

## Leashing Kenya's Dogs of War: A Theoretical Assessment

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From the standpoint of constitutional law, the handing over of the Waki envelope to the prosecutor of the International Criminal Court (ICC) represents the ceding of judicial autonomy of the state to an 'exceptional court'. The establishment of a domestic special tribunal which supplants the supervisory jurisdiction of the High Court and strips the president and attorney general of constitutional powers and immunities has a similar effect. What would motivate a country like Kenya – by all indicators an authoritarian regime – to delegate judicial powers? This essay reviews some of the key literature on why states delegate judicial processes to auxiliary courts, interrogates some of the constraints, and provides possible pointers to successful trials in the Kenyan context.

At one end of the spectrum, Tamir Moustafa's research on judiciaries in transitional contexts suggests that even though courts are often transformed into spaces for reinforcing the role of legal norms in mediating politics, authoritarian regimes generally use courts for at least five reasons: social control, legitimation, controlling administrative agents, creating credible commitments in the economic sphere and delegation of controversial reforms (Mustafa & Ginsburg 2008:1). While some of these reasons may not hold in the Kenyan context, some could. For instance, it is possible to imagine that 'disciplining' political elites otherwise untouchable by the political system could secure elite cohesion. Similarly punishing the perpetrators of the violence would reinforce commitment to the rule of law; an important ingredient in the stability of property rights and an incentive to economic investments. This position seems to find support from transitional justice scholars such as Bronwyn Anne Leebaw, who argues that law (and by extension, courts) can be 'utilized to obfuscate and legitimate abuses of power' (Leebaw 2008:97). The offshoot of this position is that it is possible to have trials of suspects of the post electoral violence without any corresponding attainment of their transformative intent. Consequently, Kenyan civil society should be alive to this possibility.

A view opposite to Mustafa's would be that Kenya is genuinely keen on meeting its international obligations under both the Rome Statute and the Genocide Convention as evidenced by its willingness, albeit unsuccessful, to establish a national mechanism for the trial of post-electoral violence perpetrators. In this sense, Kenya can be said to be committed to ensuring adherence to international criminal law. Kenya's attempted judicialization of political differences through an international criminal process can be seen as compliance with such norms (Downs et al. 1996: 389). This argument is however unconvincing given the glib manner with which [proposals](#) at the cabinet level have been made to the effect that Kenya should withdraw from the Rome Statute in order to deny the ICC jurisdiction over the Kenyan situation. A country buoyed by aspirations to comply with international standards would be unlikely to propose such actions. Instead, what emerges from this position is that the Kenyan state will not pursue normative compliance if the associated political and social cost is, in the short term, onerous. Any cost-benefit analysis is likely to centre around the succession of President Kibaki: the

cabinet's latest decision to abandon the pursuit of a local special tribunal stems largely from the perceived impact of any such trials on the strategic and vote-rich Rift Valley province. Indeed, Prime Minister Raila Odinga appears to have lost the support of Rift Valley political barons due to his enthusiastic support for such trials.

The most common justification currently advanced in support of international trials for Kenya's war crimes suspects is based on the desire to [end impunity](#). What this means, among other things, is that by punishing perpetrators, retributive justice is effected for the victims, and an increase in likelihood of punishment of political elites will ensure that such crimes do not recur. Deterrence theory in criminology, on which this proposition is based, does not anticipate that officials who have already committed human rights violations will be stopped from committing further violations. Rather, the concern is how sanctions will affect the future behaviour of other actors. Of particular relevance is the finding that beliefs about the likelihood or probability of arrest and punishment in human rights cases, rather than the severity of punishment, have a greater deterrent effect (Bueno de Mesquita 1995: 485). Deterrence research also suggests that deterrence is more effective for individuals who have higher stakes in society (Nagin 1998), which would seem to include the kinds of state officials complicit in Kenya's killings. Sikkink's [latest research](#) on the effects of human rights trials at the domestic level provides quantitative support in favour of the deterrence effect of such trials. One of her hypotheses is that countries that have held human rights trials will see greater improvements in human rights practices than those countries that have not held human rights trials. Her research, based on a survey of 192 countries, including a good number of African states, suggests that those states with more accumulated years of trials after transition are less repressive than countries with fewer accumulated years of trials, and that truth commissions are associated with improvements in human rights practices, but that trials have a stronger effect than truth commission (Sikkink & Kim 2009). Similarly, Roht-Arriaza (2005) argues that human rights trials, either domestic or international, are both legally and ethically desirable and practically useful in deterring future human rights violations.

