POLICY BRIEF

KENYA TRANSITIONAL JUSTICE NETWORK

TRANSITIONAL JUSTICE APPROACHES

In the context of the Implementation of Agenda Item Number 4

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The Kenya Transitional Justice Network (KTJN) would like to present the Policy Brief on Transitional Justice Approaches in the Context of the Implementation of Agenda Item Number 4.

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Kenya Transitional Justice Network

Abbreviations and Accronyms

ACHPR	African Commission on Human and Peoples' Rights
AG	Attorney - General
CAJ	Commission on Administrative Justice
CSO	Civil Society Organization
CIPEV	Commission of Inquiry into Post-Election Violence
DPP	Director of Public Prosecution
ICC	International Criminal Court
ICD	International Crimes Division
JSC	Judicial Service Commission
KNCHR	Kenya National Commission on Human Rights
KTJN	Kenya Transitional Justice Network
NCIC	National Cohesion and Integration Commission
NGO	Non-Governmental Organization
NGEC	National Gender and Equality Commission
NLC	National Land Commission
NPS	National Police Service
NPSC	National Police Service Commission
PEV	Post-Election Violence
SGBV	Sexual and Gender Based Violence
TJRC	Truth, Justice and Reconciliation Commission
UN	United Nations

1. Introduction

This Brief focuses on transitional justice approaches in the context of the implementation of the Kenya National Dialogue and Reconciliation Agreement. In particular, the Brief will distil and analyse the main issues that emerged from the Kenya Transitional Justice Network (KTJN) Consultative/ Technical Workshop on Transitional Justice Approaches in the context of the implementation of Agenda Item Number 4 of the Kenya National Dialogue and Reconciliation Agreement held on the 26th and 27th of February, 2013 in Nairobi.

The objectives of the workshop were to appraise progress and challenges around truth seeking processes in Kenya and examine emerging trends; to interrogate policies and strategies around reparations and propose a unified approach; to examine Kenya's options and challenges in fulfilling complementarity obligations to the International Criminal Court (ICC) based on the International Crimes Division (ICD) proposal document; and to audit vetting and lustration processes and examine best practices towards institutional reforms in the justice sector.

The workshop was therefore structured around four panels. Panel One dealt with the theme of Truth Seeking under which panellists considered matters concerning the report of the Truth, Justice and Reconciliation Commission (TJRC) and an audit of the process through which the Commission executed its mandate. Panellists discussed the TJRC report as a complete historical record of violations of human rights in Kenya and interrogated matters concerning the identification of victims and perpetrators. They also considered the steps and measures that could be taken to engage with and scrutinise the TJRC report as well as a critical appraisal of the TJRC process against international standards and most importantly the expectations of victims and the nation at large. Panellists also discussed the possible role of Article 59 commissions, the NCIC and civil society in pursuing truth seeking in fulfilment of their particular mandates.

Panel Two focused on Reparations. Amongst the issues discussed were whether the proposed KTJN reparations framework was sufficient in scope, the essential absences therein, and possible linkages and operational tools such as a victims' database. Panellists also considered the best practices in setting up a reparations policy and discussed whether Kenya, a developing country, was capable of funding such a scheme. The various strategies for implementing reparation schemes were discussed as well as the possibility of utilising local initiatives on reparations that could be adoptable nationally.

Panel Three discussed the criminal justice component of transitional justice. Central to this theme was the Judicial Service Committee's proposal to establish an International Crime Division in the High Court. The proposal was critiqued, strategies were suggested towards its improvement and importantly, its place within the wider transitional justice agenda with questions raised regarding the possibility of other domestic implementing mechanisms suitably equipped to dispense criminal justice. The particular challenges involved in addressing crimes of sexual and gender based violence (SGBV) were described and discussed.

Panel Four discussed vetting and lustration, analysing these processes as approaches towards institutional reform focusing on the National Police Service, the Judiciary and the Civil Service. Discussants analysed the best practices emerging from the current vetting of judicial officers and considered how these can be extended towards other public institutions.

2. Analysis

2.1 Truth-Seeking

Truth seeking is the bedrock of the transitional justice framework; if comprehensively and inclusively pursued and utilised, it can promote justice, social and psychological healing, foster reconciliation, and deter future violations. The truth-seeking process provides victims with a forum to tell their stories as well as accurate information on the perpetrators, patterns, and effects of abuses and violations, information that form the basis of subsequent transitional justice initiatives and interventions.

2.1.1 Critique of the TJRC

The TJRC was established to be the principal truth-telling forum and truth seeking mechanism. It was to, inter alia, establish an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office during the period between the 12th of December 1963 and the 28th of February 20081. As the central truth-telling mechanism, the TJRC was roundly critiqued in its attainment of these truth-seeking objectives. Questions were raised as to the robustness of the TJRC hearing process; the impartiality of the Commission; the lack of confidence that the victims and wider public held in the institution; the lack of transparency and accountability in the execution of its functions and the related lack of participation from other actors, groups and organisations (both state and non-state), including victims' and survivors' organisations.

2.1.2 Amnesty and the TJRC

One of the objectives of the TJRC, as contained in its constitutive Act, is to recommend the granting of conditional amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with gross human rights violations and economic crimes (see s. 5(f) of the TJRC Act). The conditional amnesty provision was central to the provision of a non-retributive truth-telling

1 Truth Justice and Reconciliation Act 2008, Section 5 – Objectives of the Commission were to: investigate the causes, nature and extent of the gross violations of human rights, economic rights and violations of international human rights law which were committed during that period; facilitate the granting of conditional amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with gross human rights violations and economic crimes; provide victims, perpetrators and the general public with a platform for non-retributive truth telling; provide victims of human rights abuses and corruption with a forum to be heard; provide repentant perpetrators or participants in gross human rights violations with a forum to confess their actions; and lastly, to compile a report providing as comprehensive an account as possible of the activities and findings of the Commission and its recommendations thereon

forum within which perpetrators could tell, and victims and the general public could learn the truth about abuses and violations. Observers of the process have raised concerns that there were no real incentives for perpetrators to seek amnesty either because the TJRC failed to adequately develop, explain and utilise the amnesty aspect of its work and/or because there was a pervasive sense of impunity on the part of perpetrators in regard to the work of the TJRC and generally in regard to the threat of criminal prosecution in Kenya.

