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TRANSITIONAL JUSTICE IN KENYA: HOW FAR SHOULD WE GO IN DEFINING THE PAST?



A Peace Resource Organisation

TRANSITIONAL JUSTICE IN KENYA: How far should we go in defining the past?

A brief historical perspective spanning pre-independence, independence and post-independence periods and culminating in the formation of a Truth, Justice and Reconciliation Commission and the entry of the International Criminal Court.

Author: Nahashon Kariuki, Coordinator: Research, Learning and Policy Programme, NPI-Africa

Editorial Team: Pascal Richard, Miek Teunissen, Zahid Movlazadeh

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List of Abbreviations and Acronyms

AU	African Union
CBOs	Community Based Organisations
CIPEV	Commission of Inquiry into the post-election Violence
CSOs	Civil Society Organisations
GPPAC	Global Partnership for the Prevention of Armed Conflict
HIGJ	Hague Institute for Global Justice
ICC	International Criminal Court
IDPs	Internally Displaced Persons
IPPG	Inter-Parties Parliamentary Group
KACC	Kenya Anti-Corruption Commission
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
NaRC	National Rainbow Coalition
NCEC	National Convention Executive Council
NGOs	Non-Governmental Organisations
NPI-Africa	Nairobi Peace Initiative-Africa
ODM	Orange Democratic Movement
PNU	Party of National Unity
TJ	Transitional Justice
TJRC	Truth, Justice and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UN	United Nations

1.0 Executive Summary

This policy paper highlights a key dilemma for societies seeking to redress the past through transitional justice measures in determining how to define that past: how far back into history is enough and not too far to truly 'do justice' in Kenya? The historical timeframe of a transitional justice process is important as different epochs present different, contradictory, pictures of identities of victims and perpetrators. Land, for example, is a central factor in Kenya's politics, conflicts and ethnic relations. It remains an unavoidable theme in the country's transitional justice discourse. Understanding the history of the land problem is therefore crucial to a discussion of transitional justice in Kenya.

The link between colonial and post-colonial violence and justice is also evident in the armed resistance against the colonial regime, which coalesced around the Mau Mau rebellion. The violent defeat of this rebellion by the British administration and its local collaborators raises the question of why transitional justice discourse in Kenya has shied away from discussing colonial violence and its consequences as an important agenda for contemporary Kenyan society.

As this paper demonstrates, any meaningful transitional justice process in Kenya cannot afford to shy away from historical injustices that took place during the colonial period as it has direct bearing on current developments. This paper analyses how post independence governments have either extended or completely ignored the way the colonial regime violated the Kenyans. This has impacted negatively on the current social, economic and political situation in Kenya and has been a basis for more recent forms of violence.

Recommendations provided at the end of this paper emphasise the need for all actors involved in transitional justice in Kenya to take such a historical view on human rights violations into account and incorporate it in their policies, funding support and work. Only by including the historical perspective can a sustainable future be built for Kenya.

1.1 Introduction

This paper analyses the historical and political contexts of Kenya from the colonial days until the entry of the International Criminal Court (ICC) in 2009 and the implications of the different historical periods for transitional justice in Kenya.

The paper begins by extrapolating the historical background of colonialism in Kenya from late nineteenth-century land alienation, to the reaction of the Kikuyu to the land question, political agitation through the nationalist movement and the Mau Mau resistance, to the declaration of a state of emergency and suppression of resistance.

Further, it analyses the independence transition in Kenya in 1963 and examines the authoritarian nature of the Kenyatta and Moi's regimes and their competing interpretations. The note also describes the history of truth seeking as captured by the advent of Truth, Justice and Reconciliation Commission (TJRC) and its accompanying leadership wrangles. After a brief look at the role of the ICC in Kenya, the paper provides conclusions and recommendations for different stakeholders.

