

Truth and Reconciliation Commissions in Africa: Lessons and Implications for Kenya

A Briefing Paper

By

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This brief indicates some lessons and problems from TRC experiences in Africa and makes recommendations for Kenya. Drawing on experiences from South Africa, Sierra Leone, Liberia, Ghana and DRC, this brief cautions that previous TRCs have not been as successful as is sometimes assumed. While the South African TRC (SATRC) gave new prominence to TRCs (or TJRC in the case of Kenya³), it has led to a fixation on a particular form of transitional justice at the expense of careful consideration of the goals sought and the context of the specific transitions. For the Kenyan TJRC to succeed it will have to respond to some of the problems identified.

I LESSONS, PROBLEM AREAS AND RECOMMENDATIONS

Lesson and Problem Area 1: *TRCs Have not been as Successful as is often Assumed as tools for truth, justice, reconciliation or national unity.* This is because:

- o Victim-focused recommendations are ignored, delayed or only partially implemented.
- o Citizens' expectations are often outside the mandate and capacity of the TRC.
- o Victims come before the TRCs in large numbers while perpetrators tend to stay away
- o Perpetrators quickly get amnesty while the threatened prosecution is never followed up
- o TRCs have often been politically-correct, focusing only on non-controversial truth
- o Given their poor follow-up on recommendations, particularly those pertaining to reparations to victims in the context of great material need, TRCs are increasingly viewed as facilitating the very impunity they set out to reverse as perpetrators get away without accountability while the victims' needs are not met

Recommendations:

- . Clear goals must be articulated and communicated to the public as to what the TIRC hopes to achieve with regard to each of the three elements (truth, justice and reconciliation).
- A commitment by the government to implement recommendations and undertake necessary follow-up should be secured up front.
- . The TJRC Act should provide for an Independent Follow-up Mechanism with a clear mandate to spearhead the implementation of the TJRC's recommendations.
- The government's commitment to cooperate and support the process and follow-up should be secured through a presidential order, as recommended by the Makau Mutua Task Force on the TJRC in 2003.
- Public expectations can be managed through a careful awareness campaign, wide consultations and clear articulation of the purpose and role of the TJRC, and its

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³ This brief uses the generic term TRC when referring to TRCs in general as implemented in other countries, and TIRC to refer specifically to the proposed Kenyan version of the TRC.

relationship, synergies or linkages with concurrent commissions, competent institutions and follow-up mechanisms (where applicable).

- In its legislation and design, the *TIRC* should have clearly stated linkages with other related institutions or commissions such as the Office of the Ombudsman, the Lands Commission or the Kenya National Commission on Human Rights. The framework for such collaboration and linkages should be worked out before the commission concludes its work.

Lesson and problem area 2: *Overriding Expectations of Material Compensation*

Kenya has to weigh carefully what the primary purpose of the *TIRC* is to be. Even when they were silent on it, past TRCs have been expected to deliver on 'justice' (variously assumed to mean compensation for victims, prosecution of perpetrators, resettlement, land re-allocation, psychological counselling, physical rehabilitation, return of stolen wealth, etc.) The Kenyan commission's explicit promise of 'justice' is certain to have implications for people's expectations and the commission's ability to deliver. Evidence from post-TRC countries in Africa and from Kenya shows expectations of material compensation as the greatest motivation for people's participation. In contrast, the reparations programmes in each of the post-TRC countries have proceeded with minimum success due to inadequate resources or waning political will after the TRC. In South Africa, the compensation amounts paid are only a fraction of what the TRC recommended. Due to this failure, the phrase 'a waste of time' has been used repeatedly to appraise the impact of the TRC in Ghana, Liberia and Sierra Leone, and in South Africa many say that, in retrospect, the TRC was a hoax, a tool to hoodwink the nation into allowing the beneficiaries of apartheid to keep what they had without organised resistance.

