

**SUMMARY OF THE TRUTH, JUSTICE,  
AND RECONCILIATION COMMISSION  
(TJRC) REPORT**

**Produced by**

**Kituo Cha Sheria**

**(Legal Advice Centre)**

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## FOREWORD

On 3<sup>rd</sup> May 2013, the Truth, Justice, and Reconciliation Commission (TJRC) presented its final report to President Uhuru Kenyatta.

Established in the aftermath of the harrowing events of the 2007/2008 post-election violence, the TJRC was tasked with inquiring into gross violations of human rights and historical injustices that occurred in Kenya between independence on 12<sup>th</sup> December 1963 and the Coalition Agreement signed on 28<sup>th</sup> February 2008.

The end product, a report comprising over 2200 pages, is structured into four separate volumes: the first volume (Volume I) provides an account of how the TJRC was formed, how it interpreted its mandate and what challenges were faced whilst carrying out this mandate; the second volume (Volume II), itself divided into three sub-volumes, focuses on the major violations of bodily integrity committed during the mandate period (including unlawful killings and enforced disappearances, unlawful detention, torture and ill-treatment and sexual violence), historical injustices and violations of socio-economic rights, and violations against groups entitled to special protection, including women and children, as well as minority groups and indigenous communities; the third volume (Volume III) addresses issues relating to national unity and reconciliation; and the fourth volume (Volume IV) catalogues the TJRC's findings and recommendations, including those relating to its implementation mechanism and reparations framework.

Given the lengthy, complex nature of the report, this publication seeks to summarise the key issues, findings, and recommendations presented by the TJRC. The purpose of this being to not only recognise the human rights violations perpetrated throughout the mandate period and to date, but to also provide a wider audience with access to pertinent information of this kind and allow for active participation in the reconciliation and healing process of the country.

In doing so, Kituo Cha Sheria, also seeks to draw attention to the fact that despite the President's receipt of the report over a year ago (at the time of publishing), he is yet to officially acknowledge the TJRC report and make it public. In the interest of pursuing peace, promoting access to justice, and enabling reconciliation, Kituo Cha Sheria urges that the government of Kenya make the report in question public and to undertake urgent action in order to realise the report's recommendations.

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## INTRODUCTION

Amidst mounting national and international pressure, the Kenya National Dialogue and Reconciliation (KNDR) process was formally launched on 29<sup>th</sup> January 2008, following nearly two months of devastating political unrest after the heavily contested 2007 general elections.

As part of the KDNR process, an agreement to establish a Truth, Justice and Reconciliation Commission (TJRC Agreement) was adopted, and on 23<sup>rd</sup> October 2008, the National Assembly enacted the Truth, Justice and Reconciliation Act (TJR Act). The Act came into operation on the 17<sup>th</sup> of March 2009.

The Commission, composed of nine commissioners – six Kenyan citizens appointed through a national consultative process, and three non-citizens selected by the African Union Panel of Eminent African personalities – was inaugurated on 9<sup>th</sup> August 2009.

### **Mandate:**

The broad mandate of the Commission was to look into gross violations of human rights and historical injustices that occurred in Kenya from 12<sup>th</sup> December 1963 when Kenya became independent to 28<sup>th</sup> February 2008 when the Coalition Agreement was signed. It was hoped that in addressing these violations, Kenya would promote peace, justice, national unity, healing and reconciliation.

More specifically the Commission was mandated to:

- (a) Establish an accurate and complete record of human rights violations perpetrated by the State since Kenya's independence on 12<sup>th</sup> December 1963 up to 28<sup>th</sup> February 2008, as well as the possible causes, nature and extend thereof;
- (b) Investigate gross human rights violations and violations of international human rights law;
- (c) Determine means of redress for victims; and
- (d) Recommend the prosecution of perpetrators of such violations, as well as reparations for victims;

The mandate of the Commission also stated that all findings of the TJRC would be made public.

## **Operational Period:**

The Commission was required to operate for a period of two years, preceded by a three-month establishment phase.

Due to challenges surrounding the suitability of its Chairperson which lasted fifteen (15) months from the appointment of the Commissioners in August 2009, legal and financial challenges, the Commission was not able to begin operating substantively and effectively until September 2010, a full year after its establishment.

The Commission was granted three extensions:

- The first extension (November 2011 to May 2012)
- The second extension (May to August 2012)
- The third extension (August 2012 to May 2013)

## **Completion of the Report:**

On the 21<sup>st</sup> of May 2013, the Commission handed over its final report to President Uhuru Kenyatta.

## **Implementation of the Report:**

At the time of publishing, the TJRC report is yet to be implemented and most worrying is that there exists a Truth, Justice and Reconciliation (Amendment) Act of 2013, which gives power to parliament to alter the recommendations of the TJRC report.

It was foreseen that the implementation process of the TJRC report would be done in accordance with the recommendations of the Commission. In the proposed amendments contained in Truth, Justice and Reconciliation (Amendment) Act of 2013, the implementation of the TJRC report will be done in accordance with recommendation of the National Assembly, upon their 'consideration' of the report. The proposed amendments will affect the implementation of TJRC's recommendations. In consequence, the proposed amendments amounts to an alteration of the TJRC report itself.

## **The TJRC Report:**

The report, comprising a total of over 2200 pages, is divided into four volumes. Volume I provides for the background and mandate of the TJRC, the methodology used, as well as the challenges faced.

Volume II, split into three parts, presents the information gathered on (a) violations of bodily integrity, including unlawful killings, enforced disappearances, torture, and sexual



violence; (b) historical injustices related to land, socio-economic rights, economic crimes and grand corruption; and (c) violations of groups provided special protection, including women, children, and members of minority or indigenous groups.

Volume III considers discussions on national unity, healing and reconciliation, particularly with regard to ethnic tensions.

Finally, Volume IV provides the Commission's findings and recommendations.

This publication will summarise each of the respective volumes in the TJRC report. In line with Kituo Cha Sheria's focus on promoting access to justice for victims, it will analyse the reparations framework provided for in Volume IV more substantially.

# VOLUME I: BACKGROUND ON THE TJRC

## CHAPTER ONE: HISTORICAL CONTEXT

### **President Jomo Kenyatta:**

The government and the ruling political party, Kenya African National Union (KANU), not only retained repressive colonial laws, but also became increasingly intolerant of political dissent and opposition. Political assassinations and arbitrary detentions were turned into potent tools for silencing dissenting voices and ultimately for dismantling opposition political parties. For the larger part of Kenyatta's reign, Kenya was a *de facto* one-party state.

The resettlement of Kenyan citizens on lands that they previously owned and lived on was riddled with corruption. As a consequence, many including those who had put their lives on the line for liberty were left landless. Ethnicity became rooted in political governance.

### **President Daniel arap Moi:**

The majority of President Moi's reign was characterised by intolerance to political dissent. In June 1982, the government pushed through Parliament a constitutional amendment that made the country a *de jure* one-party state. In effect, KANU became the only lawful political party in the country. Following an attempted coup in August 1982, the government resorted to even more vicious and repressive ways of dealing with dissent.

Political activists and individuals who dared oppose President Moi's rule were routinely detained and tortured. Security agencies systematically committed untold atrocities against citizens they were sworn to protect. The judiciary became an accomplice in the perpetuation of violations, while parliament was transformed into a puppet controlled by the heavy hand of the executive. Corruption and especially the illegal and irregular allocation of land became institutionalised and normalised. Political backing and centralisation of economic power in the hands of a few characterised the Moi era.

In 1991, President Moi yielded to demands for a multi-party state. However, political and ethnic violence, reportedly caused by the state became a part of multi-party elections held in 1992 and 1997. Ethnicity was used as a political tool for accessing power and state resources and for fuelling violence.

### **President Mwai Kibaki:**

By 2002 when the National Rainbow Coalition (NARC) took over under the leadership of President Kibaki, Kenya was a ravaged state with a history burdened by ghastly accounts of gross violations of human rights and historical injustices.

## **Road to Establishing a Truth Commission:**

### **NARC's Promises:**

NARC pledged to address and rectify historical injustices. The NARC government initiated numerous legislative and institutional reforms and a range of activities aimed at redressing past injustices. These reforms and activities included, but were not limited to:

- Judicial Commission of Inquiry into the Goldenberg Affair;
- Investigation on the magnitude of corruption in the Judiciary;
- Lifting of the ban on operations of the Mau Mau movement;
- Inquest into the alleged political assassination of Father John Kaiser
- Inquiry into the death of Dr Robert Ouko;
- Establishment of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land; and
- Creation of the Kenya National Commission on Human Rights.

### **The Task Force on Establishment of a Truth, Justice and Reconciliation Commission:**

The Task Force on the Establishment of a Truth, Justice and Reconciliation Commission was established in April 2003. It was mandated to recommend to the Minister for Justice, National Cohesion and Constitutional Affairs whether the establishment of a truth, justice and reconciliation commission was necessary for Kenya.

After a period of collecting and collating the views of Kenyans from across the country, the Task Force concluded that a truth commission was necessary. It recommended that a commission to be referred to as the 'Truth, Justice and Reconciliation Commission', be established no later than June 2004.

### **NARC's failures:**

The new government deliberately failed to implement recommendations of task forces and commissions of inquiry, just like the old Moi regime. For instance:

- June 2004 – the deadline that the Task Force on the establishment of Truth, Justice and Reconciliation Commission had set for the establishment of a truth commission – passed without the establishment of such a commission;
- The 'Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Land' was presented to the President in June 2004, but no immediate or prompt

actions were taken to implement its recommendations;

- The Parliamentary Select Committee investigating the Death of Dr Robert Ouko was dogged by controversy throughout its operations (including the resignation of a number of Committee members and the refusal of other Committee members to sign the final report). The Committee did not table its Report before Parliament despite concluding its investigations in March 2005. The Report was later tabled in Parliament in December 2010; and
- The inquest into the murder of Father John Kaiser was inconclusive. However, the Presiding Magistrate recommended further investigations. Such further investigations have never been conducted

### **The Constitution of Kenya Review (CKRC) Process:**

On being elected, the NARC government reconvened the National Constitutional Conference at Bomas of Kenya, Nairobi, for purposes of discussing, debating, amending and adopting a draft constitution.

During CKRC's public hearings across the country, Kenyans had asked for the creation of a commission, which would deal with past abuses and injustices. In response, the CKRC recommended the formation of a Commission for Human Rights and Administrative Justice with the general mandate to:

- Investigate and establish, as complete a picture as possible, of the nature, causes and extent of gross violations of human rights;
- Give an opportunity to victims and their families to relate the violations they suffered through hearings or other means;
- Address the question of granting of amnesty to persons who were involved and who make disclosure of all the relevant acts associated with the crimes;
- Make recommendations on reparation and the rehabilitation of the victims or families of the abused;
- Propose measures aimed at the restoration of the human and civil dignity of victims; and
- Report its findings to the nation.

On receiving the Bomas Draft, however, the government altered its contents and pushed through Parliament a revised draft (popularly known as the 'Wako Draft'). The Wako Draft watered down legislative powers and retained most of the presidential powers that many had hoped would be shared out to other arms of government. It also diluted the devolution framework that had been proposed in the Bomas Draft.

The revision and dilution of the Bomas Draft led to a split of opinion in the government, leading to a referendum. At the National Referendum held on 21 November 2005, 57 percent of Kenyans rejected the Wako Draft.

Following the rejection of the Wako Draft, President Kibaki dissolved his cabinet and formed a government of national unity, which incorporated prominent members of the previous KANU government. The NARC members who had opposed the proposed Constitution were dropped from cabinet. They subsequently formed the Orange Democratic Movement (ODM), while politicians and political parties allied to the government, and President Kibaki in particular, formed the Party of National Unity (PNU). The two parties, under the leadership of Raila Odinga and President Mwai Kibaki respectively, would later be at the centre of the disputed 2007 Presidential election.

## CHAPTER TWO: INTERPRETATION OF THE MANDATE

With respect to victims, the Commission was mandated to:

- Identify and specify victims of violations;
- Determine ways and means of redressing the suffering of victims;
- Provide victims with a platform for non-retributive truth telling;
- Provide victims with a forum to be heard and restore their dignity;
- Investigate into the whereabouts of victims and restore their dignity; and
- Recommend reparation measures in respect of victims.

With respect to perpetrators, the Commission was mandated to:

- Record the ‘motives and perspectives’ of the persons responsible for commission of the violations;
- Provide perpetrators with a platform for non-retributive truth telling and a forum to confess their actions as a way of bringing reconciliation;
- Determine perpetrators of violations and where appropriate recommend their prosecution; and
- Facilitate the granting of conditional amnesty to perpetrators who make full disclosure of their involvement in violations.

The Commission published names of individuals who were alleged to have committed gross violations of human rights during its mandate period. The Commission received

allegations against 54,000 individuals. However, the list of alleged perpetrators contained in the report is only limited to those who were afforded an opportunity to respond to allegations levelled against them. Due to limited resources and time constraints, the Commission could not notify all alleged perpetrators of the nature of allegations raised against them.

### **Temporal Mandate (December 1963 - February 2008):**

As per its mandate, the TJRC was to inquire into gross violations of human rights and historical injustices that occurred in Kenya between 12 December 1963 and 28 February 2008.

The temporal scope of the Commission, spanning a 45-year period, was unlike most previous truth commission, which usually focused on human rights violations during a particular event alone (e.g. an armed conflict). The Commission identified its temporal mandate as over-ambitious; seeking to address such an extended period of time. As such, it chose to focus on particular historical intervals during which violence had occurred. The Commission prioritised violations committed in the following contexts:

- Shifta War (1965-1967);
- Security operations in North Eastern, Upper Eastern and North Rift (1963-2008);
- Attempted coup (1982);
- Crackdown on multi-party and pro-democracy activists (1986-1991);
- Ethnic and politically instigated clashes (1991/1992 and 1997);
- Activities of and crackdown on militia groups (2006-2007); and
- Post-election violence (2007-2008).

### **Subject Matter Mandate: Gross Human Rights Violations and Historical Injustices:**

Gross human rights violations' were construed as including:

- (a) Violations of fundamental human rights, including but not limited to acts of torture, killing, abduction, and severe ill-treatment of any person;
- (b) Imprisonment or other severe deprivation of physical property;
- (c) Rape or any other form of sexual violence;

- (d) Enforced disappearance of persons;
- (e) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender or other grounds universally recognised as impermissible under international law;
- (f) Any attempt, conspiracy, incitement, instigation, command, procurement to commit an act referred to in paragraph (a) and (c), which was committed during the period between 12 December 1963 and 28 February 2008 and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive; or
- (g) Crimes against humanity.

The Commission prioritised investigations into unlawful killings and enforced disappearances (including political assassinations, extra-judicial killings, and massacres); unlawful detention, torture, and ill-treatment; and sexual violence. In addition to these civil and political rights, relating predominantly to violations of bodily integrity, the Commission also addressed violations of socio-economic rights. As such, it considered:

- (a) The socio-economic impact of violations that targeted individual's bodily integrity or their civil and political rights, concluding that most security operations in the country in which killings, torture and sexual crimes were committed, were also characterised by the burning of houses, theft or killing of cattle, looting of property and destruction of crops. The impact of these violations was particularly borne by the most vulnerable in society such as women, children, persons with disabilities and the elderly.
- (b) The socio-economic rights within its mandate to inquire into and establish the reality or otherwise of perceived economic marginalisation of communities; and
- (c) The socio-economic violations within its mandate to investigate economic crimes and grand corruption.

The Commission interpreted 'historical injustices' to constitute the exclusion and marginalisation (in terms of economic development) of certain groups or regions and a range of violations supportive of this phenomenon, as well as the dispossession and inequalities in the allocation of land in a variety of ways by successive governments (or those associated with them) in pre-independence and post-independence Kenya.

## **Mandate on Any Other Matter:**

The Commission understood this to include the following three functions:

- (a) Consider the reports of the relevant commissions of inquiry and make recommendations on the implementation of such reports;
- (b) Inquire into the misuse of public institutions for political objectives; and
- (c) Inquire into the causes of ethnic tensions and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities.

