

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)

THE KENYAN TJRC

Between 1963 and 2008, Kenya experienced systematic atrocities, economic crimes, ethnic violence, and the illegal taking of land. To come to terms with these historical injustices and gross violations of human rights, the Kenyan Truth, Justice and Reconciliation Commission (TJRC) was established. From the perspective of an insider and academic expert, *The Kenyan TJRC: An Outsider's View from the Inside* reveals for the first time the debates and decisions made within the Commission, including how the Kenyan Commission became the first such commission to recommend that its chair be prosecuted for gross violations of human rights. This book is one of the few insider accounts of a truth commission and one of the few that reflects on the limitations and opportunities of such a commission. *The Kenyan TJRC* provides lessons and recommendations to those interested in addressing historical injustices through a truth commission process.

Ronald C. Slye is a professor of law at Seattle University, School of Law. He was one of three international commissioners on the Kenyan TJRC, and in addition to his teaching and writing in the area, he was a consultant to the South African Truth and Reconciliation Commission. He was corecipient of the Trial Lawyers of the Year Award for human rights litigation in the USA in 1995 and is coauthor of *International Criminal Law and Its Enforcement* (2015), one of the leading casebooks on international criminal law in the US market.

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)

The Kenyan TJRC

AN OUTSIDER'S VIEW FROM THE INSIDE

RONALD C. SLYE

Seattle University

With a Foreword by Archbishop Desmond Tutu



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
 978-1-108-42203-1 — The Kenyan TJRC
 Ronald C. Slye, Foreword by Desmond Tutu
 Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108422031

DOI: 10.1017/9781108380010

© Ronald C. Slye 2018

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2018

Printed in the United States of America by Sheridan Books, Inc.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Slye, Ronald, author. | Tutu, Desmond, writer of foreword.

TITLE: The Kenyan TJRC : an outsider's view from the inside / Ronald C. Slye; with a foreword by Archbishop Desmond Tutu.

DESCRIPTION: New York, NY : Cambridge University Press, 2018. | Includes index.

IDENTIFIERS: LCCN 2018001772 | ISBN 9781108422031 (hardback) | ISBN 9781108434508 (pbk.)

SUBJECTS: LCSH: Kenya. Truth, Justice and Reconciliation Commission. | Kenya. Truth, Justice and Reconciliation Act, 2008. | Truth commissions—Kenya—History. | Transitional justice—Kenya. | Human rights—Kenya. | Reconciliation—Political aspects—Kenya. | Kenya—Politics and government—2002–

CLASSIFICATION: LCC KSK2095 .S59 2018 | DDC 323.49096762—dc23

LC record available at <https://lccn.loc.gov/2018001772>

ISBN 978-1-108-42203-1 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)

To JS and CQSS

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)

Contents

<i>List of Figures</i>	<i>page</i> ix
<i>List of Maps</i>	xi
<i>Foreword by Archbishop Desmond Tutu</i>	xv
<i>Acknowledgments</i>	xix
<i>Timeline</i>	xxiii
Introduction	1
1 The Endgame	6
2 The Most Expansive Mandate	49
3 The Elephant in the Room	84
4 I am Kenyan: Voices of the Wananchi	163
5 The Elephant Returns	197
6 Ships Passing in the Night: The ICC, the Kenyan Government, and the TJRC	231
<i>Index</i>	285

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)

Figures

1.1	Gado – We Need More Time	<i>page</i> 15
2.1	TJRC Commissioners and Kofi Annan/Noor Khamis	49
3.1	Gado – Kiplagat and statement taking	94
3.2	Gado – I will not resign	115
3.3	Gado – Stepping aside	161
6.1	Gado – ICC then and now (Don’t be vague)	236

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)

Maps

1	Map of Kenya	<i>page</i> xiii
---	--------------	------------------

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)



MAP 1 Map of Kenya
(Map No. 4187 Rev.3, December 2011, United Nations, reproduced with permission)

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)

Foreword

How does one move beyond . . . beyond a genocide, crimes against humanity, apartheid? The latter was the question that faced my country with the election of Nelson Mandela in 1994. How were we to move beyond apartheid? How could we create a new South Africa that was different from, better than, but still acknowledge, our tragic past?

To answer that question, we looked to other countries that had undergone similar transitions, particularly Argentina and Chile. In the end, we settled on the creation of the Truth and Reconciliation Commission (TRC), which I was blessed to chair. We realized that in order to create a united South Africa, we would require a measure of forgiveness – forgiveness that would not only enable the healing of a nation, but would, for those who embraced it, begin the healing of individuals who had perpetrated crimes, or who had suffered, under apartheid. National unity and reconciliation are dependent upon some amount of tolerance and forgiveness. That said, they are equally dependent on truth and justice.

