

Addressing the Post-Election Violence: Micro-Level Perspectives on Transitional Justice in Kenya¹

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The necessity of transitional justice in Kenya and the merits of certain institutional mechanisms in particular have been vigorously debated in this forum, as well as within the country itself. In both of these contexts, the perspectives of victims of past violence have received only modest attention.² Of course, their voices hardly rate as the only ones that matter; politicians, officials, activists and scholars are also vital to transitional justice processes, not to mention non-victims in the general population, whose participation as defendants, witnesses and observers is typically required for such processes to prove constructive. That being said, whether or not victims are satisfied with the approach taken and experience some degree of restoration and healing as a result represent clear benchmarks to measure the acceptability and efficacy of transitional justice measures.

To help understand how victims of the 2007-08 episode of post-election violence and other past political abuses in Kenya view transitional justice and what they might be willing to contribute to its execution, we conducted a series of focus group discussions around the country in the Summer 2009. The time was ripe for gauging the opinions of victims, since key actors within and outside the country were considering whether to try suspects of post-election violence locally or at the International Criminal Court, while simultaneously Kenya's Truth, Justice, and Reconciliation Commission (TJRC) moved toward implementation.

We selected areas of Kenya most affected by post-election violence, and an experienced moderator conducted pairs of focus groups using a mixture of Swahili and local languages in seven different locations: Nairobi's Mathare and Kibera slums; Kitale, Eldoret, Nakuru, and Naivasha in Rift Valley province; and Kisumu in Nyanza province. In each location, we split the two groups either between men and women or between youths and the middle-aged/elderly. The locations resulted in groups of mixed ethnicity and political affiliation. The groups ranged in size from five to 10 participants, with an average of six. To recruit these individuals, we relied on a network of grassroots-level non-governmental organizations that work with victims in the various locations. All of the participants had been affected by post-election violence via harm to their own or their family members' physical well-being and/or damage to their property.

We believe our approach, though limited in scope and lacking a representative random sample, affords certain advantages over a national public opinion survey. First, we concentrated the research on those most affected by violence and proposed transitional justice mechanisms. Second, victims are a distinct, small sub-population whose perspectives are difficult to capture—unless the concentration or overall prevalence of violations is very high—via the conventional sampling procedures that are typically employed for public opinion surveys. Purposefully

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² Notable exceptions include civil society campaigns and surveys conducted by South Consulting for the Panel of Eminent African Personalities to measure progress on the Kenyan National Accord and Reconciliation Act. For the findings of the latter, see <http://www.dialoguekenya.org>.

targeting this sub-population, including by restricting ourselves to select locations, was therefore an efficient approach to highlight an important constituency. Third, the relatively open format of focus groups enables participants to express their attitudes, beliefs and desires in their own words and thus elicits answers that provide a richer understanding of how they view complex concepts and difficult issues.

The main subjects of the discussions included various aspects of the disputed elections and resulting violence; the current political climate; and relevant dimensions of transitional justice. Here, we present insights concerning the participants' attitudes about justice and amnesty; preferences for specific institutional options; views about the ostensible tradeoff between peace and justice; and perspectives on the extent of and potential for reconciliation. Our hope is that this study, by injecting the vital perspective of victims based on recent original primary empirical research, informs not only the policy debates and institutional processes that are underway in Kenya, but also the public education programs that civil society has initiated to foster transitional justice.

JUSTICE

In principle, a successful transitional justice process is predicated on a shared conception of justice and what specific mechanisms may yield in terms of benefits for victims. Therefore, the initial question posed to each of the focus groups was: "What does justice mean to you?" Rather than mentioning abstract notions like fairness, rightness or even legality, the responses generally fell into two broad categories: punishment and compensation. Both conceptions are fully intuitive and relate directly to the concrete consequences of post-election violence. Lasting fears of living in proximity to perpetrators within communities are common. In addition, many of the participants were forced to flee their homes and jobs and face continued difficulties in subsisting as a result of injuries and the inability to find employment. Meanwhile, only a few of the participants linked justice to reconciliation, specifically dialogue and civil engagement. Thus, the dominant conceptions of justice emphasized official actions to prosecute those responsible for post-election violence, as well as material assistance.

An overwhelming majority of the participants, however, were dubious about prospects of justice actually materializing in Kenya. This skepticism is unsurprising given the country's weak judicial system, a political class that is widely perceived to be indifferent to the plight of victims of violence, and past abrogated attempts at investigations, prosecutions and reform. According to the participants, the main impediment to the implementation of justice is Kenya's leaders, who are seen as venal, dishonest and likely to manipulate any commissions and tribunals. An elder in Kitale sums up these feelings best: "Justice is devilish. I have to bribe to get justice." Likewise, a male respondent in Eldoret captured the pessimism about the current state of politics: "It's hard for Kenyans to get justice with our current crop of leaders." A youth participant in Dandora even argued that the current situation is worse than before: "Politics has really gone down. It is becoming dirtier."

