

Historical injustices and transitional justice interventions in Kenya: victims' and interveners' experiences and perceptions

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Abstract: This article examines historical injustices and transitional justice interventions that were initiated after the 2007 electoral conflict in the quest for conflict transformation in Kenya. During the mediation led by Kofi Annan that culminated in the signing of the National Accord in February 2008, transitional justice was emphasised as critical in attaining conflict transformation. In response, the Truth, Justice and Reconciliation Commission (TJRC) and International Criminal Court (ICC) interventions initiated a complementary restorative–retributive approach in the pursuit of transitional justice in the country. Based on content analysis of fieldwork data extracted from twenty-five focus group discussions within a sampled cluster of ten counties, this study examines and presents the experiences and perceptions of victims of historical injustices, on the one hand, and the experiences and perceptions of interveners of conflict transformation programmes, on the other hand. This is with a view to explicating the outcomes and impacts of transitional justice interventions in conflict transformation in Kenya in the post-National Accord era. In the findings, a key argument is raised that unresolved three-tier historical injustices remain critical constraints in the pursuit of transitional justice and in the quest for effective conflict transformation in Kenya.

Keywords: Conflict, conflict transformation, historical injustices, ICC (International Criminal Court), interventions, Kenya, transitional justice, TJRC (Truth, Justice and Reconciliation Commission).

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Transitional justice and the conflict situation in Kenya

Transitional justice is instrumental in conflict transformation in post-intervention states. States recovering from periods of protracted structural or manifest conflict initiate interventions that seek to address underlying structural issues and past injustices with a view to attaining conflict transformation. In the wake of the 2007 electoral conflict in Kenya, there was heightened attention on the need to address protracted historical injustices that have constrained the quest for peace. The political stalemate that persisted between President Mwai Kibaki and Orange Democratic Movement party leader Raila Odinga, and their allies, over the contested presidential election result led to mass atrocities, including the killing of at least 1,133 persons, the internal displacement of an estimated 350,000 others, and instances of sexual and gender-based violence, targeted especially against women.¹ This heightened the need for external interventions with a view to contriving peace. In response, the African Union (AU)-mandated mediation led by Kofi Annan culminated in the signing of the National Accord in February 2008. This Accord which was essentially a power-sharing agreement between the two conflicting parties emphasised the need to initiate conflict transformation interventions with a view to resolving historical injustices that attract conflict.²

The establishment of the Truth, Justice and Reconciliation Commission (TJRC) in 2009, on the one hand, and the authorisation of investigations on the Kenyan situation in the International Criminal Court (ICC) in 2010, on the other hand, presented a complementary mechanism to pursue transitional justice in the country.³ This article examines the transitional justice interventions initiated in post-National Accord Kenya. This is with a view to framing the historical injustices in the country: in particular, the atrocities and human rights violations that were perpetrated by the state, and its security operatives, against individuals and ethnic communities and that have transcended generations, starting in the period during colonialism, at independence in 1963, in the wake of multiparty democracy politics in 1991, and after the signing of the National Accord in February 2008. Besides framing the historical injustices, the paper contextualises transitional justice by explicating its instrumental and constitutive arguments. This is with a view to presenting the experiences and perceptions of victims and interveners in five key areas: first, historical injustices; second, the state's response to the historical injustices; third, the nexus between peace and justice; fourth, the outcomes and impacts of the TJRC and ICC judicial interventions; and, fifth, the alternative indigenous judicial interventions in conflict transformation in Kenya.

¹ CIPEV (2008: 305, 348–51, 396).

² Kenya National Assembly (2008a: Article 9).

³ Kenya National Assembly (2008b); ICC (2010).

The study engages document review and fieldwork. Secondary data was reviewed: first, to explicate the historical injustices and, second, to present conceptual arguments on transitional justice. Studies by Lynch, Slye, and Wambua have, for instance explored the constitutive and instrumental role played by the TJRC and ICC interventions in pursuing transitional justice in Kenya.⁴ Based on such secondary data analyses, this study, in fieldwork carried out in 2018–19, integrates qualitative data extracted from twenty-five focus group discussions (FGDs) with victims and interveners of conflict transformation interventions carried out within ten counties in Kenya: Nairobi, Nakuru, Laikipia, Kisumu, Nandi, Uasin Gishu, Bomet, Trans Nzoia, Elgeyo Marakwet, and Mombasa. Two FGDs—one representing victims and one representing interveners—were carried out in each of the ten counties. This is in addition to five FGDs—two in Uasin Gishu County and three in Nairobi County—that were carried out within different demographics in these two counties as a pilot study to establish the reliability of the data collection tools. These counties were selected because they have repeatedly experienced land- and ethnic-based electoral conflicts which have occasioned the concentration of conflict transformation interventions therein. Besides identifying the clusters, the discussants in these counties were selected through purposive sampling based on their experiences: first, as victims of historical injustices especially relating to electoral conflict, and, second, as interveners of conflict transformation programmes. The study in its design hence adopted a constructivist philosophical approach with a view to understanding the meanings, experiences, and perceptions that victims and interveners attach to historical injustices and the transitional justice interventions initiated after the 2007 conflict, and their outcomes and impact on conflict transformation in the country.

While this section introduces the study and methodology deployed, the second section explores the historical injustices experienced in Kenya during the colonial period, at independence in 1963, in the wake of the multiparty democracy politics in 1991, and after the National Accord in 2008. The third section presents the contending instrumental and constitutive arguments, and a conceptual review of transitional justice interventions in conflict transformation. The fourth section broadly presents the study findings while the fifth section concludes.

Framing historical injustices in Kenya

The discourse on historical injustices in Kenya may be traced back to the colonial period. The British invasion of the protectorate in 1885 anchored the historical

⁴Lynch (2018: 95–123); Slye (2018: 49–83); Wambua (2019: 57).

injustices that have transcended generations to present-day Kenya. Studies examining the colonial state, for instance that by Ogot and Ochieng, posit that the imperial powers committed mass atrocities on the indigenous communities with a view to dominating the protectorate.⁵ British settlers, working in collaboration with local proxies, displaced communities from their native lands and annexed huge tracts in the productive White Highlands in the Rift Valley, central, and coastal regions. The communities who resisted the invasion during the Mau Mau rebellion, and with the declaration of a state of emergency in 1952, suffered atrocities including mass killings of an estimated 11,000 natives and internal displacement of others as executed by the British army.⁶ In a study of the atrocities committed during Mau Mau, Anderson estimates that at least 25,000 deaths were associated with the uprising.⁷

At independence in 1963, President Jomo Kenyatta's administration (1963–78) did not resolve the historical injustices suffered by the indigenous communities during the colonial period. As argued by Mazrui and Khamisi, the indigenous communities who had been displaced by the British settlers suffered localised colonisation by local administrators.⁸ The redistribution and occupation of the White Highlands by local proxies, resulted in the indigenous–foreigner discourse that permeates arguments on the distribution of land resources in the country, especially in the Rift Valley, central, and coastal regions. In situations when communities protested against systemic inequalities, they suffered state-led repression, such as in the case of the human rights violations against ethnic Somalis in concentration camps during the Shifta War (1963–7).

President Daniel Moi's administration (1978–2002) advanced further historical injustices. In an analysis, Ndegwa contends that state operatives expropriated public land, and oversaw further displacement of communities from their indigenous lands, especially in the productive regions in the Rift Valley, central, and coastal regions.⁹ In a review of historical injustices during the Moi administration, TJRC avers that state operatives executed mass atrocities, especially during the Bulla Karatasi (1980) and Malka Mari (1981) massacres.¹⁰ While the state had perpetuated such atrocities during the secessionist Shifta War in 1963–7, the Bulla Karatasi and Malka Mari massacres entrenched a series of collective punishment atrocities against minority and indigenous communities in the northern frontier districts in the guise of security and

⁵Ogot & Ochieng (1995: 48–79); see also Khamisi (2018: 22–38).