Although deterrence and compliance theories may converge at the level of impact, the latter looks more at state conduct in the international sphere while the former considers social transformations engendered at the domestic level by targeted criminal proceedings. Both deterrence and compliance theories are further consistent with rational choice thinking on this issue which suggests that state officials and politicians choose impunity and repression because the benefits of such action exceed the cost (Poe et al. 1999).

Realizing deterrence in the Kenyan context, however, will be problematic if the current collectivization of culpability or victimhood is not halted through both coercive and persuasive means. By ascribing blanket guilt or innocence to ethnic groupings, it is likely that collective mobilization of communities will dull the anticipated deterrent effect of such trials. Instead, the outcomes of such trials will be rationalized away from justice and towards vindictiveness. Deterrence can be nurtured, however, if prosecutions are seen to apply across ethnic cleavages so that the sting of victors' justice is stayed. Nonetheless, this approach may not be practical, especially if aggression continues in a particular community more than in others, a most likely scenario in the Kenyan case.

In contrast to deterrence and compliance supporters, realist scholars problematize trials as a vehicle for attaining social cohesion. For instance, some scholars of this persuasion argue that trials or threats thereof could destabilize new democracies and lead to coups. They hold that ‘fragile states’ that undertake such trials could ‘commit suicide’ by dramatizing high profile persons’ arrests and incarcerations. They further argue that the threat of prosecution could cause powerful dictators or insurgents to entrench themselves in power rather than negotiate a transition from authoritarian regimes and/or civil war (Goldsmith & Krasner 2003:49). Snyder and Vinjamuri posit that ‘Policies and institutions of humanitarian justice are destined to fail’ and that ‘recent international criminal tribunals have utterly failed to deter subsequent abuses in the former Yugoslavia and in Central Africa’ (Snyder & Vinjamuri 2003:40). In the same line of thinking, Mahmood Mamdani has [disputed](#) the efficacy of indicting Sudan’s President Omar Al Bashir on the grounds that such attempts will neither secure stability in Sudan nor halt the blood letting in Darfur. In this regard, he called for the subordination of criminal accountability to the larger pursuit of political reforms. While no coup is likely to happen in Kenya, the salience of this theory is obvious, and could explain the cabinet’s decision to shelve the pursuit of a local tribunal. Indeed, many calling for justice to be tempered with reconciliation have argued that the pursuit of justice should not come at the expense of the survival of the state. However, proponents of this view have failed to show how such trials will imperil the Kenyan state. Unlike Iraq, Sudan, the Democratic Republic of Congo or even the former Yugoslavia, Kenya has stronger institutions, notably an independent military, that can provide relatively apolitical- even if sometimes heavy-handed- security arrangements. The assumption here is that pressure emerging from high profile international criminal trials could re-ignite ethnic bloodletting and trigger a military intervention. Be this as it may, what is certain is that without the political commitment to the impartial use of such institutions, it is possible for state action to be misjudged as serving partisan interests.

This paper has presented a diverse body of knowledge that could be deployed in the assessment of Kenya’s decision whether or not to try the lead perpetrators of the post electoral violence. Such an assessment must be alive to emerging empirical evidence in favour of the deterrence effect of trials. The success of the Kenyan trials will depend largely on the extent to which ethnic mobilization is checked *ex ante*. A comprehensive and sophisticated outreach strategy is an important coefficient to this, as is a framework for prosecutions or other forms of transitional justice that is consultative, accountable and above reproach. Kenya’s fractured politics would undoubtedly be tested most severely by a local tribunal whose proceedings Kenyan and international media cover extensively. Consequently, a responsive media able to provide balanced and sensitive reporting that would give dignity to the victims of violence and hate will be important. In the end, Mamdani’s [assertion](#) that deterrence may result from prosecution only when the same rules apply for all war criminals, regardless of national origin or political orientation, is appropriate for the Kenyan cases as in Sudan’s Darfur.

## Further Reading

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