## **Mandate on the Report:**

With regards to the Report, the Commission was mandated to:

- Recommend for prosecution
- Recommend for reparation for victims
- Recommend on specific actions to be taken in furtherance of the Commission's findings
- Recommend on legal and administrative measures to be taken to address specific concerns identified by the Commission
- Make recommendations relating to the mechanism and framework for the implementation of its recommendations and an institutional arrangement.

## **CHAPTER THREE: METHODOLOGY AND PROCESS**

The Commission structured its operational work into four stages:

- (a) Statement taking (including those of victims, witnesses, communities, interest groups, persons directly involved in events, or any other group or individual);
- (b) Research and investigation;
- (c) Hearings; and
- (d) Report writing.

In an effort to enable active public participation, build ownership, and reach as many



people as possible from all sectors of society, the Commission, through its Civic Education and Outreach Department, conducted various activities, including training of stakeholders, hosting workshops and meetings, and participation in *barazas* and Agricultural Society of Kenya shows. It also carried out pre-hearing civic education drives, with the objective of informing the public on the processes of the Commission, managing their expectations, and generating a receptive environment for the hearings that were to follow.

### Statement Taking:

Having recruited 304 statement takers (113 male and 191 female), the Commission commenced its nation-wide statement taking exercise on 9 September 2010, lasting for a period of five months. In anticipating the fact that some individuals would be either unwilling or unable to record statement during the formal statement taking exercise, the Commission continued to record and receive statements and memoranda at its offices and during individual as well as thematic hearings. The Commission collected 42,465 statements in total.

#### **Statements Distribution by region and gender**

Region	Male	Female	Unknown	Total
Central	1778	1574	6	3358
Coast	2455	1079	13	3547
Eastern	3467	1775	7	5249
Nairobi	832	947	2	1781
North Eastern	2883	1307	2	4192
Nyanza	2602	1828	7	4437
Rift Valley	7211	4698	23	11932
Western	3934	2890	8	6832
Not Given	649	405	83	1137
<b>Grand Total</b>	<b>25811</b>	<b>16503</b>	<b>151</b>	<b>42465</b>

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In addition to individual victim and witness statements, the Commissions also collected memoranda submitted by representatives of affected communities, groups, and individuals, which generally included longer narrations of the history, context, and causes of violations. The Commission received 1,828 memoranda in total.

### ***Regional distribution of memos.***

<b>Province</b>	<b>Count</b>
Central	162
Coast	255
Eastern	168
Nairobi	55
NG	202
North Eastern	24
Nyanza	122
Rift Valley	626
Western	214
<b>Total</b>	<b>1828</b>

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### **Research and Investigations:**

In addition to the statements, memoranda, and exhibits provided by victims and witnesses, the Commission also sources materials from the National Archives and government registries, as well as academic papers and reports from relevant organisations and institutions.

Thematic workshops were organised by the Research Department in order to explore various research themes in the presence of relevant experts and stakeholders.

The Investigation Department was established in September 2010, with the primary purpose of identifying and interviewing witnesses whose individual stories would contribute to the historical narrative of gross human rights violations in Kenya. Its role extended to the collection and analysis of relevant documentary and other forms of evidence. The Investigation Department interviewed 919 people in total.

### **Hearings:**

The Commission conducted its hearings between mid-April 2011 and the beginning of April 2012. It conducted three types of hearings:

- Individual hearings;
- Women’s hearings; and
- Thematic hearings – focusing on Access to justice, Economic marginalisation and minorities, Land, Armed militia groups, Prisons and detention centres, Torture, Ethnic tensions and violence, The 1982 attempted coup, Security agencies, extra-judicial killings, and massacres, Persons with disabilities, Women, Children, Internally Displaces Persons (IDPs) and Political assassinations.

**Table 1: Areas where the Commission held its hearings**

	Region	Hearing locations
1	Central	Nyeri, Muranga, Kiambu and Nyandarua
2	Coast	Lamu, Hola, Kilifi, Mombasa, Kwale, and Wundanyi
3	Eastern	Meru, Embu, Machakos, Makindu, Kitui, Marsabit and Isiolo
4	Nairobi	Nairobi
5	North Eastern	Garissa, Wajir, Mandera, and Moyale
6	Nyanza	Kisumu, Kisii and Kuria
7	Rift Valley	Kericho, Nakuru, Naivasha, Narok, Kajiado, Rumuruti, Eldoret, Lodwar, Kapenguria, Kitale, and Baringo
8	Western	Mt. Elgon, Kakamega, Busia, and Bungoma
9	Uganda	Kiryandongo

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## CHAPTER FOUR: CHALLENGES IN THE EXECUTION OF MANDATE

In its final report, the TJRC recognises four major challenges:

- (a) The controversy surrounding the credibility of and suitability of the Chairperson;
- (b) Financial and other resource constraints;
- (c) Legal challenges; and
- (d) The lack of sufficient State and political will to support the work and implementation of the objectives for which the Commission was established.

According to the report, other challenges generally stemmed from one or more of the above challenges, including the disengagement of key stakeholders (notably CSOs and donors) from the processes of the TJRC.

## **Credibility and Sustainability of the Chairperson:**

Civil Society and a range of other actors raised concerns about the suitability and credibility of Ambassador Bethuel Kiplagat to serve as its Chairperson.

One initial criticism was that Ambassador Kiplagat had served in powerful positions and the government of President Daniel arap Moi. Other, more specific concerns, included assertions that Ambassador Kiplagat was a beneficiary of the illegal and irregular allocations of land, a key witness to the events leading to the murder of Honourable Dr. Robert Ouko (the then Minister of Foreign Affairs), and involved in one or more meetings in Wajir related to the planning of the security operation that ended in the Wagalla Massacre, which presented a direct conflict of interest in respect of the Commission's mandate.

The conflicts of interest presented by Ambassador Kiplagat, accompanied by demands for his resignation and the dissolution of the TJRC, almost completely eroded the ability of the Commission to garner support from the public, civil society, and development partners. The conflicts of interest further worsened the Commission's financial problems, which subsequently hindered implementation of the ambitious work plan developed in the first few months of the TJRC's existence.

The Chairperson's refusal to step aside also led to the resignation of Kaari Betty Murungi as the Vice-Chairperson of the TJRC, and subsequently as a commissioner altogether. Contrary to the express provisions of the TJRC Act, she was never replaced.

Moreover, this refusal also led to the loss of important stakeholders to the work of the TJRC. The general public, CSOs, FBOs, and CBOs, as well as the media and other relevant stakeholders, adopted a policy of 'non-cooperation', some taking robust steps to paralyse the work of the TJRC.

Unfortunately, conflict of interest issues were not just confined to the Chairperson alone. Allegations that Commissioner Major General (Retired) Ahmed Farah had been involved in the security operation that became the Wagalla Massacre also surfaced. In line with the Code of Conduct, the Commission immediately instituted procedures to preclude Commissioner Farah from any information or discussions related to these events. It further undertook investigations into the allegations and concluded that:

- (a) The Navy, of which General Farah was a part, was not in fact involved in any way with the Wagalla Massacre; and
- (b) That General Farah was in fact out of the country before, during, and after the Wagalla Massacre.

## **Financial Resource Challenges:**

During its first fiscal year, the Commission lacked financial independence and as a result:

- The TJRC to seek the express approval of the Ministry of Justice for any expenditure, a process which delayed activities;
- Individual Commissioners had to rely on their personal resources when the Commission's requests were delayed or denied;
- The TJRC had no authority to approve or disapprove any expenditures made on the Commission's behalf by the Ministry;
- The TJRC had no knowledge of many expenditures made by the Ministry on its behalf; and
- Despite numerous requests, the TJRC was never given a complete account of the money spent on its behalf by the Ministry during the first year

Soon after the Commission's lack of control over its finances was made public, the then Minister of Justice alleged that the Commission might have engaged in inappropriate and perhaps illegal financial activities.

In the 2009-2010 fiscal year, the TJRC was allocated Ksh 190 million (16% of the proposed budget of Ksh 1.2 billion). Towards the end of its term, the TJRC's budget was supplemented by external donors, most of whom provided assistance in the form of technical support.

## **Legal Challenges:**

Not long after its establishment, two legal actions, both seeking the dissolution of the TJRC, were lodged in the High Court of Kenya. The substance of the two cases is as follows:

- Augustine Njeru Kathangu & 9 Others v TJRC and Bethuel Kiplagat [High Court Misc App No. 470 of 2009]

The applicants raised a constitutional challenge on the composition and statutory mandate of the TJRC.

The applicants challenged the process of nominating the Commissioners and argued that, contrary to the provisions of the TJR Act, certain prescribed representatives (e.g. the Episcopal Conference of Kenya, the National Council of Christian Churches of Kenya, and the federation of Kenyan Women Lawyers) had not participated in the selection process. The Court found that this contention lacked merit, as some of the organisations in question had been represented and

the absence of specific religious organisations did not invalidate the process.

They also challenged Ambassador Kiplagat's suitability to serve as the Commission's Chairperson, which the Court dismissed on a technicality. In relation to the TJRC's statutory mandate, the applicants also argued that the TJR Act was unconstitutional to the extent that it excluded the periods before 12 December 1963 and after 28 February 2008 from its temporal mandate. The Court ruled that the applicants could not challenge the legality of the TJR Act through a judicial review process, but would have to do so through a constitutional reference.

- **Moraa Gesicho v Attorney General and TJRC [High Court (Kisii) Petition No. 1 of 2010]**

The petitioner in this case described herself as a victim of the 2007/2008 post-election violence (PEV) and sought a declaration from the High Court that the TJRC had no basis upon which to pursue justice for victims of PEV. She therefore prayed for the dissolution of the TJRC. She based her argument on a perceived failure of the Commission of Inquiry into the Post-election Violence (CIPEV) to make specific recommendations to the TJRC as expressly required in its terms of reference. At the time the TJRC submitted its final report, this case was yet to be finalised.

### **Lack of Political Will:**

The State's lack of political will to support the work of the TJRC was manifested in a variety of ways:

- (a) The President failed to fill the position of Commissioner Kaari Betty Murungi when it fell vacant in April 2010. This forced the Commission to operate with eight Commissioners, and later when Ambassador Kiplagat stepped aside, with only seven Commissioners;
- (b) Despite the multiple requests, the State refused to hand over to the TJRC relevant documents pertaining to its mandate, including reports of previous commissions of inquiry that the TJRC was obligated to review and evaluate. In light of this consistent lack of cooperation, the TJRC was forced to acquire many such relevant documents through unofficial and informal means
- (c) The State's failed to adequately support the TJRC's reconciliation work. Through their stature and position in society, political leaders, especially the President and the Prime Minister, had key roles to play in steering the nation towards national unity and reconciliation. However, their support for this particular work was *ad hoc* and inconsistent. Only a few political leaders publicly spoke of national unity and

reconciliation within the framework of the TJR Act. However, more often than not, they took steps that instead undermined such progress.

The Commission was unable to secure an appointment to meet with the President until the handing over of its final report. The Commission also had difficulty meeting the Prime Minister, despite its ability to pay him a courtesy call when it was virtually more than half way through its work.

## VOLUME IIA: VIOLATIONS OF BODILY INTEGRITY

This Volume focuses on the major violations of bodily integrity rights that were committed during the Commission's mandate period (December 1963- February 2008). While much of this volume is focused on violations directly committed by the state, it also includes descriptions of killings, severe injury and violence, sexual violence, detention, and other similar violations committed by non-state actors. This volume contains the following chapters:

### CHAPTER ONE: GENERAL OVERVIEW OF THE POLITICAL HISTORY OF KENYA

#### **British Colonial Era:**

To establish and consolidate their rule in Kenya, the colonial administration employed unimaginable human rights violations and injustices. These included:

- (a) Use of violence: colonial administration conducted 'punitive military expeditions' in the 1890s against the Nandi in 1901, 1905, and 1906, against the Embu in 1905, against the Abagusii in 1904, 1908, and 1914, against the Kipsigis in 1905 and against the Abagishu and Kabras in 1907. In addition, the brutal injustices meted on the Mau Mau by the colonial police and the loyalists. Between 150,000 and 320,000 Africans were detained for varying lengths of time in more than 50 detention and work camps;
- (b) Manipulation: use of manipulation, colonial laws and policies to acquire both human and natural resources from Kenya, e.g. the signing of treaties involving British administrators and African leaders to create frontiers for European settlers from Britain, Canada, South Africa, Australia and New Zealand. An example is the first and the second Maasai Treaty of 1904 and 1911. The first treaty, signed without the knowledge of the Maasai people, agreed to move the Naivasha Maasai *en masse* to the Laikipia plateau, together with their cattle. Such a move enabled white settlers to occupy the whole of the Rift, Zedong and Gong. This was also the case in the Kiambu-Thika area from 1903 to 1908, central Rift Valley 1904 to 1914, and lastly in the Kericho to Nyeri/Nanyuki areas through the soldier settlement schemes following the First World War.

The British also manipulated the power equation in Luhya land by inventing empires for Mumia in Wanga and for Sudi Namachanja in Bukusu. This was followed by imposition of new leaders such as Karuri wa Gakure and Kinyanjui wa Gathirimu among the Kikuyu. In the coastal region, the Sultan of Zanzibar was manipulated by Sir Edward Northey and the British residents in Zanzibar to allow annexation of his 10-mile coastal strip to be part of the new colony



- (c) Forced labour: the colonial administration created the office of the chief as agents of local administration and tasked them with the responsibility for tax collection, maintenance of law and order and more importantly to supply cheap labour for public and settler requirements.
- (d) Land alienation: The British gave no cognisance to customary tenure systems, and by 1914 nearly five million acres (two million hectares) of land had been taken away from Kenyan Africans, mostly from the Kikuyu, Maasai and Nandi communities. It created the reserves for 'natives' and located them away from areas scheduled for European settlement.

## RECOMMENDATIONS:

In terms of the British colonial era, the Commission recommended that:

1. The Kenyan government considers entering into negotiations with the British government with a view to seeking compensation for victims of atrocities and injustices committed during the colonial period by agents of the colonial administration. This should be done within 12 months of the issuance of this report.
2. The British government offer a public and unconditional apology to the people of Kenya for all injustices and gross violations of human rights committed by the colonial administration between 1895 and 1963.

## CHAPTER TWO: HISTORY OF SECURITY AGENCIES

Independent Kenya inherited a police force that was deeply and historically troubled. From the 1890s right through to the late 1950s and early 1960s, the Kenya Police Force clearly structured itself around the policing needs of a small and politically powerful elite and racial minority. From the outset, it was built to cater to these privileged few. When, however, the Kenya Police Force did encounter African populations it was with a force and devastating violence. Throughout the Commission's mandate, this never changed. The police force remained a law unto itself. The Kenya Police Force of 1960 much resembled the Kenya Police Force of the 1900s: narrow in outlook, unclear in mission and violent in tendency. The history of the military paints a similar grim picture. During the colonial period, and especially during the emergency period, the military was engaged in the screening and interrogating of people in order to extract information from them concerning Mau Mau. It is from these twin processes of screening and interrogation that the most astonishing evidence of widespread and institutionalised torture has emerged. The military would continue to use similar brutal tactics way into the post-independence era and as recently as March 2008 during *Operation Okeo Maisha* in Mt. Elgon.

## CHAPTER THREE: THE SHIFTA WAR

The Shifta War itself arose out of a long history of political unrest in Northern Kenya. Ethnic Somali and other Northern Kenya communities resisted centralised rule from the very earliest days of colonialism. On 24 December 1964, faced by a region that was threatening to secede, President Jomo Kenyatta declared a state of emergency in Northern Kenya. What followed is what has come to be known as the ‘Shifta War’, and in which, widespread and systematic violations of human rights were committed by state security agencies. It is in the Shifta War that the citizens and communities of the new Kenyan nation experienced state brutality and violence in a large-scale level. With an official death toll of about 2,000 and unofficial estimates reaching 7,000, the Shifta War represents one of the most intensive incidences of widespread killing that Kenya has ever experienced.

