

possible alternative is to begin from first principles, to argue why law must aspire to morality, and then expose the moral merits or shortcomings of this or that legal interpretation.¹⁹ Yet, it is probably true that the internal view could be more effective in convincing skeptics, by its reference to intralegal perspectives.

Last, it is important to point out that the fact that Dannenbaum is careful—and probably prudent—to suggest legal reforms that appear to be modest does not mean that his soldier-centric view of aggression lacks far-reaching implications. For one, if it is true that the main wrong of aggression lies in the wrongful killing of individuals, it becomes unclear why the crime of aggression should require inter-*state* force to begin with. If killing soldiers in war can form the normative basis for an international crime, we should think, perhaps, of a comparable crime that would capture the wrongfulness of unjust wars even when *nonstate* actors are involved. For instance, one can think of extending criminal liability to unjust attacks by nonstate actors, even when they target combatants. Conversely, it is even possible to imagine a crime of unjust resort to force by states against armed groups, absent sufficient justification. While these notions must be examined thoroughly, this book's normative account certainly calls for a proper engagement with these questions.

In sum, *The Crime of Aggression, Humanity and the Soldier* excels in the challenging task of transposing ethical concepts into detailed suggestions for legal reform. By constantly considering the institutional and practical implications of its proposals, the book remains grounded and does not veer off to utopianism. Moreover, it is well structured, expertly written, and never digresses from its main argument. This book will surely be central in shaping the debate on the crime of aggression in the years to come.

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¹⁹ This approach is taken, for instance, in HAQUE, *supra* note 12, ch. 2.

The Kenyan TJRC: An Outsider's View from the Inside. By Ronald C. Slye. New York: Cambridge University Press, 2018. Pp. xxiii, 291. Index. doi:10.1017/ajil.2019.24

Following elections held at the end of 2007, Kenya descended into unprecedented sectarian violence along ethnic and political lines, which are too often coextensive in Kenyan politics.¹ The conflagration was spurred by concerns among members of the opposition party and its supporters that the election—which brought Kikuyu President Mwai Kibaki to power—had been rigged. Supporters of Kibaki's challenger, Raila Odinga, attacked members of the Kikuyu and Kisii communities; retaliatory raids then targeted ethnic groups associated with the opposition, including the Luo, Luhya, and Kalenjin communities. All told, over 1,000 lives were lost, 600,000 citizens were internally displaced or forced from their homes, countless women and men were subjected to sexual violence (including genital mutilation), and thousands of pieces of private and governmental property were destroyed.² Although this post-election violence was to a certain degree spontaneous, evidence subsequently emerged that government officials at the local and national levels organized, financed, and otherwise spurred the perpetrators on and deployed armed gangs, including the shadowy *Mungiki*, to join the fray.³ This tragic turn of events took many by surprise, as Kenya had long been considered a beacon of stability, development, and pluralism in the region. Thanks to several investigative commissions convened following the election, it is now

¹ Jacob Mwathi Mati, *Ethnicity and Politics in Kenya*, in THE PALGRAVE HANDBOOK OF ETHNICITY 1–17 (Feb. 11, 2019).

² See Office of the High Commissioner for Human Rights, Report from OHCHR Fact-Finding Mission to Kenya, 6–28 (Feb. 2008).

³ Felix Olick, *The International Criminal Court (ICC) Has a List of Former Mungiki Members Set to Testify Against Deputy Prime Minister Uhuru Kenyatta and Former Head of Civil Service Francis Muthaura*, STANDARD DIGITAL (Nov. 16, 2012).

abundantly clear that this rosy perception masked deep-seated grievances stemming from the colonial period and beyond that have never adequately been acknowledged, much less remedied.

