot), the Lari Massacre (colonial collaborators), and the Bulla Karatasi Massacre. It also notes the collective punishment that the government and security agencies meted out against communities in the North Eastern Province during the Wagalla Massacre. Hundreds of men and women in these regions were massacred or sexually violated. Documentation in this part of the report importantly notes that in October 1992 President Moi acknowledged these violations had occurred and promised action, including the establishment of a Wagalla Trust Fund for victims. Although the fund was never created, it is

12 TJRC Report, Volume IIA, Chapter 3, The Shifta War, 136.

13 TJRC Report, Volume IV, Chapter 3 Reparations Framework, 131, and Volume IIA, Chapter 4, Unlawful Killings and Enforced Disappearances, 427.

14 See comments of Hon. Major General Nkaisery, National Assembly, Parliamentary Debate, November 28, 2013, [www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-28th-november-2013-at-9.00a.m](http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-28th-november-2013-at-9.00a.m)

nonetheless an important finding of the commission that warrants a serious explanation from the state and requires further dialogue regarding reparations.

On political assassinations, the commission, like other past inquiries, struggled to shed new light. The TJRC noted that it had unearthed new evidence in some cases, but insufficient enough to warrant prosecutions. The commission, for example, found that there was sufficient evidence in the JM Kariuki murder to implicate multiple people, but many of the alleged perpetrators had since passed away. Multiple investigations into the death of Robert Ouko have failed to find much evidence on which to base a prosecution. Most investigations into the death of Crispin Mbai, for example, have yielded no credible witnesses.

The commission recommends that government-held information on these political assassinations should be made public through the National Archives, a public apology should be issued from the Office of the President, public memorials should be established, and, if possible, additional investigations and prosecutions should be held.

Several incidents of extrajudicial executions were identified for further investigation, including killings by security forces in Mt. Elgon, extrajudicial executions of suspected members of Mungiki, and illegal use of firearms during the 2007–2008 post-election violence. The commission recommends expedited police reform, ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, as well as reparations for families, including an apology from the president and heads of security forces for recorded incidents of gross human rights violations. Finally the commission recommends a special prosecutor be appointed to investigate the death of the well-known cleric Father Anthony Kaiser.

In general, the commission found that most massacres were left undocumented and unprosecuted and resulted from a lack of security control as well as impunity for perpetrators. The commission found that state security agencies, particularly the Kenya Police and the Kenya Army, were the main perpetrators of violations against bodily integrity in Kenya, including massacres, enforced disappearances, torture and ill-treatment, and sexual violence.<sup>15</sup> Recommendations related to massacres focused on an apology from the president as reparations for victims, barring from office those who were involved in atrocities, the release of government-held information relating to massacres, and redress for historic marginalization in areas where massacres took place.

The TJRC Report would have done well to draw attention to gross human rights violations suffered by prisoners in Kenyan jails and its related impact. The Prison Department, which is frequently regarded in Kenya as responsible for serious violations, is not mentioned by the commission.

Despite finding the Kenya Army to have been responsible for alleged crimes, no recommendations for institutional reform are made regarding this branch of the armed forces. It would have been useful for the commission to have recommended appropriate review processes to consider what, if any, steps were needed to ensure that the military enjoyed the full confidence of the state and its citizens as a rights-respecting body subject to the constitutional order and the rule of law.

The commission's investigatory strategy appears to have been more effective in the Northern and Western region of the country, given the meticulous documenting of massacres there.<sup>16</sup> It was less effective in the area of extrajudicial executions, even in the face of credible human rights reports that would have been made available to the commission, such as the Philip Alston Report

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<sup>15</sup> TJRC Report, Volume IIA, Chapter 2 History of Security Agencies: Focus on Colonial Roots of the Police and Military Forces, 33.  
<sup>16</sup> TJRC Report, Volume I, Chapter 3 Methodology and Process.

on Extrajudicial Executions<sup>17</sup> and the report of the Kenya National Commission on Human Rights.<sup>18</sup> The reasons for this inconsistency in both method and result are not easy to explain.