Forgive me for being a bit biased in my assessment that the South African TRC accomplished a good deal. New information was revealed, and there were remarkable instances of forgiveness and apology. As with any human endeavor, however, this endeavor also suffered from its limitations and flaws. Some of those were self-imposed, and some were beyond our control. The delay in providing reparations and the failure to prosecute those who did not apply for, or were denied, amnesty were outside of our control. It is unrealistic to expect any one process to shoulder the full weight and responsibility of addressing a long history of injustices. Addressing such divided pasts in a meaningful way is a complex challenge that requires multiple actors and a long-term commitment. One need only look at South Africa today to realize that as a country we have a long way to go to address the demons of our past. Notwithstanding these limitations, and perhaps because of our successes, the

South African TRC is still a model that other societies adopt and adapt to address their own tragic histories. Just as we looked to the efforts of other countries in designing our own truth commission, so too do many other countries today look to the South African commission for inspiration and guidance.

Kenya is one of the more recent examples of an effort to improve upon what we did in South Africa. After the near-genocidal violence that accompanied the 2007 presidential election in Kenya, the Kenyan people embraced a series of initiatives to strengthen national unity and prevent a reprise of the violence. One of those initiatives was the creation of the Kenyan Truth, Justice and Reconciliation Commission (TJRC). The Kenyan Commission turned out to be far more controversial than the South African one. Some have condemned it as a failure; others have praised its successes. In fact, today, prominent politicians in Kenya increasingly call for the full implementation of the recommendations provided in the TJRC's final report. How then can we evaluate the Kenyan Commission?

In this volume, Ron Slye has provided us with a detailed and rich account of the TJRC's accomplishments and failures that can be used to evaluate the Kenyan effort. Ron was introduced to the practical side of truth commissions when he became a consultant to the South African Commission. He went on to spend much of his academic life studying, researching, writing about, and reflecting on how best to address mass atrocities and legacies of injustice, including the proper role of truth commissions. Small wonder that he was then chosen to be one of three international commissioners (and the only non-African) on the Kenyan TJRC. He thus came to the Kenyan Commission with a good deal of knowledge and thoughtfulness about what such a process could and could not accomplish.

The Kenyan Commission was designed to be an improvement on the South African Commission. Most importantly, the Kenyan Commission was required to look at violations of socioeconomic rights (such as the right to access to housing, water, food, education, health care, etc.) in addition to the more traditional types of violence: killings, torture, sexual violence, and disappearances. The South African Commission has in fact been criticized for not including such structural violations as part of the core of its mandate. The Kenyan Commission also implemented innovative practices to solicit testimony concerning the violation of socioeconomic rights and put in place practices and procedures that resulted in the largest participation by women in a truth commission process to date. There were also notable failures in terms of fulfilling all of the terms of its broad mandate, but also concerning the Commission's acquiescence in the president's demand to remove references

to his father's land dealings. Finally, the Kenyan Commission was hampered by the fact that its chair was linked to three types of human rights violations the commission was charged with investigating. As Ron so ably recounts, this became a major challenge for the Commission, both internally and externally, as they tried to agree to a process to evaluate those conflicts of interest. It is a sobering story that reminds us that even the best-designed institutions are dependent on the character and integrity of those chosen to serve them.

I am sometimes asked if truth commissions are useful at all. Aren't they just a soft form of justice, or even a vehicle to prevent justice? Absolutely not. If done well, they increase public knowledge about what happened and, in some cases, why it happened and who is responsible. To appreciate the power of the truth, one only needs to read Ron's description of the enormous lengths to which the president of Kenya went in order to remove the reference to his father's land transactions. The paragraphs that were altered merely recounted the testimony of a witness; they were not part of the findings of the Commission. In other words, the Kenyan Commission did not conclude that the president's father had engaged in illegal land dealings. They merely reproduced in their report testimony of a witness to that effect – testimony that was given in public and under oath. Nevertheless, the president and his advisors resorted to threats and bribes to have that testimony removed. It is a sobering reminder of the power of the truth.

More than revealing truth, truth commissions provide a safe space for individuals of all walks of life to tell their stories, to recount their experience of the gross violations of human rights that are the focus of such commissions. The Kenyan Commission received over 40,000 statements from individual Kenyans detailing their experience with a wide range of human rights violations. This is the largest number of individual statements ever collected by a truth commission – it is almost twice as much as we received in South Africa. The fact that so many Kenyans engaged with the Commission – including the more than 1,000 who testified in their public hearings and the hundreds of groups who submitted written memoranda – is a testimony to the need for such a process. Regardless of whether one views the Kenyan Commission as a success or a failure, there is no question that the people of Kenya, like most people throughout the world who have suffered from such violations, desire an opportunity to tell their stories and to learn the truth about the individuals and institutions who are responsible for the violations that they and their loved ones suffered. While the TJRC's final report includes some of those stories, the Kenyan government has refused to produce more than a handful of copies of the report, and has removed it from the internet. I am pleased that Ron's

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)

xviii

Foreword

university has made it available online for all of those who want to read it, including the brief, twenty-two-page executive summary and the dissent that he wrote with the other three international commissioners. It is, therefore, fitting that Ron has included an entire chapter recounting some of those stories. It is, in the end, those individuals, and those stories, that are at the heart of why Ron and so many like him do the work that they do.

