

## Note

# Justice in Transition: The Effectiveness of Truth Commissions in Africa and Recommendations for the Kenyan Truth, Justice, and Reconciliation Commission

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In the past three decades, truth and reconciliation commissions (TRCs) have gained credibility as a form of transitional justice and as an alternative to criminal prosecutions of gross human rights violations.<sup>1</sup> TRCs were first used widely in South and Central America.<sup>2</sup> They gained traction as viable transitional justice mechanisms in Africa after the South African TRC submitted its report in 1998.<sup>3</sup> The increased usage in Africa in the past decade raises the question: are TRCs effective in helping to transform transitional states into stable states which respect human rights and the rule of law? Research on existing data on the rule of law, governance, and human rights practices leads this Note to answer “yes.”<sup>4</sup>

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1. See generally PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2001).

2. *Id.*

3. Steven Roper & Lilian Barria, The Use of Truth and Reconciliation Commissions in Africa: Does Establishing a Historical Record Lead to Reconciliation? 4 (Feb. 28, 2007) (unpublished paper presented at the International Studies Association Annual Convention), available at [http://www.allacademic.com/meta/p179239\\_index.html](http://www.allacademic.com/meta/p179239_index.html) (“[S]ince South Africa’s TRC, the international community’s involvement as well as the reputational effect of regional actors has internationalized the establishment of a commission.”).

4. See generally Kathryn Sikkink & Hunjoon Kim, *Explaining the Deterrence Effect of Human Rights Prosecutions in Transitional Countries*, 54 INT’L STUD. Q. (forthcoming 2010) (discussing the deterrent effects that human rights trials have on the rule of law and tentatively finding a positive effect for truth commissions as well).

In Kenya, the Truth, Justice and Reconciliation Commission (TJRC) is gearing up.<sup>5</sup> Normally a stable country, Kenya has endured several instances of serious ethnic violence in the past two decades.<sup>6</sup> This Note analyzes how successful African truth commissions have functioned and applies those lessons to Kenya.

Part I of this Note discusses the history of ethnic violence in Kenya, culminating in the election violence of 2007 and 2008. Part II discusses the history of TRCs in sub-Saharan Africa, what they were mandated to do, how they functioned, what they said in their reports, and how those reports were implemented by states. Part III introduces the measurements that this Note uses to illustrate the effect of truth commissions, including their impact on governance, the rule of law, and human rights practices. Part IV discusses the results of this survey of governance indicators and how they demonstrate the positive impact of TRCs in sub-Saharan Africa. Part V applies the lessons of past TRCs to Kenya's TJRC and discusses how it should proceed. This Note suggests that the TJRC should work with the International Criminal Court (ICC) to save valuable resources and focus its energies on reconciling the various ethnic groups of Kenya by addressing the serious issues revolving around land dispossession and reallocation.

## I. THE CONTEXT OF THE KENYAN TJRC

### A. HISTORICAL BACKGROUND

To understand why Kenya pursued the TJRC, one must understand the history of conflict in Kenya. The root causes can be traced back to the British divide and rule strategy, which centered on favoring one tribe over another and was solidified by fomenting ethnic tension through land reforms.<sup>7</sup> This strategy carried over in Kenyan politics once the British ceded control to the Kenyans.<sup>8</sup>

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5. See *Kenya Set to Get Truth Commission*, BBC NEWS, Oct. 24, 2008, <http://news.bbc.co.uk/2/hi/7688505.stm>.

6. See *Kenya Violence*, REUTERS ALERTNET, July 28, 2009, [http://www.alertnet.org/db/crisisprofiles/KE\\_VIO.htm?v=in\\_detail](http://www.alertnet.org/db/crisisprofiles/KE_VIO.htm?v=in_detail).

7. See Jina Moore, *Africa's Continental Divide: Land Disputes*, CHRISTIAN SCI. MONITOR, Jan. 30, 2010, at 26, 28.

8. *Id.*

*i. Ethnic Tensions*

Kenya is an East African country with a population of almost forty million people.<sup>9</sup> The major tribes are the Kikuyu (22%), the Luhya (14%), the Luo (13%), and the Kalenjin (12%).<sup>10</sup> In 2008, Kenya's presidential election was decided by an extremely thin margin between Mwai Kibaki (a Kikuyu) and Raila Odinga (a Luo).<sup>11</sup> Over 1000 people were killed in ethnic violence that followed the election.<sup>12</sup> It is not the first time a Kenyan election has sparked violence. After the first multi-party election in 1992, at least 1500 people were killed.<sup>13</sup>

The roots of ethnic violence trace back to colonial times when disruption of the traditional land system was a large part of the British divide and rule strategy.<sup>14</sup> The British reserved the best land for white settlers.<sup>15</sup> British policies displaced pastoralist tribes such as the Kalenjin and coerced the agricultural Kikuyu and Luo to the area as a source of cheap sharecropper labor.<sup>16</sup> The appropriation of pastoralist land and subsequent migration of agricultural peoples created tribal interactions and tensions where there had previously been none.<sup>17</sup> After independence, when Kenyans were able to buy land in the most fertile regions, the agriculturalist sharecroppers, like the Kikuyu, were first in line, aided by President Jomo Kenyatta, a Kikuyu.<sup>18</sup>

Kenyatta became Kenya's first president by helping to unite the Kikuyu and Luo against the colonial government.<sup>19</sup> The unity government didn't last long. In 1966 Oginga Odinga, a Luo leader, broke with Kenyatta's Kenya African National Union (KANU) because it became clear that Kenyatta wanted to consolidate power.<sup>20</sup> Kenyatta effectively changed Kenya into a

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9. CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2009 (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

10. *Id.*

11. Jeffrey Gettleman, *Ethnic Violence in Rift Valley is Tearing Kenya Apart*, N.Y. TIMES, Jan. 27, 2008, at A3.

12. *Around Kenya: After the Violence*, BBC NEWS, Feb. 12, 2008, <http://news.bbc.co.uk/2/hi/africa/7239554.stm>.