2.1.3 Failure to Release the Final Report

A primary failure cited was the failure of the TJRC to release its final report on numerous occasions but most particularly before the recently concluded March 2013 General Election. Despite assurances that the TJRC would release its final report on the 3rd of May 2013, there is a need to move beyond the TJRC and this can be conceptualised in two ways; first, how can transitional justice partners engage with the report once it is released and second, how can we envisage truth-seeking and truth-telling beyond the TJRC.

2.1.4 Other Truth-Seeking Initiatives

The TJRC was a temporary body with a clearly defined operative and temporal mandate. The time period of 12th December 1963 to 28th February 2008 means that atrocities committed after and before this period could not technically be considered by the TJRC. In regard to the report, the concerns raised as to the manner in which the TJRC carried out its activities suggest that there might be significant gaps in the final report that will need to be addressed. Importantly, however, the TJRC is only one of a number of truth-telling fora and truth-seeking mechanisms. State and non-state actors, including national commissions, parliamentary commissions, commissions of inquiry, NGOs, CSOs and victims' and survivors' groups have been involved in the gathering of facts on human rights abuses and violations before, alongside, and after the temporal mandate of the TJRC and possess a wealth of information useful towards the transitional justice agenda.

2.1.5 Truth-Seeking and the Judiciary

Under the empowering provisions of the Constitution of Kenya 2010 and in light of the judicial reforms that have secured the impartiality, integrity and civic responsibility within the national court system, the pursuit of both criminal and civil cases through the courts is an important forum for truth seeking and telling from a transitional justice perspective. Beyond criminal accountability through the Judiciary, which will be discussed below, Chapter Four of the Constitution contains comprehensive provisions for the protection of human rights. Article 22 allows for any person or organisation to institute court proceedings claiming that a right or fundamental freedom in the

Bill of Rights has been denied, violated or infringed, or is threatened and to seek redress through the courts.

2.1.6 Truth-Seeking and Constitutional and Statutory Commissions

Under Article 59 of the Constitution and the Kenya National Human Rights Commission Act, Cap 14, the KNCHR is mandated to, inter alia, monitor, investigate and report on the observance of human rights in all spheres of life in Kenya; and to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated. Under these provisions, every person has the right to complain to the Commission, alleging that a right or fundamental freedom has been denied, violated or infringed, or is threatened. Additionally, Article 67 of the Constitution and the National Land Commission Act, No. 5 of 2012, mandate the NLC to conduct research related to land and the use of natural resources, and make recommendations thereon; and to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. Under Article 252(3) of the Constitution, both the KNCHR and the NLC have the power to issue summons to witnesses to assist for the purposes of their investigations.

It is imperative that all state mechanisms mandated to carry out activities related to the wider transitional justice agenda, such as commissions, as well as all other relevant state and non-state actors, are adequately sensitised in this regard and properly coordinated. For example, the National Cohesion and Integration Commission, using the provisions of section 25 of the National Commission and Integration Act No, 12 of 2008, has been facilitating, in conjunction with non-state institutions, community reconciliation dialogues across the country whose objective is to promote reconciliation and dialogues in communities that have been or are in conflict. Concerns were raised as to the basis of such exercises at achieving reconciliation in the absence of the TJRC Report or an alternative comprehensive account of human rights violations, abuses and historical injustices. Such attempts at reconciliation must be preceded by the acceptance of a common narrative in regard to the violations endured by victims and acknowledgement by perpetrators for the same if they are to be successful. Additionally, the need for a coordinated approach is highlighted by the incongruity across actors in the same or closely related fields. Peace-building and conflict management, transitional justice and national integration and cohesion are highly related and interdependent fields, and efforts should be made to coordinate initiatives between them in a mutually enforcing manner.

Other relevant commissions include the Commission on Administrative Justice (CAJ), also known as the Office of the Ombudsman, established under the Commission on Administrative Justice Act 2011 and mandated to, inter alia, investigate abuse of power, manifest injustice and unlawful,

oppressive, and unfair or unresponsive official conduct. The National Gender and Equality Commission was established under the National Gender Commission Act No. 15 of 2011 and is mandated to promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution.

All the constitutional and statutory commissions have important roles to play, but they need to be sensitised from a transitional justice perspective. There needs to be engagement with the Commissions to ensure prioritisation of the transitional justice agenda and effective coordination and complementation of activities. It is important to remember that the TJRC is just one of a number of truth telling and truth-seeking fora. Though stakeholders ought to push for the release of the final TJRC Report, especially within the Kenyan context of failure to publish the reports of state commissions of inquiry, a wider emphasis should be adopted beyond the TJRC. For example, the NLC should revisit the Ndungu Land Report in order to address the violations it enumerates. The same goes for other past reports in regard to which little or no action has been taken; further, the State should be required to make public and accessible all the unpublished reports of past commissions of inquiry into human rights abuses and violations.

2.1.7 Engendering Truth-Seeking

Truth seeking is central to the transitional justice agenda and anchors all the various interventions made thereafter. Whilst institutions are important, they are not an end in themselves; the end is justice, which is ensuring that the victims, those who have suffered human rights abuses and violations under a particular or various political dispensations, are granted justice in its various manifestations. The task therefore, in regard to truth seeking, is to ensure that the victims' stories are documented, preserved and publicised and that they form the primary tool for lobbying political acknowledgment, action and redress.