With regard to the Shifta War, the Commission found that:

- (a) The Kenyan military inflicted violations and atrocities on innocent civilians during the conflict. In particular, the Kenyan Army committed mass killings of civilians during the Shifta War and that the number of people who were killed during the War is possibly much higher than the official figure of 2,000. Most of the killings took place in villages but the Commission also received evidence showing that killings took place in places of worship.
- (b) Violations against women were widespread and systematic. These violations included rape and other forms of sexual violence. The Commission received evidence that members of the Kenyan Army held women as sexual slaves. The Commission rejects the prevailing official view that sexual violence during the Shifta War was infrequent and isolated.
- (c) The Kenyan Army was responsible for the killings and large-scale confiscation of livestock belonging to civilians. The shooting of especially camels was a particular strategy employed by the Army, as it was believed that camels were used by the Shifta to transport guns and other supplies. The Army was responsible for the poisoning of livestock. Testimony received by the Commission reveal that it was common for soldiers and government officers to invade villages and confiscate cattle, sheep, camels and goats. The owners of such livestock were never told what happened to their livestock. Nor were they ever compensated for their losses.
- (d) As part of the Shifta War, the Kenyan government established restricted or protected villages or camps in which residents of Northern Kenya were essentially detained and their movement severely restricted. This villagisation programme was eerily reminiscent of the detention camps created during the colonial period. The conditions in the restricted villages in Northern Kenya were squalid. Accounts received by the Commission indicate that diseases

such as dysentery, pneumonia, malaria and tuberculosis were common in the villages.

- (e) The Shifta War had a particularly devastating impact on minority groups living in Northern Kenya such as the Sakuye.
- (f) While those fighting against the Kenyan government committed violations against the local civilian population, the Kenyan government itself committed the vast majority of violations, through its military and police officers and provincial administrators.
- (g) Those fighting against the government stole, often violently, from the local population in order to support their military activities.
- (h) This inattention to the rights and welfare of the local population continued after the end of the conflict and to some extent even continues today. Economic marginalisation and continued violations of the rights of those living in the former Northern Frontier District have their origins in the actions and attitudes of the colonial government and the newly independent Kenyan government.
- (i) The Kenyan government made a deliberate and concerted effort to cover up abuses committed in connection with the conflict, and enacted the Indemnity Act in order to protect government officials for accountability for wrongful acts committed in the conflict. The Indemnity Act not only covered up human rights abuses and other violations of both Kenyan and International Law, but itself is a violation of international law as it denies the victims of the conflict access to truth, reparations, and accountability for what they suffered.
- (j) Military and political leaders conducted the conflict with little if any regard to the basic rights of the Kenyan citizens in the region. Brigadier Joseph Ndolo and Brigadier Jackson Mulinge (as they were then) bear command responsibility for the atrocities committed against civilians by the Kenyan Army during the Shifta War.

## **RECOMMENDATIONS:**

In terms of the Shifta War, the Commission recommended that:

1. The President acknowledge that the military committed atrocities during the Shifta War and offer a public and unconditional apology to the people of North Eastern and all who were affected by the conflict. This should be done within 12 months of the issuance of the report;
2. The Indemnity Act be repealed. If the Indemnity Act is not repealed within

the stipulated time, the Attorney General shall immediately thereafter (and no later than one month after such six month period) issue a public report explaining why the Indemnity Act has not been repealed and what steps, if any, the government plans to take to ensure its repeal and to provide accountability for the violations committed during the Shifita War. This should be done within nine months of the issuance of this report by the Attorney General and Parliament

3. The government, and particularly the Ministry of Foreign Affairs, publishes the entire Memorandum of Agreement (Arusha Agreement) signed between the Kenyan and Somalia governments, which marked the formal end of the Shifita War. The Agreement should be published in at least three local newspapers with wide circulation. Moreover, copies of this Agreement should be translated into local languages spoken in Northern Kenya and be widely disseminated in the region. This should be done within nine months of the publication of this report by the Ministry of Foreign Affairs and Office of the President
4. The establishment of a public memorial to commemorate the victims of Shifita War. The memorial should be established within 24 months of the issuance of this Report by the Ministry responsible for National Heritage and National Museum
5. Investigation of persons adversely mentioned in regards to the violations of human rights during the Shifita War by the Director of Public Prosecutions

## CHAPTER FOUR: UNLAWFUL KILLINGS AND ENFORCED DISAPPEARANCES

### **Massacres:**

The history of Kenya is replete with horrific accounts of massacres committed by state security agencies in what they traditionally call security operations. Most of these massacres have been committed in Northern Kenya, particularly in North Eastern Province and in the North Rift. Section 5(c) of the TJR Act, therefore, specifically required the Commission to investigate massacres as part of its broader mandate. The Commission defined a massacre as the deliberate killing of several members a particular targeted group on a single occasion. While there have been many massacres in Kenya, the Commission focused on a just a few namely.

- (a) Firstly, the Commission focused on massacres committed during the colonial period. These include Kedong massacre, Kollowa massacre, Giriama massacres, Lari massacre, Mau Mau Massacres and Hola massacre.

(b) Secondly, the Commission focused on massacres committed in Northern Kenya (North Eastern Province, Upper Eastern and North Rift). This was in recognition of the fact that Northern Kenya has been the epicentre of massacres and gross violations of human rights. In this regard, the massacres documented were: Bubisa massacre, Bulla Karatasi massacre, Wagalla massacre, Malka Mari massacre, Turbi massacre, Lotirir massacre, Murkutwa massacre and Loteteleit massacre.

## **RECOMMENDATIONS:**

In terms of massacres, the Commission recommended that:

1. The President formally apologises for those massacres committed by government forces, and for the failure of the state to avert the massacres at Turbi and Bubisa despite having prior information of the same. This should be done within six months of the issuance of the report.
2. The victims of the above-reference massacres be provided with reparations, both individual and collective. This should be done within 36 months of the issuance of the report and be consistent with the Reparations Framework of the Commission.
3. All of the individuals identified in this report as responsible for the planning, implementation, and cover up of the Bulla Karatasi and Wagalla Massacres – be barred from public office or any other position of public authority.
4. The government shall release to the Implementation Committee all of the minutes of the relevant meetings with respect to each and every one of the massacres referred to above. This should be done within six months of the issuance of this report.
5. The government take into account the history of such massacres and other violations, including the related economic marginalisation of the region, in formulating relevant development policies, including in prioritising crucial infrastructure development. An explicit goal of such development policies must be addressing the historic economic marginalisation of this and other similar areas.
6. The Catholic Church facilitates the return of Father Adrian Joseph Janito to the country to testify about the massacre in Bubisa.

## **Political Assassinations:**

Kenya has lost some of its best and brightest to political assassination. A number of these deaths have been the subject of high profile investigations; in some cases they have been

subject to repeated investigations. Yet despite all of the investigations in these and other similar cases, the uncertainty concerning who was responsible for the killings and why specific individuals were killed is often as unclear as it was on the day the body was found.

Therefore, the Commission gathered information, undertook research and investigations, and solicited testimony to understand the context in which such killings took place; the circumstances and thus probable causes of such killings; the impact of such killings, particularly on the family and friends of the victim; and the failure of investigations to solve the mystery of why a person was killed and who was responsible. The Commission also identified those individuals it thought warranted additional investigation with respect to these assassinations. The assassinations probed include Pio Gama Pinto, Tom Mboya, Josiah Mwangi Kariuki (popularly known as J.M Kariuki), Robert Ouko, Bishop Alexander Muge, Crispin Odhiambo-Mbai, and many others.

In addition to the assassinations mentioned above, there have been assassinations of less well-known individuals in Kenya. The Commission was informed, for example, of the assassination of members of the Kikuyu elite in the late 1960s who refused to participate in and support the then prevailing practice of oathing. These individuals were killed because of their political stand against oathing, and it is likely that those who killed them did so to send a strong political message to others who might have otherwise considered opposing the practice of oathing.

In conclusion, the Commission noted that Political assassinations have occurred under each of the three successive governments since independence. The motives associated with these assassinations have varied, from getting rid of political competition, weeding out ambitious politicians, and removing perceived “dissidents” of the government or those who posed as “threats” to power. Evidence of state involvement and subsequent cover-ups is evident in the majority of political murders. Propaganda and commissions of inquiry are often used as smokescreens to get to “the bottom of the matter,” and often have the effect of masking the motives and faces behind the assassinations. Prominent figures in government are said to be implicated. Key witnesses into the assassinations disappear or die mysteriously. No real perpetrators have ever been prosecuted, much less effectively investigated.

## **RECOMMENDATIONS:**

In terms of political assassinations, the Commission recommended that:

1. All reports and materials of all previous investigations into these assassinations be made available to the public through the National Archives. This should be done within six months of the issuance of the report.
2. The President shall publicly apologise to the families of those assassinated, and to the nation, for these assassinations and the failure of previous govern-

ments to investigate adequately such killings. This should be done within three months of the issuance of the report.

3. With respect to the Ouko assassination, those individuals who have been identified by previous inquiries (including that of Troon, Gicheru, and Sungu) as individuals who should be further interviewed and investigated, and additional individuals identified in this Report linked to the assassination or its cover up, should in fact be interviewed and investigated, and the results of those investigations made public. These investigations and the submitting of a report setting out the result of such investigations to the public shall be finalised no later than 18 months after the issuance of the report.
4. With respect to the Kariuki assassination, an investigation be commenced into the circumstances surrounding the assassination, paying particular attention to those individuals identified in the report of the Mwangale Committee and in this Report. At the conclusion of such investigation, any individuals for whom sufficient evidence exists shall be prosecuted, and a report will be issued setting out all of the information discovered through such investigation concerning the circumstances, motives, and those responsible for the assassination and subsequent cover up. Such report shall be made public no later than 18 months after the issuance of the report.
5. With respect to the Mbai assassination, an investigation be commenced into the assassination and cover up, and that in particular such investigation include an investigation into Norman Nyaga. At the conclusion of such investigation, any individuals for whom sufficient evidence exists shall be prosecuted, and a report will be issued setting out all of the information discovered through such investigation concerning the circumstances, motives, and those responsible for the assassination and subsequent cover up. Such report shall be made public no later than 18 months after the issuance of the Report.
6. The government establish public memorials commemorating the lives Pio Gama Pinto, JM Kariuki, Robert Ouko, Father Antony Kaiser, and Crispin Odhiambo-Mbai and that such memorial include an educational component detailing the contributions such individuals made to the nation. Such memorials may include statues, museums, or educational institutions and shall be completed within two years of the issuance of the report.
7. An independent prosecutor is appointed to investigate and, if the evidence warrants, prosecute individuals linked to the death of Father Kaiser.

## Extra-Judicial Killings and Enforced Disappearances:

The Commission received information indicating that extra-judicial killings and enforced disappearances have been used as a repressive tactic against political dissidents and government critics both during the colonial era and in post-independent Kenya.

### Colonial Period:

- Response to Lari massacre: the hanging of 71 individuals in response to the Lari massacre which involved the killing of a number of Kenyans who had been cooperating with the colonial powers by members of the Mau Mau. A number of Mau Mau suspects were arrested, and pressure mounted on the legal department to speed up the convictions and executions. Some at the time even suggested that the suspects should face martial law, which would allow mass executions through firing squad. The hangings started on 15<sup>th</sup> October 1954 and went on unabated for some time. At the end of this period a total of about 71 people were hanged for the massacre at Lari. Many more hangings were carried out after this for Mau Mau related offences. Over 1,092 people were executed under this legal regime during the colonial period.
- Suppression of Mau Mau uprising: the killings that were conducted by Ian Henderson and the Colonial government were as immense as they were numerous. Despite the actual killings of Kenyans in high numbers of about 300-400 per month, there was the despicable targeting of young children and even labelling them terrorists. At the end of the operation, between 1952-1960, there were about 15,000 lives that were lost. This figure is disputed and estimated to be much higher. Some reports state that the estimated number of Kenyans killed by the British Army during the emergency period is about 10,000 with 1,086 executed after mock trials. The Kenya Human Rights Commission (KHRC) estimates that 90,000 people were executed, tortured or injured during the crackdown against the Mau Mau while over 160,000 others were detained in appalling conditions.
- Hola Massacre in which the colonial authorities executed 11 political detainees at Hola Camp

As far as enforced disappearances through illegal detentions, the Colonial government did not disclose to the families of the captured or detained the whereabouts of their loved ones. Those who survived these years claim that their loved ones who disappeared during the emergency period have never been found. This includes the many that were buried in unmarked graves.



## Recommendation

The British government should offer a public apology to victims and Kenyans.

### President Jomo Kenyatta's era:

- With regard to political assassinations, Kenyatta was president during the deaths of Field Marshall Baimungi (1964), Pio Gama Pinto (1965), Kungu Karumba (who disappeared since 14 June 1974), Tom Mboya (5 July 1975), Ronald Ngala (12 December 1972), J.M Kariuki (2 March 1975) and Argwings Kodhek (1969).. The investigations into these deaths were quite cursory. The lack of serious investigation into these killings created the public perception that the truth about these killings has yet to be established.
- During the requiem mass for Tom Mboya, members of the Presidential escort opened fire against the gathering crowd, which led to the killing of two people and injuring several others.
- Opening of the Russia (now Kisumu) Hospital: President Kenyatta presided over this event and in the course of this occasion there was an unexpected outbreak of chaos. It is said that the police literally shot their way through to the waiting motorcade. The official number of dead people was said to be about 11. This figure was highly contested as a cover-up and not consistent with the memories of witnesses whom the TJRC interviewed.

### President Moi's era:

- Aftermath of 1982 Coup attempt; the coup attempt and its repression left many people dead. Many people were accused of having participated in the coup and were later charged and convicted for treason, after which they were sentenced to death. Extra-judicial killings during this time also took place in the form of the shooting and killing of political dissidents as well as deaths during detention. Immediately after the coup attempt the air force officers were called back to their stations. Some were killed because they were perceived to be disloyal, and others were sent to prison where they were assaulted and tortured. The official death toll was 159 but there were speculations that the number was higher than that. Some sources put the death toll between 600 and 1,800.
- Killings during 1991 Saba Saba riots; President Moi is alleged to have instructed the security forces to use "all necessary force" to restore order. The government created a Commission of inquiry which also concluded that 20 people were killed and 60 injured. In contrast, the newspaper reports put the death toll well over 100.

## Killings of anticorruption advocates and human rights watchdogs:

- Some of those who came forward with evidence concerning extra-judicial killings and enforced disappearances were subjected to death threats and in some cases were killed or disappeared. For instance, witnesses to Dr. Robert Ouko's death, have died or disappeared in suspicious circumstances.
- A number of individuals have died under mysterious circumstances after publicly accusing the police or other members of the security forces with extra judicial killings. For example Mr. Paul Oulu and Oscar King'ara of the Oscar Foundation were shot shortly after releasing an explosive report on extra-judicial killings by the police as part of the anti-Mungiki crackdown
- The brutal murder of Bernard Kiriinya shortly after he publicly accused the police of extra-judicial killings as part of the anti-Mungiki crackdown.

## Killings during Security Operations:

- Security Operation and the SLDF in Mt. Elgon Region; Philip Alston, the UN Special Rapporteur for extra-judicial killings and enforced disappearances, estimates over 700 killings and 200 disappearances occurred in Mt. Elgon between the years 2006 and 2008.<sup>67</sup> According to various reports, over 200 people are said to have disappeared in the hands of security forces in Mt. Elgon. Some of those disappeared are said to have been dumped in Mt. Elgon National park.
- Western Kenya Human Rights Watch documented 615 people killed by the SLDF up to February 2008, 118 abducted and 33 maimed by the same group. The UN Human Rights Council reported that the number of persons killed or disappeared by the security forces were estimated at over 200. The Kenya Red Cross Society put another number of 69 to have died due to health complications, 154 owing to bullet wounds & machete cuts. The Human Rights Watch estimated the number to be about 700 people dead. Human Rights Watch pinned a total of 270 deaths and 199 disappearances at the hands of Kenyan authorities. The Commission through the information obtained from the submitted statements, memoranda and the hearings, approximated 750 deaths and over 300 disappearances.