2.0 European settlement, land alienation, African rebellion and colonial violence (1895-1963)

This period in Kenya began with the Berlin Conference in 1885. Before the conference, the power to decide Kenya's fate had shifted from the Arabs to the Portuguese and then again to the Arabs finally landing in the hands of Britain. Europe's interest in Kenya (established by the middle of the 19th century) emanated from European eagerness for exploration, discovery and exploitation. As they entered Kenya, they unearthed the fertility of the land to support the production of export crops as raw materials for industries back in Europe. Kenya came under British dominance.

A characteristic of all settler societies during the colonial period was to obtain uneven share in landownership for the colonisers. The first white settlers arrived in Kenya in 1902 as part of Sir Charles Eliot's plan to have a settler economy compensate for the recently completed Uganda Railway. Over the next three decades, British settlers consolidated their control over Kenyan land and—coupled with an increasing African population—land became a bitter point of controversy. The Kikuyu were the most affected by the colonial government's land expropriation and European settlement, losing over 60,000 acres (240 km²)¹. They went to court to challenge the theft of their land, but a Kenya High Court verdict of 1921² declared its legitimacy.

While enjoying the Kenya High Court verdict of 1921, European settlers dispossessed huge groups of Africans from their land to create room for European settlers. The Africans were confined to land reserves, such as the Kenya highlands

1 Elkins Caroline (2005) Britain's Gulag. The brutal end of empire in Kenya: London, Jonathan Cape
2 Ibid

in Central Province, Rift Valley, while parts of Western Province, Nyanza and the coastal strip were reserved for white settlers or Arabs. Communities that lost most land were the Maasai, the Kamba, the Kikuyu, the Nandi, the Kipsigis and the Mijikenda³. The total land occupied by the British settlers was 21,000 km², out of 356,000 km² of Kenyan area. With 243,000 km² being desert, it meant 74% of Kenya's arable land was out of reach for Kenyans.⁴ This seizing of land and alienation of Africans laid a foundation for the land question in Kenya.⁵

The colonial administration's response to Africans' protests against land dispossession was central to the emergence of militant and armed rebellion; particularly the Mau Mau⁶ armed revolt that peaked in the 1950s. The Mau Mau—also called the Kenya Land and Freedom Army—became an essential part of Kenya's history. The violence of the colonial period and its cost, the divisions it left behind, the unresolved land problems after independence, the ambiguity with which the Mau Mau memory is regarded, have continued to inform political events in the country today and are central to a meaningful transitional justice process.

The problem of land roused a sense of universal identity among the Mau Mau and created a shared image of the colonial administration as the enemy and land re-distribution as their aspiration. Mau Mau wanted to interrupt the colonial administrative structures by targeting for elimination the administrators and African loyalists. The terror against colonial establishment spread throughout the white highlands and central Kenya, with major consequences to intra-community relationships. It divided communities into rebels and collaborators.

The resistance against white rule was met with brutal force, torture and repression. Resistance by Africans and Asians saw leaders and their supporters arrested, detained,

tortured, deported or killed.⁷

2.1 Colonial violence of 1952 to 1960 and its implications for Transitional Justice in Kenya.

In the decade leading to Kenya's independence in 1963, the British government waged an aggressive war against freedom fighters, especially those who were suspected of being Mau Mau. During the war that stretched from 1952 to 1960, the colonial government detained without trial hundreds of thousands of Mau Mau suspects and subjected them to egregious violations of human rights.⁸

The Mau Mau displayed similar ruthlessness against those they considered traitors. The Mau Mau movement was such that the majority of its members were recruited from one ethnic group only, the Kikuyu, who constituted then, as now, about one fifth of the country's total population.⁹ The Mau Mau divided the Kikuyu into militants and loyalists. The Mau Mau felt that they fought and lost everything they owned; the loyalists retained their land and got government posts during the colonial period. When independence came, the status quo was maintained: the loyalists retained their land and had resources to educate their children who went ahead to occupy public service jobs etc. The historical injustices were maintained.

Members of the Kikuyu community were pitted against each other, those who fought as Mau Mau guerrillas or were detained as sympathisers' on one hand and those who fought against Mau Mau as home guards, or as prison warders in British pay on the other. These fissures remain to this day, silently for the most part. It divided the Kikuyu most bitterly, between 'fighters' and 'loyalists'¹⁰.