Recommendations

- The *TIRC* must clarify whether the 'justice' promised is in terms of punitive measures against the perpetrators, restorative measures for the victims, or both. Its design and mandate will have to demonstrate these understandings
- The *TIRC* will have to make clear its precise mandate and consider what levels of reparations the country can afford, and whether these will be individual, communal or simply symbolic
- A Fund for the expected reparations should be set up and money allocated at the start of the process.
- If reparations are to take the form of symbolic tokens rather than calculated restitution, victims need to be educated in advance to stem disappointment should the package turn out to be far below expectations.

Lesson and Problem area 3: *Truth for What?*

A historical review shows that truth-recovery served a practical function in contexts where 'truth' had largely been unknown or concealed from the public and state denial could therefore be reversed through truth recovery. In this sense, revelation could be an end in itself and did not have to be tied to justice or reconciliation. In Kenya, almost all the major violations have been subject of various Commissions of Inquiry, Parliamentary Select Committees, Task Forces and police investigations, with elaborate reports in which perpetrators are named and recommendations made. Some of the commissions (for example the Goldenberg Commission) required the kind of resources, investigative capacity, singular focus, time and expertise that a *TIRC* may be unable to replicate.

The *TIRC* is unlikely to add value to the quest for truth and justice, unless it has the power to enforce the implementation of the recommendations of its findings and those of earlier bodies

Conversely, the country does not need a *TIRC* to order the implementation of previous recommendations.

If, on the other hand, the TIRC wants to offer a chance to victims to publicly recount their suffering, then care should be taken to ensure that false hope for redress is not created.

Recommendations

- The TIRC should utilize its power of compulsion to summon those mentioned in previous investigations with a view to holding them accountable or extending conditional amnesty.
- Alternatively, the TIRC should focus on giving space to victims with a view to healing and restoration while recommending that all those mentioned in previous reports appear before it or face prosecution
- An examination of the policy environment should be carried out to explain the larger context of violations or repression. These findings can be the basis for support for legal and institutional reforms.

Lesson and problem area 4: *TRCs cannot be Alternatives to Functioning Institutions and National Values*

TRCs are too often being viewed as a panacea for the failure of institutions in Africa, or used to divert attention from or postpone making hard political decisions. In the absence of a people-centred constitutional order backed by strong people-friendly institutions, new violations can always be committed and recommendations for redress ignored. Similarly, in the absence of core national ethical values to which the country can rally, the TIRC in Kenya could become the venue of contestation on all manner of 'truths' where everyone will vie for the victim tag and no one will be found responsible for any of the violations and crimes.

Recommendations

- The TIRC cannot escape giving attention to and making recommendations on de facto structural issues that underlie conflict and human rights violations. Public hearings may form the foundation for future actions tied to wider sectoral and institutional reforms.
- CSOs, religious institutions and the private sector should champion advocacy for institutional and Policy reform that would ensure non-recurrence of violations and past problems.
- The TIRC should encourage Kenyans to cultivate life-preserving values that shun victimisation of innocent people and promotion of a caring, equitable society

Lesson and problem area 5: *TRCs by themselves cannot bring reconciliation*

The TIRC, in and of itself, cannot deliver reconciliation. Reconciliation is a long process with deep personal, spiritual, communal, material, space and time implications. TRC processes create a short-term space that may or may not open the way to reconciliation. In many instances, reconciliation is a consequence of what happens during and after the TRC event, including the follow-up. In Ghana, Liberia and Sierra Leone, a major criticism of the TRCs there was their failure to work meaningfully with the local cultures and traditions of justice, healing and reconciliation. In Liberia and Sierra Leone, appearance before the TRC was not viewed as sufficient to earn one automatic forgiveness or re-admission into the local community. Such people would still be subjected to local processes and rituals.

- o People have capacity to heal themselves through prayer groups, family and community support or traditional processes.
- o TRCs can appear as an interception of people's ongoing coping and forgetting. If the TRC cannot add value to people's healing process, expectations immediately shift to material compensation.