AMNESTY

The amnesty clause in the act establishing the TJRC, which allows perpetrators of certain rights violations to avoid prosecution if they come forward and confess to the Commission, has been controversial. Public support for amnesty might wane in the face of ICC prosecutions, especially since many of the alleged perpetrators include present or former cabinet members, other members of parliament, local government officials, and prominent business leaders.

Likewise, the focus group participants were rarely inclined to unconditionally forgive and forget the offenses committed by those involved in the post-election violence. At the same time, the participants drew a sharp distinction between the organizers and the actual perpetrators of the violence, exhibiting a far greater willingness to grant amnesty to the latter rather than the former, albeit with caveats on both fronts. With respect to the perpetrators, many of the participants suggested a potential willingness to approve of amnesty as long as perpetrators acknowledged their wrongs, confessed in person, and expressed a sincere and meaningful desire for forgiveness. A frequent sentiment was that such steps would provide sufficient closure for individual victims to move on with their lives. As one man in Eldoret suggested, “the only way for amnesty is for them to acknowledge their wrongs. We can forgive.”

Yet not all of the focus group participants were prepared to feel consoled if perpetrators admit guilt. Some fervently rejected amnesty, expressing residual anger and resentment that is best summed up by a woman from Nakuru: “They can talk of amnesty, but we, the real victims, cannot forgive.” Another man in Nakuru echoed the fears of many respondents about amnesty promoting impunity, in making the case for accountability as a means to prevent future violence: “If they [perpetrators] killed and are released, that will motivate others to the same atrocities. There has to be punishment to deter others.” Likewise, a male participant in Naivasha argued, “they [perpetrators] should be jailed for life so that they be a lesson to others.”

INSTITUTIONAL MECHANISMS

Criminal Prosecution

The discussion of the possibility of trying individuals complicit in the post-election violence generated differing levels of support for three options: the ICC, a special tribunal in Kenya, and a hybrid system involving both international and domestic elements. At the time, all of these options were receiving serious consideration in policy debates. Subsequently, the ICC decided to proceed with formal investigations, which are likely to result in indictments of various perpetrators. While these steps appeared to diminish the prospects for instituting a domestic tribunal, this option is still advocated periodically.

A large majority of the focus group participants preferred to send those involved in the violence—especially the organizers—to The Hague for trial. The inclination to eschew local accountability, in favor of an international alternative, was based on several factors. For one, participants commonly expressed confidence in the ICC’s ability to achieve important outcomes. A young woman in Mathare indicated, “Let The Hague take ten years, but we will know the truth and at the end we will have results.” A second woman said, “Politics is accompanied with violence. Hague could change that and impunity will cease. They will be punished well there.” Others cited corruption in the Kenyan courts, the ability of politicians and other powerful individuals to subvert the legal process, and the potential for sparking further conflict. As a woman in Kibera noted, “I think they [perpetrators] should go to The Hague because you might find these politicians may know the judges and even bribe them to have their way. If they go to The Hague, truth will rule.” A man from Eldoret agreed: “Local courts don’t have justice. The organizers are rich and therefore they will interfere. They should go to The Hague so that at least justice will be served.”

A smaller number of participants advocated a process in Kenya. Some made this case on the basis that the trials would then be more accessible and enable closer observation as well as direct participation. As one participant from Kisumu stated quite succinctly, “We would like to

witness.” Similarly, an elder in Kitale argued: “I prefer here so that everyone can have their say. We have to witness in those trials. We can’t all go to The Hague; we will have a more effective trial locally.” Others reasoned that far more people could be tried locally, whereas relatively few could reasonably taken to The Hague. Certain participants also worried that conducting trials in The Hague would mean only the organizers of violence would be prosecuted, allowing the actual perpetrators to go free. The few participants who advocated a hybrid system saw the potential for complementary functions, with organizers being sent to The Hague, while a domestic tribunal would try the perpetrators.

Truth, Justice, and Reconciliation Commission

Meanwhile, the participants’ attitudes about the TJRC were almost universally negative. Many seemed skeptical of its utility and suggested this process would be a waste of resources that could instead be going directly to victims, if not a further venue of corruption, rather than serving as a useful vehicle for rapprochement. For example, a male respondent from Nakuru stated: “These commissions are just for making money. They are just using them for the wrong purposes.” A young woman in Mathare echoed his sentiments: “That is just scheme to use public money.” Others indicated that the TJRC would be a political stunt above all else, doubting the extent to which it would engage and be responsive to the victim community. As one participant noted, the process “won’t be ours,” but rather a top-level political process. A woman in Eldoret underscored this skepticism by arguing, “That commission is just theirs. We don’t have any say. In fact, for anything that happens in Nairobi, we face the repercussions.” Furthermore, multiple participants referenced a conspicuous history of failures by previous commissions to follow up on formal inquiries and effect change: “Commissions have been formed and are fake. They never act on their reports” [young woman in Mathare]. “They never implement what they report” [male respondent from Nakuru].

