



A Truth Commission for Kenya? Incorporating International Standards and Best Practice

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The government of Kenya has recently expressed interest in establishing a truth commission to address the recent violence in the country. National civil society organizations are also pushing for truth and justice initiatives as imperative in order to stop the violence while addressing the root causes of conflict. Similar calls made during the 2002/2003 transition went unheeded, and the recent crisis illustrates that there is still a need to address the legacies of Kenya's past through reform measures, justice, and reconciliation processes. Ongoing resentment for the unaddressed episodes of past violence, forced displacements, and the chronic inequities in the distribution of the national wealth and political power among Kenya's diverse groups have exploded during the past weeks, revealing the socioeconomic and ethnic undercurrents of the political crisis. Transitional justice measures must now be part of the package for resolving the current crisis and avoiding its repetition.

A range of transitional justice measures should be considered in addressing the Kenyan crisis, including holding key perpetrators to account in a court of law, providing reparations for victims of the recent violence, and vetting security forces in order to remove those involved in abuses. States have an obligation to implement these measures with regard to international crimes, although the specific manner of implementing them will vary in different contexts.

The intent of this statement is to present guidelines, based on internationally-accepted best practices and the experience of many previous truth commissions to date, that should serve as the minimal starting point for any official truth-seeking initiative.² In contemplating a possible truth commission, Kenya should also benefit from significant work undertaken over the last years to consider a national truth commission for the country. Any initiative today should incorporate the conclusions from these previous efforts.

Establishing a Truth Commission: Minimum Standards

The following general principles should guide any initiative to create a truth commission or similar official, non-judicial, truth-seeking process:

1. Appropriate Consultation and Objectivity

A truth commission should result from a process of gathering input from all key stakeholders, including members of government, parliament, and civil society, all of whom should have the opportunity to contribute to the creation of the commission's terms

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² See also *Independent Study on Best Practices, Including Recommendations to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity*, by Diane Orentlicher, UN Doc. E/CN.4/2004/88 (27 February 2004); *Report of the independent expert to update the Set of Principles to combat impunity*, Diane Orentlicher, UN Doc. E/CN.4/2005/102 (18 February 2005); and *Rule-of-Law Tools for Post-Conflict States: Truth Commissions*, Office of the United Nations High Commissioner for Human Rights (2006).

of reference. The final mandate that is adopted should show the intention for a fair and balanced inquiry.

2. *Breadth of Mandate*

The terms of reference should provide guidance on the parameters for a truth commission's inquiry. It is important that the time period to be covered—as well as the specific events included within the commission's mandate—is not perceived as politically-motivated or otherwise biased. Any such inappropriate exclusion of key events, periods of time, or specific types of abuse may cause the process to be rejected by certain communities and thus prevent it from serving the aim of national reconciliation. Understanding the root causes of the conflict or abuses should be a main objective of the commission, which in some contexts may require the commission to address economic crimes, inequalities, or governance issues.

3. *Selection of Commissioners*

The members of a truth commission should ideally be selected through a process of consultation, including public input, with the aim of establishing a commission comprised of respected and qualified individuals, bringing together a range of skills and backgrounds, as well as an understanding of the interests of all groups. Each person selected should have a known record and ability to act independently.

4. *Independence of Operation*

The commission's terms of reference should establish structures and procedures that guarantee independence of operation. Perceptions of independence should not be compromised through any suggestion of conditional funding, the place of its physical administrative facilities, or the individuals on its staff, for example. Government offices should provide information to the commission as requested, with a presumption of full access to archives and other records. The commission should have the independence to develop its own relationship with potential international partners, be they foreign states, nongovernmental organizations, donor states, foundations, Kenyans living abroad, or others that can provide useful information or assistance.

The government should facilitate the commission's work where requested and provide reasonable financial support for its operations, while allowing the commission to take its operational and substantive decisions independently. Relevant authorities should commit to implementing in good faith recommendations that the truth commission may make in fulfilling its mandate.

5. *Appropriate Powers*

Depending on the national legal context and views received during the consultative process, the commission might be given specific powers, such as subpoena, the right to search and seize information from any location, or powers to provide robust witness protection.

The International Center for Transitional Justice is prepared to offer assistance to all Kenyan stakeholders in their search for long-term peace and justice.