Archbishop Desmond Tutu

Acknowledgments

I have many people to thank who provided invaluable support during my work in Kenya and supported me in the writing of this book. Seattle University (SU) did not hesitate to provide me with a three-year leave of absence so that I could live and work in Kenya. Three successive deans supported me during this period: Kellye Testy, Mark Niles, and Annette Clark. I also received sage advice from my SU faculty colleagues Maggie Chon and Natasha Martin, and with my frequent coauthor and coworker, Beth van Schaack. Earl Sullivan, Annie Omata, and Alison Pastor provided fantastic research assistance, and the students in my transitional justice seminar in the fall of 2015 provided useful suggestions on an earlier draft of this manuscript. I also received useful feedback from the human rights seminar run by Jim Silk at Yale Law School, and the summer scholarship workshop at Seattle University School of Law. Nora Santos and Junsen Ohno provided enormous support to me before, during, and after I was in Kenya. Barbara Swart, Bob Menanteaux, and Tina Ching provided much needed library and web-related assistance.

While I was in Kenya, Stephen Maroa provided invaluable support to me and my family. Stephen was far more than a driver. He gave me insights into Kenya that I could not receive anywhere else. I developed positive relationships with all of the commissioners at one time or another, though as recounted in this book some of those relationships became strained at times, or even broken. While I benefited and learned a good deal from each of the other commissioners, I will always have the fondest memories of my work with Berhanu Dinka. He and his wife, Almaz, were generous hosts, providing some of the best Ethiopian food I have ever eaten. Berhanu was always a calm and soothing presence. I confided in him; asked, and often followed, his advice; and, through his example and counsel, learned how to adapt my more Western-trained assumptions and instincts to an African context.

Berhanu passed away in June of 2013, shortly after we had finished our work. I had hoped to consult with him in the writing of this book, and I know that it is less complete because of his absence. I felt his presence, and heard his voice, as I wrote and rewrote this manuscript. His influence can be felt throughout the book.

The staff of the TJRC did a tremendous job under often trying circumstances. There were so many dedicated individuals that worked for the Commission, and who worked enormous hours to uncover new information about past injustices; to provide a voice to the many Kenyans who engaged with us; and who made sure, as the saying goes, “that the trains ran on time.” Japhet Biegon, our director of research during most of our life, deserves special mention. He brought an unusual level of integrity, sophistication, organization, and calm to his work and the Commission. Without him, not only would our final report be far less than what it is, but it would probably not exist. His dedication to Kenya, human rights, and social justice provides me with optimism about the future of Kenya.

I also learned and received wise counsel from numerous leaders from Kenyan civil society. In particular Binaifer Nowrojee and Muthoni Wanyeki were always available with wise advice and counsel. They are some of the most sophisticated civil society leaders I have come across anywhere, and Kenya is lucky to claim them. My optimism about the future of Kenya, which is sometimes difficult to muster, is sustained by these two and other similar leaders, including George Kegoro, Mugambi Kiai, Maina Kiai, and many others.

As I was learning how to adapt to a highly political environment and how to navigate the numerous challenges we faced, I relied upon two sets of people outside of Kenya. Norman and Constance Rice have become good friends over the years. I benefited enormously from their wise counsel, which is informed by decades of experience in public life. When I was feeling distraught and pessimistic, I knew if I reached out to either of them I would receive a perspective and wisdom that would help me get over the latest hurdle and move on with the important work we were doing. Anu and Zak Yacoob played a similar role. They, too, collectively have decades of experience in public life. During my time in Kenya, I would often escape to South Africa to recharge, and Anu and Zak were always generous with their time and wisdom. Priscilla Hayner and Yasmin Sooka were also useful sounding boards and sources of wisdom. Yasmin is one of the few people to have served on two truth commissions, and I benefited, and continue to benefit, from her wisdom and experience.

The staff of the Panel of Eminent African Personalities provided important support to the three international commissioners as we transitioned to Kenya.