13. HUMAN RIGHTS WATCH, DIVIDE AND RULE: STATE-SPONSORED ETHNIC VIOLENCE IN KENYA I (1993) [hereinafter DIVIDE AND RULE].

14. *Id.* at 17.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 18.

19. Caroline Elkins, *What's Tearing Kenya Apart? History, for One Thing*, WASH. POST, Jan. 6, 2008, at 5.

20. GODFREY MWAKIKAGILE, ETHNIC POLITICS IN KENYA AND NIGERIA: A

police state.<sup>21</sup> Once Kenyatta consolidated power, he quickly began favoring his Kikuyu tribe.<sup>22</sup>

Kenyatta was succeeded at his death by Daniel arap Moi, a member of the Kalenjin tribe.<sup>23</sup> Moi consolidated power by taking a Kikuyu, Mwai Kibaki, as his new vice president and by continuing Kenyatta's draconian tactics.<sup>24</sup> Once Moi consolidated power, he began to favor his own Kalenjin tribe.<sup>25</sup> Moi held on to power because the Luo and Kikuyu opposition would not work together; both wanted power for themselves, not to share between the two communities.<sup>26</sup>

## *ii. Election Violence*

Kenya's ethnic turmoil has boiled over several times, spurred by elections, when potential changes in power emerge. In 1992, during Kenya's first post-independence multiparty election, massive ethnic violence broke out and resulted in 1500 killed and over 300,000 displaced.<sup>27</sup> After a closely contested election at the beginning of 2008, there was a wave of ethnic violence, largely directed toward Kikuyu; over 1000 people were killed.<sup>28</sup>

Mediation by Kofi Annan, the former Secretary-General of the United Nations, resulted in a power-sharing agreement between Kibaki and Odinga.<sup>29</sup> The agreement resulted in an investigation by Judge Philip Waki into the worst human rights violations during the violence.<sup>30</sup> At the completion of his report, Judge Waki gave Annan a list of key suspects with the

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COMPARATIVE STUDY 101 (2001). Interestingly, Oginga Odinga is Raila Odinga's father. Elkins, *supra* note 19, at 5.

21. *See id.*

22. *See* DIVIDE AND RULE, *supra* note 13, at 6–7.

23. MAKAU MUTUA, KENYA'S QUEST FOR DEMOCRACY: TAMING LEVIATHAN 65 (2008).

24. *See id.* at 66.

25. DIVIDE AND RULE, *supra* note 13, at 7–8.

26. MWAKIKAGILE, *supra* note 20, at 102 (noting that the tribes' inability to work together is puzzling, as even together they would not make up 50% of the population).

27. DIVIDE AND RULE, *supra* note 13, at 1 (stating that most of the ethnic violence was located in the Rift Valley, with much of the violence between members of the Kalenjin tribe and members of the Kikuyu and Luo tribes).

28. *Around Kenya: After the Violence*, *supra* note 12.

29. Xan Rice, *Kofi Annan Hands International Criminal Court List of Perpetrators of Post-Election Violence in Kenya*, GUARDIAN.CO.UK, July 9, 2009, available at <http://www.guardian.co.uk/world/2009/jul/09/international-criminal-court-kofi-annan>.

30. *Id.*

instructions to consult the ICC if his report yielded no results.<sup>31</sup> When no action was taken, Annan handed the list to the ICC and Chief Prosecutor Luis Moreno-Ocampo requested that the ICC open an investigation into Kenya's post-election violence.<sup>32</sup>

#### B. TJRC LEGISLATION

After the Rwandan genocide of the mid-1990s, the Kenyan government seems more willing to confront the simmering ethnic tensions permeating the country.<sup>33</sup> The ethnic clashes following the December 2007 elections provided the impetus that the government needed to enact a truth commission.<sup>34</sup> The idea had been circulating for years.<sup>35</sup>

The goal of the TJRC is to document abuses of human and economic rights inflicted by the State since Kenya's independence.<sup>36</sup> The TJRC may investigate Kenya's history of gross human rights violations, economic crimes, the irregular and illegal acquisition of public lands, and the economic marginalization of specific communities.<sup>37</sup> The legislation establishing the TJRC gives it a number of tools to use. The powers include: subpoena power, search and seizure power, the ability to use police assistance if necessary, and the ability to name perpetrators and recommend them for prosecution.<sup>38</sup> On the surface, the TJRC has the power to make a real impact.

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31. *Id.*

32. *ICC to Investigate Kenya Violence*, BBC NEWS, Nov. 5, 2009, <http://news.bbc.co.uk/2/hi/africa/8344125.stm>.

33. See Scott Baldauf, *Ethnic Violence: Why Kenya is Not Another Rwanda*, CHRISTIAN SCI. MONITOR, Jan. 3, 2008, at 1 (comparing Kenya and Rwanda but arguing that Kenya differs because the ethnic clashes were not planned). *But see Kenyans 'Rearming for 2012 Poll'*, BBC NEWS, Oct. 7, 2009, <http://news.bbc.co.uk/2/hi/8293745.stm> (reporting that tribes are arming in preparation for more violence in the next set of Kenyan elections, upgrading their weapons from machetes and spears to rifles and machine guns).

34. See *Kenya Set to Get Truth Commission*, *supra* note 5.

35. Kenya had been investigating the need for a truth commission since 2003. See generally Makau Mutua, *Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, 10 BUFF. HUM. RTS. L. REV. 15 (2004).