Part of the explanation may be that the expectations set by the mandate in this regard were at least partially unrealistic. Extrajudicial executions, especially by parties belonging to or linked to the state, have long been recognized as difficult to investigate. All of the most important information rests with the very parties who have the most to lose by disclosing it and, more importantly, who still remain in power. For example, extrajudicial executions were witnessed during former President Mwai Kibaki's administration, even as the TJRC process was underway. Effective investigations into state-sponsored or state-linked extrajudicial executions require a change in the mindset of authorities toward a commitment to transparency and high levels of resource allocation and investigative sophistication. In all these areas the commission faced immense challenges. Nevertheless, it would have been beneficial if the commission had set out more information on the investigative methodologies it had employed in this regard and given a franker explanation of the challenges it faced vis-à-vis certain types of political violence, like extrajudicial executions.

In response to unlawful detentions during the previous regimes the commission recommends the enactment of legislation prohibiting torture and degrading treatment.<sup>19</sup> Further it recommends the establishment of an Office of the Independent Inspector of Prisons and All Places of Detention and that the President issue public apologies for atrocities committed by various regimes from the Kenyatta (Jomo) era to the Kibaki era.

On sexual violence the commission recommends the establishment of Gender Based Violence Recovery Centres in all counties, appointment of a Special Rapporteur on Sexual Violence, and the formulation of a Code of Conduct and Ethics for the National Police Service. There is, however, little explanation as to how the TJRC's recommendations were influenced by its findings. For example, it is unclear whether the recommendation to create 47 Gender Based Violence Recovery Centres is motivated by a finding of sexual violence countrywide. The commission also fails to sufficiently link its recommendations to ongoing reform processes in the country. Further, the recommendation on the Office of the Independent Inspector of Prisons and All Places of Detention would overlap with that of the Kenya National Commission for Human Rights, which also has a mandate to ensure human rights compliance in detention facilities and prisons.

Under Section 6(c) of the TJR Law, the commission was required to identify victims of human rights violations of various periods for the purposes of reparations. The commission did not do so to the extent that the mandate seemed to require.<sup>20</sup> Further, it failed to identify a whole spectrum of victims of violations, from sexual violence to enforced disappearance to extrajudicial execution. The report does, however, identify victims from various massacres, such as the Wagalla and Turbi Massacres.<sup>21</sup> The TRC's failures are probably the result of low levels of fundings and the myriad other problems it faced during its tenure.

### Volume IIB: Historical Injustices

The Land and Conflict Chapter of the report offers a detailed chronology of historical land injustices in Kenya. It is divided into two phases: 1) the colonial era and 2) post-independence

17 UN Human Rights Council 11th Session, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 2009 (New York: Official Record A/HRC/11/2/Add.6), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/134/39/PDF/G0913439.pdf?OpenElement>

18 Kenya National Commission on Human Rights, "The Cry of Blood: Report on Extrajudicial Killings and Disappearances" (2008), [www.ediec.org/fileadmin/user\\_upload/Kenia/KNCHR\\_REPORT\\_ON\\_POLICE.pdf](http://www.ediec.org/fileadmin/user_upload/Kenia/KNCHR_REPORT_ON_POLICE.pdf)

19 Kenya acceded to the Convention Against Torture in 1997, but has failed to enact legislation criminalizing torture. The Prevention of Torture Bill 2011 is yet to be tabled in Parliament. See Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (5-31 May 2013) [www.ohchr.org/en/countries/AfricaRegion/Pages/KEIndex.aspx](http://www.ohchr.org/en/countries/AfricaRegion/Pages/KEIndex.aspx) & <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/450/11/PDF/G1345011.pdf?OpenElement>

20 TJR Act, Section 6c: "The functions of the commission are to identify and specify the victims of the violations and abuses and make appropriate recommendations for redress."

21 TJRC Report, Volume IIA, Chapter 4 Unlawful Killings and Enforced Disappearances, 552.

era, with the post-independence era further broken down into three regimes (Kenyatta, Moi, and Kibaki). The report looks at injustices regarding communal land acquired through agreements, like the Anglo-Maasai Agreements, and those acquired through the establishment of reserves. It also analyzes the acquisition of land, coercive measures, forced eviction, and displacement by multinational companies.