2.1.8 Regional and International Mechanisms

There exist regional and international avenues for litigious and non-litigious engagement towards the ascertainment of truths regarding human rights abuses and violations in Kenya. These include the regional and international courts, the African Commission on Human and Peoples' Rights, the UN system of human rights protection, including the treaty monitoring bodies, the Commission on Human Rights, Special Rapporteurs and Working Groups.

Some communities within Kenya have indeed utilised these platforms to seek affirmation of the fact that they suffered a violation at the hands of the State. An example is the African Commission on Human and People's Rights judgment in the Endorois case that recognised the land historical

injustices suffered by that community and issued remedies for the same. This highlights the potential of using regional and international instruments (such as the African Charter) as opposed to domestic laws alone in seeking redress for human rights violations created by historical injustices.

2.2 Reparations

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law describe five basic categories of reparations: restitution, which refers to measures which restore the victim to the original situation before the violation occurred; compensation for any damages that can be economically assessed; rehabilitation, which includes medical and psychological care as well as the provision of legal and social services; Satisfaction, which includes the search for the disappeared, the decent reburial of the remains of the dead loved ones, public apologies, commemoration, memorialisation, human rights education and training; and guarantees of non-repetition, a broad category which includes measures towards institutional reforms and human rights enforcement, promotion and protection. The particular abuse or violation and the context must be analysed and understood in order to determine the reparation measure, or combination of measures, that would best suit the circumstances.

2.2.1 Draft Framework on Reparations

In the context of the TJRC process, KTJN has developed a draft framework for reparations for Kenya and submitted it to the TJRC for consideration. Summarily, it recognises the various types of reparation: restitution, rehabilitation, compensation, satisfaction, and guarantees of non-repetition. It also recognises that individual victims, families and groups as beneficiaries of reparation measures. The framework classifies violations into five categories: Category 1: violations of the right to life; Category 2: violations of the right to personal integrity; Category 3: forcible transfers of population; Category 4: historical and contemporary land injustices; and Category 5: systematic marginalisation. Taking into consideration the challenges, particularly in regard to funding and capacity, of implementing reparations, the framework adopts a step-by-step approach prioritising the most vulnerable victims and groups.

2.2.2 Categorisation of Victim Groups

Priority A victims are the most vulnerable; they include individual victims of violations in categories 1 and 2 who are children, elderly, single parents, and those who have urgent health concerns. The proposed reparation is compensation in the form of a ten-year annual pension and rehabilitation

in the form of free medical and psychosocial care. The evidentiary standard for identifying the victims under this priority level was 'most likely than not'.

Priority B concerns collective reparations; victims under this priority level are groups victim of individual and group violations such as systematic marginalisation and land injustices. The proposed reparation measures are group rehabilitation, socio-economic measures and symbolic reparations. The evidentiary standard for identifying the victims under this priority level is also 'most likely than not'. The methodology for implementation would involve community participation in decision-making processes and in the design of government policy measures.

Finally, priority C involves non-expedited individual reparations; the victims under this priority level are individual victims of violations under categories 1 and 2 that are not considered most vulnerable. The proposed reparation measures are compensation in the form of a five-year annual pension and restitution/recognition in the form of clearing of criminal records and granting of citizenship documents. The evidentiary standard for identifying the victims under this priority level is on the preponderance of the evidence.

2.2.3 Implementation Structure

The framework also proposes an implementation structure that would see the development of a Reparations Law and the establishment of a Reparations Coordinating Secretariat. The Secretariat would undertake a variety of activities, including taking leadership on matters concerning reparations, linking with the TJRC recommendations implementation mechanism, ensuring that it was adequately staffed to execute its mandate, conduct outreach, mapping, registration, evaluation and classification of claims. The Reparations Secretariat's work would be based on the principle of victim participation and stakeholder engagement; this would require partnerships with victim groups, state commissions, government ministries, and civil society organisations.

2.2.4 Need for Further Consultation

KTJN had submitted the draft reparations framework to the TJRC for consideration; it remains to be seen, upon the release of the TJRC Report, to what extent the proposal will be adopted by the TJRC. Nonetheless, the draft framework is not set in stone and will be further developed through stakeholder engagement and victim participation. The task then is to utilise the draft to inform preliminary discussions with relevant groups, institutions and particularly the incoming administration. The starting point is to ask what violations was the framework going to address? Who would be considered the victims of these violations? What are the forms of reparation to

be dispensed? And how would the framework be implemented and using which resources? In regard to implementation, aspects of the framework, such as the Reparations Law, can begin to be developed by stakeholders on the basis of the above-mentioned consultations.

2.2.5 Mapping of Victims and Violations

There needs to be a comprehensive mapping of victims and violations in order to identify the needs within the reparation framework. Though the TJRC Report might be helpful in this regard, as mentioned above, there is a significant amount of information and data on human rights violations and abuses in the possession of victims' and survivors' groups, non-state and state institutions that can be put to this purpose. There can also be devised a coordinated initiative to further collect information where gaps or uncertainty exist. A database needs to be developed to systemically map and categorising victims of human rights violations and abuses. The database should also identify individuals, groups and communities and categorise vulnerabilities in regard to gender, age and need. It is important to note that a victim under the framework is a person who individually or collectively suffered harm. This definition can include the immediate family of the direct victim. Further, the status of victim does not depend on whether the perpetrator has been identified, apprehended, prosecuted, or convicted.