Such violence is painful and can remain politically destructive in memory.¹¹ At the national level these fissures have been periodically resurrected¹² for manipulation in factional discord.

3 The Maasai lost Laikipia and were confined to Kajiado and Narok. The Kamba lost Masaku, now Machakos. The Kikuyu lost most of the Mt Kenya region. The Nandi lost 3,200 km² of the Rift valley. The Kipsigis lost Kericho. The Mijikenda lost 10 km² along the Coastal strip.

4 PeaceNet- Kenya (2008) A report of Rapid assessment of post election reconstruction: Opportunities for dialogue

5 Okoth-Ogendo, W.H.O. (1979) 'Imposition of Property Law in Kenya' in B. Harrell-Bondand S. Burman (eds) *The Imposition of Law*, New York: Academic Press.

6 The Mau Mau Uprising, also known as the Mau Mau Revolt, Mau Mau Rebellion or Kenya Emergency, was a military conflict that took place in Kenya between 1952 and 1960. It involved Kikuyu-dominated groups summarily called Mau Mau and elements of the British Army, the local Kenya Regiment mostly consisting of the British, auxiliaries and anti-Mau Mau Kikuyu.

7 Kenya Human Rights Commission (2009) *Surviving after torture: A case digest on the struggle for justice by torture survivors in Kenya*

8 Ibid

9 Maloba, W.O. (1994) *Mau Mau and Kenya: An Analysis of a Peasant Revolt*. Bloomington: Indiana University Press.

10 For the Kikuyu case, see John Lonsdale, 'Contests of Time: Old and New in Kikuyu Historiography', ch 9 in Axel Harneit-Sievers (ed), *A Place in the World: New Local Historiographies from Africa and South Asia* (Leid en, Brill: 2002), 201-54.

11 Wole Soyinka, *The Burden of Memory, the Mis use of Forgiveness*(Oxford, 1999).

12 See the Standard on Sartuday 30 April 2011. Barrack Muluka, in an article titled 'Facts are scared, the story of the Mau Mau should not be distorted, succinctly points out that "the brunt of the British colonial brutality was most felt in

Active steps towards healing, however, are far from bearing meaningful reconciliation. Any meaningful transitional justice mechanism cannot afford to turn a blind eye to such an important period in a country's history.

3.0 Independence transition (1963), the deliberate silence of the Kenyatta years (1963-1978) and the pilfering of memory

As shown below, the new government led by the First President Mzee Jomo Kenyatta kept the Mau Mau in the periphery of leadership. They were neither integrated into the structure of leadership nor compensated for their loss of land while they were in concentration camps.

The first president showed little interest in establishing large-scale resettlement efforts in the country. The resettlement schemes put in place did not address the problem of landlessness. Land that would have been used for resettlement of the landless was acquired by senior bureaucrats and influential politicians through the land purchase programme and through political patronage. Redistribution efforts became increasingly ethnicised and a base for inter-ethnic conflicts.¹³

On the one hand, inter-ethnic suspicion divided Mau Mau and its successor organisations' claims on behalf of former Kikuyu squatters on the White Highlands.¹⁴ A movement known as the Kenya Land Freedom Army threatened violence should members of other ethnic groups with deeper historical claims try to make good their entitlement to resettle in white farms at the expense of the Kikuyu¹⁵. This dispute was the main cause of the split between KANU (representing mainly the Kikuyu and the Luo) and KADU (at whose core were the Kalenjin highlanders).¹⁶

On the other hand, there existed deep mistrust at the core of the KANU party whose leadership Jomo Kenyatta inherited shortly after his release in 1961. Even before his release, he had implied that Mau Mau were 'gangsters'¹⁷. The feeling

was that he had not fought the Mau Mau battle. He had been away in Europe and was only given the mantle because he was educated. It was also felt that he had repudiated the Mau Mau to secure his release. Those who had supported him during his detention also felt that after fighting for a common cause, he appropriated the benefits alone but failed to distribute them to the Mau Mau, including other ex-detainees. This has been the bone of contention. While he enjoyed the land and other gains of independence, he selfishly asked other Mau Mau to simply forgive and forget.

