



# Transitional Justice: Impunity, Project Kenya and Burying the TJRC Report

By Gabrielle Lynch



On 21 May 2013, Kenya's Truth, Justice and Reconciliation Commission (TJRC) handed over a final report to President Uhuru Kenyatta. According to the TJRC Act of 2008, the Commission's report – or summaries of it – were to be widely disseminated. The report was also to be tabled in parliament within twenty-one days with implementation to start within six months. All recommendations were to be implemented with the Minister of Justice tasked with giving reasons for any instances “where the implementation of any recommendation has not been complied with”.

Five and half years later, few know the details of the Commission's findings or recommendations. Neither the report nor summaries have been widely disseminated. The report is no longer available through a government website and can instead only be accessed through a University of Seattle [site](#) – where one of the former TJRC commissioners, Ron Slye, is a law professor.

The report has neither been discussed in parliament nor its recommendations implemented. Instead, the only substantial discussion that the country's MPs have deemed to hold was back in December 2013 when they took advantage of the Act's reference to the Minister of Justice (an office which, with the 2010 constitution, no longer exists) to amend the TJRC Act. However, MPs opted to not only replace all references in the TJRC Act to the Minister of Justice with the Attorney General, but also removed the requirement that implementation commence within six months and added a clause that

required the TJRC report to be considered by the National Assembly.

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This record of non-implementation is hardly surprising. Kenya has a long history of commissions of inquiry that have looked into everything from "ethnic clashes" to irregular land allocations and grand corruption scandals to devil worship. However, all share one common theme: the reports are generally only read by academics and activists and their recommendations have been ignored by successive governments.

The fate of the TJRC report is rendered even less surprising when one considers the [credibility crisis](#) that surrounded the chairman, the late Bethuel Kiplagat; the limited coverage given to its public hearings by the country's media; and controversy that surrounded the report's submission. The latter due to a dissenting opinion issued by the TJRC's three international commissioners who claimed that the Office of the President had pressurised the Commission to delete sections of the land chapter, which had adversely mentioned President Uhuru Kenyatta's father and Kenya's first president, Jomo Kenyatta.

That the TJRC's report would gather dust in a government archive was thus perhaps predictable, but does it matter? Is it ok to forget the report and its recommendations? Is it perhaps even a good thing to forget and "move on" in the interests of peace and unity?

I believe that the TJRC report should be discussed. This is a belief drawn from close research of the Commission's work, which - together with an analysis of the International Criminal Court's intervention - provides the focus for a new book on [Performances of Injustice: The Politics of Truth, Justice and Reconciliation in Kenya](#).

While many Kenyans were sceptical of the TJRC from the outset, many others opted to engage with the process. In fact, the Commission collected more statements than any other truth commission to date - over 40,000 in total - alongside 1,500 memoranda. It also held public, women's and closed-door hearings in 35 locations around the country, adversely mentioned person (AMP) hearings in Nairobi and in western Kenya, and a series of thematic hearings.

Moreover, while many who spoke before the Commission valued the opportunity to speak and be heard, most engaged in the hope that further action would be taken. As one woman explained after a women's hearing in Nakuru, she was glad that she had spoken as now the Commission would "come in and help". This call for help and for justice was repeated everywhere that the Commission travelled as victims called for truth and acknowledgement, but also for reparations and prosecutions.

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Those who gave testimony spoke of the past, but also of how the past continues to impact upon the present and likely futures. As victims of state torture recalled, for example, how they lost their jobs and were unable to send their children to good schools; while those displaced during election-related violence spoke of the loss of breadwinners and livelihoods and of the daily challenges of trying to feed, house, and educate their families. The past clearly also lived on in victims' testimonies through fears of repetition and, for far too many, the ongoing injustice of a lack of redress, the ongoing nature of many issues discussed, and new injustices suffered.

Given this reality, to ignore the engagement and pleas of so many would be a further injustice to those who participated. It is also to ignore the reasons why a TJRC was established in the first place, namely, to address a history of past injustice, improve state-society and inter-ethnic relations, and guard against future violence.

This links to another reason why it is important to return to the Commission's report and to its recommendations and findings: namely, to try and counter Kenya's embedded culture of impunity.

This was certainly one of the TJRC's aims. However, if the Commission's findings and recommendations are neglected then the process will actually have served to advance, rather than counter, a culture of impunity.

This reality was evident during my attendance at the TJRC's Adversely Mentioned Persons hearings when I heard little that was new; I heard not a single admission of personal responsibility or guilt. Instead, testimonies were characterised by five discursive strands of responsibility denied: denial through a transfer of responsibility, denial through a questioning of sources, denial through amnesia, denial through a reinterpretation of events and an assertion of victimhood, and denial that events constituted a wrongdoing.

However, while AMPs denied responsibility, none denied that injustices had occurred. As a result, while the hearings provided little clarity on how and why a series of reported events may have occurred, they did recognise past injustice. In this way, they provided a public enactment of impunity: Kenya's history was replete with injustice, but AMPs were unwilling to shoulder any responsibility for it.

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These realities are connected to the substance of the final report, which offers a wide range of recommendations. These include a list of individuals who should be further investigated, prosecuted, or face lustration (or a ban on holding public office); recommendations on institutional and constitutional reforms; and a detailed reparations framework. However, while these recommendations take up much of Volume 4, the bulk of the over 2,000-page report focuses on a thematic discussion of Kenya's past. Admittedly, this account is of varied quality, but it still provides an important overview of Kenya's history that is worth discussing and engaging with. In turn, the TJRC's recommendations should - as required by the initial Act - either be implemented or clear reasons be given for any areas of non-implementation.

To say that we should return to the TJRC is thus not to suggest that the process or report are perfect. Far from it. The idea of holding hearings in public was largely lost for a variety of reasons: limited media and public engagement; the Commission suffered from an ongoing controversy around the chairman; the report is largely silent on key injustices, such as extra-judicial killings; the

chapters vary massively in their quality; and the recommendations made, even if fully implemented, will not achieve the Commission's lofty goals of truth, justice and reconciliation. Goals that require an ongoing political struggle, and substantive socio-economic and political change, which a body like the Truth Commission can recommend, and sometimes contribute to, but should never be expected to achieve.

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Yet, this reality of truth, justice and reconciliation as an ongoing struggle does not take away from the further injustice that results from ignoring the Commission's report. This includes the failure to really listen to those who spoke; to ensure that the impunity performed is undermined by action; to learn about, and acknowledge, Kenya's troubled past; and the need to discuss and implement the report's recommendations.

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