Both individual and collective reparations "are important components of a sufficiently complex and integrated reparation effort. Individual reparations serve as recognition of specific harm done to an individual, and of an individual's worth as a rights-bearing citizen. Collective reparations may serve other, albeit overlapping, functions: to respond to collective harms and harms to social cohesion (especially in places with a strong sense of collective identity), to re-establish social solidarity, and to maximise the effectiveness of existing resources. The objective is not to choose one form of reparation over another, but to understand the strengths and limitations of each and to combine them in a culturally appropriate and creative manner."[2]

2.2.6 Decentralising Reparations

Attention was drawn to the need to engage the new County Governments in transitional justice processes in general and particularly in regard to how they can contribute towards funding and implementing reparations programmes. This approach has the potential to enhance victim participation in the implementation of such programmes, as County governments are closer to the population and have a better understanding of local issues, including victims' issues.

2 Roht-Arriaza, N. & Orlovsky, K. (2009) 'A Complementary Relationship: Reparations and Development' in Grieff, P. and Duthie, R. (eds.) Transitional Justice and Development: Making the Connections (New York: Social Science Research Council) pp. 170-213 at p. 189.

Examples from other jurisdictions support this decentralised approach to reparations. In Peru, implementation of the reparations programme was spearheaded by provincial and municipal administrations, which set their own priorities and budgets, with national and local government funding. In Morocco, reparations were specifically targeted at communities in regions that were marginalised or ostracised hence, after holding a national forum on reparations, state-supported initiatives were implemented at the local level with the use of reparations funds decided by local councils based on local priorities. Similarly, Guatemala moved from a centralised reparations programme to a revised programme that now focuses on pilot projects proposed by local villages. In South Africa, the Khulumani survivors' organisation proposed a partnership between organised victims' groups and local government to 'build citizen and community competence' through local development efforts focused on the communities most heavily affected by the wrongs of Apartheid and building on constitutional and legal provisions regarding public participation in municipal planning and budgeting.

2.2.7 Funding Reparations

Questions were raised in regard to where the funds to enable an effective reparations programme could be obtained. The UN Basic Principles and Guidelines state that a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. There is therefore the need to engage the incoming government comprehensively on the issue of reparations and, more particularly, in foregrounding the transitional justice agenda across all its agencies involved in the provision of services.

Reparations require adequate input and collaboration from a wide range of government ministries, including health, education, land, housing, planning, and finance. It must also involve bodies at the national, regional/provincial, and local levels. In regard to the framework described above, this coordination would be the task of the Reparations Coordination Secretariat. However, due to the financial challenges in a jurisdiction in transition and with limited resources, actors need to be creative about raising funds without raising taxes. Other potential sources of funding for reparations include foreign debt reduction schemes, funding through international financial institutions such as the World Bank, funding from donors and the international community as well as from assets recovered from perpetrators. Funding reparations from the funds obtained or recovered from the successful prosecution of perpetrators highlights the importance of emphasising the investigation of fiscal frameworks that facilitated abuses and atrocities, investigating the corruption that more often than not, accompanies the commission of human rights violations and abuses, and the rigorous prosecution of economic crimes.

2.3 Criminal Accountability

Achieving criminal accountability for perpetrators of human rights abuses and violations committed in Kenya especially during the 2007/8 PEV continues to be a challenging endeavour. The TJRC was tasked with identifying any persons who should be prosecuted for being responsible or involved in violations and abuses of human rights in the period during its temporal mandate. Provisions in regard to amnesty were conditional and amnesty was never considered to extend to those responsible for gross human rights violations. Additionally, in October 2008, the Commission of Inquiry into Post-Election Violence (CIPEV) published its report and recommended the establishment of a Special Tribunal to prosecute those responsible for crimes committed during the 2007/8 PEV. Attempts to establish a local mechanism failed and hence, in March 2010, the ICC began investigations into international crimes as defined in the Rome Statute, to which Kenya is a signatory since 2005. The ICC indicted six persons, confirmed charges against four and later dropped the case against one person. The trials against three suspects at the ICC are scheduled to begin later in 2013. The Kenyan government has however continued to assert that those cases should be prosecuted locally.

2.3.1 Criminal Accountability for PEV Cases

Alongside the ICC process, attempts to try the post-election violence cases locally continued. In March 2011, the Kenya Police stated that the PEV files had been prepared and once a special division of the High Court was established, these would be prosecuted locally. In April 2012, the Multi-Agency Task Force on Post-Election Violence was established by the government with members drawn from the criminal justice sector and chaired by the Acting Deputy DPP to review, re-examine and re-evaluate the 6000 criminal cases reported during the PEV and make recommendations to the DPP on how to process them. By the end of 2012 the Taskforce had reviewed 4000 of those cases and had recommended 450 cases for prosecution, with 1716 suspects having been identified as having committed various criminal offences. Currently, the Government of Kenya claims that the Taskforce has reviewed all 6000 files but no information has been forthcoming on prosecutorial action taken.[3]

The Taskforce was faced with a number of challenges, including the unwillingness of victims to testify for fear of reprisal attacks in their communities; loss of evidence; on-going political reconciliation processes and a lack of political will. Though it concluded that many of the PEV cases

3 Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative. Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence in the Situation In The Republic Of Kenya In The Case Of the Prosecutor V. Uhuru Muigai Kenyatta ICC-01/09-02/11

were unsuitable for prosecution, it noted that a number of the PEV cases could be prosecuted as international crimes, provided a Special Division of the High Court was established to deal with the cases.

2.3.2 The Proposed International Crimes Division and concerns raised

Towards this purpose, the Judicial Service Commission (JSC) appointed a Committee in May 2012 to put in place mechanisms for the establishment of a Division in the High Court of Kenya to try international crimes as stipulated in the International Crimes Act No. 16 of 2008. The Committee's report on the establishment of an International Crimes Division (ICD) of the High Court was released in October 2012 and formed the basis of the analysis of the topic of criminal accountability at the KTJN Technical Workshop. The ICD would be established under the International Crimes Act to try perpetrators of international crimes of genocide, crimes against humanity, war crimes and transnational crimes.