36. The Truth, Justice and Reconciliation Commission Bill, (2008) Cap. 2 § 5. (Kenya).

37. *Id.*

38. See *id.* §§ 5–6. The legislation additionally makes obstruction of the TJRC a criminal offense. *Id.* § 6(3).

## II. AN OVERVIEW OF SUB-SAHARAN AFRICAN TRUTH COMMISSIONS

Truth commission powers and mandates vary widely based on location and circumstance. A universal aspect of TRCs, however, is that once abuses are documented for posterity, the commission makes recommendations on reparations (to right wrongs), and on reforms (to ensure that future abuses do not occur).<sup>39</sup>

More than thirty truth commissions have operated throughout the world in the past several decades.<sup>40</sup> Some are still in progress, reports from others were not made public, and for some commissions the report and related information is difficult to obtain.<sup>41</sup> This Note will focus on African truth commissions in Liberia, Sierra Leone, Nigeria, Rwanda, Ghana, and South Africa.

### A. MANDATES

TRC mandates set guidelines and boundaries within which commissions must function. Some mandates focus on a specific conflict or regime.<sup>42</sup> Other mandates are broader, focusing on an entire post-independence period.<sup>43</sup> Kenya's TJRC focuses on the latter,<sup>44</sup> as there was no single conflict on which to focus.

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39. HAYNER, *supra* note 1, at 170–71.

40. *See generally* United States Institute of Peace, Latest Resources & Tools, <http://www.usip.org/resources-tools> (select “Type: Truth Commission” and click “Filter”) (last visited Mar. 9, 2010) (providing information on past TRCs).

41. *See generally id.* (providing information on the status of the commissions and availability of reports).

42. *See, e.g.*, An Act to Establish the Truth and Reconciliation Commission of Liberia, Nat'l Transitional Legislative Assembly, May 12, 2005, art. IV, § 4, *available at* <http://www.ictj.org/static/Africa/Liberia/liberiatract.eng.pdf> (focusing on a period of instability after a 1979 coup, but allowing investigations into any other period preceding 1979 upon request); Law No. 03/99 of 12/03/1999 Establishing the National Unity and Reconciliation Commission, Mar. 12, 1999, art. 3 (Rwanda), *available at* <http://www.unhcr.org/refworld/docid/3ae6b59a18.html> (focusing on the genocide of the mid-1990s); The Truth and Reconciliation Commission Act 2000, § 6(1) (Sierra Leone), *available at* <http://www.sierra-leone.org/Laws/2000-4.pdf> (focusing on a discrete armed conflict beginning in 1991).

43. *See, e.g.*, National Reconciliation Commission Act, 2002, No. 611, § 3 (Ghana), *available at* <http://www.ghanareview.com/reconact.html>; Promotion of National Unity and Reconciliation Act 34 of 1995 s. 3 (S. Afr.). Nigeria, too, had a broad mandate in terms of the time period to investigate. *See* Hon. Justice Chukwudifu A. Oputa CFR, *Foreword to HUMAN RIGHTS VIOLATIONS INVESTIGATION COMM'N (NIGERIA), CONCLUSIONS AND RECOMMENDATIONS* ¶ 1.7 (2002), *available at* <http://www.dawodu.com/oputa1.pdf> (stating that the mandate obligated the commission “to review the past”).

44. *See* The Truth, Justice and Reconciliation Commission Bill, (2008) Cap. 1 §

In addition to defining the scope of TRCs, mandates illustrate the powers that commissions have in their investigations and recommendations. TRCs have a wide range of powers, from extremely broad to extremely limited. A strong commission may have subpoena power and the ability to make binding recommendations.<sup>45</sup> A strong commission may also be able to name perpetrators and recommend prosecution or amnesty for individuals.<sup>46</sup> Weaker commissions may not have the ability to make recommendations at all.<sup>47</sup>

## B. FACT-FINDING

TRCs have a unique ability to do an honest analysis of the rule of law in-country, identifying causes of conflicts and flaws within the governing system. An important concern of TRCs in African countries is the role of ethnic differences.<sup>48</sup> Some commissions downplayed their importance.<sup>49</sup> Others acknowledged the role ethnic differences play, but stress that the differences between factions are largely illusory or manufactured.<sup>50</sup>

TRCs focus generally on the same major crimes: gross human rights abuses such as mass killings, forced disappearances, and torture,<sup>51</sup> but some broaden their focus to

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2. (Kenya) (defining “gross human rights violations” to mean any specified act committed between December 12, 1963 and February 28, 2008).

45. *See, e.g.*, Truth and Reconciliation Commission Act 2000, § 8(1) (Sierra Leone) (granting the commission the powers of subpoena, search and seizure, and binding recommendations).

46. *See, e.g.*, Promotion of National Unity and Reconciliation Act 34 of 1995 s. 4 (S. Afr.).

47. *See, e.g.*, Law No. 03/99 of 12/03/1999 Establishing the National Unity and Reconciliation Commission, Mar. 12, 1999, art. 3 (Rwanda) (limiting the Rwanda TRC to reconciliation and public reporting).

48. *See, e.g.*, 1 REPUBLIC OF LIBERIA TRUTH AND RECONCILIATION COMM’N, PRELIMINARY FINDINGS AND DETERMINATIONS 4–5 (2009) [hereinafter LIBERIA TRC FINAL REPORT], available at [https://www.trcofliberia.org/reports/final/volume-one\\_layout-1.pdf](https://www.trcofliberia.org/reports/final/volume-one_layout-1.pdf) (attributing conflict to the socio-economic divide between ethnicities instead of to underlying differences between ethnicities).