## Killings and Disappearances of and by the Mungiki:

- Infamous Mathira massacre; a group of about 29 people were hacked to death on 21st April 2009 in Gathaithi, Chehe sub-location, Iri-ini Location of Mathira Division, Nyeri District. The Commission's research indicates that the massacre

may have been committed by a group of vigilantes who were protesting against the killings perpetrated by the Mungiki. On March 4, 2003, it is alleged the Mungiki killed 23 people in the Kariobnagi slum area.

- Mungiki and the 2007 Post-Election Violence; the Mungiki have been accused by, among others, the Waki Commission and the ICC, of committing criminal acts during the 2007 post-election violence. The Commission heard of many unfortunate incidents where the group is said to have attacked entire neighbourhoods in the name and motive of either supporting a political party or cause during the 2007 post-election violence. The Commission also heard from witnesses who gave details that the Mungiki were indeed used by the politicians to advance their political goals.

#### Killings by the Police in response to the Mungiki:

- In order to respond effectively to the Mungiki, the police established a specialised force of about 14 officers known as ‘Ondoa Kwe Kwe’, which was later locally referred to as ‘Kwe Kwe squad’. The exact timing of the establishment of this squad coincided with the time within which over 500 people died in the hands of the police according to the report by the KNCHR. Alluding to the fact and likelihood that the people who were shot and dumped at city mortuary are Mungiki, KNCHR investigated the circumstances surrounding the deaths of 454 people that were left at the city mortuary between June-October of 2007. Almost all of these individuals were young Kikuyu male adults. The cause of death according to the pathologist was gunshot wounds at close range. For those instances where the families have come to claim those bodies, they are said to hail from Kiambu, Murang’a, Nyeri and Nairobi slums such as Mathare, Korogocho, Huruma, Dandora and Kariobangi. Another indication that shows the purposeful execution besides the fact that the gunshots were fired at close range is that most of these gunshots were aimed from a close range.

#### Killings during Electoral Periods:

- 1992 General Elections: the violence and the deaths that occurred at this time were primarily caused by the tension between the “reformers” and “anti-reformers,” the fear of the KANU government and its beneficiaries being ousted from power, and the debates on majimboism and strong national centralised power. This political hostility took on an ethnic dimension, creating hostility between members of the Kalenjin and Luo communities. This ethnic hostility manifested itself in Sondu with the creation of Kalenjin and Luo zones, which in turn led to the famous Sondu Massacre. In addition, there was ethnic cleansing directed against members of the

Kikuyu and Kalenjin communities in the Rift Valley. When the government finally acknowledged the abnormal amount of violence it reported far fewer deaths than that reported by the media and civil society organisations. Richard Carver, in his “Kenya Since the Elections” (1994) stated “The official death toll of 365 is lower than all other estimates. Inter Press Service reports opposition estimates of 800 dead (14 May 1993), while another recent press estimate is 1,000 (The Guardian, 28 April 1993). Africa Watch puts the number of dead at 1,500, extrapolating from the 750 estimate made by the Kiliku parliamentary select committee (November 1993). The government even attempted to block discussions of the violence in parliament until parliamentarians protested.

- 1997 General Elections- Kaya Bombo violence: It was testified that the clashes were instigated by the government for the purpose of chasing those who were perceived to be from other parts of Kenya and who were assumed to be supporters of the opposition. The violence took place primarily in the Likoni-Kwale area, a KANU-dominated zone. This violence left several people dead. Testimonies before the Commission, corroborated by research from numerous NGOs, research institutions and other bodies, establish that most of the 1997 election violence was politically-motivated, with members of different ethnic communities fighting against each other despite the fact that they had lived together peacefully for many decades. Many of the resulting deaths were committed by local militia, acting either in retaliation or defence on the one hand, and the police and other arms of the government who acted in defence of the militias but also fuelled the violence for their own political ends, on the other.
- 2007 General Elections: the 2007 post-election violence witnessed the largest number of deaths of any election period. The Commission of Inquiry into Post-Election Violence (CIPEV or ‘Waki Commission’) detailed the circumstances and causes of 1,113 killings which occurred during that period which included; the growing power and personalisation of power around the Presidency; historical marginalisation and perceived inequities concerning the allocation of land and other national resources; increasing poverty and unemployment; unaddressed grievances and previous acts of political violence that erupted around general elections in the 1990s. The 2007 post-election violence was also characterised by the use of excessive force and extra-judicial killings by the police. The Waki Commission listed 962 victims of shootings by the police, 405 of whom were fatal. The Waki Commission report concluded that gunfire was the single most frequent cause of death during the post-election violence, and assumed that all such deaths were caused by the police.

## RECOMMENDATIONS:

In terms of extra-judicial killings and enforced disappearances, the Commission recommended that:

1. The President and the respective heads of the Kenya Police and the Kenya Defence Forces, offer a public and unconditional apology for extra-judicial killings committed during the mandate period. This should be done within six months of the issuance of the report;
2. The fast-tracking of reforms in the Police Service, including introduction of new standard operating procedures on the use of force;
3. The government ratifies the International Convention for the Protection of All Persons from Enforced Disappearance. This should be done within two years of the issuance of the report;
4. The establishment of a fully equipped national modern forensic laboratory within 36 months of the issuance of this report, and thereafter in every county.
5. The Commission recommends the abolition of the death penalty and the commuting all death sentences to life imprisonment or other appropriate sentence by the Attorney General and parliament Within 2 years of issuance of the report
6. Compensation for families of victims of extra-judicial killings and reparations for victims and survivors be made in accordance with the Commission's Reparation Framework.

## CHAPTER FIVE: UNLAWFUL DETENTION, TORTURE AND ILL-TREATMENT

The Commission received 4,345 statements and memoranda on torture and 1,144 on unlawful detention. It conducted thematic hearings on Torture and on Prisons and Detention Centres during which it heard witnesses from the Ministry of Public Works, the Prisons Service as well as relevant civil society organisations whose areas of expertise include promoting the rights of torture victims and of prisoners. The Commission also relied on secondary sources of information available at its disposal, including academic writings and reports by non-governmental organisations.

- Colonial Period: between 150,000 and 320,000 Africans were detained for varying lengths of time in more than 50 detention and work camps. The treatment in the camps, staffed by little trained non-Kikuyu, loyalists and European settlers, was often brutal. The information about what was happening there was carefully controlled and the colonial office and the governor systematically denied reports of mistreatment. Male detainees were often sexually abused 'through sodomy with

foreign objects, animals, and insects, cavity searches, the imposition of a filthy toilet bucket-system, or forced penetrative sex'. Women had 'various foreign objects thrust into their vaginas, and their breasts squeezed and mutilated with pliers.' Variations abounded, with sand, pepper, banana leaves, flower bottles (often broken), gun barrels, knives, snakes, vermin, and hot eggs being thrust up men's rectum and women's vaginas. A common practice during interrogation was to squeeze testicles with pliers.

- Widespread and systematic use of torture also occurred in the following contexts: Kenyatta regime: during the Shifta War, Moi's regime: in the aftermath of the 1982 attempted coup; between 1982 and 1991 purposely to quell dissenting political voices and as part of the crackdown on Mwakenya; between 1993 to 1997 as part of the crackdown on the February Eighteenth Revolutionary Army (FERA); in 1997 following a raid on a police station in Likoni; detention and torture of Kaya Bombo suspects and Kibaki's regime: in 2008 during *Operation Okoa Maisha*, a security operation to flush out members of the Sabaot Land Defence Force (SLDF) in the Mt. Elgon region.

## **RECOMMENDATIONS:**

In terms of unlawful detention, torture and ill-treatment, the Commission recommended that:

1. The enactment of legislation prohibiting all forms of torture and other forms of cruel, inhuman or degrading treatment or punishment committed both by state and non-state actors. Such legislation shall be enacted within one year of the issuance of the report by ;
2. The establishment, through legislation, of the Office of the Independent Inspector of Prisons and All Places of Detention. This office shall be charged with the function of inspecting prison conditions and investigating allegations of torture and death in custody. The office shall issue periodic reports to the public on the condition of prisons in Kenya and other matters under its mandate;
3. The rapid, effective and transparent implementation of the proposed police reforms, including the introduction of new standard operating procedures on the use of force based on international standards. In particular, Force Standing Order 51, which allows the use of lethal force to protect property, should be repealed;
4. The prosecution of police officers and other state agents who

were involved in the torture and ill-treatment of individuals during the mandate period.

5. The President offers a public apology to all victims of torture and unlawful detention and acknowledges the role of the state in the design and use of the Nyayo House torture cells;
6. Nyayo House be converted into a memorial after consultation with victims of torture; and
7. The provision of reparation for victims of unlawful detention, torture and ill-treatment as per the framework described in the Chapter on Reparation Framework.

State security agencies should apologize for gross violations of human rights committed by predecessor agencies between 12<sup>th</sup> December 1963 and 28<sup>th</sup> February 2008

The government should enter onto negotiations with the British government with a view to seeking compensation for victims of the colonial period within a year of issuance of the report

Parliament should create a National Human Rights Day on the 10<sup>th</sup> of December within 6 months of issuance of the report

## CHAPTER SIX:SEXUAL VIOLENCE

The Commission received hundreds of statements from women, men and children outlining serious sexual violations perpetrated by individuals and groups of people including ordinary citizens and state officials. A total of 1,104 statements from adults were received in regard to sexual violations. Of these, 103 were from men. The statements and memoranda presented in regard to sexual violence represent a victim count of 2,646 women and 346 men.

Additionally, testimonies were heard from women and men in the public hearings, *in-camera* hearings and women's hearings. All the victims who recorded statements, regardless of their sex, identified their perpetrators as being men. The victims ranged from elderly women and men to young children. In many instances, sexual violence was in the context of other violations such as extra-judicial killing, serious injury, torture and forced displacement amongst others. The types of sexual violations reported to the Commission included mass rapes (rape of many women in a community at the same time); gang rape (rape of women by more than two men at the same time); sodomy; mutilation of male and female genitals; castration; forced circumcision of both men and women; sexual torture; and penetration of women's sexual organs by harmful objects.

The Commission came face to face with the reality of the extent to which cases of sexual

violations have continued to be unreported. Many accounts of rape and other sexual violence marked the first time that the victims were narrating their experiences. While a number of women chose to give their testimonies *in camera*, many more women chose to talk freely in the women's public hearings. A few spoke openly at the public hearings. Men on the other hand chose to speak *in camera* only. While some men actually testified about their ordeal with sodomy, many more women spoke about the sexual violence that their sons or husbands went through, reinforcing the existing view that sexually violated men find it extremely stigmatising to report and talk about the violations.

The Commission learnt that some women, at the height of conflict in which they suffered sexual violence, preferred to deal with issues they considered critical; such as fleeing, seeking shelter and caring for injured family members. Accordingly, such victims had neither sought medical attention nor received psycho-social support even from family members. In some cases, women had borne the pain and scars of sexual violence as well as shame and the silence, for three or even four decades. This was particularly the case in regard to victims of sexual violence during the Mau Mau period and the Shifta War. It was observed that, in a number of instances at the women's hearings, women began by speaking about other violations and it was only after they saw other women share similar experiences or after being probed by the Commissioners that they opened up about their own experience of sexual violence.

Many victims of sexual violence indicated that they did not report the sexual violations for fear that they would be shunned by their family members as well as by society. They said their communities' treatment of victims of sexual violence discouraged them from reporting. Indeed, this was the case for most Samburu and Maasai women who had been sexually violated by British soldiers.

The history of harassment of victims of sexual violence at various police stations also discouraged women from reporting and talking of sexual violence due to lack of faith in the system. Reporting became even more difficult, especially in cases where state security agents' that the victims would have ordinarily been expected to report to, were the perpetrators. Security officers at police stations intimidated victims, and blamed them for the violation and often covered up the violations to protect their colleagues. This was among the reasons why victims of sexual violations, even during the struggle for independence, remained silent, with many citing the difficulties of accusing government officials in the same government.

**The report documents cases of sexual violence during the colonial period, cattle raids, security operations, Shifta War, Mount Elgon conflict and security operation, ethnic and political violence, interrogation and forced evictions.**



## RECOMMENDATIONS:

In terms of sexual violence, the Commission recommended that:

1. The President acknowledges and offer a public and unconditional apology for acts of sexual violence committed by state security agencies during security operations and other periods of generalised violence such as the 2007/2008 Post-Election Violence. This should be done within three months of the issuance of the report;
2. The establishment of a gender violence recovery centre in every county. Such a centre shall serve as a one-stop centre for provision of comprehensive services for victims and survivors of sexual violence including medical and counselling services. Investigators trained in the investigation of sexual violence should also be permanently stationed in such a centre. In respect to this recommendation, the governments may borrow good practices and lessons from South Africa's Thuthuzela care centres and the Nairobi Women's Hospital;
3. Reparation be provided for victims and survivors of sexual violence as per the Reparation Framework proposed by the Commission;
4. An Office of the Special Rapporteur on Sexual Violence is set up as recommended by the Commission of Inquiry into the Post- Election Violence. This should be done within 12 months of the issuance of the report.
5. The National Police Service Commission formulates a new Code of Conduct and Ethics for the National Police Service in line with the Constitutional values and principles and spelling out disciplinary and accountability measures for failure to adhere thereto.
6. The prosecution of Nganda Nyenze, who allegedly planned, supervised or was otherwise involved in the Kavamba Operation in which women were raped and/or sexually violated.
7. The British government apologises for sexual violence committed against women in Samburu and Laikipia by British soldiers.
8. The Kenyan government considers entering into negotiations with the British government with a view to seeking compensation for victims of sexual violence committed by British soldiers in Samburu and Laikipia.

## **VOLUME IIB: HISTORICAL INJUSTICES AND VIOLATIONS OF SOCIO-ECONOMIC RIGHTS**

This volume focuses on the historical injustices related to land, socio-economic rights, economic crimes and grand corruption. The TJRC considered this a unique part of their mandate because not only had there been no previous investigations or inquiries into these violations, but because the TJRC is the first truth commission to have an express obligation to look into such a broad range of violations.

### **CHAPTER ONE: ECONOMIC MARGINALISATION AND VIOLATIONS OF SOCIO-ECONOMIC RIGHTS**

While the majority of Kenyans may not have been detained without trial or subjected to torture and/or other violations against their physical integrity, post-independence governments' exclusionary economic policies and practices in the distribution of public jobs and services inflicted suffering on huge sections of society at different historical moment.

In this chapter, the TJRC focused specifically on the regional dimension of economic marginalisation and identified the following provinces, or parts thereof, as having suffered the greatest economic marginalisation during the Commission's mandate:

- North Eastern (including Upper Eastern);
- Coast;
- Nyanza;
- Western; and
- North Rift

Within certain regions further marginalisation was found to exist, due largely to regional and local rather than national forces.

In making its assessment on marginalisation, the TJRC used a number of indicators, including:

- Employment (especially in the public sector);
- Education;
- Health;
- Housing;

- Access to justice;
- Water;
- Sanitation; and
- Food security

### **Context of Economic Marginalisation:**

The TJRC finds that economic marginalisation experienced in Kenya since independence has occurred in a historical, socio-economic, and political context marked by certain factors, including:

- An overly centralised state both in terms of power and resources;
- Ethnicisation of politics and public life in general;
- An all-powerful ‘imperial’ presidency marked by lack of accountability;
- Lack of judicial independence;
- Weak rule of law and personalisation of power;
- Bad governance and rampant corruption;
- A stunted economy in which the state was the main dispenser of largesse; and
- Conflicts revolving around land with large swathes of the population unable to access this important resource.

The TJRC further recognises the colonial administration in power between 1895 and 1963 planted the seeds of inequality, most notably through their ‘divide and rule’ policy. The failure of subsequent governments (including in particular the Kenyatta government) to correct this injustice by restoring communities to their lands from which they had been forcibly evicted by the colonial regime, is largely to blame for remaining inequalities in land ownership and access across much of Kenya.

The TJRC finds that while post-independence governments have had a role in skewing economic empowerment in favour of certain ethnic communities, certain communities – in particular sections of the Kikuyu community – got a head start by virtue of their proximity to centres of settler economy. Moreover, the policies of the Kenyatta regime would entrench the economic hegemony of the Kikuyu community based on this core group.