Following these events, the African Union requested that the Panel of Eminent African Personalities, chaired by former UN Secretary-General Kofi Annan, mediate the crisis occasioned by the post-election violence.⁴ A National Accord was brokered that called for the convening of a Commission of Inquiry on Post-Election Violence (known as the “Waki Commission” after its chair, Justice Philip Waki) with a mandate to investigate what happened, including the conduct of state security agencies implicated in the violence, and to make concrete recommendations.⁵ The Waki Commission called on the government to establish a Special Tribunal to investigate and prosecute perpetrators. If the government failed to do this, the Waki Commission recommended that Kenya refer the situation to the International Criminal Court (ICC). Kenya also took some minimal steps to create a more broad-based truth commission. When the threat of ICC action materialized, the government finally created the Truth, Justice, and Reconciliation Commission (TJRC or Commission) to inquire into the root causes and antecedents of the violence.⁶

In a new book, *The Kenyan TJRC: An Outsider's View from the Inside*, Professor Ronald C. Slye of Seattle University School of Law offers a compelling account of his service as the only non-African international commissioner on the TJRC, having

been appointed by the Panel of Eminent African Personalities (p. 8) on the basis of his expertise in transitional justice and his prior service as a consultant to the South African Truth & Reconciliation Commission.⁷ The book is part poignant memoir, in which Professor Slye recounts his and his colleagues attempts to be true to their mandate in the face of startling countervailing forces, and part essential reading on the theory and practice of transitional justice. The book is also, in many respects, an exercise in setting the record straight. Several scandals rocked the work of the Commission, including revelations that its chair, the late Kenyan diplomat Bethuel Kiplagat, was directly implicated in three foci of the Commission's work: the misappropriation of land that had been reserved for public use, political assassinations, and historical massacres. Added to this are accounts of hostile leaks, brazen bribes, and strident demands coming all the way from the State House that certain conclusions regarding land grabbing by Jomo Kenyatta—the father of Kenyan independence and of the current president—be excised from the TJRC's final report over the objections of some of the commissioners (p. 185). These various narrative strands are effortlessly woven together as Slye situates his remarkable experience on the Commission within the academic and policy literature on transitional justice.

Beyond its academic importance, the book is all the more significant because the Kenyan government inexplicably dismantled the TJRC's website, rendering its report and the underlying materials unavailable to the public at large. In addition to publishing this account, Slye has created a companion website⁸ containing the TJRC's records and a full copy of the report—which runs over 2,000 pages—including the international commissioners' piercing dissent to the decision to accede to the government's

⁴ See Beth Van Schaack, *Seeking Truth, Justice & Reconciliation in Kenya*, INTLAWGRRLS (July 7, 2009), at <http://www.intlawgrrls.com/2009/07/seeking-truth-justice-reconciliation-in.html>.

⁵ See Int'l Ctr. Transitional Just., *The Kenya Commission on Post-Election Violence*, available at <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf>. The Waki Commission's report is available here: http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf.

⁶ See The Truth, Justice and Reconciliation Bill, 2008 (Ken.), available at <https://www.usip.org/sites/default/files/file/resources/collections/commissions/Kenya-Charter.pdf>.

⁷ The other two international commissioners were Ambassador Berhanu Dinka of Ethiopia and Judge Gertrude Chawatama of Zambia. All of the other commissioners were Kenyan, representing different ethnic groups (p. 9).

⁸ See <https://digitalcommons.law.seattleu.edu/tjrc-core>.

ensorship demands around land-grabbing at the dawn of Kenya's independence.⁹

The Kenyan TJRC joined a long tradition of truth and reconciliation commissions dating back to the political transitions in the 1980s, particularly in Latin America.¹⁰ In many of these transitional contexts, the prosecution of those deemed responsible for the commission of atrocity crimes was foreclosed, either legally—due to the existence of an amnesty or other “full-stop” laws¹¹—or as a practical matter—because responsible individuals retained enough political or military power to jeopardize the transition if legal accountability was pursued too vigorously.¹² In the face of such blockages, actors developed an array of institutional innovations, including truth and reconciliation commissions and lustration programs, that fell short of criminal accountability but that still responded to some of the felt needs of victims for redress and reform. At the time, these measures were often seen as a second-best alternative to a more robust retributive response. Today, we recognize not only the inherent limitations of the system of criminal justice when it comes to the rehabilitation of victims and the repair of societies but also that these alternative responses can have value in and of themselves.¹³ Truth commissions in particular respond to the emergent right to

truth,¹⁴ identify patterns and practices of violence with an eye toward preventing their recurrence, and offer cogent recommendations for reform.