49. *See, e.g.*, 2 SIERRA LEONE TRUTH & RECONCILIATION COMM’N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION 29, ¶ 40 (2005) [hereinafter WITNESS TO TRUTH] (finding that systemic corruption was a key cause of the conflict in Sierra Leone).

50. For example, Rwanda’s Commission goes to great length to downplay substantive differences between Hutu and Tutsi. *See* United States Institute of Peace, Truth Commission: Rwanda 99, <http://www.usip.org/resources/truth-commission-rwanda-99> (last visited Mar. 9, 2010) (discussing the findings of the Rwanda TRC).

51. *See, e.g.*, 1 TRUTH AND RECONCILIATION COMM’N OF SOUTH AFRICA, REPORT 29, ¶ 19 (1998) [hereinafter SOUTH AFRICA FINAL REPORT]. (stating that the mandate

economic crimes as well.<sup>52</sup> The economic crimes can be framed in terms of violations against individuals, as in Ghana,<sup>53</sup> or against an entire racial group, as in South Africa.<sup>54</sup>

### C. RECOMMENDATIONS

Most TRCs recommend monetary reparations to victims of gross human rights abuses in their final reports.<sup>55</sup> Reparations are one of the basic rights of these victims.<sup>56</sup> They are a key factor in securing public participation in TRCs. In Ghana, for example, 90% of statement-givers listed reparations as a major reason for their participation.<sup>57</sup>

Commissions often recognize the importance of resolving land disputes during the reconciliation process. In Ghana, the TRC recommended restitutionary reparations, saying that land and property unlawfully seized should be returned, but if the return of property was not possible the commission recommended monetary compensation.<sup>58</sup> One of the remedies available in South Africa was a land claims court, which allowed compensation for the lost land if it was impracticable to have it returned.<sup>59</sup>

### D. IMPLEMENTATION

TRCs report on more state abuses than are realistically compensable by governments and traditionally follow-up has been the Achilles' heel of TRCs. It can take years from the time

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limited the commission's investigation to gross violations of human rights, including killing, abduction, torture and severe ill-treatment).

52. See, e.g., 1 NAT'L RECONCILIATION COMM'N (GHANA), REPORT 91-155 (2004) (discussing invasion of property rights throughout report). Property rights as human rights are enshrined in Article 17 of the Universal Declaration of Human Rights. Universal Declaration of Human Rights, G.A. Res. 217A, art. 17, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

53. See 1 NAT'L RECONCILIATION COMM'N (GHANA), *supra* note 52, at 91-155.

54. See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 176 (2004).

55. See *id.* at 159 (stating that monetary compensation may be in the form of a lump-sum, pension, or a package of services).

56. See Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

57. NAHLA VALJI, INT'L CTR. FOR TRANSITIONAL JUSTICE, GHANA'S NATIONAL RECONCILIATION COMMISSION: A COMPARATIVE ASSESSMENT 22-23 (2006), available at <http://www.ictj.org/static/Africa/Subsahara/GhanaCommission.pdf>.

58. 1 NAT'L RECONCILIATION COMM'N (GHANA), *supra* note 52, at 91.

59. Roht-Arriaza, *supra* note 54, at 176-77.



a TRC submits a report until the time a government pays out reparations.<sup>60</sup> In some countries the pool of money is so small that it is reserved for victims of gross violations.<sup>61</sup> Other countries were creative with their resources. South Africa's land claims court supplemented a lack of written evidence by hearing testimony from historians, anthropologists, and local elders, and the potential remedies included full ownership, partial rights to the land, rights to other land, or compensation for the lost land.<sup>62</sup> This model could prove extremely useful to the TJRC in Kenya.

### III. MEASURING GOVERNANCE, HUMAN RIGHTS STANDARDS, AND THE RULE OF LAW

The question facing TRCs has long been whether they serve a purpose beyond truth telling; do they have lasting positive impacts on the states in which they operate? A major difficulty in determining the effectiveness of TRCs has been a dearth of materials by which to measure their success or lack thereof. Some scholars have argued that truth commissions are effective through legal and social theory.<sup>63</sup> These theories, however, offer no concrete, measureable evidence in favor of transitional justice mechanisms. In the last decade, non-governmental organizations (NGOs) have undertaken a significant effort to develop effective measurements of security, governance, public participation, human rights practices, and the rule of law.<sup>64</sup>

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60. South Africa's government took over five years to act on reparations and eight years to implement them. *Id.* at 174.

61. See generally Justice in Perspective, The Sierra Leone Truth and Reconciliation Commission, [http://www.justiceinperspective.org.za/index.php?option=com\\_content&task=view&id=30&Itemid=19](http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=30&Itemid=19) (last visited Mar. 9, 2010) (detailing the problems of implementing the reparation measures in Sierra Leone).

62. Roht-Arriaza, *supra* note 54, at 176–77.

63. James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 *LAW & CONTEMP. PROBS.* 123 (2009) (stating that one theory of success relies on two principal prongs: whether the commission attracts attention from the target audience and whether or not the commission is perceived as legitimate by the same target audience).

