



Engaging Minorities and Indigenous Communities in the Kenya TJRC

*Recommendations and Comparative Practices
Briefing Note 2010*

CEMIRIDE (Nairobi, Kenya)

The Advocates for Human Rights (Minneapolis, USA)



Kenya is a country of rich diversity and cultural resources. Minority groups, pastoralists, hunter-gatherers and other indigenous peoples are an important part of this cultural richness. But minorities and indigenous communities also have been systematically marginalized and suffered grievous human rights violations during the TJRC mandate period from 1963 to 2008.

The roots of this marginalization and victimization reach back well before 1963. The experiences of minority and indigenous communities have shaped their interaction with the Kenyan state. The TJRC has an important opportunity to create a new paradigm of engagement and begin to reshape the way that Kenya's diversity contributes to the Kenyan polity. This new paradigm of engagement must be reflected in all of the TJRC's activities and policies in order to demonstrate a true commitment to realizing the rights of minorities and indigenous peoples in Kenya.



Who are minorities and indigenous peoples in Kenya?

The definition and application of the terms 'minorities' and 'indigenous' for purpose of distinction and identity are still problematic in Kenya. In other contexts, the term marginalized groups has been used as an omnibus definition for both terms. It should be noted that the Proposed Constitution of Kenya adopts this approach, by defining "marginalized community" and "marginalized groups".

Minorities

Drawing from the guidelines derived from Article 27 of the International Convention on Civil and Political Rights and the 1992 United Nations Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities, it is possible to develop specific, practical criteria so as to identify and protect minorities in Kenya. These criteria include people who:

- belong to any ethnic, linguistic or religious group within Kenya;
- have a non-dominant position within the state;
- possess a sense of belonging to that group;
- are determined to preserve and develop their distinct ethnic identity; and
- are discriminated against or marginalized on the grounds of their group membership.

Examples of such groups in Kenya include but are not limited to the Nubians, Yiaaku, Malakote and Il Chamus. These groups have historically been subject to political marginalization, cultural assimilation and non-recognition.

Indigenous Peoples

There is no internationally agreed upon definition of indigenous peoples as different States adopt different definitions in their particular contexts and circumstances. Significant strides have however been made in the form of the International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries and the United Nations Declaration on the Rights of Indigenous Peoples. While Kenya is not a party to either of these instruments, they provide insight into key principles such as ‘self-identification’ and ‘recognition by others’ that may be utilized in creating guidelines for what groups constitute indigenous peoples in Kenya. Factors used to identify indigenous people include:

- Self-identify as an indigenous group and are recognized by others as such;
- Conform with particular social, economic and cultural customs and traditions compared to others within their surroundings;
- Have a shared sense of solidarity as a distinct community;
- Maintain a collective historical claim of common origin and ancestral lands;
- Retain traditional institutions and social organizations as known to them over generations;
- Demonstrate a collective dependence on natural resources in the territory over a long period of time;
- Continue to use traditional means of livelihood in their traditionally occupied lands;
- Have suffered and continue to suffer exclusion and discrimination;
- Maintain, at least in part, distinct linguistic, cultural and social/organizational characteristics.

These guidelines include many pastoralist and hunter-gatherer communities in Kenya who have self-identified as indigenous peoples and have been recognized as such in the report of the African Commission on Human and Peoples’ Rights Working Group of Experts on Indigenous Populations/Communities. Such communities include but are not limited to the Ogiek, Watta, Sengwer, Maasai, Samburu, El Molo, Turkana, Rendile, Gabra and the Endorois.

Recommendations to the TJRC for Inclusion of Minorities and Indigenous Peoples

The following recommendations are based on the practice experience of Cemiride and The Advocates for Human Rights, as well as extensive research on truth commissions around the world. The recommendations here are meant to open a dialogue on the issue of inclusion of minorities and indigenous peoples in the Kenyan TJRC with all stakeholders in the process.