Ambassador Nana Effah-Apenteng always provided wise counsel and was the source of many fascinating stories concerning Kenyan and African politics, often recounted over late night dinners. Gerry Bennet, and then Justin Jepson, provided counsel and support during some of the most challenging parts of our operations. Last, but by no means last, Neha Sanghrajka was an invaluable supporter to both me and the Commission. It was Neha who first identified me as a potential commissioner – so I have her to both thank and blame! Neha worked harder than anyone else I ever came across in Kenya. My optimism for Kenya's future is also based upon Neha's commitment to her country and its future.

I would be remiss if I did not thank the numerous members of the diplomatic community who provided support, and sometimes provided much-needed criticisms and advice. As I cannot mention all of them, I thank them here collectively. While the United Nations played a mixed role with the Commission, two officials in particular played important positive roles in our work. The UN resident coordinator in Nairobi, Aeneas Chuma, often provided wise and calm counsel. Ozonnia Ojielo was a strong anchor in an often rocky sea, whether it was navigating Kenyan civil society, the United Nations, or the Kenyan government. Ozonnia brought a level of sophistication and insight that was invaluable to both me and the Commission.

As I began to write the book and to seek a publisher, Michaela Wrong generously agreed to meet me and provide advice. I have enjoyed and learned much from her numerous books. One of the books I always recommend to my students, and which I read as I made my move to Kenya, is her book about Kenya, *It's Our Turn to Eat*. I tried to write this book so it would be as easy to read, as accessible, and as informative, as Michaela's books. I am grateful for her example and wise counsel.

Dave Danielson, who has been a friend and a fellow traveler in the worlds of accountability and transitional justice, was an invaluable reader and editor of an earlier version of this manuscript. Dave provided the sort of service that I always crave, and that we all need, but so rarely get: brutal, honest, and constructive criticism. Dave warned me that he was a brutally honest reviewer, and he did not let me down. This book is much better as a result of his input, and I am forever grateful for his suggestions and advice.

John Berger at Cambridge University Press has been a joy to work with. Ever patient with my missing deadlines, John identified a number of peer reviewers who provided numerous useful suggestions for the manuscript, some of which I adapted and which have made the book stronger. I want to thank those anonymous reviewers for taking the time not only to read the manuscript, but also to provide useful suggestions and feedback. The team at

Cambridge was also first class, including Emma Collison, Mathavan Ishwarya, and Elizabeth Kelly, who made the production side of publication a breeze.

David Krut generously allowed me to reprint the artwork by Diane Victor that graces the cover. My thanks to both him and Diane Victor for their support.

Archbishop Desmond Tutu has been a guiding presence in my life since we first briefly met in the 1990s when I worked with the South African Truth and Reconciliation Commission. As you will see in the following pages, he played a small but important role during our early efforts to address the conflicts of our chair. He is one of the few moral voices in the world today and continues to have the courage to speak truth to power in all parts of the world. At a time when he had retired and was no longer taking on new projects (he claimed this time to have *really* retired), he generously agreed to write a foreword for this book. I am humbled by his work, both big and small, every day.

Finally, I could not have done any of this without the constant support of Jen. She joined me for two of the three years that I lived in Kenya and provided a haven of sanity, comfort, and love in what was often a turbulent sea of politics, intrigue, and seemingly insurmountable challenges. Without her support, I could not have done the work that I did, or written the book that is before you. She has also now given me Charlie, whose smile and glee make it so much easier to have confidence and optimism about the future of our world.

Timeline

December 27, 2017 –	Post-Election Violence
February 23, 2008	
February 28, 2008	National Accord
October 15, 2008	Waki Commission Report Released
July 9, 2008	Kofi Annan Hands Evidence to ICC
August 3, 2009	TJRC Commissioners Sworn In
March 31, 2010	ICC Authorizes Investigation
December 15, 2010	Six Kenyans Indicted by ICC (the “Ocampo 6”)
April 16, 2010	TJRC Requests Creation of Tribunal to Investigate Chair of the TJRC
October 29, 2010	Chief Justice Announces Creation of Tribunal to Investigate Chair of the TJRC
November 2, 2010	Chair of the TJRC “Steps Aside”
April 11, 2011	Launch of TJRC Public Hearings
April 27, 2011	Chair of TJRC Stops Tribunal from Investigating His Past
May 10, 2011	Tribunal’s Term Expires with No Decision
January 4, 2012	Chair of TJRC Returns to Commission
March 4, 2013	Election of Uhuru Kenyatta and William Ruto
May 21, 2013	Final Report Handed to President and Made Public
June 2, 2013	Dissent of International Commissioners Made Public
March 25, 2015	President Kenyatta Apologizes and Announces 10-Billion-Shilling Restorative Justice Fund

Cambridge University Press
978-1-108-42203-1 — The Kenyan TJRC
Ronald C. Slye , Foreword by Desmond Tutu
Frontmatter
[More Information](#)
