

Why Kenyans Must Embrace and Support the TJRC

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The debates over transitional justice in Kenya have been largely silent on the issue of the Truth, Justice and Reconciliation Commission (TJRC). It is evident that beyond the initial commentary at the TJRC's inception – when the appointment of some commissioners was vigorously queried – much of the attention has focused on possible prosecution of key perpetrators either in The Hague or by the Special Tribunal for Kenya. One could attribute this fixation with The Hague, Special Tribunal and the envelope delivered to the Prosecutor of the International Criminal Court (ICC) to the contentious nature of the process, and the fact that the Prosecutor's sights are trained on some Kenyan principals. However, I suggest that this sole focus on prosecutions – and in particular the ICC – is somewhat misguided. Here, I consider, - based on the strength of several legal, policy and practical considerations – why Kenyans need to embrace and own the TJRC.

First, we need a comprehensive view of justice. While prosecutions are necessary, international law requires that we prosecute *at least* the most serious crimes and those who bear the greatest responsibility. But justice is not complete by only jailing a handful of perpetrators. We need approaches that will attend to the concerns of victims such as reparations, rehabilitation and truth telling. We also need approaches that address the broader national questions that foster inter-ethnic rancor, impede peaceful coexistence and national reconciliation.

Second, the ICC can and *will only* prosecute a few individuals. Even locally, a Special Tribunal and national courts cannot prosecute all of those who wielded machetes, stones and homemade guns. We must find other options of accountability. This is what the recent endorsement by the ICC Prosecutor for a 'three-tier approach' is about.

Third, we must internalize the fact that trials will only yield *judicial truth*: truth relating to whether a particular individual is guilty or not for a particular crime. Trials will not tell us enough about context and history. Trials reveal little – and will leave unopened the closets of Wagalla, Likoni, Molo, Burnt Forest, Elgon and other places. Crucially, the law will prevent us from prosecuting most – if not all – crimes committed decades ago because of the problem of retroactivity. But at the TJRC, we can open those closets and ensure that the victims of Wagalla at least know the truth, and have an opportunity to receive reparations. We may know who perpetrated the violence, and find ways of ensuring they account for it: for instance we can ban the public figures among them from running for public office.

The TJRC's process should not be equated to impunity. One of the key functions of the TJRC is to ensure this global truth comes to the fore, is recorded and committed to national memory. It will ensure that no one re-writes history to suit their own beneficial narrative. It will ensure that we come to terms with the past and begin to

find ways of moving forward. The events of 2007 occurred partly because we have too many unaddressed instances of injustice.

Fourth, we must embrace the TJRC because we as a nation called for it. We must support it because we need it. The TJRC is not a foreign imposition. It is not even an imposition by politicians or the Kofi Annan talks. The TJRC has deep roots in battered communities around the country. Since at least 1992, Kenyans thirsted for truth. The Mutua Task Force in 2003 said as much. When Kenyans spoke to the Ghai Commission on constitutional reforms (CKRC), many said the same. It is safe to conclude that in 2003, the TJRC's creation was merely *suspended* because of political games.

Fifth, truth commissions – unlike trials – operate flexible procedures that allow for the widest possible opportunity for victims to participate, tell their stories and confront their tormentors in a less adversarial and friendly forum. Access to justice is of paramount importance. Few victims can locate The Hague on a map. Even fewer will participate in The Hague or receive reparations should trials commence. The TJRC can – and should – bring a keen listening ear and justice to a town they know near them.

Sixth, as the cases of South Africa, Sierra Leone and others demonstrate, truth commissions have their flaws. While we may want as many people as possible – if not every perpetrator – to be prosecuted for crimes, this may not be possible for some of the reasons suggested above. Further, insisting on prosecutions may not foster truth telling. That is why the Truth, Justice and Reconciliation Act that creates the TJRC provides that those who testify before the Commission will not incur criminal or civil liability. I remain convinced that without a TJRC, where people can talk without fear of prosecution and other harm, we are bound to repeat the murderous folly of 2007-2008. Truth can set Kenyans free.

The TJRC can only succeed if we want it to succeed. We may not like some commissioners for a range of reasons, but we can make the process our own. We must publicly and critically ask piercing yet constructive questions of the TJRC. Sometimes the sheep know best where the grass is greener, and the shepherd must follow.

However, truth searching must be managed in a transparent and accountable manner. The hunter must have the right tools, and must know their craft. It is important that the Commissioners, especially those inexperienced in matters related to truth commissions, gain a deep understanding of the relevant issues. The TJRC must have the right gear that will enable it not only to open, scrutinize and record what lies within closets of historical injustice, but to commence a process through which at least some of its key consequences can be addressed. It matters what you do with the truth you have unearthed. For these reasons, the TJRC must be supported, but it cannot stand alone. The ICC is relevant, as are the Special Tribunal

and the national courts. Moreover, this comprehensive process must be supported by other related measures.

We must address the concerns of victims. This requires different forms of unwavering government and civil society commitment. Those currently grappling with matters of constitutional and other institutional reforms must act diligently and a sense of historic responsibility. They must consider themselves part of, rather than separate from, the broader transitional justice project that is unfolding in Kenya.

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