64. See *infra* notes 67–69 (introducing three sets of NGO-produced measurements of good governance).

#### IV. ANALYSIS OF THE EFFECTIVENESS OF TRUTH COMMISSIONS

##### A. SETTING UP THE ANALYSIS

In order to measure the effectiveness of TRCs, the countries that have engaged in the TRC process are compared to three groups of countries: The first category is made up of states which have undergone democratic transitions but have not undergone transitional justice mechanisms. These are Kenya, Namibia, Malawi, Mozambique, Senegal, and Benin.<sup>65</sup> The second category is made up of states which have undergone transitions from civil conflicts. These are Lesotho, Cote d'Ivoire, Angola, Burundi, and Ethiopia.<sup>66</sup> The final category is made up of states which have not had transitions during the past several decades. These states have had relative continuity during the period from 1990 onward. These states are Tanzania, Cameroon, Zambia, and Mali.<sup>67</sup>

The information gathered for this Note was taken primarily from three sources: *The Corruption Perceptions Index*,<sup>68</sup> the *Ibrahim Index of African Governance*,<sup>69</sup> and the World Bank's *Worldwide Governance Indicators*.<sup>70</sup> Because each NGO used its own measurement system, the raw data needed to be streamlined before it could be compared.<sup>71</sup> For each data

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65. These countries fall generally within the category of states which transitioned from quasi-democratic authoritarian regimes into what are represented to be more functional democracies. Sikkink, *supra* note 4, app. at 39. Namibia is the exception, as it gained its independence from South Africa in 1990. CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2009 (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html>.

66. Sikkink, *supra* note 4, app. at 39.

67. CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2009 (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/index.html>.

68. Transparency International, Corruption Percentage Index [hereinafter CPI], available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi](http://www.transparency.org/policy_research/surveys_indices/cpi).

69. MO IBRAHIM FOUNDATION, IBRAHIM INDEX OF AFRICAN GOVERNANCE [hereinafter IBRAHIM INDEX], available at <http://site.moibrahimfoundation.org/The%20full%202008%20Ibrahim%20Index.pdf>.

70. World Bank, Worldwide Governance Indicators [hereinafter WGI], available at <http://info.worldbank.org/governance/wgi/index.asp>.

71. Nine data categories were used. The CPI measured public perception of state corruption. CPI, *supra* note 68. The Ibrahim Index provided measurements on the rule of law, participation in the political process, and human rights practices. IBRAHIM INDEX, *supra* note 69, at 1. The WGI provided information on voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, and control of corruption. WGI, *supra* note 70. Not all of the available measurements from each source were used, because in the opinion of the author, statistics such as "Security" do not necessarily reflect improved human rights

category, a state's performance in 1998 was compared to its performance in 2008 to see if the state in question showed a measureable improvement in that data category.<sup>72</sup> States' scores were measured on a quantitative basis as opposed to a qualitative basis.<sup>73</sup>

## B. RESULTS

The scores discussed in this section refer to the number of data categories the state showed improvement in. The first group of states, transitional societies which utilized truth commissions, had an average score of 3.5, meaning they showed discrete improvement in between 3 and 4 of the measureable categories on average. Out of this group, Liberia showed the greatest improvement, with a score of 6, and South Africa showed the least improvement, with a score of 1. Two of the states, Sierra Leone and Rwanda, had criminal prosecutions in addition to truth commissions. Their scores were 3 and 5.5, respectively.

States undergoing democratic transitions without transitional justice mechanisms had an average score of -1.16. Only Kenya, with a score of 1, had a positive score within this group of states. Benin and Malawi both had low scores of -1.5 while Senegal stayed stable.

More variable was the group of states undergoing transitions from civil conflict. Their scores ranged from Angola, with a score of 3, to Cote d'Ivoire, with a score of -5. The average among this group was 0.3. Burundi and Lesotho showed improvements of 1 and 2, respectively, while Ethiopia had a score of 0.5.

The last group of states, those with little change in

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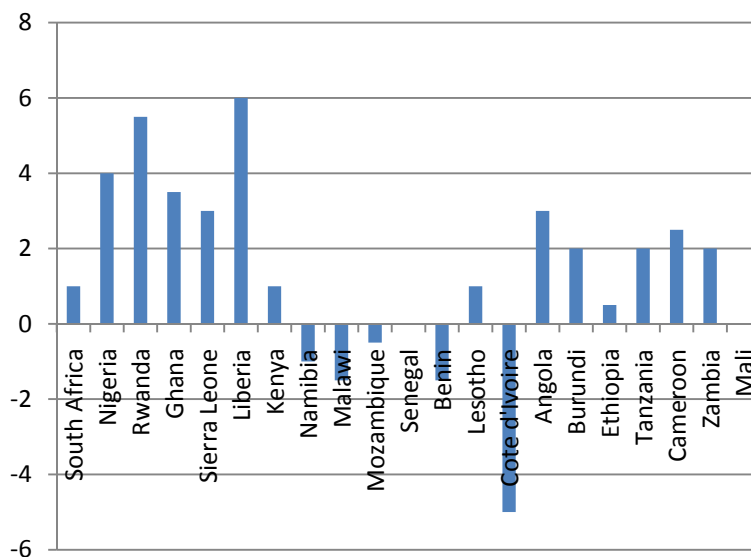
practices.

72. Because of limited resources, the statistical analysis is admittedly crude. Each data category was analyzed to determine if a country displayed measureable improvement between 1998-2008. For Liberia, Sierra Leone, Lesotho, and Cote d'Ivoire, measurements were taken from the time when open hostilities ended to avoid skewed data. Nine data categories from the sources listed in notes 68-70 were used. If a state showed improvement or degradation of standards outside of the margin of error they were awarded a "1" or a "-1" with a maximum score of "9" and a minimum of "-9." If the data showed a clear positive or negative trend that was not technically outside the margin of error because of high variance, states were awarded "0.5" or "-0.5." The goal is to show which states made discrete, measureable improvements.

73. Because of significant margins of error in many of the surveys, it is difficult to tell the degree of improvements that states made, but this Note puts emphasis on those states that made measureable improvements among multiple categories.

government in the last twenty years, was the most variable group. Three of these states showed moderate improvement in the measureable categories. Tanzania, Zambia, and Cameroon scored 2, 2, and 2.5 respectively. Mali showed no improvement. The average score was 1.3. Below is a graph summarizing the states' scores.