Soon after his return, Kenyatta declared—in light of reports that former militants had sworn to kill him 'if I disobey them'—that he would not allow 'hooligans' to rule Kenya, since 'Mau Mau was a disease which had been eradicated, and must never be remembered again.'¹⁸ Yet almost all KANU branches in Central Province, Kikuyuland were in the hands of ex-detainees. Kenyatta's political base appeared to have been captured by the young men whose disrespect for him he had known of since 1950. It is not surprising that he took care never to organise KANU more thoroughly. It would have raised a storm of recrimination. He chose instead to rule through the Provincial Administration, whose senior members had been the first African cadets in the colonial service, and whose early experience had been in fighting the Mau Mau war in British uniform.

This was the institutional reminiscence with which independent Kenya was ruled. Mau Mau memoirs were sought after, edited, and published by radical or laissez-faire westerners, without whose initiative Mau Mau might have remained hushed in print. Nobody asked Loyalists for their memories. They were not academically trendy, but they had authority. They had the authority to remain silent. It was they, not the Mau Mau memoirists, who controlled public memory in Kenya¹⁹.

After gaining independence, Kenyatta's idea was to trivialise the main reasons behind Mau Mau in order to avoid compensating them. He ideologically censored the radical story of Mau Mau in the interest of the new ruling alliance, between the national petit bourgeoisie and international capital—who happened to be the loyalists and settlers who could support him. By so doing, he alienated the Mau Mau further thus increasing their sense of grievances. Mau Mau then begun to be viewed as a Kikuyu peasants' army²⁰. These, as is the fate of most peasant rebels, had been cast off by their clientele when the latter no longer needed them. Certainly,

Central Province. There were more than enough home guard families oppressing the people of Central Kenya".

¹³ Okoth-Ogendo, W.H.O. (1979) 'Imposition of Property Law in Kenya' in B. Harrell-Bond and S. Burman (eds) *The Imposition of Law*, New York: Academic Press.

¹⁴ Njonjo, A., (1978) 'The Africanisation of the White Highlands': A Study in Agrarian Class Struggles in Kenya, 1950-1974. Ph. D Dissertation, Princeton University.

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Jomo Kenyatta (1968) *Suffering Without Bitterness: The Founding of the Kenya Nation*, Nairobi, 124,

¹⁸ Ibid

¹⁹ Leys, C. (1975) *Underdevelopment in Kenya: The Political Economy of Neo-colonialism 1964- 1971*, London Heinmann.

²⁰ Maina wa Kinyatti, *Mau Mau: A Revolution Betrayed* (Nairobi, New York and London, 2nd edn 2000); *Journal of A African Studies*.

politicians appear to have retained considerable freedom in their choice of when and why to call up the memory of Mau Mau. The Mau Mau, later christened the Kenya Land Freedom Army has now transformed into a group calling itself Mungiki (a ruthless militia group claiming its descent as children of the Mau Mau) and continued to wreak havoc and mayhem in the Kenyan social, economic and political arenas with impunity. Only a transitional justice process devoid of political or any other imperatives aside from revealing the truth and achieving healing and reconciliation will settle this quagmire and move the country forward.

4.0 The Moi year (1978-2002), the advent of torture and ethnic clashes

Moi's regime went down in Kenya's history as the most notorious for detaining and torturing political opponents. The release of all political prisoners by Moi on his assumption of power in 1978 proved illusory, with the detention of anybody who was deemed a political opponent. This was compounded by the first constitutional amendment under Moi's regime, which transformed the country into a de jure one party state. In addition, several detention laws, which had been suspended in 1978, were reinstated, giving Moi the right to suspend all individual rights under the constitution. The failed coup of August 1982 also led to a number of political detentions. In 1986, alone, an estimated 100 people were detained for their alleged association with Mwakenya, an anti-Moi movement²¹.

