

## Transitional justice: lessons from Kenya on what works, and what doesn't

In today's world it's almost expected that transitional justice mechanisms - such as criminal trial reparations, memorialisation, and truth commissions - will be introduced to help consolidate a country's transition from authoritarianism and conflict to democracy and peace.

By [Gabrielle Lynch](#) 27 Aug 2018



A supporter of Uhuru Kenyatta after the Kenyan president's ICC charges were dropped in December, 2014. Daniel Irungu/EPA

For example, an [International Criminal Tribunal for Rwanda](#) was established after the country's 1994 genocide. In 2002, the Sierra Leone government and United Nations (UN) set up a [Special Court](#) to address serious crimes committed during the country's decade long civil war (1991-2002).

The International Criminal Court (ICC) has also had various interventions in Africa, and [scores of truth commissions](#) have been established around the world since the 1980s.

The underlying idea is that societies need to deal with violent and unjust histories if they are to move on to new future. The aim is to bring about substantive results, such as the imprisonment of individuals or reparations. It's also to perform or enact a [clean break with the past](#).

As transitional justice efforts have become more widespread, their mandates have also become increasingly ambitious. They are now often called on to reveal the truth about past injustices, to see that justice is done and to reconcile individuals and communities.

But it's increasingly evident that these mechanisms often fall far short of such lofty goals. This is despite the time and money spent on transitional justice, and the hope that they often inspire.

In my new book, [Performances of Injustice: The politics of truth, justice and reconciliation in Kenya](#), I explore the gap between aspiration and reality by looking at the two transitional justice mechanisms that were introduced following Kenya's [post-election violence](#) in 2007/8.

The first is the [ICC intervention](#), which initially confirmed charges against four Kenyans for their alleged role

in the violence. The second is the country's Truth, Justice and Reconciliation Commission.

The ICC focused only on those deemed most responsible for the violence. In contrast, the commission was tasked with looking at a wide range of injustices that had occurred between Kenya's independence in 1963 and the end of the post-election violence in 2008. Between 2009 and 2013, the commission received more than 40,000 victims' statements, held public hearings in 35 locations across the country and published a [substantial report](#).

One key lesson from my research is that transitional justice mechanisms are not generic "tools" that can be used in different contexts with the same effect. Rather, their success or failure depends on their design and approach, but also on how they are received, and responded to, by people on the ground.

## **Politics of truth, justice and reconciliation**

The ICC's intervention was soon mired in controversy. Those indicted and their allies [spun the court's involvement](#) as a biased imposition by foreign powers, an extension of colonialism, and a path to further injustice.

Their supporters rallied around them and two of the accused – Uhuru Kenyatta and William Ruto – were [elected President and Deputy President](#) in 2013 while their cases were still underway. The cases later collapsed due to a lack of evidence [amid claims of witness intimidation and harassment](#).

The commission, meanwhile, was quickly dismissed by many as just another commission of inquiry whose report would be relegated to dusty shelves. Its hearings generally attracted small audiences and little media coverage, while the report is yet to be discussed in parliament.

The Kenyan experience highlights the importance of context, and of public reception and interpretation. It also provides evidence of the [law of unintended consequences](#).

The ICC failed to bring any perpetrators to book. It also fuelled a sense – among opponents and supporters alike – that further injustice had occurred either as a result of neo-colonialism or impunity.

The commission also helped to reinforce a culture of impunity. Thousands of victims gave extended testimony about the injustices and atrocities they had suffered, and their ongoing impact. But with the exception of one unnamed individual who testified in a closed hearing, not a single person admitted to wrongdoing.

The accused – or "[adversely mentioned persons](#)", as they were called – did not deny that injustices had occurred. But they did deny, through one line of reasoning or another, that they could be held responsible.

Instead, and as had occurred with the ICC, alleged wrongdoers used the opportunity to present themselves as good and strong leaders. Their appearance in turn helped to entrench a sense of injustice and continuity. The same political elite were in power and could rely on state, peer and community support to protect themselves.

The book also discusses other ways in which Kenya's transitional justice efforts were undermined or reinterpreted, and how they unintentionally served to reinforce certain inequalities and injustices.

## **Justice that works**

Despite these problems, my argument isn't that transitional justice should be abandoned. Nor would it be correct to say that the Truth, Justice and Reconciliation Commission or ICC were a waste of time with no positive impact. There were some commendable outcomes from both.

The ICC's intervention highlighted that there can be consequences for leaders accused of involvement in inciting or organising violence. The commission's report also provided a historical overview of injustice in Kenya and offered wide ranging recommendations that [activists](#) and [politicians](#) can use to lobby for justice and reform.

The point is that transitional justice mechanisms can't be applied with the same effect in different contexts. Instead, justice seekers need to consider the ways in which the past actually persists in a particular context and how transitional justice efforts are likely to be received and interpreted.

And while these mechanisms can make positive contributions to a transition, they are ill suited to meet the increasingly ambitious expectations placed on them.

Transitional justice mechanisms are typically short-term efforts with limited mandates. As such, they cannot grasp the complex ways in which unjust and violent pasts affect the present.

Such ambitious goals as truth, justice and reconciliation require ongoing political struggle, and substantive socio-economic and political change, which transitional justice mechanisms can recommend, and sometimes contribute to, but cannot be expected to achieve.

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