**Figure 1. State Scores on Human Rights Practices**



What do these results mean for TRCs? It appears that countries with TRCs are more likely to see positive developments in human rights practices, governance, and the rule of law than states that do not utilize TRCs. Nigeria, Rwanda, Ghana, Sierra Leone, and Liberia all saw significant improvements in public participation in the political system and in human rights practices. South Africa, the state whose score improved the least, already had one of the highest scores on the continent according to the Ibrahim Index.<sup>74</sup>

74. IBRAHIM INDEX, *supra* note 69, at 6.

## V. IF TRUTH COMMISSIONS WORK, WHY ARE THEY SUCCESSFUL?<sup>75</sup>

### A. ELEMENTS OF SUCCESS

There appear to be three major keys to success required for TRCs to complete their mandates: the independence of the commission, the amount of governmental support for the commission, and civil society support. There has been no successful TRC without a degree of all three of these ingredients.<sup>76</sup>

TRCs cannot be successful if they do not have the confidence of the people, and too much government support can lead to perceptions of bias in the public.<sup>77</sup> In South Africa, the TRC's independence was evident because the ruling party, the African National Congress (ANC), disagreed with some of the TRC's findings.<sup>78</sup> More recently, the Liberia TRC quashed the idea of pro-government bias when it recommended that President Ellen Johnson Sirleaf and other government officials be barred from holding future public office.<sup>79</sup>

On the other hand, government support is necessary for both political and financial reasons. The Liberia TRC recommendation concerning bars to holding political office may prevent other recommendations from being enacted.<sup>80</sup> Sierra

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75. For the purpose of this Note, successful TRCs are those that completed their mandate, released a report, and made the report widely available to the public.

76. See generally Int'l Ctr. for Transitional Justice, *Truth Commissions and NGOs: The Essential Relationship*, iv, (ICTJ Occasional Paper Series, Apr. 2004), available at <http://www.ictj.org/images/content/1/0/106.pdf> (discussing civil society interaction in the truth commission process).

77. See *id.* at 14–15 (expressing the principles of commission formation, including that it is best if it is “formed after an open decision-making process” in order to foster “public engagement”). The Chadian commission, for example, seemed to be little more than a politically motivated attack on the former president and his supporters. See UNITED STATES INSTITUTE OF PEACE, TRUTH COMMISSION: THE COMMISSION OF INQUIRY INTO THE CRIMES AND MISAPPROPRIATIONS COMMITTED BY EX-PRESIDENT HABRÉ, HIS ACCOMPLICES AND/OR ACCESSORIES (1990), available at <http://www.usip.org/files/file/resources/collections/commissions/Chad-Report.pdf> (stating, for instance, that “more than forty ex-leaders of the political police and other Habré-era regime still occupy official positions”).

78. Gibson, *supra* note 63, at 138 (noting that the South African “TRC was sued by nearly every major political party in South Africa,” including the ANC).

79. *Death Threats Sent to Liberia TRC*, BBC NEWS, July 10, 2009, <http://news.bbc.co.uk/2/hi/africa/8143910.stm>.

80. See *Liberians React to Truth Commission Report*, VOICE OF AM. NEWS, July 8, 2009, <http://www.voanews.com/english/archive/2009-07/2009-07-08-voa63.cfm> (stating that without Johnson Sirleaf in power, the country risks instability). The decision to name Johnson Sirleaf was not popular among all Liberians. *Id.*

Leone and Ghana both had issues with monetary support, receiving only modest budgets that left many victims uncompensated and the commissions the unenviable task of choosing who would receive reparations.<sup>81</sup>

Another ingredient to a successful TRC is public involvement. The ICTJ notes that civil society is “the ‘essential ingredient’ in a truth commission for its ability to participate in and improve the process at all stages . . . .”<sup>82</sup> Ghana saw the involvement of NGOs at every level, including in the drafts for the TRC Act.<sup>83</sup> In South Africa, a commentator involved in the commission expressed regret that a variety of NGOs were not more involved to give the commission needed balance.<sup>84</sup>

#### B. HOW SHOULD THE TJRC PROCEED?

An important aspect of TRCs has been their willingness to address conflicts along ethnic lines head-on. TRCs in South Africa, Ghana, Rwanda, Sierra Leone, Nigeria, and Liberia all address ethnic tensions and their causes, stressing that it is corruption and governmental mismanagement that produced tensions as opposed to any substantive differences between tribes.<sup>85</sup> The TJRC mandate allows it to address the causes and scope of human rights and economic rights violations committed since independence.<sup>86</sup> Given this broad mandate the most legitimate and effective means to pave the way for reconciliation between Kenya’s tribes is through the public hearing process and through its investigation and eventual report.

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81. Ghana had only \$1.5 million available for over 2000 victims. *Ghana: Reparations for Victims of Human Rights Abuses*, IRIN NEWS, Oct. 17, 2006, <http://www.irinnews.org/report.aspx?reportid=61353>. Sierra Leone had \$3 million available for thousands of victims. *Reparations to Be Paid to Sierra Leone’s War Victims*, BLACK SOC’Y NEWS, Jan. 30, 2009, <http://emergingminds.org/Reparations-to-be-paid-to-Sierra-Leones-war-victims.html>.

82. *Truth Commissions and NGOs: The Essential Relationship*, *supra* note 76, at iv.

83. *Id.* at 17 (noting that political, victim, and religious groups were involved in drafting the legislation that created Ghana’s National Reconciliation Commission).

84. *Id.* at 14.