In addition to the colonial legacy and ethnicity, the TJRC discussed the role of a centralised state and personalisation of power, client-patron relations and corruption, land and economic marginalisation, and historical irredentists/secessionist struggles and state sovereignty as factors contributing to the context in which economic marginalisation developed.

### **The Role of the State in Economic Marginalisation:**

The TJRC finds that despite being imbued with values of inclusion, human dignity, brotherhood, and social justice, the Sessional Paper No. 10, entitled 'African Socialism and its Application to Planning in Kenya' (1965), sowed the seeds for inequality and marginalisation that would characterise the Kenyan state in succeeding years.

The report subsequently goes on to make specific findings in relation to economic marginalisation of North Eastern, Nyanza, Coast, Western, and North Rift.

### **RECOMMENDATIONS:**

In terms of economic marginalization, the Commission recommends that:

1. The government formulate, adopt, and implement a policy that deliberately targets the socio-economic development of historically marginalised regions identified by the Commission. This should be done within 12 months of the report being issued;
2. The policy must include strategic development plans and budgetary allocations aimed at the economic and social development of marginalised communities;
3. The policy must recognise that these reparative actions are over and above the provisions of Article 204 of the Constitution (2010) in utilisation of the Equalisation Fund;
4. The government must consider actions such as building an efficient road networks linking marginalised areas with the rest of Kenya (e.g. building boreholes and water-catchment systems, building hospitals within reach of all communities adequately stocked and well-staffed, schools with adequate facilities, courts of law), and ensure that all government services and public facilities are available to them; and
5. In the five years subsequent to the enactment of the policy, preference should be given to marginalised regions in the sharing of national revenues as envisaged under Article 202 of the Constitution (2010) to ensure that the development projects are realised and the policy is implemented.

## CHAPTER TWO: LAND AND CONFLICT

The TJRC further finds that land related injustices take many forms, including:

- Illegal alienation and acquisition of individual and community land by public and private entities;
- Illegal alienation of public land and trusts;
- Preferential treatment of members of specific ethnic groups in settlement schemes at the expense of the most deserving landless;
- Forceful settlement of members of a community outside of their homelands;
- Forced evictions; and
- The phenomenon of land grabbing, especially by government officials.

### **Historical Background and the Colonial Era:**

The TJRC finds that colonial land policies and practices, first by Arabs at the Coast and then by the British more generally, generated some of the land-related problems, including scarcity of land and landlessness, which have in turn resulted in violent conflict among Kenyans.

The colonial administration used a variety of methods to obtain land from local communities, often irregular and/or illegal. Such practices included:

- The acquisition of land through establishment of “native reserves”;
- The acquisition of land through agreements e.g. In 1904, Maasai elders, through Lenana, their leader, entered into the first “agreement” with the British administrators in which they purportedly agreed to surrender their prime grazing lands in Suswa, Ol-Joro Orok and Ol-Kalou areas and move to Laikipia. It is estimated that under this agreement approximately 11 200 members of the Maasai community and over two million head of their livestock, lost their land to only 48 Europeans
- The acquisition of land through coercive measures, including e.g. forced African labour, forced military service, and forced taxation;
- The acquisition of land through forced evictions, e.g. the Talai, Pokot, and Turkana, as well as the Elgon Maasai/Sabaot; and
- Land alienation and displacement by multinational corporations e.g. James Finlay company had a lease in rift Valley for 999 years

Land alienation during the Mau Mau movement - Land was alienated from those associated with the Mau Mau and allocated to those who were loyal to the administration

According to the TJRC, the colonial land laws, policies, and practices had both immediate and long-term effects, including permanent displacement. The colonial administration further created arbitrary, ethnic specific boundaries, which in turn generated a notion of exclusivity of land rights by certain communities in certain areas. It promoted inequality in land and related rights, as well as poverty and destitution. In light of this, the TJRC confirmed that land has been and remains one of the major causes of intra and inter-ethnic conflicts.

### **Land, Transition, and Independence:**

Land was the focus of negotiations for independence between the British colonial administration and the local elites, raising the hopes of Kenyans that upon attaining independence, all land-related claims would be resolved with finality. The subsequent failure of the first independent government to fully address existing land issues was likely to perpetrate inter-ethnic conflict.

Instead of addressing existing land questions, officials of the newly-formed independent government in Kenya turned the foreign-funded settlement schemes into cartels for their own acquisition of, and benefit from large tracts of land in the Rift Valley, among other parts of the White Highlands and in the process, defrauded communities that were affected by land alienation by the British further still.

In the land tenure systems operating at independence, three categories of land emerged:

- Government land (including local authority land);
- Trust land / Community land; and
- Private land

Post-independence, irregularities and illegalities involving government lands remained plentiful. Evidenced by the intensified illegal transfer of land from the public domain to private individuals through practices commonly known as ‘land grabbing’, senior government officials, their cronies, and relatives showed a blatant disregard for the law, instead enriching themselves at the expense of the public. In this regard, the TJRC draws on examples relating to Karura Forest, Ngong Forest, and Bellevue.

Moreover, politicians often exploit real or perceived land injustices, especially around election time, for personal gain. The TJRC recognises this dangerous mix of land-related claims and political aspirations of specific groups and/or individuals as a ‘tinderbox that could ignite at any time’.

The TJRC further discusses instances of local authority involvement in illegal land allocations, illegal alienation of state corporations' land, settlement schemes for undeserving people, illegal settlements, and the illegal acquisition of ADC farms, as well as the illegal sub-division and allocation of trust land, the illegal land alienations during President Moi's administration, land and multi-party politics in Kenya, the key actors and factors in land related problems, and the Commission of Inquiry and Land.

As such, the TJRC finds that there is a very close link between land injustices and ethnic violence in Kenya. Moreover, land related injustices are prominent factors that provoke violence between and within ethnic tribes in Kenya.

Since independence there has been no genuine political will on the part of the State to address grievances and disputes relating to land, and as such, all post independence governments have failed to honestly and adequately address land-related injustices that started during colonialism. This failure on the part of both the colonial and post-independence governments is the reason individuals and communities often resort to self-help measures, including violence.

Existing land-related injustices are sometimes taken advantage of or used to address other societal problems, especially political differences, and whilst land-related injustices have affected virtually every part of Kenya, communities at the Coast, especially the Mijikenda, the Taita and Pokomo have suffered the most and the longest. The TJRC further finds that land-related injustices at the Coast constitute one of the key reasons for underdevelopment in the area and lie at the root of the emergence of the Mombasa Republican Council.

Provincial administration has pervasively and significantly perpetrated land-related injustices, including forceful evictions of individuals and communities and land grabbing for personal gain. As a result of their lack of moral authority and support, the TJRC finds that they should not participate in any efforts to redress land related problems in the new constitutional dispensation.

Finally, the TJRC finds that the current constitutional dispensation, including the new constitutional body on land and related laws, provide a sound basis to fully address land-related injustices, including historical ones, but only if there is political will to so use these laws and institutions.

## **RECOMMENDATIONS:**

In terms of land and conflict, the Commission recommends that:

1. The Ministry of Lands or other appropriate government authority immediately begins surveying, demarcating and registering all remaining government lands, including those formerly owned or managed by local authorities, all protected

wildlife areas and river banks, among other public lands;

2. The National Land Commission commences work with the Ministry of Lands and settlement to undertake adjudication and registration exercises at the coast and all other areas where the same has not been conducted. Measures shall be designed to revoke illegally obtained titles to and re-open all public beaches, beach access routes and fish landing beaches, especially at the Coast;
3. The National Land Commission in furtherance of its mandate expedites the process of addressing and/or recovering all irregularly and/or illegally acquired land. Measures should be designed by the Ministry of Lands and settlement to encourage individuals and entities to surrender illegally acquired land;
4. The Ministry of Land in conjunction with the National Land Commission design and implement measures to revoke illegally obtained titles and restore public easements;
5. The National Land Commission develops, maintains, and regularly updates a computerised inventory of all lands in Kenya, including private land that should be accessible to all Kenyans as required by law. Countrywide, land registries should be computerised and made easily accessible as required by the law; and
6. The National Land Commission formulates and implement strict guidelines in terms of the maximum acreage an individual or company can buy in respect of private land.
7. Reparations for historical land injustices to be implemented by the National Land Commission within 36 months of the release of the TJRC report.

### CHAPTER THREE: ECONOMIC CRIMES AND GRAND CORRUPTION

The TJRC finds that corruption is endemic in Kenya, despite a growing public awareness of the consequences of corruption, and its negative and destructive effects on development and the economy.

The TJRC reiterates some of the causes of corruption, as previously identified by the former Kenya Anti-Corruption Commission (KACC), including:

- Political patronage;
- Bad governance;



- Lack of political will;
- Breakdown and/or erosion of societal values and norms;
- Weak and/or absent management systems, procedures, and practices;
- Misuse of discretionary power vested in individuals or offices;
- Lack of professional integrity;
- Lack of transparency and accountability;
- Tribalism, favouritism, and cronyism;
- Inefficient public sector;
- Greed; and
- Non-enforcement of the law.

Some of the effects of corruption include, but are not limited to:

- Poor health services;
- Poor transport and/or communication networks;
- Reduced investment and relocation of investors in other countries;
- Increased cost of goods and services;
- Delay, denial, and sale of justice in courts;
- Increased poverty;
- Shoddy work and stalled projects;
- Unemployment;
- Loss of confidence in government;
- Rise in crime and insecurity;
- Negative international image; and
- Irregular/illegal acquisition of public land, property, and utilities.

The TJRC identifies a direct link between corruption and gross violations of human rights, particularly in the case of economic, social, and cultural rights, where corruption is likely to undermine enjoyment of these rights in relation to the state's duty to provide or regulate

public services in relation to health, housing, water and education. Corruption may also violate principles of equality and non-discrimination, the right to political participation, and the rights to a fair trial, among others. Moreover, Individuals have been killed, tortured, and subjected to other violations of human rights because of their efforts to combat corruption.

The TJRC further recognises that corruption has a disproportionate impact on vulnerable and marginalised groups, such as the poor, minorities and indigenous people, women, children, persons with disabilities, people living with HIV/AIDS, refugees and internally displaced persons, and prisoners. Members of these groups are more and are less able to defend themselves.

In addition, the negative ethnicity relating to land appears to be reflected even in the settlement of IDPs, with those who get resettled often coming from communities able to access political power.

Moreover, poor people are affected by corruption because it diverts resources from investment in infrastructure that is crucial to lift them out of poverty. Corruption undermines the quality of public services on which the poor depend particularly to meet their basic needs. Minority and indigenous people suffer effects of corruption when they are displaced by, for example, corruptly approved infrastructure developments.

In its report, the TJRC discusses a number of grand corruption cases in more depth, including the Ken Ren, Goldenberg, Charter House Bank, and Anglo-Leasing scandals. It further addresses the initiatives taken to combat corruption, the anti-corruption legal framework, the recent legislative developments on leadership and integrity in Kenya, and the corruption reports received by the Commission.

### **Challenges of Fighting Corruption:**

The TJRC notes major challenges in the fight against corruption that need to be addressed:

- The lack of a national anti-corruption policy;
- The failure to fully domesticate the United Nations Convention Against Corruption (UNCAC);
- The failure to fully entrench the Ethics and Anti-Corruption Commission (EACC) in the Constitution of Kenya (2010);
- The insufficient number of Commissioners at the EACC;
- The lack of prosecutorial powers by the EACC;

- The failure to provide for anti-corruption measures targeting the private sector;
- The lack of specific provisions empowering the EACC to deploy special investigative techniques;
- The proliferation and duplicity of anti-corruption laws;
- The conflicting definitions of integrity thresholds pursuant to the Constitution of Kenya (2010), namely chapter six therein;
- The Ambiguity in the role of the EACC under chapter six of the Constitution and the Leadership Integrity Act;
- The lack of political will to fight corruption;
- The harassment and intimidation of whistle blowers; and
- The lengthy adjudication of corruption cases in court.

Grand corruption and economic crimes have had profound and far-reaching effects on the enjoyment of the socio-economic rights by the people of Kenya, particularly the poor. According to the TJRC, the interconnected crimes are sinister and lessen the availability and access to fundamental needs of human life, including food, education, health care, shelter etc.

## **RECOMMENDATIONS:**

In terms of economic crimes and grand corruption, the Commission recommends that:

1. A national anti-corruption policy to guide the war against corruption is formulated by the Attorney General within 18 months of issuance of the Report , as it is necessary to criminalise other offences that are in UNCAC but not yet domesticated in Kenya;
2. The provisions of the Anti-Corruption and Economic Crimes Act, Public Officers Ethics Act, Ethics and Anti-Corruption Commission Act, and the Leadership and Integrity Act be harmonised to avoid confusion and duplicity, and that the four pieces of legislation are in fact, merged into one. This should be done by the Attorney General within 18 months of issuance of the Report
3. The number of commissioners of the EACC be increased to the maximum constitutional limit of nine. This increase in the number of staff is also required to deal with the increased workload created by the two levels of government with the attendant huge sums of public funds being allocated to the 47 counties. There

is a real danger of corruption being ‘devolved’ to the counties unless the EACC is quickly restructured, empowered and visible at both levels of government. This should be done by the Attorney General within 18 months of issuance of the Report

4. The EACC be given a sound constitutional grounding through amendment of Article 79 of the Constitution to specifically provide for its powers and functions as is the case with other Constitutional commissions.
5. The clarification of the definition of integrity and the attendant integrity threshold that should be used to either disqualify or remove a person from public office. Chapter 6 of Constitution of Kenya 2010, if properly interpreted and applied, will definitely be a major boost in the war against corruption in Kenya. It should be clearly defined as to when the integrity bar begins to operate, that is, whether it is at the time:
  - When mere allegations are made against an individual;
  - When an individual is under investigation’
  - When an individual is under prosecution;
  - When an individual is convicted; or
  - When an individual has exhausted his right of appeal after conviction; and
6. The EACC commence or hasten investigations into grand corruption scandals mentioned in this Report, which have remained unresolved for many years. Appropriate criminal and or civil sanctions must thereafter be taken against the perpetrators of grand corruption and economic crimes.
7. The President should release the report of the Commission of Inquiry into the conduct of the Artur Brothers and their Associates ( Kiruki Report) within 6 months of issuance of the report.

## VOLUME IIC: VIOLATIONS AGAINST PROTECTED GROUPS

### (WOMEN, CHILDREN, AND MINORITY GROUPS AND INDIGENOUS PEOPLES)

This volume focuses on the stories and narratives of women, children and members of minority and indigenous groups.

Women experienced historical injustices and gross violation of human rights, children were abused and their rights violated and groups of people suffered because they are members of a minority group or indigenous peoples. One of the most important issues facing members of such groups is the basic right of citizenship – the right, and recognition, that they are an integral and valued part of the nation. Some of these people lacked legal documents to prove they were citizens, thus subjecting them to numerous indignities and barriers to accessing the basic necessities of life.

### CHAPTER ONE: GENDER AND GROSS VIOLATIONS OF HUMAN RIGHTS (WOMEN)

In seeking to document the gendered dimensions of injustice and violations between 1963 and 2008, the TJRC recorded a total of 16,377 statements from women (representing 38% of the total statements received). It deliberately focused on the experience of women for two reasons:

- (a) Historically, Kenyan women have been the subject of systematic discrimination and marginalisation; and
- (b) When compared to men, women are disproportionately susceptible to violations simply on the basis of their gender.

The TJRC recognised **two** express entry points for dealing specifically with the plight of women:

- (a) Rape of any other form of sexual violence; and
- (b) Persecution of an identifiable group of collectively on [the basis of] gender.

Throughout the mandate period (1963-2008), women did not enjoy equal status to men. This inequality can be largely attributed to patriarchal customary norms and practices, which relegate women to a subordinate status and subject them to gross violations of human rights.