Concerns raised with regard to the establishment of an ICD of the High Court were as follows

2.3.2.1 Rules of Procedures

There are several issues regarding complementarity with the Rome Statute. The JSC proposal states that the ICD shall adopt the rules of procedure and evidence that have been set out by the ICC, to deal with genocide, crimes against humanity and war crimes. The ICC rules of procedures and evidence are a mixed bag between civil law and common law systems and would raise significant substantive and procedural challenges in the Kenyan context.

2.3.2.2 Appeals

There is also the matter of appeals from the ICD to the Court of Appeal and ultimately, the Supreme Court. Whilst the JSC proposal states that a selected bench within the Court of Appeal will be trained on matters of international criminal law and required to hear appeals from the ICD, it does not adequately develop the procedural logistics for such a bench within the Court of Appeal and is silent on how further appeals would be treated at the Supreme Court.

2.3.2.3 Transnational Crimes

The JSC proposal does not limit the ICD's mandate to crimes under the Rome Statute. It has expanded the jurisdiction of the proposed division to consider transnational crimes, including human trafficking, terrorism, money laundering, piracy and cyber laundering. Arguably, this detracts from the establishment of the ICD as a transitional justice mechanism, as it potentially overburdens the court and reduces its ability to deal with human rights violations and abuses

effectively. It also poses challenges of overlapping jurisdiction with other courts in Kenya currently mandated to deal with transnational crimes.

2.3.2.4 Retroactivity

There are also arguments in relation to retroactivity, i.e. can persons be prosecuted under domestic law for violations that were not crimes under Kenyan law at the time of the offense. The International Crimes Act came into effect in January 2009, after the PEV crimes were committed and does not contain provisions for retroactivity. This raises a significant challenge for prosecuting perpetrators of PEV violations under that Act. The JSC has rationalised its position enabling such prosecution under Articles 2(5), (6) and 50(2)(n)(ii) of the Constitution; the former states that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya; the latter states that the right to fair trial includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not a crime under international law. These positions are arguable and need to be interrogated further; indeed, stating that the crimes to which they refer were crimes under Kenyan law at the time, just not 'international crimes', could address the challenge the retroactive application of legal provisions.

2.3.2.5 The Death Penalty

The JSC proposal does not consider the fact that certain offences in Kenya, including murder, robbery and attempted robbery, are punishable through the death penalty. The Rome Statute does not allow for the passing of a death sentence upon a person accused of international crimes with the maximum sentence being life imprisonment. It would therefore be absurd for a person to be found guilty of crimes by the ICD that would attract the death penalty under the Penal Code not being so sentenced whilst as an ordinary crime, the High Court could have pronounced the harshest sentence. Indeed, for complementarity, some suggest the ICD can only operate after the repeal of the death penalty in Kenya.

2.3.2.6 Complementarity and the ICC

Beyond these substantive issues, there are other areas of significant challenge to the establishment and effectiveness of the division. Particularly in light of the revisionary jurisdiction of the ICC in regard to international crimes prosecuted at the ICD, the court would be at pains to ensure that it fulfils international standards in regard to, amongst others, the quality of the court facilities, prison facilities, lack of a reparations scheme, and provisions as to witness protection. Such administrative aspects will require significant funds to be mobilised towards ensuring compliance with international standards.

2.3.2.7 Logistics and Legislative Reform

The proposed circuit nature of the ICD, with its permanent station in Nairobi, has raised concerns amongst victims and practitioners as to how this will be effectively implemented. Many of the implementation measures and legislative amendments required for the effective establishment of the ICD require political will, which by and large, in a country mired in impunity, has been lacking. Questions also arise as to the human resources needed to operationalize the ICD. Additionally, the requirements for reform across the criminal justice system, particularly in the investigations and prosecution aspects related to the ICD require extensive coordination and goodwill across government agencies that might be difficult to obtain, further frustrating proceedings and delaying justice. The proposal lacks comprehensive linkages with the DPP and NPS.

2.3.2.8 Political Expediency vs. Victim and Stakeholder Engagement

Issues have also been raised concerning the reason for pushing for the establishment of the ICD. The lack of participation of non-state stakeholders in the process, particularly a lack of focus on the views, opinions and recommendations from victims, survivors and related groups, suggests that political expediency has been privileged at the detriment of transitional justice objectives.

There is a need to further critique the JSC proposal, pointing out the areas that need to be addressed, framing the minimum requirements that such a division should meet, and most importantly, ensuring that the input of victims are substantively taken into account. Alarm has been raised at the fact that the JSC proposal is due to be formally adopted despite the fact that it has not dealt with the raft of issues identified herein. For example, though the proposal mentions that the ICD will consider granting reparations, it does not adequately develop a framework for such consideration. In addition, the ICD proposal is silent on the need to involve victims in its processes, a crucial aspect of the ICC process.

2.3.3 Prosecuting International Crimes as Ordinary Crimes?

There are a lot of concerns regarding the 'impunity gap' and the fact that thousands of persons who committed offences during the PEV will not be prosecuted, as focus remains solely on international crimes. Further, as mentioned earlier, there are many abuses and atrocities that have occurred before and after both the temporal periods of the PEV and the TJRC mandate; these too require criminal accountability.

Commentators have proffered two theses entitled the 'hard mirror thesis' and the 'soft mirror thesis'. Under the former, prosecuting an international crime as an ordinary crime cannot satisfy the principle of complementarity. Under the soft mirror thesis, commentators accept that the principle

of complementarity permits a State to prosecute international crimes as ordinary crimes, as long as the State is not conducting sham trials designed to shield perpetrators from criminal responsibility. However, they still insist that states should incorporate the substantive provisions of the Rome Statute, because it is better for states to prosecute international crimes as international crimes than as ordinary ones. Practitioners have argued for a soft mirror approach which recognises the importance of prosecuting international crimes as international crimes, but also recognises the importance of pursuing ordinary prosecutions, especially when regard is given to the immediate and long suffered grievances of victims of human rights violations and abuses. As such, the ICD should not limit criminal accountability within the transitional justice agenda to international crimes committed during PEV but also focus on ordinary (domestic) crimes committed during the PEV.