Recommendations

- The TJRC should recognize grassroots dynamics and endeavour to achieve local rootedness through smaller sittings at the community level. For example, there would be both symbolic and healing value to holding public hearings with regard to the Wagalla

Massacre at the Wagalla Airstrip where the majority of the killings took place, provided adequate media coverage is provided to give such hearings a national reach. Equally holding hearings in sites of violations such as Nyayo House, Burnt Forest, Molo, the site of the burnt church in Eldoret, Likoni, etc., would create space and signal invitation to wider participation.

- Local languages and information gathering methodologies should be used to ensure wide participation of affected people.

Lesson and problem area 6: *TRCs as Avenues for Restorative Justice*

It has been argued that TRCs promote restorative justice as opposed to retributive justice. However, as already indicated, experience from South Africa, Ghana and Sierra Leone shows that key perpetrators stay away from the TRCs, thereby denying the processes the restorative aspect of encounter. A focus on only those who 'bear the greatest responsibility' in Sierra Leone meant that people who directly and visibly afflicted atrocities on communities were not indicted by the Special Court, while in South Africa many freedom fighters were dissuaded from appearing before the TRC for fear of implicating their seniors or political parties.

- o Restorative justice (RJ) is described as a process whereby all stakeholders in an offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.
- o RJ redefines crime as violations against human beings-not the abstract state-and justice as based on restoration, itself based on reparation, symbolic or material.
- o RJ encourages victims, offenders and the community to be directly involved in resolving conflict, and upholds offender accountability through meetings between perpetrators and victims, as well as apologies from perpetrators.
- o In the encounter, the wrong and the remedy are mutually agreed upon. In this sense, 'restoration' does not necessarily preclude 'retribution': many reconciliation processes and rituals in Africa embrace an element of punishment, whether by means of paying a fine or being made to lose face. 'Restoration' of the victim is tied to some act of atonement by the perpetrator or the perpetrator's community.
- o TRCs can be better avenues for restorative justice if they resonate more with basic tenets of human rights and understandings and principles of justice and reconciliation of societies concerned.

Recommendations

- o The TJRC should promote and encourage dialogue encounters between perpetrators and victims. Such encounters should be encouraged beyond the life of the TJRC
- o Such encounters can be individual or communal involving community leaders from the different sides of conflict
- o The TJRC can delegate such encounters to mutually accepted and respected community leaders and civil society organisations but ensure linkage to the national level TJRC process
- o Where culturally accepted, communities should be encouraged to enter into covenants and undertake rituals of forgiveness and reconciliation.
- o The TJRC should envision arrangements that involve NGOs and faith-based communities in the facilitation of continued interaction between victims and perpetrators to enhance reconciliation beyond the space provided by the TJRC.

Lesson and problem area 7: *TRCs as sites for convenient and contested 'truths'*

The expectations, fears and political leanings of witnesses can to a large extent determine the testimony or 'truth' they bring before the commission. In the case of Ghana, expectations of compensation meant that the majority of the witnesses and statements before the NRC largely focused on violations that led to financial loss. In South Africa, perpetrators carefully crafted 'the truth' in statements drafted with the help of lawyers to avoid implicating themselves in crime, to fit their acts within the definition of 'politically-motivated acts', to 'qualify' for reparations and to

secure amnesty. Some respondents admitted to submitting highly subjective narratives in a vengeful quest or to qualify for reparations.

Recommendations

- . The *TIRC* should invest resources in investigations and research to augment witness testimonies
- The TJRC should enjoy operational independence and its leadership and staffing should be persons of unquestionable integrity, to protect the process from becoming a tool for advancing partisan political agendas.
- . Particularly for Kenya, the TJRC should be cushioned from regional, ethnic and political contests that would dilute its work.

Lesson and problem area 8: *Thin onjustice--Crime and Perpetrator 'Laundering'*

TRCs in Africa are perceived as being too lenient with perpetrators and hard on victims, in the process circumventing justice. In South Africa, the construction of apartheid as a consequence of debased human nature rather than as a systematised violation of human rights presented perpetrators as persons to be pitied and not punished. The few perpetrators who appeared before the amnesty commission managed to unburden themselves of the social stigma as unrepentant violators even when they were actually not repentant. However, the victims had to wait, first, for the commission to recommend reparations, and then for the actual implementation, so far not forthcoming for most. Further, there was the expectation that those perpetrators who failed to disclose their acts or apply for amnesty would be prosecuted. These prosecutions have not materialised, while some persons who had been found guilty through criminal investigations applied for and obtained amnesty.