⁶BBC News (2011).

⁷Anderson (2005); see also Elkins (2005).

⁸Mazrui (1994); Khamisi (2018: 22–38).

⁹Ndegwa (1997: 599–616); see also Khamisi (2018: 22–38); Mazrui (1994); Wamwere (2008: xi).

¹⁰TJRC (2013: 180–374).

disarmament operations.¹¹ In response to the failed 1982 military coup, the state declared emergency statutes and committed atrocities against dissidents, including detention without trial, sexual violence, and torture. The Wagalla (1983) and the Lotiriri (1984) massacres also depicted human rights violations during the Moi regime.¹² In response to these injustices, Press and Wambua underscore that civil-society-led non-violent resistance against the state culminated in the repealing of Section 2A of the Constitution, thereby paving the way for the return of multiparty politics in 1991.¹³ The return of multiparty democracy was also a result of democratisation across the world at the end of the Cold War.

The return of multiparty politics in 1991, however, occasioned an electoral conflict cycle in Kenya due to ethno-political antagonisms. The state-orchestrated conflict perpetuated by security agencies in the Miteitei farm in the border of Nandi and Kisumu districts in 1991, as argued in Ogot and Ochieng, led to ethnic conflict that heightened the indigenous–foreigner standpoints based on the existing narratives around landownership in the Rift Valley.¹⁴ As argued by Ndegwa, this conflict led to the killing of an estimated 1500 people and the displacement of an estimated 300,000 others.¹⁵ The 1997 elections occasioned further conflict in the Rift Valley and the coastal region, and heightened ethno-political differences in the country. The 1997 Likoni massacre, in particular, advanced the indigenous–foreigner discourse that is anchored within historical discourses around land distribution in the coastal region. In a report, Human Rights Watch (HRW) records that this massacre led to the displacement of an estimated 100,000 non-locals and the killing of 104 others.¹⁶

President Mwai Kibaki's administration (2002–13) renewed the quest for transitional justice with the appointment of the Task Force led by Makau Mutua on the Establishment of a Truth, Justice and Reconciliation. The outbreak of electoral conflict in 2007 following the disputed presidential election result, however, heightened ethnic antagonisms in the country. As recorded in the Commission of Inquiry into Post-Election Violence (CIPEV) report, this conflict led to the deaths of 1,133 people and the internal displacement of 350,000 others.¹⁷ In a further review of the elections, the CIPEV and the Kenya National Commission on Human Rights (KNCHR) reports underscore that this conflict was characterised by the indigenous–foreigner discourse that is premised on existing historical injustices, especially on the

¹¹ *Ibid.* (Vol. 1, xii; Vol. 2A, 193–220, 367–74).

¹² *Ibid.* (Vol. 2A, 180–374); Sheikh (2007: 45–52, 150–8).

¹³ Press (2015: 205–32); Wambua (2017: 13); see also Ogot & Ochieng (1995: 198–9); Press (2006: 37–62).

¹⁴ Ogot & Ochieng (1995); see also Barkan (1993: 93); Throup & Hornsby (1998).

¹⁵ Ndegwa (1997: 85–99); see also Kenya National Assembly (1992); Oyugi (1997); TJRC (2013).

¹⁶ HRW (2002: 2–3, 24); see also Akiwumi Commission (1999: 233–78).

¹⁷ CIPEV (2008: 305, 351).

distribution of land resources.¹⁸ The political stalemate that ensued between President Kibaki and Raila Odinga over the disputed election result heightened calls for external intervention. This conflict was resolved owing to the mediation led by Kofi Annan that culminated in the signing of the National Accord in February 2008.

During the mediation, the need to address historical injustices was emphasised as critical in attaining conflict transformation. The enactment of the TJRC Act in 2008 and the launch of the Commission in March 2009 marked a coordinated approach towards addressing the historical injustices that have constrained conflict transformation. While the TJRC, on the one hand, provided a mechanism that would address historical injustices with a view to serving retributive and restorative justice to perpetrators and victims, respectively, the ICC process initiated in March 2010, on the other hand, would help prosecute the perpetrators of the 2007 conflict while serving restorative justice to the victims through the Court's Trust Fund for Victims (TFV). The TFV, which was established by the Assembly of State Parties in 2004, intended at implementing reparations as would be ordered by the Court, would hence promote restorative justice for victims. As argued by ICC's Office of the Prosecutor (OTP), the state, however, failed to cooperate with the Court, in supplying evidence, in particular communication logs and financial transactions of the alleged perpetrators.¹⁹

While these two judicial interventions may have, in part, contributed to the peaceful elections in 2013 perhaps due to the deterrence occasioned by the ICC trials and TJRC investigations, besides the conflict transformation interventions implemented across the country by state and non-state actors,²⁰ the killing of thirty-seven people after the 8 August 2017 elections following the nullification of the presidential election result, and the killing of twenty-five others in Nairobi, Kisumu, Busia, and Migori during the 26 October fresh presidential elections as reported by KNCHR revitalised the discourse on the need to address historical injustices.²¹ A review of arguments on the instrumental and constitutive value of transitional justice as postulated by scholars, and practitioners, hereinafter explicates on the TJRC and ICC interventions in Kenya.

¹⁸ *Ibid.* (39, 41); KNCHR (2008: 52); see also HRW (2008).

¹⁹ ICC (2014); see also ICC (2016).

²⁰ Wambua (2020: 4–7).

²¹ KNCHR (2017: 16; 2018: 19).

Instrumental and constitutive arguments on transitional justice

The discourse on transitional justice in conflict transformation attracts two main contending arguments: the instrumental value of transitional justice on the one hand, and the constitutive value of transitional justice on the other. The key argument raised in studies in regard to the gap under review in this article is, first, on the *instrumental value of transitional justice*: how should transitional justice interventions be sequentially implemented in order to enhance conflict transformation without risking re-entry into conflict? Studies such as those by Murithi, and Murithi and Ngari argue that initiating transitional justice immediately after peace agreements may constrain conflict transformation as retribution may renew antagonisms amongst conflicting parties, leading to further conflict.²² Since transitional justice interventions are anchored on prior injustices, as argued by Teitel, how, then, should judicial mechanisms such as the TJRC and ICC be enforced without constraining conflict transformation?²³ Debates on truth commissions attract further concerns on their agency as either judicial or quasi-judicial mechanisms. In the case of Kenya, the integration of the justice variable in its establishment, and the recommendations for prosecutions as postulated in the TJRC Act, and the TJRC report, firmly anchors the TJRC as a quasi-judicial mechanism.²⁴

A second argument is raised on the *constitutive value of transitional justice*: that is, what are the outcomes and impact of transitional justice on peace and conflict transformation? Musila argues that transitional justice as an institutional process seeks to confront the past with a view to moving from repressive regimes to more open and democratic societies.²⁵ Mutua underscores that transitional justice is applied in states recovering from despotic rule and imbalances with a view to stabilising the state through inclusive reforms and change.²⁶ Adopting liberal arguments on adherence to human rights enshrined within international norms, Nzau espouses the victim–perpetrator argument on restorative versus retributive justice by advancing the quest for reparations for victims and the punishment of perpetrators of mass atrocity crimes. This attracts further contestations on how to serve justice to perpetrators and attain reconciliation with victims without attracting renewed conflict that would constrain conflict transformation interventions.²⁷

²² Murithi (2010: 1–19); Murithi & Ngari (2011: 10); see also Murithi (2015: 73–97).