The discussion reveals that government policies, laws, and practices had immediate and long-term negative effects on Kenyan communities, including causing permanent displacement. The land distribution policies of the independent government in the 1960s almost exclusively benefitted government officials, which marks the advent of resentment and distrust toward the government among communities that rightly felt short-changed.

The commission accordingly found that there is a strong link between land injustices and ethnic violence, the forceful settlement of communities outside of their homelands, and certain communities benefitting from settlement schemes to the exclusion of others.

Although it was mandated to “consider the reports of the relevant commissions of inquiry and make recommendations on the implementation of such reports,” the TJRC makes no specific recommendations on how to better implement past reports from commissions of inquiry, taking into consideration the passage of time and the changed political and legal environment.

## **Volume IIC: Group Discrimination and Oppression**

### **a) Gender and gross human rights violations**

This chapter highlights the different ways in which women in Kenya have experienced historical injustices and gross violation of human rights during the period covered by the TJRC mandate. It brings to the fore the specific burdens borne by women after human rights violations were suffered by either themselves or a spouse or close relative.

The commission found that Kenyan women have suffered atrocities, in some cases for no other reason than their being female. In some accounts given to the commission women were targeted for violation as a way of harming their community. Further, a majority of women felt abandoned by the state, which they perceived as unwilling to address their grievances.<sup>22</sup>

The commission held special hearings for women, with the understanding that they would be more open and engaging than mixed-gender hearings. The commission strove to learn from the experiences of the Makau Mutua Task Force process,<sup>23</sup> which found that women felt more comfortable speaking about issues that concern them among other women. It is to the commission's credit that it created space for women's experiences in the truth-seeking process.

Given the importance of the issues and the serious violations women have faced over time, the commission's engagement on gender issues was positive. However, the TJRC, based on its mandate, failed to provide data on various categories of violations that women have suffered or to give recommendations stemming from the hearings that are targeted at improving human rights guarantees for women.

### **b) Children and gross human rights violations**

Following the trend of recent truth commissions, the TJRC investigated violations suffered by children and youth, who comprise half of the Kenyan population today. It made important efforts to facilitate the safe participation of children in its hearings and operations. The com-

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<sup>22</sup> TJRC Report, Volume IIC Chapter 3, Minority Groups, Indigenous People and Gross Violations of Human Rights, 151.

<sup>23</sup> See Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, <http://53.marsgroupkenya.org/media/documents/2008/03/2530fca5826a918db99428822663dc29.pdf>

mission gathered approximately 2,000 statements from children and organized two thematic hearings in which children gave testimony in camera. While the commission stressed the vulnerability of children, both as direct and indirect targets of grave violations, it also importantly recognized their right to participate.

After considering the economic status of children, including levels of education, health and child labor—and emphasizing the acute challenges facing children with disabilities—the chapter analyses the impact of past conflicts on children. Focusing on the PEV, the report extensively documents instances of killing and maiming, sexual violence, and forced recruitment, yet fails to name the Turbi massacre as an attack against schools.<sup>24</sup> Finally, the chapter considers forced displacement and abuses committed within the Juvenile Justice System.

As happens in other parts of the report, the difference between gross violations of human rights and violations of socioeconomic rights becomes problematic, especially when considering the specific safeguards to which children have a right according to the Convention on the Rights of the Child. In particular, the report fails to emphasize the perverse effects that the collapse of state institutions have had on the lives of children in Kenya. For example, as drafted, the alarming problem of street children in Kenya appears to be primarily a consequence of conflict rather than poverty, loss of parents, and/or domestic violence.

Likewise, it is not strongly emphasized, and hence not addressed in the recommendations, that most cases of sexual violence against children are linked to socioeconomic status (with an inverse correlation) and perpetrated by individuals who should protect the victims from harm, including family and community members and state agents.<sup>25</sup> The lack of statistical data documenting the findings of the commission in regards to violations against children makes this problem more evident.

### **Volume III: National Unity and Reconciliation**

One of the more critical chapters in this volume addresses ethnic tensions in Kenya. This chapter attempts to document their causes and effects, including their drivers and root causes, and the government policies that have undermined national cohesion and unity (for example, stereotyping and excluding certain groups from the political affairs of the state). It seeks to make a causal link between heightened ethnicity and politics, land, and violence.