Recommendations

- The *TIRC* must be seen to uphold justice for the victims of violations
- Amnesties must not be extended for crimes that fall under the purview of international humanitarian law and crimes against humanity
- . To avoid the appearance of preferential treatment of perpetrators, individual reparations should be given within a reasonable time, especially if amnesty is granted at the time of the hearings. Alternatively, verdicts on amnesty should be delayed until after reparations are paid
- . Perpetrators named by witnesses or in previous reports should not be considered for amnesty until they appear and answer questions to the satisfaction of the *TIRC*.

Lesson and Problem area 9: *Role of Strong Champions and Moral Authority*

In South Africa, the role and stewardship of Archbishop Desmond Tutu and President Nelson Mandela were strong moral voices for the cause of the TRC. Their involvement gave credence to the possibility that a TRC can be a vehicle for the moral rebirth and reconciliation of the nation once it honestly confronted its past and broke from it in favour of a more inclusive, justice- and human rights-minded society. Such inspired moral leadership is not readily available in the rest of Africa; in spite of it in South Africa, there is a residual sense that the transition remains incomplete and in need of a new perspective and leadership.

Recommendations

- o Kenya's religious leaders and eminent persons in society should be encouraged to be the moral voice for a spirit of honesty, truth, humility, forgiveness and national unity that could assist the TJRC meet its objectives

Lesson and problem area 10: *Catharsis is Impermanent and Expectations are Dynamic*

One of the greatest contributions of TRCs is the creation of space for victims to publicly tell their stories in a manner that brings cathartic relief: However, lessons from South Africa suggest that catharsis is temporary, particularly if other hoped-for changes remain unachieved.

Depending on the circumstances of the transition, expectations can be minimal and so any positive changes can draw euphoric celebration. With time, though, people begin to expect regime change to translate into more tangible benefits.

Failure to implement recommendations on reparations has created the perception that TRCs serve the interests of the rich and the political class, or the intellectual who are struck by the stories of others.

Recommendations

- . The TJRC should factor in the short-term (before and during hearings) and long-term (after hearings) psycho-social support and reintegration needs of victims and perpetrators
- The TJRC must ensure that immediate gains in terms of healing relief of victims are buttressed by the implementation of restorative measures and sustained reconciliation efforts.
- . The TJRC should have an established referral mechanism for cases beyond its mandate

Lesson and Problem area 11: *Regime confidence and addressing the root causes of conflict*

Transitional justice choices are inextricably political and dictated by the level of security and confidence a regime enjoys. In Kenya, the underlying causes of violent power struggles are deeply embedded in the structures of state power, the economy, resources and ethnic relations. Getting to the bottom of such issues requires political will, courage and regime stability. If there is no regime stability or confidence, TRCs tend to subordinate truth recovery to 'reconciliation' by seeking non-controversial truth, thereby skirting the root causes of communal tensions.

Recommendations

- o The legislation must ensure operational independence of the TJRC
- o The TIRC should make policy recommendations for addressing the root causes, and assign responsibility to competent institutions

Lesson and problem area 12: *Addressing gender concerns*

Truth Commissions are under increased pressure to create free and safe spaces to address the often-overlooked sexual and gender-based violence (SGBV) suffered by women and children. Sierra Leone and South Africa offer useful lessons for dealing with SGBV.

Recommendations

- o Negotiating with women witnesses on the composition of panels to listen to their testimony
- o Training all TRC staff on gender issues
- o Allowing some women to tell stories on behalf of others or in groups
- o Hearings in camera but ensuring that private disclosure of violations does not rob them of public attention or create the impression that these are 'private' or embarrassing violations.
- o The TJRC should provide adequate protection and security to sexually-violated witnesses, particularly if the perpetrators are former or current members of the country's security forces.