²³ Teitel (2000: 11–26).

²⁴ Kenya National Assembly (2008b).

²⁵ Musila (2009: 28–9).

²⁶ Mutua (2015: 1–9).

²⁷ Nzau (2016: 52–7).

In respect to these two contending arguments, truth commissions assume both instrumental and constitutive agencies in transitional justice interventions due to their agency in addressing past legacies of injustices with a view to attaining peace. Truth commissions are, however, faulted as mechanisms initiated to evade justice due to their calls for reconciliation between perpetrators and victims, and amnesty for perpetrators. In a similar view, Kimathi and Kariuki assert that balancing prosecutions with amnesty may constrain peace agreements, and suppress accountability and reconciliation.²⁸ Internationalised criminal tribunals, which pursue the culpability of perpetrators, also emphasise the instrumental and constitutive agencies in transitional justice interventions. The ICC, in this case, pursues accountability for perpetrators of mass atrocity crimes through retribution while sequentially advancing reparations and restitution for victims. In prosecuting perpetrators, the ICC enhances accountability and may deter future commission of atrocities. Studies such as that by Nmaju posit that, although the Court may serve retributive justice, it may not enhance conflict transformation due to possible renewed antagonisms between victim- and perpetrator-communities.²⁹ Paternoster, in an analysis of deterrence theory, also raises caution on criminal deterrence by denoting that there is a marginal deterrence effect on retribution due to a disconnect between criminal systems and their effectiveness.³⁰ The arguments raised on the instrumental and constitutive agency of transitional justice in the foregoing review inform the analysis of the TJRC and ICC interventions in conflict transformation in Kenya. A presentation of findings on victims' and interveners' experiences and perceptions on, first, the centrality of unresolved historical injustices as a key variable in explaining conflict; second, the state's response to the historical injustices; third, the nexus between peace and justice; and, fourth, the outcomes and impacts of the TJRC and ICC judicial interventions hereinafter demonstrates the instrumental and constitutive role of transitional justice in conflict transformation in post-National Accord Kenya.

Findings on victims' and interveners' experiences and perceptions

Based on the foregoing secondary data analysis on historical injustices and transitional justice interventions in Kenya, this study, in fieldwork carried out in 2018–19, integrated qualitative data extracted from twenty-five FGDs with victims of historical injustices, and interveners of conflict transformation programmes. These FGDs were

²⁸ Kimathi (2010: 8–11); Kariuki (2015: 9–10).

²⁹ Nmaju (2009: 78–95).

³⁰ Paternoster (2010: 765–6).

carried out within ten counties in the country: Nairobi, Nakuru, Laikipia, Kisumu, Nandi, Uasin Gishu, Bomet, Trans Nzoia, Elgeyo Marakwet, and Mombasa. The interveners engaged in the FGDs included: state agencies, peacebuilding inter-governmental/non-governmental organisations, business and private sector, faith-based organisations, academia, research and training, activism and advocacy, media and communication, financing agencies, and judicial interventions. This was with a view to understanding the experiences and perceptions of victims and interveners on the impact and outcomes of the two transitional justice interventions in Kenya's conflict transformation agenda.

The discussants were selected through non-random purposive sampling based, first, on their experiences as victims of historical injustices associated with land distribution and electoral conflicts and, second, on their interactions as interveners—that is, local implementers of peace programmes. While the victims were on the one hand identified based on their experiences as victims of historical injustices, especially the atrocities committed during the 1992, 1997, and 2007 conflicts, the interveners were on the other hand selected based on their experiences and interactions with victims of historical injustices in the course of their conflict transformation interventions.

At the outset, the research deployed in primary data collection found nine key variables that would explain electoral conflicts and conflict transformation in Kenya. These variables, informed by a review of secondary data on factors that occasion electoral conflicts in Kenya, were: (i) historical injustices, (ii) structural, economic, and political issues, (iii) institutional inadequacies, (iv) legal and constitutional issues, (v) ethnic-identity-based factors, (vi) gender-based factors, (vii) cultural factors, (viii) ideological considerations, and (ix) demographic factors, in that order. Using the views generated in the twenty-five FGD sessions, the analysis identified the frequency with which any or all the above nine variables were identified by discussants per session as constraints to conflict transformation. In the study findings, and as illustrated in Figure 1, the victims and interveners in these selected counties identified other key variables which have a higher frequency than historical injustices as their key factors that constrain conflict transformation in the country.

As shown in Figure 1, there is consensus amongst discussants across the sessions in the selected counties that, while historical injustices—with a frequency of 15—inform discourses on conflict transformation, other variables including institutional weaknesses—with a frequency of 25—take precedence in explaining electoral conflicts in Kenya. In all the cluster counties selected, discussants argued that institutions charged with electoral processes, for instance the electoral commission, carry out elections that are characterised by irregularities that lead to political antagonisms amongst political party or coalition leaders, and their patronage. This argument is alluded to in the Independent Review Commission (the Krieglger Commission) report which noted

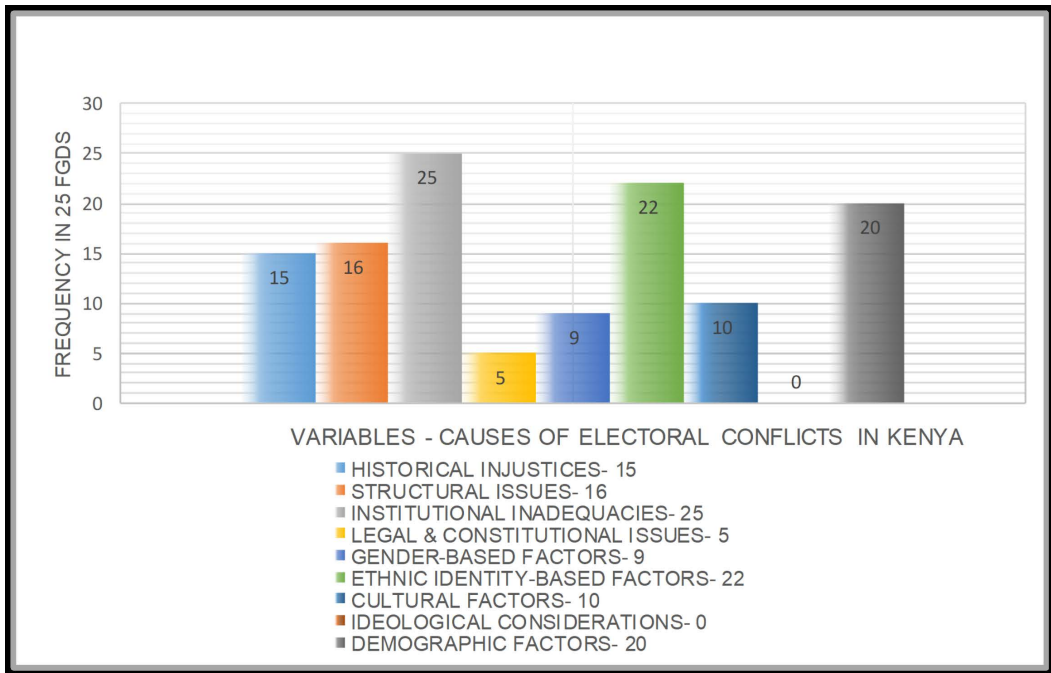


Figure 1. Victims' experiences and perceptions on causes of electoral conflicts in Kenya. *Source:* Muema Wambua.

the irregularities and illegalities in the tallying of the presidential results that eventually led to the 2007 conflict.³¹ Such irregularities and illegalities were also cited by the Supreme Court of Kenya in the nullification of the 2017 presidential election.³² Besides institutional weaknesses, discussants argued that ethnic-identity differences—with a frequency of 22—premised on the indigenous–foreigner discourse are pronounced during campaigns. A discussant in Kiambaa, Eldoret, argued that:

Politicians are the ones who incite violence. I would like to see the politicians who incite others being sanctioned, or denied chance to vie, so that it can be a lesson to others. Because they are the one who cause harm to others, if it were not for the politicians, there would be no violence, these kids [who were burnt in Kiambaa KAG church] could not have been killed. Because I have lived for 52 years here in Uasin Gishu, I have schooled with these Kikuyus, I would attend school at far distances and would eat at their [Kikuyu] homes during lunch time because our home was far, there was no problem, but when bad politics came in there were divisions. There is nothing we couldn't do with them [Kikuyus].