Building on this history, the Kenyan TJRC featured a number of important innovations of institutional design and best practices that will no doubt inform such efforts in the future. For one, and as revealed by its title, the TJRC was granted a unique three-pillar mandate focused on truth, justice, and reconciliation in equal measure. The justice imperative was more express, and expansive, than in prior truth commissions (pp. 60–61). Although the constitutive legislation did not allow commissioners to grant amnesty to perpetrators, they could subpoena testimony, offer expansive testimonial immunity to witnesses, name names, and make recommendations for prosecution (pp. 67, 188–92).

Second, the TJRC operated pursuant to an extended temporal jurisdiction stretching back to the date of Kenya's independence: December 12, 1963. This enabled the TJRC to document not just the post-electoral violence—described as “near genocidal”—but also to produce a better understanding of the causal factors and antecedents, some of which date to the colonial period, with an eye toward prevention and non-recurrence (p. 8). This wider lens enabled the Commission to look at a number of historical injustices that had never received focused attention in Kenya, such as the *Shifita* War (1963–67) in the Northern Frontier district involving ethnic Somali secessionists;¹⁵ the 1984 *Wagalla* Massacre (the worst in Kenya's history) that left upwards of 3,000 ethnic Somalis dead;¹⁶ and the as-yet unsolved assassination of Foreign Minister

⁹ The chapter on land was subject to several last-minute changes at the insistence of the Office of the President. The dissent, which discusses the changes the Kenyan commissioners agreed to, is available here: <https://digitalcommons.law.seattleu.edu/tjrc-core/8>.

¹⁰ See Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 LAW & SOC. INQUIRY 79 (1995).

¹¹ See, e.g., *Ley de Punto Final*, Law No. 23,492 of 24 December 1986 (Arg.).

¹² José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, 13 HAMLINE L. REV. 623, 644 (1990) (discussing the political realities that may constrain the full implementation of transitional justice principles).

¹³ See generally Eric Brahm, *Uncovering the Truth: Examining Truth Commission Success and Impact*, 8 INT'L STUD. PERSPECTIVES 16 (2007) (discussing potential contributions of truth commissions to transitioning states).

¹⁴ See Human Rights Council Resolution 2005/66, Right to the Truth, para. 1 (Apr. 20, 2005) (“[r]ecogniz[ing] the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights”); Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies*, 33 BERKELEY J. INT'L L. 526 (2015).

¹⁵ Patrick Mayoyo, *Shifita War Marked the Start of Brutal Killings*, DAILY NATION (May 22, 2013).

¹⁶ John Oywa, *Fresh Secrets of the Wagalla Massacre in Which More than 3,000 People Died Have Come to Light*, STANDARD DIGITAL (June 11, 2011).

Robert Ouko in 1990.¹⁷ As one of many key recommendations, the Commission called for a repeal of the 1974 Indemnity Act, which for all intents and purposes imposed an amnesty on those responsible for the crimes of the *Shifita* War. In addition to expanding the public's knowledge of these discrete events, the Commission made important revelations about historical injustices around land distribution and expropriation—the most frequent complaint articulated by witnesses before the Commission. The importance of this issue in Kenya is underscored by the fact that land grabbing was the one allegation that powerful government actors sought to have removed from the final report on the eve of publication (p. 185). This longer time frame produced a more accurate and fulsome explanation of the post-election violence: “The picture painted by the testimony and other information we received is of a Kenya struggling with the weight of generations of gross violations of human rights” (p. 195).

Third, the TJRC's mandate also compelled it to examine not just violations of victims' rights to physical integrity but also of their economic, social, and cultural (ESC) rights. In this regard, the Commission went beyond the focus on conflict minerals taken up by commissions in Liberia¹⁸ and Sierra Leone.¹⁹ This attention to the full panoply of human rights enabled the TJRC to explore, and come to a sophisticated understanding of, the dominant economic interests underlying political violence throughout Kenya's modern history. The promotion of ESC rights also informed many of the Commission's recommendations, which sought to respond to victims' demands for both retributive and restorative justice (pp. 62, 77).