Lesson and problem area 13: *Clarity of Terminology and Goals*

TRCs in Africa have shied away from offering clear definitions of the terms they use in a manner that could indicate the goals sought and what the public should expect. This lack of clarity means that the concepts and praxis of 'truth', 'justice' and 'reconciliation' are being referred to imprecisely and, unfortunately, renders them subject to scepticism. For example, it is not clear what constitutes reconciliation, and at what point or in what time frame after truth telling it is expected to happen. In what some scholars call the metaphor of the victim, those viewed as perpetrators also claim to be victims of the system, and the demarcation of groups needing to be reconciled or compensated blurs. The concepts of justice, reconciliation and reparation tend to

merge amongst victim groups. For instance, in South Africa material compensation is often equated to 'reconciliation' with both the loss and injury, and with the perpetrators, while justice is perceived as the right to reparations. The discourse on the 'good victims' (those who make no demands) and the 'bad victims' (those who advocate rights-based access to reparations) highlights contending perceptions and expectations of the TRC process. In South Africa the criteria for recognition of victims, acknowledgement and reparations for different types of violation are contested.

Recommendations

- o The *TIRC* will need to proffer and operationalize clear definitions of 'reconciliation', 'truth', 'victim', 'perpetrator' and 'justice', particularly in view of the high expectations of those who would wish to be viewed as victims or avoid being viewed as perpetrators
- o In Kenya, the *TIRC* will have to carefully untangle the terminological muddle as clarity of terminology holds the key to setting realistic goals and expectations

Lesson and problem areas 14: *Design and Mandate of the TRC*

TRC processes have tended to commence without careful examination of the needs and expectations of the people followed by an attempt to align the mandate and design to these needs, expectations and resources available. Unrealistic perceptions of the TRC as a panacea for all problems create dissonance between the expectation and the mandate of the TRC. The result is that most recommendations are often ignored, partially implemented or altered due to cost implications or political interests. For most people, the only thing that changes during the so-called transition is the departure of the old regime or the cessation of violence. These challenges are often foreseeable but tend to be ignored at the point of design, perhaps due to time constraints or the need to secure political backing.

- . The TJRC should consist of several interrelated sub-commissions and subcommittees each with a clear mandate such as investigations; amnesties; truth and reconciliation; reparations; etc.
- The TJRC must ensure clear definitions and internal cohesion and connection of the various working committees,
- Staffing and resource allocation must be ironed out prior to the commencement of the public phase of the commission.
- The TIRC will need to embrace a comprehensive agenda and make recommendations that encompass accountability for perpetrators, reparations for the victims, building social trust, establishing or strengthening institutions, legal reforms and reclaiming the right to be protected by the state.

Lesson and problem area 16: *Transitional Justice and New Victims*

Implementation of recommendations can lead to new 'victims' and make reconciliation more difficult. In Kenya, the limited lustration targeted at public officials hired under the Moi regime created a wave of anger and resentment by sections of society and partly explains the post-December 2007 elections violence. Similarly, the partial implementation of the recommendations of the Ndungu Report on illegal land acquisitions led to evictions from forests and therefore new landlessness.

Recommendation

- o The TIRC should create wide public awareness that rectifying misdeeds of the past may create discomfort for some

11 OTHER RECOMMENDATIONS

1. Timeframe and Public Participation in the Design

The February 2008 agreement indicates that the TJRC will run for two years. The current Draft Bill provides for a three-month preparatory period. However, given the amount of time that may be taken up by design considerations and consultations, background research, and legislation, this timeframe is unrealistic. For example, the South African TRC took about one and a half years to design, a process that involved wide consultations with experts, local and international human rights bodies, design of legislation and public debate in the selection of commissioners. We propose:

- . Flexibility in the TJRC legislation that provides for possible extension of its life
- Creating a one-month window for the public's participation in the design to broaden the ownership of the commission

2. Security of Witnesses

The TJRC will almost certainly work simultaneously with other commissions. Of particular concern is the proposed Commission of Inquiry into the Post-Election Violence whose mandate includes recommending prosecution of those found to be responsible for the violence. The post-election violence created many perpetrators and victims who may be required to or want to appear before the TJRC. Similarly, the TJRC, in considering historical injustices, may have to delve into matters already dealt with by other commissions whose recommendations were never implemented or were inconclusive due to their political sensitivity (Goldenberg, Ndungu, Ouko, Akiwumi, JM Kariuki, etc.). Some of the people mentioned in previous investigations still occupy places of power. Securing the cooperation of witnesses is crucial.