³¹ Independent Review Commission (2008: x, 115–38).

³² Supreme Court of Kenya (2017).

*When there were ceremonies, it was as if I was at home, I would sleep in their house, but when there was violence in 2007, we could not live together.*³³

Reiterating the aforementioned argument that ethnic-identity differences constrain conflict transformation in Kenya, a former provincial administrator in Mukima, Laikipia, noted that political divisions between the predominant Kikuyu and Kalenjin ethnicities that were entrenched at independence over land redistribution in the region permeate political processes, leading to ethnic tensions that eventually occasion conflict, especially during elections.³⁴

Discussants further identified demographic considerations—with a frequency of 20—in specific youth employment, as triggers of electoral conflicts. Emphasising youth unemployment, a member of the District Peace Committee (DPC) in Kamukunji, Nairobi, for instance, argued that interventions for peace do not address the underlying issue of youth unemployment.³⁵ As a result, the youth remain vulnerable as they are easily incited by the politicians to perpetuate electoral conflict.³⁶ Besides demographic considerations—with a frequency of 20—structural factors including economic and political marginalisation of some ethnicities, and regions, in the distribution of national resources—with a frequency of 16—were emphasised. Highlighting the marginalisation suffered by their community in Sabaot, Trans Nzoia, in the access and distribution of resources, a member of the DPC, noted that:

*There is still marginalisation in leadership and in the distribution of resources that leads to ethnic antagonisms. The Sabaot are the indigenous community in this region. There is discrimination of the Sabaot people that has continued to cause violence. The artificial borders created at independence led to the discrimination of some communities, especially on the distribution of the land resource. ... The unresolved land question since independence attracts relapse. ... Other communities have received land schemes but not the Sabaot.*³⁷

The discussants also identified, in particular, the relegation of women in peace interventions based on gender constructions—with a frequency of 9—and cultural factors—with a frequency of 10—as constraints to conflict transformation. In all

³³ Discussants, FGD CODE 024 with victims of the Kenya Assembly of God Kiambaa Church arson in Kiambaa, Eldoret, Uasin Gishu County, 15 October 2019.

³⁴ Discussant, FGD CODE 008 with Peace Implementers in Mukima, Laikipia West, Laikipia County, 18 January 2019.

³⁵ The District Peace Committees were restructured into County Peace Committees following the advent of devolution, as enshrined in the Constitution of Kenya, 2010.

³⁶ Discussant, FGD CODE 003 with local peace implementers and members of the local and District Peace Committee, Eastleigh, Nairobi, Nairobi County, 20 December 2018.

³⁷ Discussant, FGD CODE 019 with members of District Peace Committee in Kitale, Trans Nzoia County, 29 January 2019.

discussions held across the clusters, discussants negated ideological differences—with a zero frequency—as a cause of conflict in Kenya. This discussion hereinafter confines itself to analysis of the variable of historical injustices in relation to transitional justice, which is the subject under consideration as defined at the outset in this article.

Experiences and perceptions on historical injustices

The variable of historical injustices, as elsewhere underscored by Mwagiru and the CIPEV, was identified by discussants as a major variable that informs conflict and the conflict transformation agenda in Kenya.³⁸ In essence, therefore, addressing these injustices through transitional justice interventions was viewed by victims as a prerequisite for peace. In an assessment, discussants draw their explanations of historical injustices based on their experiences in the wake of multiparty democracy politics in the country in 1991. As a result of the ethnic-identity and land-based conflict atrocities experienced in these regions, especially during the 1992, 1997, and 2007 elections, transitional justice is hence fundamentally understood, or at least explained, by victims and interveners from three contending perspectives; first, on the premise of landownership during colonial times and in the independence era during the Jomo Kenyatta regime; second, the rights to regain land lost as a result of subsequent internal displacement of supposed foreigner-inhabitants and evictions by the government during the Daniel Moi regime, especially in the wake of multiparty politics in Kenya; and, third, on the resettlement and compensation of supposed ‘foreigners’ during the Mwai Kibaki and Uhuru Kenyatta regimes. I have, in a typology, hence conceptualised these injustices as *first-tier*, *second-tier*, and *third-tier historical injustices*. The three-tier injustices are interlinked by *first intermediate injustices* and *second intermediate injustices*.

First-tier historical injustices, as conceptualised in this study, anchor transitional justice discourses specifically on land injustices committed during the colonial period and the associated atrocities suffered by victims. The expropriation of land in the Rift Valley, central, and coastal regions and the subsequent displacement of communities attracted the indigenous–foreigner narrative in Kenya’s politics. Based on this narrative, some communities, especially the Kikuyu, are perceived to have benefitted from the colonial annexation. At independence, communities, previously displaced, suffered further injustices when their ‘former’ tracts were allocated to proxies and allies in the

³⁸ Mwagiru (2008: 11–13); CIPEV (2008: 23); see also TJRC (2013); Office of the African Union Panel of Eminent African Personalities (2014: 55).

Kenyatta regime, leading to the first intermediate injustices. Citing these first-tier injustices, a regional coordinator with PeaceNet argued that: *‘historical injustices were carried out by senior chiefs like [names withheld for ethical considerations—security of the discussant] who distributed land without consulting the local communities. The Catholic Church owns hundreds of acres from Mathari to Mweiga yet there are so many local people without land in the region. [Prominent Kenyan—name withheld for ethical considerations—security of the discussant] has a ranch of 46,000 acres in Laikipia.*³⁹ Such narratives about how indigenous communities’ lands were distributed during the transition from colonialism explain the first-tier and first intermediate injustices.⁴⁰

Second-tier historical injustices, as conceptualised in this study, were pronounced in the wake of multiparty democratic politics in 1991. Indigenous communities that were displaced during the first-tier injustices bought land, settled in other regions, and re-established their livelihoods. The re-introduction of multiparty politics, however, attracted ethnic politics in these regions and accentuated the indigenous–foreigner discourse that inflamed land-based conflicts, especially in the 1992 and 1997 elections. While these conflicts were reportedly instigated by state security agencies, as well as non-state actors (for instance, militia groups facilitated by the opposition), they evolved into ethnic conflicts that led to the second displacement of the perceived ‘foreigner’ communities from their legally acquired land. The atrocities committed during the 1992 and 1997 elections in the Rift Valley, central, and coastal regions hence inflicted second-tier injustices on communities that had experienced first-tier injustices and first intermediate injustices. These communities which suffered second-tier injustices subsequently suffered second intermediate injustices after they were, for the second time, displaced from their land during the 2007 conflict.