Start-up and Hiring

- Immediately reach out to civil society groups that work with minority and indigenous communities to develop regularized communication.
- Allocate dedicated funding to minority and indigenous engagement.
- Undertake measures to ensure that members of minority and indigenous communities are represented among commission staff.
- Probe staff candidates’ understanding of minority and indigenous rights issues during the hiring process.

In recent years, the mainstreaming/integration of gender concerns into truth commission operations has been a high priority. Key lessons can be drawn from the experience of integrating gender into truth commissions. Ensuring that diverse communities are welcomed and encouraged to apply for staff positions within the commission is critical. Moreover, hiring staff from minority and indigenous communities into positions of leadership demonstrates an important commitment to diversity. However, it is clear that ensuring representation is only the first step. Interviewing for staff positions should include questions designed to evaluate candidates’ commitment to supporting the engagement of all Kenyans in the TJRC process, including those from minority and indigenous communities. Engaging civil society groups, who can advise the TJRC early on related to engagement of specific communities, has been an important practice in other truth commission processes such as in Peru, Ghana, and Timor-Leste.

Internal Structures and Policy

- Establish an advisory group composed of leaders from Kenya's minority and pastoralist communities to provide input to the commission on key issues impacting how those communities interact with the TJRC.
- Immediately establish an internal committee of the commission to focus on minorities and indigenous peoples' rights, and to develop and act as a liaison with the external advisory group.
- The advisory group, minority and indigenous organizations, and leadership at the TJRC should work together to develop internal policies that support engagement with minority and indigenous communities.

The TJRC Act Section 22 provides the Commission with the power to establish necessary committees, Section 30 enables the Commission to appoint officers and staff as well as draw on experts and consultants, and Section 27(1)(d) allows the commission to put in place special arrangements, mechanisms and procedures for vulnerable groups. Past truth commissions have used these same types of powers to establish, for example, advisory groups of religious and traditional leaders (Liberia, Sierra Leone), to establish special committees to focus on key populations (Liberia, Ghana), or to develop policies allowing data and victim lists from CSOs that work with minority and indigenous communities to be integrated into the truth commission process (Peru, Guatemala, Chile). The development of these specific mechanisms should not be to the exclusion of other efforts to mainstream consideration of minority and indigenous rights into daily operations. For example, in Timor-Leste, the Commission created a Steering Committee in order to assess what the people of Timor-Leste, from every corner of society, wanted from the process. The Steering Committee's interviews revealed a near consensus that any process of reconciliation needed to take place on the local level and involve traditional Lisan dispute resolution, which is a combination of beliefs, customs and traditions of East Timorese people that varies from community to community and is particularly important in rural areas. This information led the Timor-Leste commission to create a Community Reconciliation Process based on the principles of Lisan.

Staff Training

- Work closely with independent experts and civil society groups to provide regular and ongoing training for staff relative to minority and indigenous rights integration in all TJRC processes.

It is clear from efforts to integrate gender into truth commissions around the world that a one-time training is insufficient. The same doubtless holds true for training on minority rights concerns; staff training on minority rights should be regularly integrated into ongoing training throughout the life of the TJRC. Trainings should cover, at a minimum, the international legal framework of minority and indigenous rights, reasons why minority and indigenous communities may be more vulnerable to human rights violations, ways in which to gather information about human rights violations committed against minority and indigenous communities, concerns of minority and indigenous communities in various regions, and the overlap of minority and indigenous rights with other concerns such as gender.

Research

- Commission a study of integration of minority and indigenous communities' practices of justice, reconciliation, reparation, and memorialization for use in developing policies and recommendations.
- Develop a dedicated research plan for human rights violations that targeted or disproportionately impacted minority and indigenous communities.

In Peru, Sierra Leone, and Liberia, to name a few, truth commissions asked civil society and international partners to prepare a background report on the use of traditional and indigenous methods of conflict-resolution, reparation, and healing. These documents were designed to inform commission activities throughout the outreach, statement taking, public hearings, and reporting phases. In both Guatemala and Peru for example, substantial resources were allocated toward investigating violations committed against indigenous populations.