85. *See, e.g.*, HUMAN RIGHTS VIOLATIONS INVESTIGATION COMM’N (NIGERIA), *supra* note 43, ¶ 1.35. Even while downplaying the differences between ethnicities, Nigeria’s TRC recognized ethnic tensions as a serious problem, noting that many of the petitions they received “provide telling illustration of how divided we are as a country and of how suspicious and afraid we are of one another.” *See id.*

86. The Truth, Justice and Reconciliation Commission Bill, (2008) Cap. 2 § 5(b). (Kenya).

*i. Public Hearings*

Public hearings are a widely used method of truth-finding in the TRC process.<sup>87</sup> There are many ways to carry out public hearings. In Liberia, the TRC created an advisory council made up of chiefs and elders in order to engage Liberia's different tribes.<sup>88</sup> The Nigerian TRC involved itself in community mediation in addition to public hearings.<sup>89</sup> In Sierra Leone, the TRC experienced resistance to its public hearings,<sup>90</sup> until it made efforts to engage local communities in the process.<sup>91</sup>

As the Sierra Leone TRC eloquently stated, no one method of reconciliation can be unilaterally appropriate:

The [TRC] began its work on the premise that there is no universal model of reconciliation that can apply to all countries. Reconciliation is not a concept that can be imported to a country from abroad. It has to emerge from within the society and be owned by that society.<sup>92</sup>

A TRC in a multiethnic state like Kenya must ensure that different tribes feel included in the process.<sup>93</sup> This could be achieved with a hybrid system involving public hearings and mediation between at-odds communities.

A logical starting point for the TJRC is to hold public hearings within urban slum communities. Those communities have been particularly victimized by "explicit government policy" and indifference, and have been flashpoints for ethnic violence because of poverty and crowded and unsanitary living conditions.<sup>94</sup> The violence in the slums, however, is a symptom

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87. See, e.g., 2 LIBERIA TRC FINAL REPORT, *supra* note 48, at 152 (2009) ("Public hearings are an essential component of the TRC work.").

88. *Id.* at 50.

89. See HUMAN RIGHTS VIOLATIONS INVESTIGATION COMM'N (NIGERIA), *supra* note 43, ¶ 1.31 (stating the Nigerian commission's pride in its work in Moroko Villiage in Lagos State, where it mediated the signing of a Memorandum of Understanding between factions).

90. See ROSALIND SHAW, UNITED STATES INSTITUTE OF PEACE, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE, 4, (2005) (stating that "there was little support for bringing the Commission to Sierra Leone, since most people favored instead a 'forgive and forget' approach").

91. See Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS Q. 361, 364 (2005) (describing the Sierra Leone Commission's inclusion of local practices in the execution of public hearings).

92. 3 WITNESS TO THE TRUTH, *supra* note 49, ch. 7, ¶ 6.

93. See, e.g., 2 LIBERIA TRC FINAL REPORT, *supra* note 48, at 75–76 (2009) (even in a much smaller country like Liberia, the TRC made a special effort to engage diverse tribal leaders across the country).

94. AMNESTY INT'L, THE UNSEEN MAJORITY: NAIROBI'S TWO MILLION SLUM DWELLERS 6 (2009), available at <http://www.amnesty.org/library/asset/AFR32/005/2009/en/3b6e7351-8e08-4b61-9d7b-6e3b86eb0057/afr320052009eng.pdf>.

of Kenya's ethnic problems, not the cause; the prejudices originated in the countryside.<sup>95</sup> As such, holding public hearings in other communities where violence occurred would also be appropriate. The hearings would ideally be tailored to engage diverse populations. The best way for the TJRC to do this is to partner with local NGOs that are familiar with local circumstances and customs.<sup>96</sup> The TJRC should also engage the media to broadcast these public hearings across the country in order to familiarize all of Kenya with the experiences of different communities in different regions.<sup>97</sup>

*ii. Investigation of Abuses and Possible Remedies*

The TJRC's mandate requires it to spend significant time probing the election violence of 2007–08 and of 1992.<sup>98</sup> The involvement of the ICC, however, may limit the resources that the TJRC must expend on investigations surrounding the 2007 election, as the ICC will likely begin its own investigation soon.<sup>99</sup> A potential TJRC public hearing system could prove to be a boon for the ICC, providing evidence, witnesses, and exposure of other potential defendants.<sup>100</sup> In addition, working with the ICC could provide needed legitimacy and independence to the TJRC that might be otherwise difficult to come by.<sup>101</sup>

ICC involvement in Kenya will not abdicate the TJRC from investigating gross human rights violations.<sup>102</sup> Even though the

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95. As discussed *supra* Part I(a), tribal tensions likely began or were aggravated by colonial land policies and relocation of agricultural tribes such as the Luo and Kikuyu as sharecroppers.

96. See generally *Truth Commissions and NGOs: The Essential Relationship*, *supra* note 76 (discussing guidelines for NGOs that engage with truth commissions established by the State).

97. The South African TRC had broad media engagement, with daily news items and a weekly television show dedicated to rounding up Commission activities. See *id.* at 21.

98. See The Truth, Justice and Reconciliation Commission Bill, (2008) Cap. 2 § 5(a). (Kenya). (stating that the TJRC must investigate post-independence human rights abuses).

99. *ICC to Investigate Kenya Violence*, BBC NEWS, Nov. 5, 2009, <http://news.bbc.co.uk/2/hi/africa/8344125.stm>.

100. See, e.g., Elizabeth M. Evenson, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COLUM. L. REV. 730, 760–63 (2004) (discussing how criminal courts and TRCs may work together).

101. See, e.g., Cynthia Johnston & Tom Pfeiffer, *Sudan's Bashir Goes to Libya, Defying ICC*, REUTERS, March 26, 2009, <http://www.reuters.com/article/homepageCrisis/idUSLQ938918.CH.2400> (illustrating that the ICC is willing to indict sitting government officials, including heads of state).