In the third-tier historical injustices, as conceptualised in this study, some victims who suffered first-tier injustices and second-tier injustices as well as first and second intermediate injustices were excluded from the resettlement and compensation programmes implemented by the coalition government following the signing of the National Accord in 2008. While many victims received compensation in cash and others were resettled in government-acquired lands, as explained by Nzau, some victims still seek compensation.⁴¹ These particular victims argue that they were marginalised by the state agencies in the compensation programmes and are yet to find closure with reference to atrocities suffered during the 2007 conflict. In a discussion

³⁹ Discussant, FGD CODE 009 with members of the District Peace Committee in Karandi, Laikipia West, Laikipia County, 21 December 2018. Argument reiterated in TJRC (2013: Volume 2B (Pre-Interference), 295–6).

⁴⁰ See also Wamwere (2008: 25).

⁴¹ Nzau (2016: 22–60).

with victims of the Kenya Assemblies of God (KAG)—Kiambaa church arson in Kiambaa, Eldoret, a discussant pleads that:

I ask from the government; we have never been compensated, we the people of Kiambaa. We have seen many people come and collect information, but they don't give us anything. The victims of Kiambaa have not been compensated. ... Government interventions have helped, there are so many people for peacebuilding, counselling. Since we lost a lot of property, we will never recover it. All property I acquired as a young person was lost, nothing will be restored.⁴²

This argument on restitution is averred by another victim who noted that she has not completely healed and has never been compensated by the state.⁴³ In another case, a victim argued that they are not willing to go back to their legally acquired land, and are not able to rebuild their livelihoods afresh because of the cycle of displacement they have suffered out of first-tier and second-tier injustices.⁴⁴ While this three-tier historical injustices typology conceptualised in this analysis is generalized, thereby creating an impression of homogenisation of victimhood, it is essential to note that not all victims in all the selected clusters underwent the sequenced episodes of victimisation. It is also important to note that, while some individual victims may have not suffered the sequenced episodes of injustice, the pattern of historical injustices in the country, especially on land-based distribution, were largely meted out to particular ethnicities across the three tiers and hence the tendency of the analysis to concentrate upon the homogenisation of victimhood across the selected cluster counties. This three-tier historical injustices typology, intermittently fused by first intermediate injustices and second intermediate injustices, is illustrated in Figure 2.

These historical injustices entrenched during the colonial and early post-colonial eras as first-tier injustices, especially on the distribution of land resources, hence transcended generations at independence through the multiparty democratic politics era as second-tier injustices into the post-National Accord era as third-tier injustices. Based on victims' experiences, the unresolved injustices, especially the distribution of land resources, have attracted ethnic antagonisms that are oftentimes depicted amongst communities during elections. Despite the state's interventions towards transitional justice, the failure to effectively address these injustices during the first intermediate and second intermediate transitions has constrained conflict transformation.

⁴² Discussant, FGD CODE 024 with victims of the Kenya Assembly of God Kiambaa Church arson in Kiambaa, Eldoret, Uasin Gishu County, 15 October 2019.

⁴³ Ibid.

⁴⁴ Discussant, FGD CODE 014 with victims and beneficiaries of Catholic Justice and Peace Commission/ Rural Women Peace Link peace interventions in Burnt Forest, Uasin Gishu County, 23 January 2019.

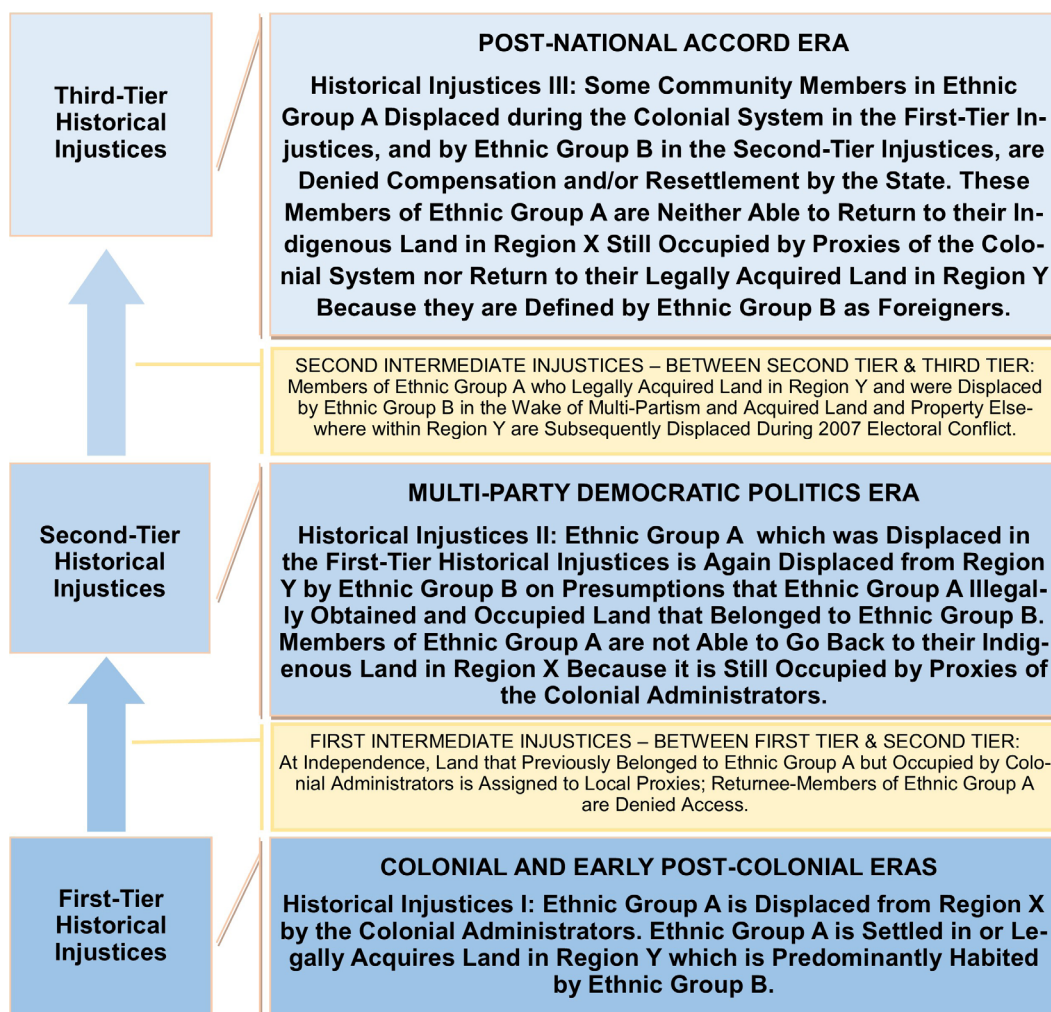


Figure 2. Three-tier typology of historical injustices on land issues in Kenya: victims’ experiences and perceptions. *Source:* Muema Wambua.

Experiences and perceptions on state response to historical injustices

In a further discussion on the outcomes and impacts of the interventions initiated by the state in response to these three-tier historical injustices illustrated in Figure 2, discussants argue that the state implemented programmes that sought to address the existing indigenous–foreigner discourse, especially in the Rift Valley, central, and coastal regions. In most FGD sessions, interveners underscored that the government through the National Steering Committee on Peacebuilding and Conflict Management

(NSC) streamlined interventions for peace, and further strengthened the infrastructure for peace through district (county) peace committees, and local peace committees.