Outreach and Sensitization

- Establish regional and community-based networks to build trust and ensure accessibility.
- Work closely with genuine representatives of minority and indigenous communities to conduct assessments of how communities view the TJRC and how they would like to be approached by the Commission.
- Design outreach strategies, programs and messages that are tailored to specific communities and that take account of their self-identification as a minority or indigenous group.

Chile's commission followed one of the most common forms of outreach for statement-taking methodology by opening regional and provincial offices. The commission allowed victims and the families of victims to register their cases at regional offices of the federal government and at provincial government offices; expatriates could register with Chilean embassies and consulates abroad. The Liberian commission operated on a regional office model, but statement takers went door-to-door to encourage individuals to provide statements and would take statements on the spot in the victim's home if needed. The Peruvian commission also established regional offices with fixed and mobile teams in charge of outreach and education, statement collection, and case investigation. Mobile teams traveled to remote districts, such as the region of Selva Central, where a majority of the Peruvian indigenous Asháninka live and where there were several reported incidents of human rights abuses against the group. Over the span of three two-week visits, the commission interviewed settlers and indigenous leaders in the community. In addition, in a separate visit, the commission interviewed leaders from two indigenous groups.



Statement Taking

- Ensure that statement givers can provide information to the TJRC in the language of their choice, while also preserving confidentiality.
- Allow for flexibility in how individuals and groups can provide information to the TJRC, keeping in mind that overly-legalistic or purely individual processes may reduce participation and miss important types of information about group interaction with the state.
- Partner with civil society groups that have long-standing relationships with minority and indigenous communities to maximize participation.

Several truth commissions – in Liberia, Peru, Sierra Leone and South Africa for example – have made policy decisions to recruit statement takers and deploy them within their own communities. This enables statement givers to communicate in their own language and provides other benefits of cultural sensitivity. Both the South African and Peruvian truth commissions partnered with local civil society groups to have them act as statement takers under the auspices of the commission. This method can be very effective, but it should be borne in mind that some individuals will be more comfortable speaking to an outsider with no connections to the local group. The Liberian commission found that in refugee and diaspora communities, statement givers were often more comfortable speaking to a non-Liberian than to a Liberian. While much truth commission information is collected on an individual basis, minority and indigenous communities may also wish to submit information as a group. Previous truth commissions (Chile, Liberia, etc.) have allowed for submissions on behalf of groups, community organizations, and NGOs to supplement their individual data collection.

Interaction with Human Rights Mechanisms

- Develop policies enabling the commission to adopt the findings and conclusions of competent human rights tribunals, such as the African Commission on Human and Peoples' Rights.

Human rights bodies such as those under the auspices of the UN and the African Union have been important arenas for documenting and adjudicating human rights violations against minorities and indigenous peoples. The TJRC should incorporate the conclusions of other competent, objective human rights tribunals into their analysis, in the absence of powerful reasons for not doing so. For example, the African Commission on Human and Peoples' Rights recently released a precedent-setting decision on the land rights of the Endorois indigenous community from Lake Baringo. The TJRC should incorporate the evidentiary record and findings from this and other comparable processes so as to preserve limited investigatory resources and so as to ensure consistency.

Public Hearings

- In consultation with communities, integrate traditional and indigenous practices into public hearings programs.
- Ensure that public hearings take place in all regions, including remote areas.
- Dedicate specialized thematic hearings to minority and indigenous rights issues.

Many commissions integrate diverse communities into public hearings by ensuring that hearings take place in each region of the country. Liberia is a typical example – the commission held regional hearings in each of the 16 Liberian counties, despite post-conflict transportation and infrastructure difficulties. These hearings involved chiefs and traditional leaders from the communities in the proceedings. In designing public hearings, the TJRC should maintain flexibility, consider any preexisting reconciliation efforts already underway, and engage in extensive consultation with communities to creatively address local reconciliation needs. The Equity and Reconciliation Commission of Morocco held seven national public hearings around the country and provided translators for major languages to ensure that witnesses could testify in the language in which they were most comfortable. Truth commissions also generally hold thematic hearings on key issues that relate to root causes of conflict. Dedicating thematic hearings to the issues confronting minority and indigenous peoples will be an important component of addressing root causes under the TJRC mandate.