- The TJRC should have a witness protection programme that guarantees the safety of witnesses.
- The TJRC should clarify its relationship, synergy or practical linkages with other commissions

3. Training for Commissioners and Staff

TJRC staff should be trained on the purpose, mandate and capacity of the commission.

- . They should have full knowledge of the components of the TJRC, the interconnections of its various subcommittees and the referral or feedback mechanisms that victims and perpetrators should pursue before and after the hearings.
- . They should be well trained on comprehensive, supportive and objective statement-taking, as there is no time to fill gaps from incomplete information.
- Good training can improve on the speed and productivity of the Commission and increase the number of persons heard.

4. Follow-up mechanisms

The abrupt conclusion of TRCs at the end of their mandate leaves many loose ends and unfinished business, especially the handling of information; follow up of incomplete cases and implementation of recommendations. National human rights institutions, such as the Kenya National Commission on Human Rights should be strengthened to take the post-commission mandate as part of the process.

- o The KNCHR could be particularly mandated to take up the prosecution of perpetrators who may not meet the amnesty requirements, either because they failed to appear or their acts fall under violations of international humanitarian law.
- o The TJRC should make provisions for the involvement of the International Criminal Courts with regard to the above.

- o Incomplete investigations should be referred to existing investigative institutions

III CONCLUSION

Lessons from countries that have tried truth commissions indicate that the concept and objectives are noble, but the process of implementation is often compromised by political imperatives and the need to sidestep costly reparations. Kenya needs to examine and learn from these lessons to avoid deferment of the objectives of recovering the truth, achieving justice and opening the way for community reconciliation. The noble values and aspirations that currently inform and guide Truth Commissions in Africa appear to be inconsistent with human rights principles of accountability and criminal responsibility, which subjects TRCs to criticism as vehicles of impunity. Perpetrators tend to stay away or are granted amnesty while victim-friendly recommendations are ignored, delayed or partially implemented. Truth commissions have not addressed socio-economic and legal-historical distributive justice questions such as poverty, inequality and marginalisation. All these not only make reconciliation more difficult, but also obscure any real success achieved by the TRC in the long term. Kenyans can attempt to avoid these pitfalls by:

1. Using the TIRC as a forum for honest self-examination that could lead to the emergence of a new united country based on values of social justice, honesty, industry and freedom. From the start, the TIRC should send a strong signal of integrity and impartiality and guard against political manipulation by leaders, ethnic elites and political parties that might want to protect implicated individuals. Strong moral leadership from religious institutions and respected Kenyans will be crucial.
2. Articulating clear and realistic goals with regard to each of the key elements (truth, justice and reconciliation) and communicating these to the public. This clarity should be reflected in the design and mandate of the TIRC
3. Guarding against becoming a vehicle for perpetuating impunity. Given the previous use of violence and of displacement and dispossession of people as a political strategy, the TJRC should send a strong signal that this is inconsistent with the requirements of peace and justice. In this regard, the TIRC should avoid the pitfall of the **false equivalence of wrongs**: there can be no justification for the taking of a life of another innocent Kenyan and those responsible should face prosecution and public censure.
4. Kenyans should have realistic expectations of the TJRC and should not expect it to resolve all current and past problems. Civil society should maintain pressure for strong institutions and the implementation of sound policies on land, elimination of corruption and government waste, human rights protection, resource management and distribution, and immediate attention to the land-displaced and urban-homeless.

(See accompanying **Background Paper**)