2.3.4 Sexual and Gender Based Violence (SGBV) crimes

There must be increased awareness and appreciation that SGBV crimes constitute grievous violations of human rights and result in substantial suffering for victims. SGBV crimes face peculiar challenges due to the nature of the offences that demand special attention within the transitional justice agenda. There are significant gaps in the criminal accountability for SGBV due to the barriers to accountability for SGBV crimes. The most significant barrier is in regard to the reporting and investigation of these crimes; it is imperative that institutional reforms are initiated at the NPS and DPP level that give special priority to SGBV crimes, enabling victims to report with confidence and security, and for officers to investigate the crimes with the appropriate sensitivity and proficiency.

2.4 Vetting and Lustration

Vetting processes are important from a transitional justice perspective as they prevent those accused or convicted of committing human rights abuses and violations from holding public office. It forms part of continuous institutional reforms to ensure that violations by state institutions never occur again. In the transitional justice context, vetting refers to the processes through which an individual's integrity is assessed in order to decide whether he or she is suitable for public employment. Vetting processes are designed to screen current or potential public employees to determine if their prior conduct, including, most importantly from a transitional justice perspective, their respect for human rights standards, warrants their exclusion from public institutions. Vetting processes also assist institutions to (re)establish citizens' trust in and the legitimacy of public institutions. Additionally, excluding from public office those implicated in abuses can also contribute to the dismantling of informal criminal networks and structures associated with past abuse.

2.4.1 Types of Vetting

There are two basic types of vetting processes in transitional settings: review and (re)appointment. Review refers to the process of examining the background of serving employees and the removal of those who are found unsuitable for public service because they have been involved in serious abuses. Review represents the gradual restructuring of a continuously existing institution. The abusive institution, with its employees, remains in place but is transformed by means of targeted reform interventions including vetting. (Re)appointment, on the other hand, involves examining the background of candidates and the selection of those who are found most suitable for public service. (Re)appointment involves the disbandment of the abusive institution and the establishment of a renewed institution. Though the (re)appointment process opens the way for broader reforms and can also provide a better opportunity than a review process to overcome a deep crisis of trust in the public sector, there are risks involved in the process. Disbanding security agencies and judicial structures creates a security gap that leads to increased criminality and other security problems, and possible destabilisation of the transition and the nation as a whole. Recreating state institutions such as ministries and security institutions runs the risk of creating a governance and security gap if no alternative services are put in place and if replacements are scarce or take a long time to be identified; and potentially providing significant opportunities for political manipulation and arbitrary interference in the workings of otherwise independently operating state institutions. Basically, actors must carefully assess the context in which vetting of the particular institution is sought in order to determine the mode and scale of the vetting procedure.

2.4.2 General Criteria for a Vetting Process

It is imperative that due process be followed during the vetting procedure. Vetting procedures are in principle administrative and preventive and are not meant to replace the criminal justice system. There are general criteria for vetting and in designing a vetting process; in order to have legitimacy, a vetting measure must respect the rule of law and human rights. It should respect the rights of those targeted; should be based on objective and reasonable criteria; be governed by law in order to avoid arbitrary application; respect the principle of individual responsibility; and be relatively autonomous and independent of criminal proceedings. The vetting procedure should also allow for a phase of investigation and verification of a candidate's background by an impartial body, separate from the appointment organ. Importantly, the organ in charge of dismissal must be impartial and the investigation and verification body must allow a candidate to respond to the allegations and have access to legal remedies, including appeal. The design of a vetting process needs to have operational provisions for the collection of information and have access to any information it requires; have adequate information management systems; and suitable sequencing

in regard to the moving from complaints, investigation, summons to appear, cross examination, reply to accusations, decisions, review/appeal.

2.4.3 Vetting as part of Wider Institutional Reforms

Vetting should fall within other measures of institutional reform; as a stand-alone measure, experience shows that vetting is generally insufficient to ensure that abuses are not repeated. Therefore a holistic and coherent approach to institutional reform not only addresses the shortcomings of individual members of institutions, but also addresses structural deficiencies. Coordination with other institutional reform measures can mitigate the potential negative effects of vetting and ensure proper coordination and sequencing so that they do not negatively impact each other or prove counter-productive. Coordination also allows other institutional reforms to safeguard the outcomes of a vetting process from political interference.

2.4.4 Lessons from the Vetting of Judges and Magistrates

In Kenya, the Judiciary has experienced an extensive vetting process that has significantly contributed to the marked increase in public confidence in the institution as well as, generally, more efficient and effective operations. Recognising that the criminal justice system is constituted by several highly interdependent institutions, there have been calls for the vetting of personnel in the National Police Service, the office of the DPP, members of the Bar, and the civil service in general.

2.4.4.1 The Police

The National Police Service Act No. 11A of 2011 provides for the vetting of all members of the National Police Service (NPS), including police reservists, to determine their suitability to continue serving. Considering the alleged role of the police in the commission of human rights abuses and violations in Kenya, this vetting process is particularly important from a transitional justice perspective. It is important to take into consideration the structural components of a proper vetting process outlined above as well as draw lessons from the on-going judicial reforms and vetting process. There needs to be a roadmap for the reform of the entire institution; as the Judiciary developed the Judiciary Transformation Framework, the NPS should develop a similar foundational document for reforms and vetting. Such a reform document and strategy should be decentralised with each station and personnel within the NPS well acquainted with its objectives and procedures. There is also a need to study and consider the numerous reports from parliamentary committees, official task forces, and non-governmental actors on the status of the NPS or the Kenya Police as it was before. This will help to conceptualise the challenges that the service faces. The task from a

transitional justice perspective is to foreground those issues that involve the commission of human rights violations and abuses.