Some of these norms and practices have not only been entrenched in society, but were also protected and permitted by legislation and sanctioned by the state. They include:

- Payment of dowry or bride price;
- Early and/or forced marriage;
- Widow inheritance;
- Disinheritance;
- Polygamy;
- Chastisement of wives; and
- Female genital mutilation or cutting (FGM/C); as well as
- State sanctions and discrimination.

In line with the disadvantages associated with a lower standing in society, the TJRC identifies a range of complex socio-economic factors that affect Kenyan women in particular. These factors include challenges in relation to:

- Feminisation of poverty;
- Employment;
- Land rights;
- Education;
- Reproductive health; and
- HIV/Aids

### **Leadership and Political Participation:**

Between 1963 and 2008, women were generally kept outside mainstream leadership. Political exclusion and state repression of female political participation ensues today, whereby women are rarely represented in decision-making forums, including those in which their wellbeing are debated and approved.

Poor representation in decision-making processes has culminated in the adoption of gender-blind policies and a chronic failure to mainstream gender, as a result of which women are decisions including those relating to their wellbeing are debated and approved.

## **Conflict:**

Almost without exception, it is women who bear the greatest brunt of conflict. They have also increasingly become specific target of violence, evidenced in particular through instances of rape and sexual violence.

In this respect, the TJRC focused in particular on the gross violations of human rights that occurred during the Mau Mau war, the Mt. Elgon conflict, and the 2007/2008 PEV.

## **Forced Displacement:**

Forced displacement has been described as a permanent feature of Kenya's history. It commonly represents a failure on the part of a state to ensure the safety of those within its territory, and can give rise to two categories of victims: internally displaced persons (IDPs) and refugees.

Women are almost always more vulnerable to violations of their human rights as a result of such displacement, and particularly to sexual and gender based violence.

## **Women and Peace-making:**

Often excluded from formal peace processes, women's participation in peace-making has largely been limited to informal processes and protests.

## **Women and State Repression:**

While men were the predominant victims of repressible and authoritarian tactics employed by the state between 1963 and 2008, women also suffered, both as primary and secondary victims.

As primary victims, scores of women, especially politicians, academics, and human rights activists, as well as female Members of Parliament who were vocal in their opposition to repressive rule, were often detained, tortured, and subjected to politically motivated charges, wrongful convictions, and public humiliation. Many more were killed, raped, or subjected to other gross violations of human rights during what the state referred to as 'security operations'.

The vast majority of women, however, were secondary victims of state repression, as a result of the harm inflicted on their husbands and/or children.

The TJRC also identified the need for special attention to the most vulnerable among women, including women in rural and slum areas, internally displaced and refugee women, women with disabilities, women living with HIV/Aids and women belonging to minority and indigenous groups.

## **RECOMMENDATIONS:**

In relation to women, the Commission recommended that:

1. The President offers a public and unconditional apology for State's sanction of discrimination against women during the mandated period. This should be done within six months of the issuance of the report;
2. The Gender and Equality Commission steps up measures to raise awareness about harmful cultural practices that adversely affect women's enjoyment of human rights;
3. The Attorney General and Parliament expedites the enactment of the Marriage Bill (2007), Matrimonial Property Bill (2007), Family protection Bill (2007), Equal Opportunities Bill (2007); within 18 months of issuance of the report
4. The Kenyan and Ugandan governments, in conjunction with UNHRC, conduct an independent survey of the willingness of Kenyan Refugees in Uganda to return to Kenya, and immediately facilitate the return and resettlement of those who are willing. This should be done within nine months of the issuance of the report;
5. The government ensure that the composition of land dispute tribunals meets the Constitutional gender ratio requirement. This should be done within 12 months of the issuance of the report; and
6. The Ministry of Health adopt a Plan of Action outlining measures to be taken to increase and improve maternal health facilities in the country and reduce the number of cases of delivery at home. This should be done within 12 months of the issuance of the report.

## **CHAPTER TWO: CHILDREN AND GROSS VIOLATIONS OF HUMAN RIGHTS**

This Chapter provides an account of gross violations of human rights suffered by children during the Commission's mandate period and the impact of such violations on their lives. It is based on approximately 2000 statements from children and multiple reports and testimonies from adults and representatives of civil society organisations and child protection agencies.



The report found that children were directly and indirectly affected by the gross violations of human rights and historical injustices committed in Kenya between 1963 and 2008.

As direct victims, children suffered atrocities including killing, maiming, torture and sexual violence. They also witnessed atrocities and as a result of which many of them remain traumatised.

While conflict and political unrest exacerbate the vulnerability of children, the effects of human rights violations, displacement, poverty, and a general lack of protection also have important physical, psychological, and socio-economic repercussions in their lives.

### **Economic Status:**

In considering the economic status of children, the TJRC focused on:

- (a) **Education:** Despite the introduction of free primary education in Kenya in 2003, many children are still unable to access education. In addition, gender inequality also remains at alarming rates in some parts of the country, where few girls are able to attend school, largely as a result of cultural beliefs and practices that privilege boys.

Children with disabilities face particular challenges in relation to access to education, with the existence of few specialised institutions to cater for their needs, which are often inadequately resourced.

- (b) **Health:** Economic and infrastructural factors limit the access to health care services, as a result of which not all children in Kenya have access to these services. Even minimal fees payable at health care institutions are beyond the reach of a good number of families. This inaccessibility of health care services is often compounded by the lack of responsible caregivers.

- (c) **Child Labour:** The phenomenon of child labour dates back to the colonial period during which children worked on farms owned by white settlers. However, the incidence of child labour has since been on the rise, often a product of the vulnerable economic status of families. The TJRC estimated that there are at present, one million children engaged in child labour in Kenya.

Predisposing factors that increase instances of child labour include: absence or loss of parents; domestic violence; and violent conflict.

In cases of sexual exploitation specifically, uncooperative relatives who opt to receive compensation instead of calling for the prosecution of respective perpetrators hamper enforcement of the law.

## **Children and Conflict:**

Violent conflicts that have marred Kenya since independence have had a profound impact on children in various ways.

Children were both direct and indirect victims of gross violation of human rights committed in the following contexts: Shifta War, security operations in Northern Kenya, Mt. Elgon conflict, ethnic clashes of 1992 and 1997, and most recently, during the 2007/2008 Post Election Violence (PEV).

Children were directly victimised through killing, maiming, torture, and sexual violence. They also witnessed such crimes on a large scale, leaving many traumatised.

## **Forced Recruitment:**

Vigilante and/or militia groups in Kenya, including e.g. Mungiki and Saboat Land Defence Force, targeted children for forced recruitment, emphasising the status of such children as victims and perpetrators all at once.

## **Forced Displacement:**

Displaced children (IDPs and refugees) are subjected to extremely harsh conditions, which negatively impact their access to education, health care, decent shelter, adequate food and other basic human needs. The 2007/2008 PEV generated the highest number of internally displaced children in Kenya's history.

The majority of Kenyan refugee children and youth living in Kiyandongo Refugee Camp, Uganda, are willing to return to Kenya, but are unable to do so due to their fate being tied to that of their parents or guardians.

## **Juvenile Justice:**

Despite the enactment of the Children Act of 2001, which established a new legal framework relating to juvenile justice in Kenya, the TJRC received testimonies concerning violations against juvenile delinquents. Despite the distinctions made in the Act, children in need of care and protection, such as abandoned and/or street children, often find themselves in the juvenile system designed for child offenders.

State responses to gross human rights violations against children include:

- (a) Police: There have been some attempts to incorporate a child-sensitive

approach in the police service, e.g. the introduction of children's desks within police headquarters. However, challenges remain in this regard, as the officers who run these desks often lack the necessary training to do so. Similarly, accusations of inaction are routinely levelled against the police and allegations of police officers colluding with alleged perpetrators of violations against children's rights are rampant.

- (b) Judiciary: The courts have been proactive in enforcing children's rights, e.g. in relation to parental responsibility and access to justice for those unable to afford legal representation. However, numerous sentences for those convicted of sexual offences against children continue to fall short of what is provided by the law and there continues to be no formal mechanism to assist illiterate parties to obtain justice.
- (c) Department of Children Services (DCS): Despite efforts to resolve issues and protect the welfare of children, run rehabilitation should, remand houses and rescue centres, the DCS remains understaffed and lacking in adequate resources as well as specialised training.

Non-state actors also play an important role in the promotion and protection of children's rights, e.g. in the investigation and reporting of human rights violations, engaging in legislative and policy advocacy, and creating public

## **RECOMMENDATIONS:**

In terms of children, the Commission recommended that:

1. The President apologises for atrocities committed against children during the mandate period. This should be done within six months of the report;
2. Psychosocial and counselling services be provided to children victims of gross violations of human rights and injustices;
3. Reparations be provided to children victims of gross violations of human rights and injustices within 36 months of issuance of the report
4. The Borstal institutions be placed under the Department of Children's Services in the Ministry of Gender, Children and Social Development by the office of the President within 12 months of issuance of the report
5. The children's desks at police stations be well funded and only officers who have been trained appropriately should deal with children;
6. More remand homes be established to avoid placing alleged juvenile delinquents in police cells and prisons;

7. Restorative justice mechanisms be formally introduced in the juvenile justice system and police officers be sensitised and trained to set these in motion;
8. The Department of Children's Services be well funded to adequately respond to violations of the rights of the child; and
9. The Ministry of Education work towards the progressive integration of children with disabilities in the mainstream educational facilities by tailoring these facilities to suit their specific needs.
10. The Ministry of Education should integrate children with disabilities into mainstream educational facilities within 12 months

### CHAPTER THREE: MINORITY GROUPS, INDIGENOUS PEOPLE AND GROSS VIOLATIONS OF HUMAN RIGHTS

Minority groups and indigenous people are often more vulnerable to injustices and violations than other segments of society and have suffered specific gross violations of human rights simply on account of their membership in these communities.

In ensuring the participation of these groups, the TJRC received statements from individual members of minority and indigenous groups, as well as memoranda prepared jointly by members of these groups. It also listened to their testimonies as well as evidence provided by experts in this field.

The TJRC identified minorities in Kenya to include:

- (a) Non-Africans, such as Kenyan Asians;
- (b) Religious minorities, such as Muslims, Hindus and those who follow traditional African religions;
- (c) Ethno-linguistic minorities, such as Nubians; and
- (d) Indigenous peoples, such as pastoralists, hunter-gatherers, and fisher peoples.

In reviewing the situation of self-identified minorities and indigenous groups, the Commission was also presented with the problem of "internal minorities", such as e.g. the Ajuran, Garre and Degodia within the Somali community.

#### **Injustices and Violations Specific to Minority Groups:**

The TJRC recognises various human rights violations and injustices specific to minorities and indigenous people.

### Systematic Discrimination:

Between 1963 and 2008, the state failed to recognize the existence, unique culture and contributions of many minority and indigenous communities in Kenya. In fact, it discriminated against these very communities, specifically those residing in North Eastern, Upper Eastern, Rift Valley and Coast provinces, through emergency laws and regulations that violated their rights to equality before the law and due process of law.

### Formal Recognition and Right to Identity:

Despite widespread popular belief that Kenya is a composite of 42 tribes, there is no statutory or policy basis for this belief. Moreover, this figure was not arrived at through self-identification by citizens, but from the number of tribes enumerated in a 1989 population and housing census report. Most minorities were identified under the broad rubric “others” or subsumed within a dominant identity, such as the Kalenjin or Luhya – a factor that contributes to deep-seated feelings of exclusion.

In terms of non-recognition, the TJRC considered that the right to identity of numerous minority and indigenous communities, including the Nubians, Munyoyaya, Waata, Ogiek, Sabaot, Kuria, Kona, Bajuni, Hara, Saakuye, Burji, Isaak, Sengwer, Suba and many others, had been denied by the state.

### Citizenship:

The Commission considered the application of legal provisions to exclude a given group from access to citizenship to be a deep and egregious breach to the right to identity.

That said, between 1963 and 2008, the Kenyan state discriminated against communities in the North Eastern and Upper Eastern regions of the country (including the Nubian, Somali, and Galjeel communities), as well as Muslim communities in general through legislation and regulations on citizenship, which denied these groups equality before the law.

### **Collective Punishment:**

The Kenyan state maintained in its statute books a plethora of oppressive laws that had a particularly adverse effect on minority groups and indigenous people. These laws specifically sanctioned the collective punishment of certain communities.

Collective punishment, which often occurred in the context of security operations and disarmament, took place predominantly in Northern Kenya – a region inhabited by various minority groups and indigenous people – and recurrently resulted in massacres of

innocent citizens.

The massacres that occurred under the guise of such security operations included: Bulla Karatasi Massacre, Wagalla Massacre, Malka Mari Massacre, Lotirir Massacre, and Murkutwa Massacre, as well as attacks on the Pokot community and bombing of Samburu communities.

### **Violations of Land Rights:**

The TJRC identified pastoralists and hunter-gatherers in Kenya to have been affected most severely by land loss, land fragmentation and forced evictions, resulting in increased marginalisation, deepening poverty, and cycles of conflict with neighbouring communities and with the state.

Communities affected by the state's failure to address historical injustices with regard to land, included the Boni, Coastal, Endorois, Maasai, Ogiek and Sengwer communities.

Furthermore, land regimes in Kenya, including trust Land, government land and group ranches, have resulted in *de facto* discrimination and led to massive dispossession of the ancestral lands of pastoralist and hunter-gatherer communities.

### **Violations of Right to Development:**

According to the TJRC, the Kenyan state's development policies did not create conditions that would lead to qualitative improvement in the lives of minority and indigenous communities. Instead, the vast majority of development projects contributed to the intensified marginalisation and exclusion of such groups.

### **Political Participation:**

Minority groups believe that they are marginalised in large part because they have no access to political positions that would grant them decision-making power.

In order to increase loyalty and power bases for political elites, a multitude of government services are considered highly politicised and distributed through ethno-political networks. As a result, minorities and indigenous groups have little representation at the local government, let alone in higher political arenas.

In its report, the TJRC reflects on the various experiences of the Endorois, Ilchamus, Maasai, and Sengwer communities.

## **Access to Justice:**

Kenyan minority groups and indigenous peoples have been largely excluded from accessing justice on multiple levels throughout the TJRC mandate period.

As the means through which individuals and groups vindicate their other human rights, for minorities and marginalised groups, access to justice encompasses customary justice systems, formal justice mechanisms, administrative mechanisms, legal aid policy and legal awareness. In this respect, the TJRC discusses various challenges relating to access to justice for these groups, including:

- Limited knowledge of rights;
- Barriers to access to justice (including physical access to formal mechanisms, financial access and legal aid, and cultural barriers to justice); and
- Institutional arrangements (including customary systems and Kadhis' Courts)

The TJRC further found that the state failed to implement important judicial decisions related to promoting and protecting the rights of minority groups, such as the Ilchamus' and Endorois' decisions. This trend has consistently undermined minority groups' confidence in the ability of the Kenyan justice system to deliver substantive equality.

## **Minority and Indigenous Women:**

According to the TJRC, minority and indigenous women and girls are considered some of the most vulnerable groups in Kenya.

### Violence Against Women:

Violence against women is a major concern amongst many minority communities in Kenya, as it has traditionally been considered an acceptable practice in many groups. In addition to being confronted with violence in their own communities, violence against minority and indigenous women is also perpetrated by security forces and other communities. In fact, killing and sexual violence against women and children, which would have been strictly taboo under traditional norms, has become increasingly common during inter-communal conflict.

Moreover, security forces that are often dispatched ostensibly to protect communities also engage in violence against women.

### Access to Socio-Economic Rights:

Marginalised minorities and indigenous peoples in Kenya are generally poorer than the rest of the population. This inequality has significantly impacted women's ability to access education and health services, e.g. maternal health facilities and providers.

### Marriage and Inheritance:

Legal pluralism in Kenya has often had a disproportionately negative impact on minority and indigenous women. Since they are more likely to live in rural, marginalised areas, they also are more likely to govern their affairs through customary systems. These are often patriarchal and do not sufficiently protect the full array of women's rights.

While the statutory system of regulating marriage and inheritance rights may be more protective of women on paper, formal justice systems also often discriminate against minority women on the basis of language, geographical, financial and other barriers.