Supporting Victims and Witnesses

- Develop a plan early on, and seek sufficient funding, to provide culturally appropriate psychosocial support to individuals who participate in the TJRC process.



There are significant risks for individuals who participate in truth commissions, including safety concerns, retraumatization, and other mental health consequences. Psychosocial support is universally under-resourced in truth commission processes. Often, what support is available is not accessible to minority and indigenous communities for geographic or cultural reasons. For example, early on in the Peru truth commission process, victims were expected to travel from their rural villages to Lima, the capital, if they needed counseling services. Recognizing that taking a several

days' journey for a few hours of counseling was unworkable, the commission and its civil society partners ultimately funded practitioners to move into and live in rural areas to provide counseling in a more accessible manner. Training counselors on the particular sensitivities of minority and indigenous communities is also a critical step. This process is expensive, but must not be overlooked. Commissions have been creative in using limited resources. In Timor-Leste, the Healing Workshops Program was developed for those most severely affected by the conflict. Each three day workshop involved a wide variety of activities aimed at helping the survivors no matter in what stage of healing they were. Additionally, in order to combat the commission's lack of mental health staff and resources, several NGOs with expertise in this kind of healing and group therapy worked as facilitators of the process. The South African Commission set up a briefing program for public hearing participants, made up of trained mental health workers, as well as local members of each community, who were trained on the spot in mental health work. The briefers were in place during the hearings in order to support and empower individual witnesses, aid community reconciliation and help transform these individual testimonies into effective national healing.

Final Report and Recommendations

- Dedicate sections of the report to addressing minority and indigenous rights concerns and integrate the experiences of minority and indigenous peoples throughout the report.
- Ensure that the broad spectrum of human rights violations are addressed in the TJRC final report, specifically including violations of economic, social and cultural rights which are of particular concern in many minority and indigenous communities.
- Incorporate international and regional legal standards relating to minority and indigenous rights into the final report, specifically the African Charter on Human and Peoples' Rights Articles 19-24 on peoples' rights, International Labour Organization Convention No.169, the Convention on the Elimination of All Forms of Racial Discrimination, the U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities and the Declaration on the Rights of Indigenous Peoples.



Commissions in Peru and Guatemala have expressly recognized that many abuses were targeted at indigenous populations. In Guatemala, the Commission expressly addressed the wrongs done to indigenous and minority populations in several of its recommendations. The Commission recognized that the indigenous populations of Guatemala, specifically the Mayan people, were subject to “racism, inequality, and exclusion.” The Guatemala Commission also specifically named international agreements that it recommended the government enforce, including the Convention on the Elimination of All Forms of Racial Discrimination and the First Optional Protocol to the International Covenant on Civil and Political Rights. The Peruvian commission found that the “vast majority of the victims were poor, indigenous, peasants, traditionally discriminated against and excluded,” and that they should receive preferential treatment from the government. Moreover, past truth commissions have made a point of addressing economic crimes. Liberia’s commission report went as far as to determine that economic crimes can amount to gross human rights violations and war crimes. The Timor-Leste commission detailed extensive property rights violations by the government, including widespread appropriation of land.

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Thanks to Gray Plant Mooty for their assistance in the creation of this briefing note.



Contact Information

Center for Minority Rights Development

Justice Program

P.O. Box 14692-00100

Nairobi, Kenya

Website: www.cemiride.or.ke

Tel No: +254 20 6009682

The Advocates for Human Rights

International Justice Program

650 Third Ave. South, Suite 1240

Minneapolis, Minnesota, USA 55406

Website: www.theadvocatesforhumanrights.org

Email: hrights@advrights.org

Tel No: +1-612-341-3302