Fourth, informed by the feminist transitional justice literature, the TJRC mainstreamed gender in all aspects of its work.²⁰ This included the

creation of a special gender unit that focused on Sexual and Gender-Based Violence—including against men—as well as systemic forms of gender discrimination (pp. 68–72). Over 1,000 women participated in women's forums held around the country to offer safe spaces for women to testify (pp. 192–93). Its mandate to consider ESC rights also enabled the Commission to address traditional cultural practices harmful to women alongside the feminization of poverty—forms of violence that regularly receive less attention than war-time sexual violence in transitional justice processes (p. 71). In terms of its staffing, the Commission boasted a rare gender balance and featured the first woman chair of a truth commission, renowned peacebuilder Tecla Namachanja Wanjala. The Commission also formed partnerships with the most important Kenyan women's organizations, including *Maendeleo ya Wanawake* and the Gender Violence Recovery Center at the Nairobi Women's Hospital.²¹ This gender mainstreaming reversed the trend revealed in research suggesting that female participation in previous truth commission processes has been disproportionately low.²²

Fifth, the TJRC developed a number of important policies and procedures that have set a new standard of practice, including around data collection and analytics; ways to magnify institutional impact on a limited budget, which was largely controlled by the Kenyan

TRANSITIONAL JUST. (July 2006); Christine Bell & Catherine O'Rourke, *Does Feminism Need a Theory of Transitional Justice? An Introductory Essay*, 1 INT'L J. TRANSITIONAL JUST. 23 (2007); Fionuala Ní Aoláin, *Advancing a Feminist Analysis of Transitional Justice, in FEMINIST PERSPECTIVES ON TRANSITIONAL JUSTICE: FROM INTERNATIONAL AND CRIMINAL TO ALTERNATIVE FORMS OF JUSTICE* (Martha Albertson Fineman & Estelle Zinsstag eds., 2013).

²¹ See Ron Slye, *Feminism and the Kenyan TJRC (Part I)*, INTLAWGRRLS (Nov. 1, 2018), at <https://ilg2.org/2018/11/01/feminism-and-the-kenyan-tjrc-part-1>; Ron Slye, *Feminism and the Kenyan TJRC (Part II)*, INTLAWGRRLS (Nov. 1, 2018), at <https://ilg2.org/2018/11/01/feminism-and-the-kenyan-tjrc-part-2>.

²² See Kimberly Theidon, *Gender in Transition: Common Sense, Women, and War*, 6 J. HUM. RTS. 453 (2007) (discussing attempts to incorporate a greater gender sensitivity to transitional justice processes, focusing in particular on Peru).

¹⁷ Robert Ouko “Killed in Kenya State House,” BBC (Dec. 9, 2010).

¹⁸ *Truth Commission: Liberia*, U.S. INST. PEACE (Feb. 20, 2006), at <https://www.usip.org/publications/2006/02/truth-commission-liberia>.

¹⁹ *Truth Commission: Sierra Leone*, U.S. INST. PEACE (Nov. 1, 2002), at <https://www.usip.org/publications/2002/11/truth-commission-sierra-leone>.

²⁰ See Vasuki Nesiah, et al., *Truth Commissions and Gender: Principles, Policies, and Procedures*, INT'L CTR.

government; and techniques to manage expectations around accountability and reparations, which have dogged prior efforts. Slye conveys the Commission's gradual realization of the need to deploy strategic messaging in order to control the narrative and tackle deliberate, and inadvertent, misinformation about its work that was in the Kenyan ether. Throughout their tenure, the commissioners endeavored to produce an array of truths (including forensic, social, and dialogic) in the face of revisionist and competing narratives and to foster a genuine public conversation within the Kenyan populace (pp. 164–65).