A minority of the participants expressed cautious support for the Commission, but still questioned its fairness, the legitimacy of its leadership and its potential impact. In addition, the few participants who did say they wanted the commission conditioned their support on the delivery of financial assistance, the creation of jobs or the punishment of offenders. These stipulations echo the observations we made earlier that victims seem especially interested in substantive outcomes. A process alone is seen as largely inadequate, not least because victims lack confidence in Kenyan institutions and officials operating with integrity and acting in the public interest, let alone conscientiously addressing the needs of victims. In fact, the TJRC has commenced operation and begun to hear evidence, but continues to be plagued by the controversy over Chairman Bethuel Kiplagat’s past association with former President Daniel arap Moi’s regime, itself a violator of human rights.

PEACE OR JUSTICE?

Earlier, we mentioned the participants’ fears that any efforts to prosecute individuals implicated in the post-election violence could incite further violence and threaten the security of populations that have already been victimized—a standard concern in countries that have undergone a transition from a period of conflict. These anxieties may be based on only the theoretical risk of a backlash, without a clearly quantifiable threat. That being said, comparative examples of such violence do exist, including instances where victims have been specifically targeted, e.g., the killings of dozens of witnesses in Rwanda’s gacaca proceedings. Along

similar lines, the absence of legislation and institutions to safeguard witnesses in Kenya has recently come to light as the ICC has begun its investigations.

These and other sorts of vulnerabilities and apprehensions presumably contribute to the fact that the focus group participants were split on whether they support legal accountability for those involved in the post-election violence, or peace and stability. Those in the latter category expressed a desire to co-exist harmoniously and to live free from fear. A woman in Naivasha advanced this point, making reference to the dire consequences of conflict, “If we had peace then we would not be wearing donated clothes.” Those desiring justice argued that justice itself is most likely to produce peace and stability in the long run. One man in Naivasha related the metaphor, “Justice is the table that carries peace.” Another said likewise, “If you have justice you get everything else.” A young participant argued, “You must have justice in order to be free.” Not everyone drew a direct link between justice and peace, but rather some participants observed that peace can be a tenuous state of affairs and mask underlying grievances that implicitly could simmer and hold the potential to become disruptive. As one woman in Kibera noted, “we are living peacefully yet we live grudgingly because some of us were violated and undermined.”

Interestingly, the participants in each focus group tend to share similar attitudes about this issue, but there were not consistent patterns by gender and location. For example, the female participants in Kibera wanted justice first and foremost, whereas their male counterparts preferred peace and stability. In Naivasha, by contrast, the female participants prioritized peace and stability, while the male participants desired legal accountability. A natural explanation for the intra-group similarities could be participants following the lead of the first one or two peers to speak. Yet the other questions did not yield this sort of consistency in responses, as might be expected if certain participants in each group were influencing their peers. In so far as we can rule out that sort of phenomenon, it appears that attitudes concerning the choice between justice and peace and stability are highly contextual in terms of geography and personal traits.

RECONCILIATION

Definitions of reconciliation varied considerably among the focus group participants. The most common understandings were forgiveness, acceptance of others, and acknowledgement of wrongs committed.

When asked whether reconciliation was occurring in their area, or in Kenya more generally, virtually all of the participants believed that progress had been modest at best. They pointed to many pieces of evidence, most notably their continuing fear of returning home, the fact that stolen properties have not yet been returned, and the failure of perpetrators to apologize or be punished for their transgressions.

The participants were equally cynical about the prospect of reconciliation down the road, even questioning the basic readiness of Kenyans to pursue and achieve this outcome. A Nakuru woman asked, “How can there be reconciliation when I am still feeling the pain for my murdered son?” This visceral reaction is evidently widespread, with another participant observing that many victims “still feel the pain.” Some also cited the ongoing presence of perpetrators in their communities and were resistant to the notion that under these circumstances reconciliation could be achieved through policy pronouncements alone. As a Kitale elder explained, “If you killed my father, [even] if the government says we should live together, I can’t live with you. I still have anger.” Others blamed inter-party wrangling within the Coalition government, which was

viewed as a persistent problem. A further source of worry was the strong ethnic elements to the post-election violence, which have not dissipated and were even exacerbated in some areas by the flight of people and the development of enclave communities.

CONCLUSION

This brief article represents a first installment of insights from victims of post-election violence concerning their preferences about and expectations for transitional justice in Kenya. The series of 14 focus group discussions we conducted around the country reveal urgent desires for redress of past harms and losses and for fundamental changes in politics and society, so that people can have the basic necessities of life and not face constant fears of renewed conflict. The focus group participants were supportive of and otherwise open to a variety of transitional justice options, typically with a bottom-line focus on what is required to achieve meaningful and lasting results. On this count, the strongest sentiment favored compensation to victims as well as prosecution of those responsible for organizing the violence, a task that most preferred to assign to international authorities. Progress in these respects was viewed as essential for stability and reconciliation. Yet there was considerable skepticism among the participants that these challenges would be taken up promptly and effectively and have a lasting, positive impact on the lives of victims and peace in Kenya.

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