The vetting process should begin with acknowledgement and recognition from the high ranking officers within the NPS of the rot within the police service and a declaration of a commitment to address this through wide ranging reforms, a central pillar of which would be a transparent and effective vetting process. This process should begin with those holding highest office and continue down systematically to the rank and file of the service. There should be wide and genuine by-in within the police service with a demonstration of the potential benefits.

As mentioned above, the vetting process is complemented by other institutional reforms, for example, the professionalisation of administrative structures within the police service in departments such as finance and ICT. Human resource management should be similarly professionalised and a skills audit undertaken that would result in the placing of police officers within the docket in which their expertise is most needed. The vetting process should be transparent and accessible to all persons, including members of the public and non-state actors. The latter can crucially contribute to the process through participation, monitoring, technical support and coordination in conjunction with the National Police Service Commission.

3.General Recommendations To All Stakeholders

3.1. Strategies could be formulated on how to engage with the TJRC Report once it is released. This is a crosscutting theme because the recommendations that emerge will affect how interventions going forward are framed.

3.2. The truth-seeking and truth-telling process needs to be conceptualised and pursued beyond the TJRC. Stakeholders ought to consider how to utilise other mechanisms including state commissions, constitutional commissions, the court system and non-state mechanisms to build a comprehensive picture of atrocities and abuses even in regard to those periods outside the temporal mandate of the TJRC.

3.3. There should be coordination between the activities of the various institutions and mechanisms mandated to gather evidence and testimony on human rights abuses committed in Kenya, including the KNCHR, NCIC, CAJ and NLC. This could mean creating partnerships with CSO actors, survivors and victims groups to ensure that there is a strong transitional justice component in the work of these organisations, to ensure sharing of information and capabilities, coordination and no duplication or repetition of tasks.

3.4. Public Interest Litigation, particularly through CSO actors, should be utilised in a targeted manner in specific viable situations to compel state actors to act or to provide access to information relating to human rights violations and atrocities. Public Interest Litigation would also provide a useful tool in the context of reparations and securing affirmative action in the benefit of specific groups or individuals.

3.5. Stakeholders need toensure that victims' stories are comprehensively gathered, documented and categorised whilst highlighting specific systemic violations or abuses. These accounts are an invaluable tool for the lobbying of state and non-state actors for adequate response and redress and form the basis of conceptualisation of future transitional justice initiatives.

3.6. Consideration should be given on how to exploit regional juridical bodies as well as mechanisms within the UN human rights protection system to promote the goals of transitional justice in Kenya. The ACHPR is a potential forum at which the Kenyan state's failure to robustly pursue justice for human rights violations could be forwarded for adjudication placing further pressures on the government and raising the profile of the plight of victims of violations. African Human Rights Mechanisms should take up a more proactive role in engaging States

on transitional justice issues building on ongoing discussions within the African Union for a Transitional Justice Policy Framework for Africa.

3.7. The Reparations Framework needs to be circulated and opened to debate and validation. Victim participation in the development of the framework is essential considering the fact that the framework was developed under tight timelines with little consultation.

3.8. The recommendations that emerge from the TJRC Report in regard to reparations need to be assessed against, and, if at all, to the extent necessary, harmonised with the Reparations Framework that will be further developed by KTJN in consultation with stakeholders.

3.9. The documentation and indexing of data as contained in Recommendation 3.5 above will be central to the design of the Reparations framework as it will help create a mapping of victims and human rights violations; this is also necessary for the categorisation of victims in regard to violations suffered and their vulnerability in terms of age, gender and need; identification of victims.

3.10. The State must provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. There must be engagement with the incoming government on this issue, but they must be approached with a comprehensive reparations framework developed as under Recommendations 3.8 and 3.9 above.

3.11. Practitioners and actors, in partnership with the government and development agencies need to be creative about sources of funds for reparations. Stakeholders need to map potential sources of funding whilst engaging with state and non-state, domestic and international agencies to validate and pursue the variety of options.

3.12. The recovery of assets from perpetrators will require a two-pronged approach through the courts as well as through the Ethics and Anti-Corruption Commission. Foregrounding the transitional justice agenda in this regard can provide an added incentive for the recovery of ill-gotten assets. Thought also needs to be given as to how these resources can be particularly directed toward reparations.

3.13. The relationship between reparations and development in particular, and transitional justice and development in general needs to be interrogated further. This dimension brings in a vast array of state and non-state institutions involved in development activities in Kenya; there would be a need to sensitise them towards the priorities of transitional justice and subsequently, competently coordinate any proposed reparation initiatives.

3.14. The JSC proposal on the establishment of the ICD needs to be critiqued with a comprehensive report delivered to the JSC, the Judiciary, the DPP, the AG and the NPS with a summary drafted for public and civic engagement. It will outline the reservations contained above and recommend areas for consideration and amendment. A number of strategic questions need to be interrogated:

- How does the ICD rationalise a mixed common and civil law approach in its rules of evidence and procedure?
- How will the appeal structure from the ICD to the Court of Appeal and to the Supreme Court operate?
- Should transnational crimes be dealt with within the ICD?
- How do we address the challenge of the retroactivity of international crimes?
- Does the death penalty have to be repealed for the successful operation of the ICD?
- Can the ICD reasonably achieve international standards in regard to physical and institutional infrastructure?
- Is there political will to secure the legislative reforms necessary to operationalise the ICD?
- How can the ICD be insulated from political imperatives?

