

Introduction

In April 2009, I received a call from someone working for the African Union's Panel of Eminent African Personalities informing me that I was on a short list of candidates to serve as one of three international commissioners with the Kenyan Truth, Justice and Reconciliation Commission (TJRC). When I asked how short the list was, he said he could not tell me. A week later, I received a second call from the same person informing me that I was now on a "very short" list and wanting to know if I would take the position if offered it. I asked how short the "very short" list was, and he again replied that he could not tell me. I had been approached for positions earlier in my professional life where a similar question had been posed to me: if offered, would I accept? In my early professional life, I was less thoughtful about such questions and invariably responded yes. In this case, I asked for twenty-four hours to think about the question, which I was given. At the time, I did not know much about Kenya. At this point, I had spent a few days in Nairobi for reasons related to some of my academic work. While I had studied Kenya over the years, and even worked as a law student for PEN International concerning the detention of Professor Maina wa Kinyatti, I did not consider myself particularly knowledgeable about Kenya and its history.

As I was contemplating whether to say yes to the possible offer to join the Kenyan TJRC, I did not know who the other international commissioners would be – or even who they might be. The six Kenyan commissioners that were to join the three international commissioners had not been chosen yet. There were a lot of unknowns. The possibility of being out in the real world again, engaging firsthand with the many issues to which I had devoted my academic life, was in the end too tempting for me to pass up. I asked myself: if the other commissioners proved to be problematic, or if other information came to me that made me question the wisdom of serving on such a commission, would I be willing to resign? After giving it some thought, I concluded

that I would be willing to take that risk and resign if necessary. Little did I know at the time how prescient my thought process would be, as less than a year later I would be revisiting the question of whether I should resign. I informed the Panel of Eminent African Personalities that I would accept the position if it were offered to me. Twenty-four hours later, it was offered to me, and I accepted.

In 2009, I was a tenured professor of law at Seattle University. I taught my classes well and had published a number of articles and books in the areas of international human rights law, international criminal law, and transitional justice. While my career had been mostly academic up until that point, I had some practical legal experience in the areas of human rights and transitional justice. My academic career began with a strong link to practice. Upon graduating from law school, I was a clinical law professor at Yale, where I taught, among other things, an interdisciplinary transactional clinical class that focused on homelessness, housing, and economic development. After teaching for two years, I moved to Manhattan to work for a small boutique law firm that specialized in environmental law as well as real estate, housing, and a small amount of international human rights law. My time as a full-time attorney was short-lived. While I learned a good deal during my two years at the law firm, I longed to return to an environment where I had more control over what I did rather than being subordinate to partners or clients. I thus returned to Yale to help run the human rights center based at the law school. For three years, I engaged in a wide variety of activities related to international human rights law, from organizing conferences and speaker series, to teaching courses on human rights and assisting with an international human rights clinic, to working with students on a variety of human rights-related projects. Three years later, I had an opportunity to move to South Africa. This was 1996, two years after the election of Nelson Mandela and the formal end of apartheid. I was a fellow at the Community Law Centre of the University of the Western Cape. While I worked on issues of housing and poverty at the Community Law Centre, I ended up spending most of my year in South Africa working with that country's Truth and Reconciliation Commission. I became a consultant with the Commission's research department, providing assistance on how to interpret the Commission's mandate and researching and drafting small parts of what ended up being the Commission's final report. I attended a number of the public hearings of the Commission and engaged in numerous debates with both commissioners and staff on a wide variety of issues.

In 1997, I was offered a visiting professorship at Seattle University School of Law, which then became a permanent appointment two years later. My previous experience, particularly in South Africa, provided inspiration for much of

my subsequent teaching and writing. I continued to return to South Africa while the TRC was still operating and for many years after it finished its work. I was the inaugural holder of the Bram Fisher Visiting Professorship in Human Rights at the University of the Witwatersrand (also known as “Wits”) in Johannesburg, South Africa. I became an honorary professor at Wits and established a five-week program that brought together law students from the USA and Africa to study topics ranging from legal writing to international criminal law at that university.