Over the course of its existence, the TJRC experienced multifaceted efforts to sabotage its work from a number of fronts. Within its own ranks, a perennial challenge was Kiplangat's incessant dissembling and unwillingness to resign notwithstanding the burgeoning allegations against him. The extraordinary result is that the Commission ultimately recommended that its chair be prosecuted for the very human rights violations that it was charged with investigating (p. 84). When it comes to governmental resistance, the book details acts of bribery and collusion, the bullying of staff members, and commissioners literally hijacking drafts of the report at the printers. Kenyan commissioners were forced to go into hiding in the face of threats, and Slye recounts how he dealt with mounting concerns about his own safety. More surprisingly, perhaps, civil society organizations—who might have been natural allies—did not fully embrace the TJRC, in part due to the conflicts of interest of the TJRC's chair but also due to misunderstandings—some purposefully disseminated—about the nature of its work and longstanding distrust of government institutions, particularly among historically disfavored minority and regional communities. Throughout the book, Slye recounts his and his colleagues' ethical and strategic deliberations about how to build trust within the populace and address these efforts to undermine their work. This culminates in the difficult (and unprecedented within the history of truth commissions) decision by the international commissioners to issue a dissent in the face of overt political pressure to amend the Commission's conclusions.

The final chapter of the book contributes to the ICC's increasingly beleaguered history by providing a comprehensive postmortem of the Kenya cases. The TJRC and the ICC worked largely in acoustic isolation—a relationship of “avoidance” in Slye's words (p. 5). That said, Slye identifies the reciprocal influence of events unfolding within the two institutions, particularly with the indictment for crimes against humanity of the so-called Ocampo Six,²³ Kenya's multiple efforts to undermine the ICC proceedings from within and without the Rome Statute (all while ostensibly “cooperating” with the Court as was its obligation as an ICC member state), and the ultimate collapse of the Kenyan prosecutions amidst rampant witness tampering.²⁴ The TJRC also became somewhat entangled within Kenya's unsuccessful, and largely disingenuous, admissibility challenge on complementarity grounds. Slye concludes that action by the ICC actually undermined accountability efforts in Kenya—a process he calls “negative complementarity” (p. 242)—by derailing the Waki Commission's proposal that Kenya establish a special court to address the post-election violence (pp. 237–38, 243). At the same time, it seems increasingly clear that the presence of the ICC—coupled with the strategic alliance between ICC defendants Kenyatta and Ruto and the unification on one ballot of the ethnic groups that had been on opposite sides in 2007–08—was instrumental in keeping the 2013 elections relatively free of violence. Unfortunately, this effect had worn off by the 2017 elections,

²³ The ICC's first prosecutor, Luis Moreno-Ocampo, charged six prominent Kenyans with masterminding the post-election violence, three from each major political bloc. The defendants were Vice President William Ruto, former Industrialization Minister Henry Kosgey, and radio presenter Joshua Arap Sang, who were associated with the Orange Democratic Movement opposition party, and President Uhuru Kenyatta, civil servant Francis Muthaura, and former police commissioner Maj. Gen. Mohamed Hussein Ali, who were associated with the majority Party of National Unity.

²⁴ The cases involving offenses against the administration of justice remain open, although the defendants are at large. *See, e.g.*, Situation in the Republic of Kenya, Prosecutor v. Walter Osapiri Barasa, Warrant of Arrest, Case No. ICC-01/09-01/13 (Aug. 2, 2013).

which also triggered serious violence, although not to the same scale as in 2007–08.²⁵

Throughout his account, Slye offers a candid assessment of where the TJRC fell short of its mandate and its most ambitious aspirations, but also where it was able to make important progress on enhancing Kenyans' understanding of their own history. Notwithstanding all of its challenges, the TJRC produced remarkable results. Over 40,000 Kenyan voices were heard through the Commission's statement-taking process and live hearings—the largest number of victim statements ever collected by a truth commission. The Commission also generated dozens of cogent recommendations, which remain unfulfilled. Slye's book reveals just how hard this work is and how many countervailing forces must be overcome to deliver justice—broadly defined—after mass violence.

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