The commission was mandated to “inquire into the causes of ethnic tensions and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities.”<sup>26</sup> The report derives much of its understanding from a wide variety of historical injustices committed during the period under investigation, which it combines with a discussion of ethnicity and ethnic tension, national unity, and reconciliation.

The commission found that, during the Colonial period, the British Colonial government pursued a policy of “divide and rule” in order to consolidate their hold on the country and lessen the possibility that the African population would resist colonial rule. Second, it created ethnically defined administrative boundaries and set them with little consideration for historical interethnic interactions and relations. Third, the Colonial Government focused on developing infrastructure and social services in “productive” areas of the country at the expense of the rest of the country.

According to the TJRC Report, colonial land policies resulted in displacement and inequality that remained largely unaddressed in the policies and practices of independent Kenya. The rul-

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24 TJRC Report, Volume IIA, Chapter 1, Historical Context: General Overview, 25, and Volume IIA, Chapter 4, Unlawful Killings and Enforced Disappearances, 375.

25 TJRC Report, Volume IIC, 175, par 42.

26 TJRC Act, “No. 6 of 2008,” Section 6 (5).



ing elite in independent Kenya did not have the political will or commitment to create a truly democratic and prosperous Kenya for all of its citizens.

The report does well to identify the causes of ethnicity, which include Colonialism and policies in Kenya that continue to have a far-reaching effect on how communities interact. These include administrative, economic, and land policies that have bred a sense of division and hatred among Kenyan communities. It also identifies successive regimes as not only maintaining policies that ingrained ethnic division, but exploiting them, further resulting in “insider-outsider” dynamics.

The commission makes no tangible, actionable, or concrete recommendations on the issue of ethnicity in Kenya or how to deal with ethnic tension. Its only recommendations are based on the Mt. Elgon case study.<sup>27</sup> Some probable recommendations for resolving ethnic tensions implied in the TJRC Report, and explicit in the new constitution,<sup>28</sup> include ethnic inclusion in public offices at the national and county level, fostering civic engagement and dialogue among ethnic groups at the national and county level, and equitable distribution of resources among various regions.

The presidency, county government, political parties, the Public Service, and Parliament are specific organs of the state identified by the constitution as capable of playing a key role in managing ethnic tension and fostering national cohesion.

## Volume VI: Findings and Recommendations

### a) Recommendations

Volume VI covers the implementation of the TJRC's recommendations. It recommends that legislation be passed to establish a special implementation committee (Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission Act) to work with relevant stakeholders in order to facilitate and monitor implementation of the recommendations and administer a reparations fund. The proposal is based on the challenges faced by other truth commissions in seeing their findings implemented.

Such a committee would also play a limited role in implementing parts of the report, more specifically, the administration of the reparations fund; mapping, registering, and processing victim claims using the TJRC database; and facilitating recommendations on memorialization. Further consideration should be given to an external monitoring process that would hold the government to account and report to the National Assembly from time to time. However, the description of the mechanism does not differentiate sufficiently between the reparation process and other processes, such as memorialization, preservation of the information gathered, raising public awareness, and managing or monitoring funds, etc. These are very different complex functions that would benefit from a clearly defined structure.

### b) Reparations

The report provides a clear conceptualization of reparations and related state obligations. The chapter on recommendations mentions, among its sources, demands for redress expressed by victims in the testimony-taking process. Victims preferred legal and institutional reparations as reparations to the nation.<sup>29</sup>

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27 TJRC Report, Volume VI, Chapter 1, Findings and Recommendations, 57–59.

28 See NCIC Study on Ethnic composition of Public Service in Kenya, Volume III, Appendix 1, Article 232 on principles of public service, Article 201 on principles of public finance which includes equitable development and Article 131 on the role of the President in fostering national cohesion, Article 174 on the role of devolution in fostering cohesion, Article 91 and the role of political parties in promoting cohesion, etc.