There is also consensus among intervener discussants that the government, in collaboration with non-state actors, implemented resettlement and compensation programmes that benefitted the majority of internally displacement persons (IDPs) who were victims of the 2007 electoral conflict. Victim discussants, however, identified disparities in the compensation by claiming that some IDPs were awarded ten thousand shillings, while others received forty thousand. There were some IDPs who received four hundred thousand while others received land as compensation from the government. Concerns were also raised by victim discussants regarding conflict profiteers/entrepreneurs who were not victims but benefitted from the compensation programmes as they were allocated prime land and also received cash payouts from the government. Nevertheless, the resettlement of IDPs, for instance on Waitiki land, was pointed out by interveners in Likoni, Mombasa, to have considerably addressed the land question in the coastal region. Victims and interveners, however, criticised institutions like the judiciary and the National Cohesion and Integration Commission for failing to prosecute leaders who perpetuate ethnic- and land-based incitements during elections.

While the majority of discussants explained the three-tier historical injustices from the premise of land- and ethnic-related conflicts, and their associated atrocities, some discussants especially in Kisumu highlighted economic marginalisation as a form of historical injustice that has expressly denied inhabitants equal access to development opportunities. Power distribution at the national level has since independence relegated some regions, and hence socio-economic development programmes have not been equitably distributed across the country, especially in opposition zones. Some discussants in Kisumu further talked about extrajudicial killings reportedly perpetrated by security agencies in the region during elections as a form of historical injustice. Discussants in Mukima and Karandi in Laikipia also described the extrajudicial killings allegedly committed by security agencies in the region over the proliferation of the Mungiki—an outlawed ethnic militia group with roots in central Kenya. Similar narratives about extrajudicial killings allegedly committed by security agencies and militia groups, as also reported by TJRC, were articulated by discussants in Saboti, Trans Nzoia, amongst victims of the Sabaot Land Defense Forces (SLDF)—an outlawed militia that agitated for land rights for the minority Sabaot ethnic community—in areas like Saboti and Mount Elgon.⁴⁵ A victim discussant in Saboti, Trans Nzoia, argued that victims of the extrajudicial killings and IDPs need to be compensated in order to find healing and closure. In reiteration on the need for reparations, this discussant in Saboti narrated that:

⁴⁵ TJRC (2013: Volume 1, 14, 71, 153).

I am from Western. We were displaced and fled to Trans Nzoia. My husband was killed and then my second born child was shot and was incapacitated to the present day. We lost everything. Up to date, I have never found residence. I live in a school. I do not have a farm, I do not have anything. ... It was because of the land issues. ... My husband did not want to join the perpetrators [SLDF] because he was born-again. ... They [SLDF] accused him of working [spying] for the government. They came in the night and shot my husband and the child.⁴⁶

Some discussants advanced the narrative about historical injustices by explaining forced disappearances and extrajudicial killings allegedly executed by security forces to counter high crime rates in Kibera and Dandora in Nairobi. Other discussants defined historical injustices by citing atrocities allegedly committed by state agencies in their quest to counter violent extremism in Eastleigh and Majengo in Nairobi, and elsewhere in the Likoni neighbourhood in Mombasa.

Perceptions on the nexus between justice and peace variables in judicial interventions

To advance the discourse on transitional justice, discussants weighed-in on the interplay between justice and peace in the case of Kenya's conflict transformation agenda. Two key contending arguments were raised. On the one hand, victims and interveners underscored that pursuing justice, specifically in addressing unresolved historical injustices on land distribution would renew the indigenous–foreigner discourse that would elicit further ethnic antagonisms. On the other hand, victims and interveners underscored that, unless such historical injustices are resolved, the country will remain trapped in a conflict cycle due to the transcending indigenous–foreigner discourse that permeates during elections. Reiterating on the need to address historical injustices, a Youth Initiatives Kenya officer in a discussion in Dandora, Nairobi, noted that:

If we don't resolve the past, we will never have justice, and there will be revenge. We cannot solve peace [conflict] without addressing the past injustices. We do not have peace. This is illusion. This is calm before the storm. We have not addressed historical injustices. The government has never reached out to victims. The leaders are guilty, they have never apologised.⁴⁷

⁴⁶ Discussant, FGD CODE 018 with victims and beneficiaries of Free Pentecostal Fellowship of Kenya peace interventions in Saboti, Trans Nzoia County, 28 January 2018.

⁴⁷ Discussant, FGD CODE 005 with local implementers and beneficiaries of peacebuilding interventions in Dandora, Nairobi, Nairobi County, 21 December 2018.

The need to resolve historical injustices was averred by a member of the county peace committee in Nakuru who argued that there is the need for forgiveness on the part of the victims, with structured programmes on restitution without which there will be no reconciliation.⁴⁸ This assertion on addressing historical injustices was averred by a community service and development officer in Kisumu who argued that justice and peace must be served concurrently in order to punish perpetrators and retribute victims, however protracted the pursuit of justice would be.⁴⁹

Experiences and perceptions on the TJRC process

In the particular case of the TJRC intervention as a mechanism for transitional justice, there were divergent opinions from the interveners and the victims of the 2007 conflict, among other historical injustices. On the one hand, most interveners acknowledge that the TJRC process was in itself instrumental in establishing facts about historical injustices that have transcended generations, as detailed in the Commission's report findings. Intervenors acknowledge that the Commission was instrumental in extracting information from victims and alleged perpetrators and hence asserted the centrality of truth-telling in uncovering the past. Intervenors argue that there was significant involvement of non-state actors, especially non-governmental organisations, in providing objective information about atrocities committed on individuals and communities by state operatives. In addition, intervenors argued that the TJRC created safe spaces for women to present their personal experiences about sexual- and gender-based violence they have suffered, as well as atrocities experienced by other proximate women. Intervenors also asserted that the TJRC created an opportunity for minority communities to air their grievances to the state. In addition, intervenors highlighted that, despite the extensive TJRC findings, the expunging of information that established culpability on the political elite by some commissioners affected the credibility of the report.

On the other hand, some victims argued that the TJRC process was elitist in that it held meetings in upmarket hotels and mostly engaged the civil society organisations, as well as the elite members of the community. While evidence given by TJRC and Slye demonstrates that the witness testimonies and hearings engaged communities at the grass-roots level in social halls, schools, and churches, some discussants argued

⁴⁸ Discussant, FGD CODE 007 with members of District Peace Committee in Nakuru, Nakuru County, 11 January 2019.

⁴⁹ Discussant, FGD CODE 010 with local peace implementers in Kisumu, Kisumu County, 21 January 2019.

that some victims who would have supplied information to the commission were sidelined.⁵⁰ In addition, some of the victims interviewed claimed that the meetings organised at the grass-roots level were biased and prearranged to suit a preferred response of the local mobilisers, perhaps with a view to isolating victims who would have otherwise exposed local perpetrators. In that respect, therefore, some victims argue that the TJRC did not sufficiently engage grass-roots communities and hence their opinions were less considered in the reporting. There were arguments by some interveners in Eldoret that the TJRC sittings were carefully crafted with witness statements extracted from some privileged members of the community with a view to protecting perpetrators of historical injustices. There was nevertheless consensus amongst interveners and victims that the failure of the National Assembly to adopt the report suppressed its implementation and hence constrained conflict transformation. In particular, discussants argued that the TJRC failed to provide reparations for victims and hence denied them closure. A member of the DPC in Kamukunji, Nairobi, further noted that the TJRC hearings and witness statements re-traumatised victims and ‘opened wounds that were already healed’.⁵¹

While these experiences of discussants, first, to a large extent establish victimhood and, second, fault the TJRC for failing to address their plight, especially in the quest for administration of justice through reparations, victims engaged in this study established an identity that has, on the one hand, depicted one particular community—the Kikuyu—as the victims, and, on the other hand, another community—the Kalenjin—as the perpetrators. Despite evidence in reports including CIPEV (2008), KNCHR (2008), and HRW (2008) showing that other communities, for instance the Kalenjin, Luo, Luhya, and Kamba were also affected by historical injustices, the indigenist–foreigner discourse especially in the Rift Valley, central, and coastal regions has erroneously established a homogenous identity of victims. A review of the TJRC report, for instance, demonstrates the heterogeneity of victimhood in Kenya as it extensively explicates the historical injustices suffered by different ethnic communities across the country during the different epochs established in this study: that is, the colonial period, at independence in 1963, in the wake of multiparty democracy politics in 1991, and the post-National Accord era. Emphasising the heterogeneity of victims, Jacoby’s theory of victimhood underscores that the construction of grievance-based identity blurs the victim–perpetrator dichotomy and may hence lead to victimhood as a collective identity.⁵² In what may be defined as secondary victimhood, Laxminarayan

⁵⁰ TJRC (2013: 96–115); Slye (2018: 193–6).