102. The TJRC must establish “an accurate, complete, and historical record” of abuses. The Truth, Justice and Reconciliation Commission Bill, (2008) Cap. 2 § 5(a).



ICC will investigate the 2007 election, there is still a need for individuals affected by the violence to share their stories. A key difference between the ICC and TRCs is that the latter are victim-focused.<sup>103</sup> It is not unprecedented for TRCs and criminal courts to share overlapping subject matter.<sup>104</sup> The TJRC can look to both Sierra Leone and Rwanda as a model for how to interact with criminal courts in a TRC context.<sup>105</sup> Also, events of 2007–08 were just a small part of Kenya’s turbulent history.<sup>106</sup> Even if the ICC investigates the 2007–08 violence, there is no shortage of human rights abuses perpetrated by the government to investigate.<sup>107</sup>

If the TRCs in Ghana, Nigeria, and South Africa are any indication, the TJRC will not stop its work at just the election violence.<sup>108</sup> As discussed above, much of Kenya’s ethnic tension is a product of policies enacted in colonial times and supported by the subsequent Kenyan governments.<sup>109</sup> The TJRC should follow the lead of South Africa and investigate economic crimes centered on the misappropriation of land by the post-colonial government.<sup>110</sup> The recommendations of the TJRC should not advocate a program of land reallocation in most cases, however. Other African states have demonstrated that massive land

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(Kenya).

103. *Id.* § 5(a)(ii) (stating that the historical record should focus on the victims’ perspective).

104. *See generally* Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 *YALE H.R. & DEV. L.J.* 139 (2003) (examining the seemingly conflicting relationship between a Reconciliation Commission and a Special Court that prosecuted the most culpable perpetrators of war crimes and crimes against humanity).

105. *See* WITNESS TO THE TRUTH, *supra* note 49, at 109–13 (explaining that the TRC investigated gross human rights violations despite the presence of the Special Court for Sierra Leone); *see also* Alexander Dukalskis, *Overlapping Institutions: How Truth Commissions and Tribunals Complement or Constrain Each Other*, Presented at Western Political Science Association Conference (Mar. 19, 2009) (discussing the necessity for TRCs and criminal tribunals to work together and analyzing how they can best do so).

106. *See supra* Part I(a).

107. *See* Mutua, *supra* note 35, at 39–41. The author discusses past massacres of specific ethnic groups in north-eastern Kenya, including a 1969 massacre of Luo by the Kenyatta government. The author also recommends investigation into assassination, disappearances, and torture perpetrated against the political opposition, especially during the Moi regime. *Id.*

108. Ghana, for example, devoted an entire section of its chapter on violations to invasion of property rights. 1 NAT’L RECONCILIATION COMM’N (GHANA), *supra* note 52, ch. 5.2.5.

109. *See supra* Part I(a).

110. 5 SOUTH AFRICA FINAL REPORT, *supra* note 51, at 258, 280 (discussing South Africa’s use of a Land Claims court in conjunction with the TRC).

reallocation programs have done more harm than good.<sup>111</sup> A workable model may be similar to the South African solution, where a land claims court employed allocation of unused land and monetary compensation instead of reallocation of land.<sup>112</sup> If the TJRC recommends an ad-hoc land claims court, it would be well served to recommend that a panel avoid issues of bias by requiring a presiding judge to belong to a different tribe than the parties involved. The TJRC should spend significant time outlining a possible land claims court and make it a centerpiece of their recommendations.

Kenya has been a relatively stable country for the past forty years, allowing a broad base of civil society groups to form that have developed their own plans and agendas.<sup>113</sup> Because of this, the TJRC will be under pressure on many fronts by groups advocating for their issues to be heard.<sup>114</sup> The TJRC should be mindful that African TRCs have been hindered in the past by recommending more reparations than are feasible.<sup>115</sup> Since international standards require that the TJRC prioritize victims of gross human rights violations,<sup>116</sup> it must scrupulously draft its recommendations to prioritize reparations and legal reforms it sees as essential. Beyond gross violations, the TJRC should work out a system that focuses on land issues and peace building between communities, and ways to curb ethnic favoritism by political leaders.<sup>117</sup>

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111. See generally Nick Dancaescu, *Land Reform in Zimbabwe*, 15 FLA. J. INT'L L. 615 (2003) (discussing the failures of Zimbabwe land redistribution and how it has contributed to Zimbabwe's current problems with famine and skyrocketing inflation).

112. See Roht-Arriaza, *supra* note 54, at 176–77 (discussing South Africa's Land Claims Court).

113. There is usually a strong NGO presence in states that ultimately form TRCs, allowing civil society groups to help shape a TRC. *Truth Commissions and NGOs: The Essential Relationship*, *supra* note 76, at 13–15.

114. *Id.*

115. See *supra* Part III(d), discussing the failure of South Africa and Ghana to implement recommendations in a timely fashion. See also Mutua, *supra* note 35, at 37–38 (discussing the difficulties in trying to investigate every human rights violation during a four-decade period and urging a future commission to have a sense of scope).

116. Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

117. See *supra* Part I(a) (discussing the causes of ethnic violence in Kenya).

## VI. CONCLUSION

The analysis of governance measurements of a variety of African countries supports the assertion that TRCs have a positive effect on governance in Africa, especially with regards to public participation in government and improving human rights practices. These findings build on existing evidence that TRCs are effective mechanisms to improve governance practices of transitional states.<sup>118</sup> Applying the lessons of past commissions to Kenya's TJRC suggests that the TJRC should make every effort to complement the efforts of the ICC in Kenya, engage local populations in carrying out its mandate, and draft realistic, coherent recommendations on reparations and reforms with a priority on reconciliation among ethnic groups for future stability.

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118. See, e.g., Gibson, *supra* note 63.