29 TJRC Report, Volume IV, Chapter 3, Reparations Framework, 100–1.

The commission recommends that the National Assembly issue reparation regulations that would mirror and actualize its proposed Reparation Policy Framework.<sup>30</sup> However, it does not sufficiently develop the operative institutional framework to execute such a program, including the mode of financing. A detailed plan requires not only substantial funds, but also institutional, managerial, and technical skills on the part of staff. While it is important to have a comprehensive plan related to the nature and amount of wrongdoings and harms suffered by victims, Kenyan authorities will need to identify the capabilities of the Kenyan state and possible international commitments to support a reparations plan.

## CONCLUSION

The difficulties surrounding the TJRC process and its final report reflect the reluctance of the political leadership to account for the country's dark past. Political neglect, the selfish and irresponsible behavior of its chairperson, and financial troubles compounded the challenges inherent in implementing an unwieldy and over-ambitious legal mandate. While the TJRC Report reflects many of the weaknesses of the country's truth-seeking process, it provides an important foundation for examining Kenya's past, and most importantly, it makes recommendations that, if heeded, could help to create a stronger republic, with rule of law and respect for citizens' rights.

It is notable that local human rights and transitional justice groups were relieved that the commission managed to present a somewhat wide-ranging report of 2,000 pages.<sup>31</sup> While this may be indicative of the low expectations for the process, it suggests interest and a degree of hope. Moreover, that the tenor and tone of the report amplifies victims' voices and demands accountability from the state for past atrocities is admirable.

Currently, the TJRC Report faces several serious challenges, including the government's reluctance to publish it as well as several court cases. Most of the cases seek orders from the High Court to expunge aspects of the report, in particular where petitioners have been adversely mentioned, to bar the Attorney General from tabling the report before Parliament, or to block implementation all together.<sup>32</sup> Other petitioners seek orders from the Court to quash the TJRC Report entirely.

A serious challenge to the report is the intention of the National Assembly, presently vested with the document, to make alterations to it. In December 2013, the House debated and passed an amendment to the TJRC Act, giving the National Assembly the power to determine how the commission's recommendations would be implemented.<sup>33</sup> Initially the purpose of the bill was to replace the "Minister for Justice and Legal Affairs" with the "Attorney General" in the report so as to be in line with the current political order and facilitate implementation. However, the amendment opened the door for several other amendment proposals, including altering sections 49 and 50 to effectively allow the National Assembly to "consider the report." If the National Assembly were to succeed in amending the report, Kenya will hold the unfortunate distinction of being the first country to alter an official truth report after its public issuance.

30 TJRC Report, Volume IV Chapter 3, Reparation Framework, 102.

31 See, for example, George Kegoro, "Despite low public expectations, report shouldn't be a waste," *Daily Nation*, May 25, 2013, editorial, [www.nation.co.ke/oped/Opinion/At-least-Kiplagat-team-provided-for-reparations/-/440808/1862942/-/sbu307/-/index.html](http://www.nation.co.ke/oped/Opinion/At-least-Kiplagat-team-provided-for-reparations/-/440808/1862942/-/sbu307/-/index.html)

32 The following cases have been filed against the Report

- a. Njenga Mwangi & Anor v TJRC & Or (Commission Petition Number 286 of 2013)
- b. Kiri wa Ngugi & or v TJRC & Or (Miscellaneous Civil Application No.192 of 2013)
- c. Kiri wa Ngugi & or v TJRC & Or (Miscellaneous Civil Case Number 213 of 2013, Judicial Review)
- d. George Ngero Gichuru & 23 Others v TJRC (Constitutional Petition No.29 of 2013, Nakuru)
- e. Hon Basil Criticos v AG & Or (Petition Civil Suit No 576 of 2012, High Court at Nairobi)
- f. Ngengi Muigai v TJRC & Anor (Miscellaneous Civil Application Number 277 of 2013, Nairobi)
- g. Beth Wambui Mugo v TJRC & Anor (Judicial Review No. 284 of 2013, Nairobi)

See also Gideon Keter and Maryanne Karanu, "OP accused of blocking TJRC report," *The Star*, June 22, 2009, [www.the-star.co.ke/news/article-125256/op-accused-blocking-tjrc-report](http://www.the-star.co.ke/news/article-125256/op-accused-blocking-tjrc-report)

33 The TJRC Act gave the commission the power to determine the mechanism or framework for implementing its substantive recommendations and obligated the government to follow.