⁵¹ FGD CODE 003 with local peace implementers and members of the local and District Peace Committee, Eastleigh, Nairobi, Nairobi County, 20 December 2018.

⁵² Jacoby (2014: 511–12)

argues that victims may develop a perception of victimisation in situations when their grievances are not addressed by state agencies.⁵³ Such a misconstrued collective victimhood identity may be deduced from the perceptions of victim discussants from a particular community—Kikuyu—as noted in this study, especially in regard to the historical injustices anchored on the indigenous–foreigner discourse in the distribution of land resources in the Rift Valley, central, and coastal regions of the country.

Experiences and perceptions on the ICC process

In the case of the ICC intervention and its outcomes and impact on transitional justice, discussants argued that the process initially appeared as an alternative to Kenya's weak judicial mechanisms. Since the judiciary failed to prosecute perpetrators of the 1992 and 1997 conflicts, the ICC hence appeared to be a mechanism that would perhaps punish perpetrators of the 2007 conflict. The failed attempts to establish a special tribunal as recommended by the CIPEV, and the authorisation of the ICC situation in Kenya, provided a recourse to victims that retributive justice would eventually be served to perpetrators without state interference. In a study of victim participants in the ICC, the Human Rights Center (2015) notes that victim participation in the Court was constrained by extensive state security apparatus. While the OTP coordinated its outreach activities with a field office, their initial interactions were with well-established non-governmental organisations based in Nairobi, far away from the epicentre of the violence. The participants in this study also cited that they favoured the ICC processes due to its immediate criminal indictment and the need to deter future electoral violence. In an interview with 204 respondent victims who had submitted witness statements to the Court's Victim Participation and Reparation Section (VPRS), the Human Rights Center (2015) notes that the Court offered the victims a platform where they would share their experiences and those of their proximate family members and friends.⁵⁴ The victims' interactions with the VPRS, or their legal representatives, gave them the voice they needed to air their grievances and articulate their demands. The victim participants also noted that the domestic courts as well as regional courts were biased, unlike the ICC which was perceived as neutral or apolitical, at least.⁵⁵ Due to its perceived neutrality, the Court was hence viewed to be the only effective approach to find justice for victims and deter the future commission of mass atrocities in Kenya. Some respondents, however, depicted

⁵³ Laxminarayan (2012: ii)

⁵⁴ Human Rights Center (2015: 51).

⁵⁵ *Ibid.* (53).

the Court as not impartial, based on narratives of witness coaching and witness bribery that watered down the credibility of the investigations. In addition, instances of witness intimidation, as well as disappearances, affected victims who withdrew their evidence, thereby weakening the evidentiary weight of the cases. In a further study on perceptions towards the ICC in Kenya, Dancy *et al.* demonstrate victims' biases against domestic courts on claims that such courts would insulate perpetrators of mass atrocities. A key observation made by Dancy *et al.* is that such perceptions are based on group allegiances to ethnic identities and in-group formation, and not to the Court's perceived bias against African states. The study further showed that the victims had less trust in the government and domestic institutions; hence their support for agencies like the ICC.⁵⁶

Despite the withdrawal of the *The Prosecutor v. Uhuru Muigai Kenyatta* case in March 2015 and the vacation of charges in the *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* in April 2016, discussants underscored that the ICC served as deterrence to future commission of atrocities. The naming of alleged perpetrators and the pretrials in The Hague showed the centrality of international law in prosecuting atrocities in situations where domestic mechanisms fail to serve justice. A discussant in Eastleigh, Nairobi, observed that '*the ICC contributed immensely on the peace we have today. The ICC acted like deterrence. If the president can be taken up by the ICC, then any other politician can be taken [arrested], jailed or convicted.*'⁵⁷

As a result of the investigations, there were contending arguments amongst discussants on the outcomes and impacts of the ICC intervention on conflict transformation. On the one hand, some discussants noted that the investigations led to integration between the perceived antagonist communities, especially the Kikuyu and Kalenjin, who have suffered the three-tier historical injustices, especially in the Rift Valley, central, and coastal regions. Due to the ICC pretrials, the two political leaders—Uhuru Kenyatta and William Ruto, who were alleged to have perpetrated the mass atrocities committed during the 2007 conflict—engaged their communities in dialogues that fostered reconciliation, especially towards the 2013 elections. On the other hand, some victims argued that ICC investigations renewed antagonisms between the alleged perpetrators and their patronage, and against the opposition leaders who had been incorporated into the coalition government following claims that the leaders supplied the Court with evidence incriminating the perpetrators. A Youth Initiatives Kenya officer in Dandora, Nairobi, noted that '*the ICC process split the communities. Coalitions were built around ethnic communities whose leaders*

⁵⁶Dancy *et al.* (2019: 1444–53).

⁵⁷FGD CODE 003 with local peace implementers and members of the local and District Peace Committee, Eastleigh, Nairobi, Nairobi County, 20 December 2018.

were tried [indicted].⁵⁸ Discussants, however, assert that the withdrawal and vacation of the two cases ended the quest for justice, especially for victims who suffered atrocities during the 2007 conflict.

In addition, discussants argued that the ICC led to further atrocities: for instance, the killing of key witness Meshack Yebei.⁵⁹ Some discussants raised concerns that the prosecution of the alleged perpetrators, especially within the two communities that have suffered atrocities in the Rift Valley and central regions, would lead to renewed antagonisms. A discussant argued that; *‘ICC did not help, there were rumours that once [name of prominent Kenyan withheld for ethical considerations—safety of the researcher] is jailed, all these witnesses who were well-known had to leave the area of Kimuri [in Eldoret]. The Kalenjins would say once [name of prominent Kenyan withheld for ethical considerations—safety of the researcher] is jailed, the Kikuyus would be evicted.’*⁶⁰

There are further narratives from discussants that the ICC process was infiltrated by civil society organisations that supplied evidence, and at worse coached witnesses, who eventually withdrew from adducing evidence at the Court, thereby weakening the evidentiary weight of the cases. A discussant asserted that the ICC process was elitist since it neither identified perpetrators at the grass roots nor adequately engaged the victims at the grass-roots level in evidence gathering.⁶¹ In addition, some discussants noted that the politicisation of the ICC process eventually halted their quest for retributive justice and denied victims closure, thereby derailing integration and reconciliation. Regarding healing and closure, a discussant in Kiambaa, Eldoret, narrated that:

I was among those who were in the church [KAG Church—Kiambaa]. I was there even when it was burning. I always thank God because I don't know how I escaped from the church, because we had others who did not survive. I escaped through there [pointing at an imaginary fence] where there was barbed wire fence and a house. I was there even when that house was torched. I am not sure whether it was ignited using petrol. I saw them igniting the fire. After which I went to the road where I met three young men who attacked me on the head. My neighbour's daughter took me to the referral [Moi Teaching and Referral Hospital], I was treated at the Cathedral. ... We were bereaved, we will

⁵⁸ Discussant, FGD CODE 005 with local implementers and beneficiaries of peacebuilding interventions in Dandora, Nairobi, Nairobi County, 21 December 2018. Argument averred by Discussant, FGD CODE 016 with local peace implementers working with the Catholic Justice and Peace Commission in Bomet, Bomet County, 24 January 2019.