3.15. There should be an initiative to assess the viability of instituting proceedings in regard to normal crimes whether these fall within the ambit of international crimes or not. Emphasis therefore should be on sharing the information gathered under Recommendation 3.2, 3.3 and 3.5 above with prosecuting authorities, consolidating rationalising the evidence with that in possession of the NPS and DPP towards expediting the trial of the most viable cases from the PEV.

3.16. Attention ought to be paid to the prosecution of criminal cases that lie outside the PEV cases. The transitional justice agenda in regard to criminal accountability should not be solely captured by cases following the PEV or emerging from the TJRC Report. That evidence or testimony in possession of state and non-state actors that points to criminal conduct in the commission of human rights abuses and violations outside the temporal mandate of the TJRC or the specific incidence of PEV ought to be pursued with equal vigour.

3.17. Particular attention needs to be paid to cases of SGBV. Reporting, investigation and prosecution of these crimes face peculiar challenges that have left victims marginalised and with little or no access to justice.

3.18. There should be continued monitoring and analysis of the on-going vetting process of judicial officers. Building on the critical analysis of that exercise, recommendations should be made for the planned vetting of members of the NPS, the proposed vetting of members of the Bar and the potential vetting of all civil servants. Once again, the emphasis should be focused on those aspects of vetting that correspond with the transitional justice agenda.

3.19. Across all the recommendations, the focus must be on victims of human rights violations and abuses. Not only in regard to gathering their testimony and evidence, but also in ensuring that measures towards achieving transitional justice are substantively informed by their opinions and needs. Emphasis throughout must be on how best to engage individual victims, victims' groups and survivors' groups towards maximising their involvement in these processes. Additionally, these efforts must be sensitive to the fact that these atrocities and violations were committed across the breadth of the nation and its communities; with efforts made to involve individuals and groups across the country to the greatest extent possible.

4.Specific Recommendations

4.1. Key State Actors (JSC, DPP, NPS, AG, TJRC Implementing Committee)

4.1.1. Truth Seeking

- The government must ensure that the TJRC Report is made public and widely disseminated.
- The government must ensure that the recommendations emerging from the TJRC Report are fully implemented.
- An audit should be undertaken in regard to the financial probity of the TJRC.
- The government and state agencies should publish and disseminate the reports of all previous commissions of inquiry and investigatory task forces.
- Constitutional and state commissions, in collaboration with civil society organisations, should establish a partnership mechanism towards the compilation of data on human rights violations and atrocities.
- The partnership mechanism above should further develop a mechanism for complementing their overlapping mandates and activities from a transitional justice perspective.

4.1.2. Reparations

- Recognise the State's obligation to provide reparations for victims of violations.
- Enable budgetary considerations for reparations.
- Ensure victim participation in any reparations programmes, including in the design of symbolic reparations at the local level, for example memorials.
- Create a multi-ministry and multi-departmental task force on reparations.

4.1.3. Criminal Accountability

- JSC and DPP should address the challenges raised in this policy brief with regard to the proposed ICD of the High Court.
- Plans to formalise the ICD should be suspended until public and stakeholder consultations are complete and consensus is achieved. The JSC should open a consultation process with

stakeholders, including civil society organisations and victims groups.

- The NPS and DPP should urgently consider the options of prosecuting PEV crimes as normal crimes.

4.1.4. Vetting/Institutional Reform

- Develop and disseminate frameworks for the proposed vetting of members of the NPS and other state officers.

4.2. Civil Society

4.2.1. Truth Seeking

- Collate information, data and testimony in regard to human rights violations committed in Kenya in reports as well as in the institutional memory of state and non-state actors.
- Identify situations in regard to which public interest litigation can be pursued to access information.
- Create partnerships with state and constitutional commissions.
- Support and enable victims' and survivors' groups towards ensuring the documentation of all information in possession of these groups.
- Interact with victims' and survivors' groups as well as the general public in developing a framework for audit and engagement with the TJRC Report.

4.2.2. Reparations

- Ensure that victims' stories are comprehensively gathered, documented and categorised whilst highlighting specific systemic violations and abuses.
- Identify situations in regard to which public interest litigation can be pursued to obtain remedies for victims of violations.
- Engage victims in discussions around the Reparations Framework.

4.2.3. Criminal Accountability

- Continue exploiting regional human rights mechanisms towards remedy for human rights violations.

- Develop a comprehensive report on the proposed ICD to be delivered to the JSC, the Judiciary, the DPP, the AG and the NPS with a summary drafted for public and civic engagement.

4.2.4. Vetting/Institutional Reform

- Engender and promote issues of transitional justice across state institutions and particularly in regard to county governments.
- Develop a framework for the vetting of state and public officers, civil servants and members of the bar.

5. The Kenya Transitional Justice Network (KTJN)

1. Vision

National accountability, equity and unity

2. Mission

To collaborate towards the realization of transitional justice programmes (components) in Kenya comprising Truth-seeking, Criminal Justice, Constitutional Change and Institutional reform.

3. KTJN Membership

a) KTJN is the Transitional Justice Network for Kenya.

b) Individuals and groups [general, working and thematic] form the membership of the KTJN.

c) The working group forms the executive committee steering or coordinating the network to realize the above vision, mission and the programmes. This committee is made up of the following members: KHRC, ICJ-Kenya, ICPC, KNCHR, FIDA-Kenya, COVAW, CREAW, KLA, ICTJ, Mazingira Institute, UAF-Africa, CMD CRECO, 4Cs, AfriCOG and CEDMAC.

d) The criterion for general membership is pegged on subscription to the mission and vision of the KTJN.

e) To join KTJN please contacts any of the organizations named above or those with their contacts below

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COVAW Coalition on Violence Against Women

Federation of Women Lawyers Haki za Akina Mama FIDA Kenya

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