### Access to Land:

The TJRC considered that in rural areas and marginalised communities in particular, women are responsible for planting and harvesting of crops, preparing food, accessing fuel (wood or charcoal) and water, as well as childcare, all of which are very land-dependent activities. Yet, they make up less than five percent of the holders of land titles in Kenya.

## **RECOMMENDATIONS:**

With regard to minority groups and indigenous peoples, the Commission recommended that:

1. The government ratifies the ILO Convention 169; Convention on the Prevention and Punishment of the Crime of Genocide; Convention on the protection of the Rights of Migrant Workers and Members of Their Families; Convention Against Discrimination in Education; and Statelessness Convention. This should be done within two years of the issuance of the report;
2. The President issues an official, public and unconditional apology to minority and indigenous communities in Kenya for the State's systematic discrimination against these groups and communities. This should be done within six months of the issuance of the report;
3. Obstacles experienced by minority groups, such as members of Somali and



Nubian ethnic communities in accessing national identify cards be removed. This should be done within 12 months of the issuance of the report;

4. The Kenya Law Reform Commission examine all Kenyan legislation to ensure that it does not result in *de jure* or *de facto* discrimination against minority groups.
5. The Kenya Law Reform Commission, in consultation with minority and indigenous groups, develop national legislation governing state-sponsored or private development programmes that require free-prior and informed consent of affected communities (including specific guidelines on how to engage in a process of consultation with communities);
6. The government develop a plan on data collections and disaggregation on minority and indigenous communities, with special attention to ensuring disaggregation of data related to women; and
7. The government release and implement the recommendations of the Presidential Special Action Committee to Address Specific Concerns of the Muslim Community in Regard to Alleged Harassment and/or Discrimination in the Application/Enforcement of the Law.

# VOLUME III: NATIONAL UNITY, HEALING AND RECONCILIATION

## Background:

- Integration of ethnic groups without compromising their distinct identities has been a challenge;
- Ethnicity has been an instrument of divisions of people;
- Failure to take adequate measures to address ethnic tensions has resulted to violence;
- Heightened levels of ethnic tension have resulted to violence;
- Contestations and/or ignorance to act on reports on ethnic clashes, e.g. the 1991/1992 clashes – famously the Kiliku report, and the 1997 tribal clashes – commonly called the Akiwumi Commission; and
- The 2007/2008 PEV was a result of long standing ethnic tension.

## Mandate:

The TJRC's report recognises the study and finding on issues of ethnicity with the aim of achieving national unity, healing and reconciliation in Kenya. It also looks into the causes of and problems raised by ethnic tension.

The study and findings draw upon the colonial period, post-independence period, the role of culture and stereotypes, politics, land issues and a case study of the infamous Mt. Elgon Conflict (2006 – 2008).

Ethnicity issues are looked into hand in hand with: economic marginalisation; violations of socio-economic rights; and land conflicts.

## CHAPTER ONE: ETHNIC TENSION

Ethnic tensions are protracted social and political confrontations between groups of persons as a result of their differences either in; colour, race, religion, ethnicity or origins. Such confrontations could be either physical or non-physical. Physical confrontations, in this context, result to ethnic violence.

## **Ethnic Composition of Kenya:**

- 44 ethnic groups, drawn from the Bantu, Nilotic and the Cushitic people.
- Kenya's population (approximately 41 million – 2010 census) also includes people of Arabic, Asian and European origins.

## **Causes of ethnic tension:**

- 'Divide and rule' policy by colonialists:
  - Creation of ethnically defined administrative boundaries by colonialists;
  - Magnification of ethnic differences and stereotyping meant to create suspicion and hatred;
  - Development of infrastructure and provision of social services in productive areas at the expense of the rest of the country (resulting to inequalities hence competition for resources and services);
  - Land policies leading to tribally administered native reserves and consequent restrictions on inter-trade and contact between the units;
  - Post-independence politicisation, manipulation, and exclusion of ethnic communities.
- Insider/outsider dynamics:
  - Assertions by communities of superior claims of ownership or occupation to territories, land, and resources at the expense of others.
- Names and their meaning:
  - Claims that places have been given foreign names otherwise than their indigenous names.
- State sanctions:
  - The treatment of Kenyans based on ethnicity as a state policy, e.g. the requirement that Somalis to carry passes to assist in distinguishing them from Somali foreigners.
- Negative perceptions and stereotypes:
  - The labelling and portraying of communities that generalise traits and apply to all members regardless of individual perceptions. This is often in negative terms.

- Culture and Stereotypes:
  - Stigmatisation and regarding communities to be lesser or weaker based on their traditional cultural beliefs and practices.
- Pastoralism:
  - Dynamics of cattle rustling and other resource based conflicts. Factors contributing to these animosities include; frequent droughts and inadequacy of water and grass, clan animosity, and proliferation of firearms from neighbouring countries.

### **Ethnicity and Politics:**

In post-independence, it is viewed that, an elite group – Kiambu mafia – dominated politics resulting to a class of capitalists. This group enjoyed economic prosperity and political influence and repressed any resistance from other Kenyans.

This authoritarian leadership attracted opposition with both wings divided along ethnic lines.

Subsequent assassinations of leaders, oaths of allegiance to leadership and communities, and ethnicisation of politics – especially in electoral competitions – have always had ethnic undertones.

### **Land and Ethnic Tension:**

Since independence, ethnic tension in Kenya is central to the redistribution of land formerly occupied by white settlers. Fertile and productive white highlands, unlike unproductive native reserves, were redistributed in a skewed manner to favour the ruling class at the expense of all.

Successive governments used land to induce patronage and build political alliances.

The continued practices of illegal/irregular allocation and distribution of land in disregard of public interest has created a feeling of marginalisation among communities. This became a foundation of ethnic tension and violence especially in Rift Valley and the Coast.

Regional inequalities and imbalance as a result of government policies that favour investment of resources in only high potential areas of production coupled with the ethnic dimensions of land allocation and ownership have ethnic consequences.

Redistribution of land on “willing buyer willing seller” programme, after independence,

without considering those who were displaced by colonialists has always been a source of ethnic tension.

### **Ethnicity and access to Public Office:**

There is a perception that representation in government positions has benefits to the respective communities from which those in the positions come from. This creates competition for representation, increasing the likelihood of violence during elections.

Ethnicity has played a role in appointments to cabinet positions, offices of permanent secretaries/principal secretaries, and the civil service.

Enrolment in public institutions such as universities has been observed to take an ethnic dimension, too.

### **Ethnicity and Displacement:**

There have been repeated waves of ethnic violence resulting to displacement of people. However, the Government has not been appropriately responding to this issue.

Government initiated assistance to IDPs has been perceived discriminatory, e.g. resettling a specific class of IDPs. Such discrimination continues to inflame inter-community relations instead of fostering reconciliation.

## **CHAPTER TWO:ETHNIC TENSION, LAND AND POLITICS**

### **(A CASE STUDY OF THE MT. ELGON CONFLICT)**

Between 2006 and 2008 Mt. Elgon experienced violence whereby about 600 people lost their lives, hundreds experienced sexual violence, and about 45,000 people were displaced. A case study of the conflict indicates ethnic identity, land, and electoral politics as the root causes for these events.

### **Ethnic Identity:**

Mt. Elgon is dominated by the Sabaot, who are in turn made up of sub-groups. Some groups have expressed a feeling of continued political marginalisation, loss of cultural identity and ethnic victimisation as a result of the fluidity of their identities, and their ethnic origin perceptions. The presence of some perceived minority communities feature in the evolution and unfolding of the Sabaot Land Defence Force (SLDF) and the ethnic violence in the area.

## **Land:**

### Colonial History:

Communities at Mt. Elgon have their own understandings about their belonging to the area.

Colonialism also played a role in the settlement of peoples on the mountain – the mountain having been set aside as a native reserve.

There has been perceived dominance, by other communities, of the economic and political life of the areas giving rise to incidences in which politicians champion for the administrative separation of the area to suit ethnic groupings.

Ethnically unchanged boundaries, competition between KANU and KADU, and ethnically divided constituents resulted to violence on Mt. Elgon in 1963.

### **Chebyuk Settlement Scheme:**

The government hatched a plan to move a community from the mountain for developmental reasons – including suggestions for creating a national park –, and resettling the landless and the displaced to Chebyuk settlement scheme.

People were moved into the settlement that did not actually exist – Chebyuk had not been officially de-gazetted and therefore was still a forest. The land could not be demarcated and titles could not be issued either.

People assigned themselves plots; sub-divided plots, sold and re-sold them, and even those not in the original resettlement plan joined in.

As de-gazettement took place after people had settled in the scheme, those who had settled wanted their squatter and user rights recognised.

Disgruntling between communities that allocated themselves land and those that missed out led to sporadic outbreaks of violence and threats flowing back and forth the various communities.

Allocations and self-allocations were annulled due to these competing interests. Evictions, applications for resettlement, vetting, and delays in issuing titles that followed were also marred by violence.

Land and ethnicity issues were the underlying causes eventually leading to the emergence of the SLDF.

## **Politics:**

Mt. Elgon land was deeply politicised. Politicians and parties mobilised along ethnic lines – in both elections and the 2005 referendum.

The campaign to the 2007 elections saw the use of the SLDF by politicians for allegedly fundraising activities, garnering support for an accused politician and inflicting violence to the people.

A local CBO – Chepkrur and Korng’otuny –, a local politician and “land owners” who were opposed to evictions to pave way for phase III of Chebyuk settlement are alleged to have been behind the rising of the SLDF.

## **Violence:**

By 2006, people were called to arms and protests and to fight over phase III of the Chebyuk settlement.

By August 2006, there were reports of murders of local politicians and administrative officers perpetrated by SLDF. The atrocities by the militia (mainly the Soy) soon escalated to torture, rape, abductions, and assaults targeting the Mosop people.

It is alleged that SLDF got its finances from politicians, looting, cattle rustling, and taxation of teachers.

The state response through the disciplined forces to the militia was also alleged to be marred with violence and human rights abuses including: beatings, looting, rape, extortion, and killings.

The TJRC finds that the emergence of emergence of SLDF was due to the government’s failure to address land-related injustices that members of the Sabaot have suffered. It further finds that SLDF was responsible for gross violations of human rights including killings, torture, and sexual violence, and that during Operation *Okoa Maisha* the military and police were responsible for gross violations of human rights including killings, forced disappearances, torture and sexual violence.

## **RECOMMENDATIONS:**

In terms of Mt. Elgon conflict specifically, the Commission recommends that:

1. The President offer an apology to the people of Mt. Elgon for atrocities committed by the military and police and their failure to offer protection. This should be done within six months of the issuance of the report;

2. The State establish trauma and healing centres at Mt. Elgon to provide psychosocial support to victims and survivors with special attention to widows. This should be done within six months of the issuance of this report;
3. Those who suffered atrocities be provided reparation in accordance to the corresponding TJRC Reparation Framework;
4. A monument be established in Mt. Elgon to commemorate victims and survivors, resulting from activities of state security agents and SLDF, of Mt. Elgon;
5. The State to map all mass graves where people were dumped or disposed during the conflict, to exhume, identify and properly bury them. This should be done within 18 months of the issuance of the report;
6. Individuals involved in militia activities in Mt. Elgon including financing, planning and instigating e.g. Fred Kapondi, John Bomet, and Jackson Psongoiwo be prosecuted.
7. Colonel Stephen Boiywo who was the commanding Officer of the military during the 2008 *Operation Rudi Nyumbani* at Mt. Elgon for gross violations of human rights by the military be prosecuted.
8. The Police Service Commission ensure that every police station reflects ethnic diversity and gender balance.

## CHAPTER THREE: HEALING AND RECONCILIATION

The TJRC was mandated to provide victims, perpetrators, and the public a platform for non-retributive truth telling.

It was also mandated to provide repentant perpetrators or participants in gross human rights violations a forum to confess their actions as a way of bringing reconciliation.

In addition, the Commission was to inquire into the causes of ethnic tensions and to make recommendations on the promotion of healing, reconciliation and coexistence among ethnic communities.

The Commission endeavoured to promote and contribute to reconciliation efforts – as reconciliation is a process than an event.

### RECOMMENDATIONS:

In terms of healing and reconciliation, the Commission recommended that:

1. Dialogues and spaces for exchange by and around individuals, communities



and institutions;

2. Truth discovery through confessions and other means to establish an accurate and complete historical record;
3. Public acknowledgment of violations and responsibility coupled with contrition and apologies;
4. Forgiveness (interpersonal; intercommunity; state-individuals);
5. Ensuring accountability of individuals and institutions through reparations and prosecutions;
6. Restoration of victims' dignity through public acknowledgment, reparations and prosecutions; and
7. Institutional reforms.

While the Commission acknowledged efforts towards national unity, healing and reconciliation by organisations, the government and NGOs, it also recognised challenges.

The challenges to reconciliation and national unity include:

- Lack of political will;
- Absence of structures and institutions that can change attitude and acceptance between hostile groups;
- Lack of all victims' participation due to ethnic polarisation;
- Lack of follow up mechanisms;
- Prioritisation of aftermath reaction to issues e.g. prosecutions than addressing the root causes; and
- Lack of adequate funding to and under-utilisation of District Peace Committees.

The TJRC also identified opportunities that led to national unity and reconciliation. They include:

- The constitution of Kenya 2010, e.g. Article 10 emphasising on national values and principles of good governance and the bill of rights;
- Enacted legislations, e.g. National Cohesion and Integration Act (2008) – which among others criminalises hate speech and outlaws discrimination on ethnic and other social grounds;
- Other legislations, including;

- The National Cohesion and Integration Act No. 12 of 2008;
  - The Political Parties Act No. 11 of 2011;
  - The Ethics and Anti-Corruption Commission Act No. 22 of 2011;
  - The National Gender and Equality Act No. 15 of 2011; and
  - Persons With Disabilities Act No. 14 of 2003.
- The established institutions e.g. the National Cohesion and Integration Commission (NCIC) mandated to promote and facilitate equality, good relations, harmony and peaceful coexistence of communities; and
  - Reforms in sectors as the judiciary and the police service.

## **RECOMMENDATIONS:**

The Commission further recommends that:

1. The President convene a National Reconciliation Conference/Day; the President and security agents to offer a public apology for violations and injustices committed; the President to outline the nation's Reconciliation agenda; representatives of victim groups be facilitated to attend; and the day be declared a public holiday. This should be done within six months of the issuance of the report;
2. Alleged perpetrators of ethnic incitement and violence be investigated and prosecuted. The list of adversely mentioned persons by the commission to aid in identification;
3. The Director of Public Prosecutions (DPP) issue a public report indicating its progress in investigating and prosecuting 2007/2008 Post-Election violence cases. This should be done within three months of the issuance of the report;
4. Evaluation of all institutions and mechanisms in peace-building, reconciliation and early warning for harmonization of their activities and adopting a coordinated approach;
5. Comprehensive and sustained community dialogues be carried in areas with perennial ethnic tension and violence;
6. District Peace Committees be funded adequately and be publicised; and
7. The Ministry of Education to develop a peace education curriculum for use in schools.

# **VOLUME IV: FINDINGS, RECOMMENDATIONS, (INCLUDING THE IMPLEMENTATION MECHANISM AND REPARATIONS FRAMEWORK)**

## **CHAPTER ONE: FINDINGS AND RECOMMENDATIONS**

These have been incorporated and documented above, respectively.

## **CHAPTER TWO: IMPLEMENTATION AND MONITORING MECHANISM**

### **Introduction:**

The major challenges to reports of commissions are in implementation. Lack of implementation limits the impact of the work done and contributes to public fatigues and disappointment. Due to this, the TJRC was empowered by the TJR Act to create an implementation mechanism to ensure the recommendations are implemented and the progress is monitored.

### **Mandatory Nature of Commission's Recommendations:**

Through section 50(2) of the TJR Act, recommendations of this report must be complied with. Reasons for non-compliance and/or non-implementation shall be furnished in the National Assembly.

Implementation of the report should commence six months upon publication of the report – section 49(3) before the amendment to the TJR Act.