⁵⁹ Discussant, FGD CODE 011 with victims and beneficiaries of Interventions in Kisumu, Kisumu County, 21 January, 2019; see also ICC (2015).

⁶⁰ Discussants, FGD CODE 024 with victims of the Kenya Assembly of God Kiambaa Church arson in Kiambaa, Eldoret, Uasin Gishu County, 15 October 2019.

⁶¹ Discussant, FGD CODE 002 with victims and beneficiaries of peace interventions in Kibera, Nairobi, Nairobi County, 19 December 2018.

*never heal. We were never compensated by the government. It is very painful. I sought counselling, but will never forget. My child died, her wife suffered, and the child that was born was affected at birth.*⁶²

Perceptions on ‘alternative’ indigenous judicial interventions

Due to the perceived failure of the TJRC and ICC, and domestic judicial mechanisms, specifically the recommended Special Tribunal for Kenya and the International Crimes Division of the High Court, some discussants argued for indigenous dispute resolution mechanisms as ‘alternative’ interventions for pursuing justice. The failure of the government to implement the TJRC report, and the subsequent withdrawal and vacation of the two cases in the ICC failed in serving restorative and retributive justice to victims and perpetrators, respectively. Some victims still bear trauma associated with the conflict and hence find ICC guilty of a miscarriage of justice, and further accuse the government of protecting the Adversely Mentioned Persons in the TJRC report. Some victim discussants argued that they have never found closure since they interact with perpetrators at the grass roots who were never prosecuted. These discussants hence argue that indigenous dispute resolution mechanisms are well structured to rebuild relations between victims and perpetrators, and their communities, since they are implemented based on social–cultural norms that are commonly accepted by the conflicting communities. A discussant averred that *‘it is important to have local mechanisms which promote peace. It is better to have local solutions. The local people know the local challenges and they still have the solutions.’*⁶³ In reiteration, a discussant argued that indigenous dispute resolution and methods of reconciliation can attract justice and peace within conflicting communities since they are sanctioned by elders who are revered.⁶⁴

The quest for alternative indigenous judicial interventions in a multi-ethnic country like Kenya where the configuration of the electoral conflict coincided with ethnic affiliation, however, attracts further discourses on the applicability of indigenous judicial interventions. Due to the perceptions of ethnic victimhood, especially of the Kikuyu community, efforts to engage the council of elders to deploy indigenous judicial interventions to address victims and perpetrators of the electoral conflict

⁶² Discussants, FGD CODE 024 with victims of the Kenya Assembly of God Kiambaa Church arson in Kiambaa, Eldoret, Uasin Gishu County, 15 October 2019.

⁶³ Discussant, FGD CODE 012 with victims and beneficiaries of peace in interventions, Kapsabet, Nandi County, January 22 2019.

⁶⁴ Discussant, FGD CODE 016 with local peace implementers working with the Catholic Justice and Peace Commission in Bomet, Bomet County, 24 January 2019.

have failed. Although the *Athuuri* and *Muiyot* elders representing the Kikuyu and Kalenjin communities, respectively, advanced traditional reconciliation between the two communities especially after the 2007 conflict, discussions on reparations and retribution failed when the *Athuuri* elders invoked the collective ethnic victimhood of their community and asserted that they can only engage in such a mechanism if and when the *Muiyot* acknowledge guilt on behalf of their community—the Kalenjin. For example, narratives were raised by a discussant that elders from the Kalenjin community rejected the reconstruction and memorialisation of the victims of 1 January 2008 Kenya Assemblies of God Kiambaa church arson, arguing that such a practice anchors claims that the atrocities were committed by members of their community against the Kikuyu.⁶⁵ Elsewhere in Saboti, discussants claimed that the *Kokwet* Sabaot council of elders would discourage the punishment of perpetrators, would discourage victims from providing evidence in courts, and would sanction victims to forgive perpetrators, unconditionally.⁶⁶ While these indigenous interventions may have succeeded in their implementation in the case of the *gacaca* courts in Rwanda and the *mato oput* among the Acholi in northern Uganda, they may fail in multi-ethnic communities due to engrained ethnic victimhood identity discourses. In addition, indigenous judicial interventions may be avenues to subvert the rule of law, and may be deployed to protect perpetrators who may have committed atrocities. Besides, the composition of these councils of elders in Kenya is male-dominated due to existing patriarchal and gendered constructions, and may hence relegate the women's agency which is a critical constituency in judicial interventions.

Conclusion

The foregoing analysis of historical injustices in Kenya underscores an argument that there exist individual victimhood and collective victimhood in the country that is premised on perceptions and experiences of victims, spanning from the colonial period through independence era in 1963 and the wake of multiparty democracy politics in 1991 into post-National Accord Kenya. The failure of the state, and of non-state actors, to effectively address the three-tier historical injustices as conceptualised in this article has impacted on the conflict transformation agenda in the country. Conflict transformation in Kenya has also been hampered by other variables including:

⁶⁵ Discussant, FGD CODE 024 with victims of the Kenya Assembly of God Kiambaa Church arson in Kiambaa, Eldoret, Uasin Gishu County, 15 October 2019.

⁶⁶ Discussant, FGD CODE 018 with victims and beneficiaries of Free Pentecostal Fellowship of Kenya peace interventions in Saboti, Trans Nzoia County, 28 January 2018.

economic and political factors, institutional inadequacies, legal and constitutional issues, ethnic identity differences, gender-based constructions and cultural factors, as well as demographic considerations.

Despite the impetus towards addressing historical injustices in the period after the signing of the National Accord in February 2008, the failure of the state to establish the special tribunal for Kenya as recommended in the CIPEV report, as well as the delayed actualisation of the International Crimes Division of the High Court, has affected transitional justice in the country. While the internationalised intervention of the ICC presented a complementary approach towards pursuing transitional justice, the withdrawal and vacation of the two cases derailed the quest for retribution for perpetrators of historical injustices, and reparations for victims. In addition, the failure to establish the implementation framework and the reparations committee as defined in the TJRC Act, as well as the failure of the National Assembly to debate and adopt the TJRC report with a view to implementing its findings constrained the quest for addressing the historical injustices.

In order to attain effective conflict transformation in Kenya, it is therefore essential for the state to address existing grievances of victims who bear the experiences of historical injustices as conceptualised in the three-tier typology. While the individual discussants engaged in this study may not have experienced the first-, second-, and third-tiers in their entirety, as well as the first intermediary and second intermediary historical injustices, their individual experiences and perceptions establish a sense of collective victimhood identity largely anchored on the indigenous–foreigner discourse. It is in responding to such claims of victimhood through transitional justice that individuals and communities would reconcile with their perceived perpetrator communities.

While the narratives presented by discussants in the ten selected counties about historical injustices may not be used to expressly generalise on the outcomes and impact of transitional justice interventions in post-National Accord Kenya, they nevertheless present empirical and objective perspectives on the contending experiences and perceptions of victims and interveners that would perhaps inform further interventions for transitional justice in the country. By implication, these experiences and perceptions inform the need for the state to perhaps revisit the resettlement and compensation programmes with a view to addressing the concerns of victims who are yet to find healing and closure in regard to the three-tier historical injustices as conceptualised in this study.

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