Opinion is divided on the real impact of these amendments. On the one hand they seem to cure a weakness of the TJRC Act, the proposed implementation mechanism that lay outside of state machinery. On the other hand, these amendments fail to bring clarity to the implementation process and now leave it to the discretion of the National Assembly. It is also feared that these amendments are motivated by intentions to alter the report so as to expunge the names of adversely mentioned persons.<sup>34</sup> It is now up to civil society and organized groups to engage with the National Assembly in a bid to discuss and agree on an effective and accountable implementation process. Further civil society will also need to engage with the Attorney General to ensure that the monitoring of the report's implementation is just as effective.

In sum, the report provides findings on several important issues:

- i. It identifies various constitutional, legislative and institutional reforms, such as police reform or judicial reforms, that have been underway since the commission was established.
- ii. It makes bold recommendations on the release of government-held information related to massacres and killings. This gives nonstate actors an opportunity to act on such recommendations if the government fails to provide such information as required under Article 35 of the Constitution, which deals with the right of access to information
- iii. It proposes a robust reparation framework and makes follow-up on reparations for victims a possibility. It specifically recommends apologies from the state as a first step toward the acknowledgment of victims' sufferings.

The report's key weaknesses are:

- i. Recommendations occasionally appear piecemeal and at times do not seem to flow from the findings. There sometimes appears to be insufficient data to sustain a number of findings.
- ii. Some violations are more comprehensively investigated than others, with no apparent explanation for discrepancies in detail.
- iii. The commission was unable to identify victims in many cases, especially those who suffered gross human rights violations, which is neither surprising nor easy to remedy. The fact that many expected individualization of victims reveals perhaps unrealistic expectations. Wherever possible, future efforts should continue to try to assist in the identification of these victims.
- iv. It is impossible to divorce the report from the commissioners themselves. The impact and the credibility of the report were severely undermined by the conduct of Kiplagat personally and the behavior of other commissioners regarding the TJRC report.
- v. The report at times fails to link its recommendations to ongoing reform processes or clarify linkages, like implementation of the Constitution, thereby making it more difficult for policy makers to take up these recommendations or identify priorities or synergies.

Kenyan authorities must discuss the recommendations and do their utmost to implement them, while explaining in detail their reasons for any failure to do so. Well-meaning public officers and nonstate actors would do well to read the report and lift those findings and recommendations that can be implemented and support a discourse on those recommendations that appear complex and politically unpopular. Kenyan society as a whole needs to discuss these recommendations and use them as a platform to build a stronger society.

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34 See Institute for War and Peace Reporting "Concerns Over Bid to Amend Kenya Rights Report," August 16, 2013, available at <<http://iwpr.net/report-news/concerns-over-bid-amend-kenya-rights-report>>. See also *Daily Nation*, "MPs can now change Truth Commission report," December 16, 2013, <http://mobile.nation.co.ke/news/MPs-can-now-change-Truth-commission-report/-/1950946/2101712/-/format/xhtml/-/346nh4z/-/index.html>; Emeka Mayaka-Gekara, "Jubilee leaders plot to clear their names from TJRC report," *Daily Nation*, editorial, <http://mobile.nation.co.ke/News/Jubilee+leaders+plot+to+clear+their+names+from++TJRC+report+/-/1950946/1958078/-/format/xhtml/-/5vdaov/-/index.htm>

**Lessons to Be Learned: An Analysis of the Final Report of Kenya's Truth, Justice and Reconciliation Commission**

It should also be noted that only a small number of Kenyans have read the report. Its impact would be greatly enhanced if an abridged version that is written in accessible language is produced and disseminated throughout the country.

While the report does not fully (and almost certainly could not) respond to the TJRC's extensive mandate, it recognizes and explains some of the commission's shortcomings. Challenges, particularly regarding the deeper analysis of key violations, need to be addressed by further investigation. However, none of those weaknesses should affect the serious consideration that the report deserves.

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