The Cabinet Secretary is tasked to report the progress of implementation of the report to the National Assembly within 3 months of submission and twice a year thereafter.

The State has the primary responsibility of implementing the recommendations and it should ensure its organs and officers with the duty to implement do so and lack of it they should face sanctions. The State should demonstrate its legislative, policy and other measures undertakings in the implementation of the recommendations. If the State cites resource constraints for non-compliance, it should demonstrate so and articulate an action plan for resource mobilisation. In terms of international best practice, governments are obliged to undertake to give due consideration to findings of investigative reports into human rights violations.

### **Authority for an Implementation and Monitoring Mechanism:**

Section 48(2)(f) of the TJR Act requires the minister/Cabinet Secretary for justice to operationalize the implementation mechanism as proposed by the commission to monitor

and facilitate the implementation. This is also backed by section 49(1) of the TJR Act.

### **Objectives of the Mechanism:**

- To work with government bodies, civil society, faith based organizations, international donors, and any individual or organisation to facilitate the implementation of the recommendations;
- To monitor and report to the public on implementation;
- To manage and administer the Reparation Fund; and
- To do any other activity to fulfil the letter and spirit of the recommendations

### **Nature of the Mechanism:**

- The report is to be widely disseminated and be made accessible to the public and those that participated and contributed to it;
- Recommendations including but not limited to reparations be implemented – bearing in mind the commission; raised expectations of victims, lacks powers to grant reparations, and there being lack of or little political goodwill to implement the recommendations;
- Mechanism would be independent of existing independent institutions with mandate related to the commission, be an independent legal entity, and be sufficiently resourced with time and staff; and
- There be established, by legislation, a Committee for the Implementation of the Recommendations – the Implementation Committee.

### **The Implementation Committee:**

- It shall be the main body responsible for implementing and monitoring the implementation or the report;
- It shall be supported by a Technical Secretariat
- Parliament should pass a law establishing the committee, providing for its functions and powers, within one month of issuance of this report;
- The Implementation Committee shall be capable of: suing and being sued;

acquiring, holding, charging and disposing of property; borrowing and raising money; and doing things or acts for proper discharge of its functions;

- Its headquarters shall be in Nairobi but it may establish offices any place in Kenya.

### **Functions of the Committee:**

- Manage, accept, solicit for funds and administer of the Reparations Fund;
- Map, register and process victims' claims;
- Facilitating processes of memorialization in consultations with relevant government bodies;
- Management and securing the archives of the commission;
- Monitor implementation aspects assigned to the government;
- Ensure public awareness of the implementation process at each stage;
- Recruit its staff and technical secretariat in an open and transparent manner;
- Disseminate the report and other publications by the commission to the public;
- Create a monitoring and evaluation plan to measure progress periodically on implementation; and
- Prepare and publish periodic reports of its activities.

### **Powers of the Committee:**

- To execute its functions related to implementation and monitoring of the implementation of the report; and
- The Act establishing the Committee should impose an obligation on h government to respond in time o requests made by the committee.

### **Technical Secretariat:**

- It shall be supporting the Committee and comprise of experts in relevant fields;
- Its core staff will be full-time employees whereas others may be on consultancy

basis;

- There should be a reference group or ad-hoc thematic sub-committees to provide focused policy orientation of the implementation process;
- The secretariat should have the following units: Outreach and Registration; Evaluation and Classification; Individual Claims Section; Group Claims Section; and the Victim Participation, Gender and Minorities Unit; and
- The Implementation Committee may make specific requests from other bodies or institutions to provide services or support in implementation.

### **Operationalization of Implementation Committee:**

Before amendments to the Act, Section 49(1) provided that upon publication of the Report the Minister should operationalize the implementation mechanism. Implementation would have begun within six months upon publication of the report. If the Implementation Committee is not operationalized within three months, the commission's secretariat shall remain in place till the Committee is operationalized. The TJRC's secretariat shall be in charge of the Commission's documents and materials till the Committee is operational.

## **CHAPTER THREE: REPARATION FRAMEWORK**

### **.Who is Responsible for Reparations?**

- The State
- Rationale: Violations were either committed by state agents or because the state failed to protect its citizens

### **Types of Reparations:**

- Restitution: Restoration to original position before violation occurred;
- Compensation: Money for damage suffered;
- Rehabilitation: Medical care and psychosocial service vouchers will be provided to victims demonstrating need pursuant to guidelines established by the Implementation Committee;
- Satisfaction includes official declarations restoring dignity and reputation, public

apology, commemoration and tributes and

- Guarantees of Non-repetition: Prevention of re-occurrence of violations includes structural measures that will prevent re-occurrence of the violations.

## **The Reparations Fund:**

### Financing Reparations:

- A Reparation Fund shall be appropriated annually from the Consolidated Fund;
- Assets recovered through proceedings of the Ethics and Anti-Corruption Commission and the Courts shall be used to fund reparations during the lifetime of the Implementation Committee.

### Use of the Victim's Reparations Fund:

- Compensating victims, both individually and communally;
- Rehabilitating;
- Memorialization; and
- Exhumation (the identification and reburial of victims)

### The Reparations Fund must conform to:

- Gender sensitivity and perspectives;
- Implementation at county and national levels;
- Involvement of various actors in government; and
- Consultation of victims at all levels

### How much should the government commit at initial to the Reparations Fund?

- 500 million Kenyan Shillings

## **Recommendation to National Assembly:**

- The National Assembly is to append a set of regulations relating to reparations to the proposed Committee for the Implementation of the recommendations of the TJRC; and
- Reparations regulations should mirror the reparations policy framework

## **Principles for Implementation of Reparation Measures:**

- Victims' involvement;
- Victims empowerment;
- Integration of institutions involved; and
- A combination of reparation measures to be utilised to facilitate reconciliation and healing

## **Eligibility for Reparations:**

- Determined by the type of violations;
- Time of occurrence of violations; and
- Type of beneficiaries

## **Violations:**

- Under the TJR Act, reparations are limited to gross violations of human rights perpetrated by:
  - State agents (systematically or as a policy);
  - Non-state actors with state complicity (systematically or as a policy); and
  - State or non-state actors (for failure to protect large scale violations)
- Only violations perpetrated between 12 December 1963 and 28 February 2008 are eligible for reparations



## Categories of Violations:

- Category 1: Right to Life
  - Massacres;
  - Summary or arbitrary executions;
  - Political assassinations; and
  - State complicit disappearances or killings
  
- Category 2: Right to Personal Integrity
  - Torture;
  - Inhuman and/or degrading treatment;
  - Arbitrary arrests and illegal detention of political detainees/human rights defenders;
  - Rape;
  - Sexual gender based violence; and
  - Mutilation and grievous bodily harm
  
- Category 3: Forcible transfer of populations
  - Conflict induced;
  - Development projects that lead to evictions(without consultation, compensation, and resettlement plans)
  - Deaths or disabilities linked to displacement; and
  - Violations of ECOSOC rights related with displacement
  
- Category 4: Historical and contemporary land Injustices
  - Illegal acquisition or occupation of community land;
  - Illegal state seizure of community or trust land; and

- Violations of rights to ancestral lands of indigenous peoples
- Category 5: Systematic marginalization
  - Discrimination through state policy;
  - Discriminatory laws;
  - Minority rights violations;
  - Right to nationality violations;
  - Indigenous peoples' right to in identity and recognition;
  - Indigenous and minority peoples' right to participation; and
  - Violations of ECOSOC rights in marginalization context

#### Reparation Measures and Prioritisation:

- Prioritization intends to make reparations to beneficiaries manageable through a program recommended by the Commission.

#### **Priority A: Most Vulnerable:**

Individual victims of Category 1 & 2: right to life and personal integrity violations including SGBV:

- Child victims (below 18 years at filing time);
- Elderly victims (60 years at filing time);
- Those with urgent health concerns relating to violations;
- Single heads of households with economic hardships relating to violations;
- Orphans under 30 at filing time; and
- Direct deaths relating to forcible transfer of populations

Evidentiary standards for eligibility under priority A:

- In registration: “more likely than not”

- Reparations: “on preponderance of evidence”

### **RECOMMENDATION:**

The Implementation Committee should conduct outreach activities and register most vulnerable victims. Adjudication of claims of the most vulnerable should be expedited. Reparation for these victims should in forms of:

- Compensation: standardized ten-year annual pension; and
- Rehabilitation: medical care and psychosocial support

### **Priority B: Collective Reparations:**

Collective reparations are meant to remedy violations of individual and group rights.

Rationale for collective reparations: to maximize the use of available resources; promote collective reconciliation; to address inequalities arising from identity and gender; and to address symbolic reparations.

Collective reparations are to be handled by a **Group Claims Unit**.

These are victims bound by a common identity, experience or violation. They include those of:

- Systematic marginalization;
- Historical land injustices; and
- Violations against specific populations (including massacres, environmental degradation etc.)

### **RECOMMENDATIONS:**

#### a. Historical Land Injustices

- Restitution of land, including conversion of public land from community land;
- Formal recognition of specific areas as community land;
- Resettlement and/or access to alternative community lands;

- Compensation; and
- Where development has taken place, benefit-sharing schemes
- Reparations through the National Land Commission as mandated by Article 67(2) (e) of the Constitution and the National Land Commission Act;
- Implementation Committee should process and review land claims and forward them to the National Land Commission;
- Implementation Committee should develop guidelines for:
  - Standardization of community historical injustices claims;
  - Investigating land claims in consultations and following best practices;
  - Setting the level of evidence required (at a minimum – clear and convincing); and
  - Identifying overlapping claims and recommend facilitated Alternative Dispute Resolution mechanisms
- In recommending reparation measures, the **Land Unit** will:
  - Consider land rights of bona-fide third party purchasers;
  - Prioritize delineation and registration of community land through a government approved process;
  - Define community land in terms of ancestral boundaries and conduct credible exercises when mapping; and
  - Give ritual and spiritual use of land priority in community claims of restitution or ownership

b. Socio-economic measures

- Communities or group victims should have a say in the use of funds meant for socio-economic reparations guided by non-discrimination, fairness and equality;
- Eligibility for collective reparations – on the “more than likely” evidentiary standards – should be determined by the Implementation Committee;
- Victim groups will propose reparation measures with support from the Implementation Committee upon consulting victims, survivors, the civil society and technical experts; and

- Minimum standards of participation in socio-economic reparation measures, providing for:
  - Inclusion and participation of affected communities in decision making;
  - Inclusion of women and children;
  - Sustainability of socio-economic measures taken;
  - Conducting an independent, credible expert assessment of socio-economic measures to be shared with communities;
  - Most affected persons, determined through principles by implementation Committee, must be included in consultations;
  - Participatory process must take into account customary structures of decision making; and
  - Implementation Committee to overview participation process or mandate a local actor to do so.

c. Government Policy Measures

- The State has an obligation to ensure the right to development. This reparation programme has to link with the State's previous neglect and/or oppression of marginalised areas or groups to correct these injustices.
- The reparative measures must be specific and deliberate to prioritize development of marginalised areas with a moral and political content distinguishing them from other development projects.

**RECOMMENDATIONS:**

1. The Government to enact and implement a policy deliberately targeting socio-economic development of historically marginalised areas within **one year** of submission of the TJRC report to the President (23 May 2013);
2. This policy must include strategic development plans and budgetary allocations;
3. This policy to recognize that these reparative measures are over and above the utilization of the Equalization Fund in Article 204 of the Constitution;

4. Government to consider infrastructure, institutions, government services and public facilities availability to marginalized areas; and
5. **Five years** subsequent to the enacted policy, marginalized areas to be given preference in sharing of national revenue as provided by Article 202 of the Constitution

d. Non-material Reparation Measures

- Meant to recognize victims' experiences, restore their dignity and reputation, and demonstrate state responsibility for violations and ensure non-recurrence.
- The Implementation Committee should engage groups to develop proposals, state institutions, and appropriate entities to ensure implementation of non-material measures.
- Non-material reparative measures:
  - Restitution of civil rights, including expunging criminal records of victims wrongly convicted of crimes for political reasons;
  - Provision of citizenship to those denied due to discrimination;
  - Revoking gender, ethnic, or religious identity discriminating laws and policies;
  - Removal of obstacles to realization of accountability - e.g. the Indemnity Act;
  - Official recognition of marginalized communities;
  - Clarification of historical facts - e.g. in education curricula and expositions in museums;
  - Identification of disappeared individuals, including exhumation and reburial;
  - Official state acknowledgement of responsibility and formal apologies to victims; and
  - Establishment of memorials to commemorate victims

e. Public Apologies and Memorialisation

- These are symbolic reparations to victims accruing from their right to satisfaction recognized by the UN General Assembly Resolution 60/140 of 2005.
- Public apology is the acknowledgment of wrong doing by the state and/or its entities - a duty stemmed from the state responsibility to provide security and ensure law and order.
- A state is legally responsible for actions and omissions of present and previous regimes or governments
- Public apologies must include at least:
  - Acceptance of blame for past abuses;
  - Specify the apology: what violation and reason for apology – not generalized;
  - Recognition of victims;
  - Recognition of the immoral character of violations and abuses;
  - Recognition of need for reform; redress and guarantee of non-repetition; and
  - Publicity of the apology
- **Memorialisation** is the process of perpetuating the memory of a person, group of persons, incident, event or an era. They include; renaming of public spaces and buildings, creating memorials, statutes and museums, dedicating detention and torture sites of memory, art, and establishment of national days.
- Victims and communities must be involved in all memorialization measures
- Memorialization can foster reconciliation by:
  - Serving as spaces to foster public dialogue;
  - Correcting distorted versions and bring about a common historical narrative;
  - Keeping social and political issues on the agenda; and
  - Serving as a reminder of futility of violence and pledging for non-repetition

## RECOMMENDATIONS:

1. The government, through the President, to formally acknowledge and apologize to Kenyans for gross violations of human rights for the period between 12 December 1963 and 28 February 2008;
2. State security agencies (including the National Police Service, National Defence Forces, and National Intelligence Services) to apologize to Kenyans for gross violations of human rights for the period between 12 December 1963 and 28 February 2008 - e.g. for their involvement in extra-judicial killings, arbitrary and prolonged detention, torture and sexual violence;
3. Judiciary to apologize to Kenyans for failure to address impunity and performing its role of deterrence to prevent perpetration of gross human rights violations for the period between 12 December 1963 and 28 February 2008;
4. Wagalla air strip in Wajir, in consultation with the community, to be made a national monument to commemorate victims of Wagalla Massacre;
5. Nyayo House basement to be made a museum and monument to commemorate victims of torture by State security agents;
6. Implementation Committee to create a sub-committee to call for and consider proposals for memorialization. and for funding commemoration of past violations; and
7. Creation of a *National* Human Rights Day on 10 December to coincide with International Human Rights Day

### Priority C: Individual Reparations (Non-Expedited):

- **Eligibility:** Individual victims who have experienced violations of the right to life and that of personal integrity, including SGBV.
- Those with the opportunity to access reparations under priority A and B cannot access reparations under this priority.
- **Available reparations:**
  - Monetary compensation in the form of a standardized five-year pension scheme. If the victim is deceased, payments to be made to victim's immediate family;



- Non-material reparation, including restitution of rights, dignity, and recognition, e.g.
  - Expunging criminal records of those wrongly convicted for political reasons or whose confessions were attracted through torture;
  - Grant of citizenship for those denied as a result of discriminatory policies.

Evidentiary standards for priority C:

Based on victim mapping exercise or demonstration of claim on a preponderance of the evidentiary standard in event assumption cannot be made on the former.

### **Victim Participation:**

- Victims ought to participate in designing, implementing, and monitoring the reparation programme;
- Implementation Committee should develop policies on engagement with victims and their representatives in each stage and must consider:
  - Mobilization and organization of victims;
  - Victims that may be left out;
  - Participation of female victims;
  - Facilitation of marginalized victims to participate; and
  - Capacity building of victims to advocate for their interests and to contribute to empathy amongst themselves
- Reports on victim participation and satisfaction in implementation mechanisms and service providers to be submitted to the Implementation Committee every six months.

# NOTES

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