In January 2009, Barack Obama became president of the United States promising to make torture illegal and to close the US-run prison in Guantanamo Bay, Cuba. During those early days of the first Obama administration, many proposals were floated concerning the closing of Guantanamo and making a clean break from the discredited policies of the newly departed administration of George W. Bush. One of the issues being debated was whether US officials who engaged in torture and other cruel, inhuman, or degrading treatment should be prosecuted for their crimes. Senator Patrick Leahy proposed that the US establish what he called a “South African-style” truth and reconciliation commission. He argued that we should take a page from Nelson Mandela and South Africa and embrace reconciliation, and that we thus consider amnesty for those responsible for wrongdoing rather than prosecution in order to encourage confessions about what had been done and why. While I did not oppose such an approach, I was concerned that the understanding of what South Africa did and why it worked (to the extent that it did), was not well understood by Senator Leahy and others, at least as reflected in how they publicly spoke about the choices available. I thus wrote a newspaper article that made two points. First, I pointed out that if we were serious about reconciliation along the South African model, we would facilitate engagement between individuals detained in Guantanamo and other US facilities with those US officials who had tortured and abused them. It was not clear to me that that was what Senator Leahy and others were proposing. Second, amnesty did not mean no prosecution. In South Africa, prosecutions occurred alongside the amnesty process. In fact, providing the carrot of amnesty in return for the confession of perpetrators was only possible if there was a credible threat of prosecution. If the proposal was to provide amnesty and foreclose prosecution, it was difficult to imagine why anyone would come forward to confess. Within twenty-four hours of the publication of this opinion piece, I was contacted by the Nairobi office of the Panel of Eminent African Personalities asking if I would consider applying for a position with the Kenyan TJRC. I provide in these pages my experience over the next four years serving as one of nine commissioners on the Kenyan TJRC.

The purpose of this book is to clarify the history and legacy of the Kenyan TJRC. We as a Commission did a mediocre job of engaging with the public about our purposes and operations. There is a good deal of misinformation, most particularly outside of Kenya, concerning the Commission's history and its work. I meet colleagues at conferences who still believe that I resigned from the Commission (which I did not) and that the Commission either fell apart without completing its work or that it is still ongoing (neither of which is true). Some are under the impression that the Commission focused on the 2007 election-related violence. While the violations committed after the 2007 election were a part of our mandate, the mandate entrusted to us was far broader. Even within Kenya, there is very little understanding of what the truth commission did, in part because of the government's decision to block publication of the report and refusal to engage with, much less follow, our numerous findings and recommendations.

This book then highlights some of our accomplishments. While we were by no means perfect, we did accomplish a good deal – far more than most people are aware. Yet I also acknowledge the mistakes we made and the challenges we faced. While many are aware of the challenges – the conflicts of interest of our chair, the interference by the president in the content of our report – here, too, there is much misinformation. Some of the failures were caused by forces outside of the Commission's control – and some of those forces have not been adequately revealed or discussed. I hope to remedy that state of affairs with this book. Some of the failures were due to our own limitations and failings. The purpose here is not to point fingers – though I do identify important actors and the mistakes they made and take some responsibility myself – but to lay bare who did what and, to the extent I can, why. I do, of course, have my own, sometimes strongly held, opinions about what we should have done. I express those opinions here, but I hope that I do so in a way that acknowledges other views and judgments about what we did.

Chapters 1, 3, and 5 provide the most detail concerning the two major challenges we faced: the conflicts of interest of our chair and the interference by the president in our final report. In those chapters, I endeavor to convey what it was like to experience the development of these issues firsthand. I hope to lay bare the issues around our chair and the various efforts we made to address them in a way that clarifies rather than obfuscates the issues presented. I also reveal the events leading up to the intervention of the president's office to the best of my ability (I was out of the country during some of the events that led to that intervention). Some of the information in both of these sections will be made public here for the first time, and part of my purpose is to enrich the historical record about these events. Beyond documenting

what happened, I also believe that both of these challenges provide important lessons to future truth commissions, and to future attempts to increase accountability and the rule of law in Kenya.

Chapter 2 provides the history of how and why the TJRC was created and critically discusses the broad mandate that we were given. Chapter 4 provides a window into some of the most important work we undertook through our public engagement with victims and survivors. The full extent of that engagement and the important contribution many Kenyans made to our work can be found throughout our 2,100-page report.

Chapter 6 discusses the relationship between the ICC and the TJRC. That relationship was mostly one of avoidance by both institutions. In this chapter, I also discuss the efforts by the Kenyan government to oppose the work of the International Criminal Court (ICC). Those efforts are similar to, and in some cases directly related to, the efforts by the government to control, slow down, and stop some of the work of the TJRC. The last chapter provides some concluding remarks and lessons that I have taken from the experience of my work in Kenya during my four years as a commissioner.

I have established a website that provides access to many of the documents on which I relied on writing this book: <https://digitalcommons.law.seattleu.edu/tjrc/>. Most importantly, a full copy of the final report, including the dissent that I and the other two international commissioners submitted, can be found at the website. This is particularly significant, as the government has removed the official TJRC website, and it is thus extremely difficult to find a copy of our final report. I have also included in the website transcripts of our public hearings, a resource that, as far as I am aware, has not been made available to the public. References to the hearings are in the form of RTJRC [date] [place], and can be found accordingly on the website. While I do refer in the book to some of the testimony we heard in our *in camera* hearings, I do not include those transcripts here, as the testimony provided at such hearings is and must remain confidential. The website also has a list of the html addresses referred to in the book for ease of access.