The period between 1989 and 1991 was described as marking the worst human rights violations in Kenya's history.²² Many members of parliament who demanded a multi-party system and prominent pro-democracy advocates were detained. Several arrests followed the Saba²³ skirmishes of 1990 and throughout the 1990s, detention, arbitrary arrests and torture continued in spite of the 1992 multiparty elections. Attempts by opposition parties in 1993 to have the detention laws abolished failed, and detentions continued even after the recommendation to repeal detention without trial was made by the Inter-Parties Parliamentary Group (IPPG).

The Nyayo Torture Chambers, where pro-democracy

21 Wanyande Peter, Omosa Mary and Chweya Ludeki (2007) *Governance and Transition Politics in Kenya*. Nairobi; Nairobi University Press.

22 Kenya Human Rights Commission (2009) *Surviving after torture: A case digest on the struggle for justice by torture survivors in Kenya*

23 Saba Saba is the Swahili name for the seventh day of July, literally meaning "seven seven". It is the day protesters in Kenya successfully demanded free elections in 1990.

activists and those deemed anti-government were detained and tortured, still remembered by many Kenyans. Different Nyayo²⁴ projects undertaken by Moi during 1983-1989 failed with corruption being a common denominator in all of them. By the mid 1990s, Moi was running a bandit economy, which enabled among others the theft of 65.6 billion Kenya shillings from the national treasury²⁵. Conservative estimates for the period 1994-1995 put the effects of corruption at 127.4 billion Kenya shillings²⁶.

Throughout the 1990s, the Moi government instigated and directed ethnic clashes against communities deemed oppose his regime. Examples were the 1983 Wagalla massacre, where a total of 3000 Degodia people perished at the hands of state forces in a brutal massacre that bordered on genocide, and the Bagalla and Malka-Mari massacres all in north-eastern Kenya. As a result of mounting pressure on the Moi government to legalise multi-party politics, instigated ethnic violence broke out in Miteitei in western Kenya in 1991, spreading to multi-ethnic districts in the Rift Valley²⁷.

In addition, the Kalenjin²⁸ elite used Majimboism as a code word for ethnic territorial claims, so that it ultimately became a justification for indiscriminate and violent expulsions of people from other ethnic groups from the Rift Valley region. Other instances of politically instigated ethnic clashes to punish groups associated with the opposition, took place in May 1993 in Nakuru when KANU youths demolished 600 kiosks belonging mainly to Kikuyus; the violence in Trans Mara District in March 1997, the July 1997 ethnic violence on the coast a few days after the National Convention Executive Council (NCEC) rally, and the January 1998 post December 1997 general elections ethnic violence in Nakuru and Laikipia²⁹.

In spite of the establishment of various Commissions to investigate human rights violations and the misappropriation of public property during Moi's regime, most of them never made their findings public, others never had their recommendations implemented and others were disbanded before completing their task. The hunger for closure from these atrocities committed under Moi continued to fuel the need for a truth

24 President Moi was popularly known to Kenyans as "Nyayo," a [Swahili](#) word for "footsteps." He championed what he called "Nyayo philosophy," which means following the leader and is, he claimed, a distinctive African tradition of [leadership](#). He claimed to be following the footsteps of the first Kenyan President, Jomo Kenyatta.

25 Wanyande Peter, Omosa Mary and Chweya Ludeki (2007) *Governance and Transition Politics in Kenya*. Nairobi; Nairobi University Press.

26 Ibid

27 Ibid

28 The Kalenjin are a [Nilotic](#) ethnic group inhabiting the [Rift Valley](#)

[Province](#) in [Kenya](#)

29 Ibid

commission in Kenya even after the National Rainbow Coalition (NaRC) regime came to power in 2002. While a truth commission is necessary after societies emerge from an abusive regime such as Moi's, there is need for the democratic implementation of ongoing reforms, separate from the mandate of truth commissions. Issues such as economic crimes, land policy reforms, and regional developmental inequalities require concerted constitutional, policy and institutional responses that a truth commission is not equipped to deliver³⁰.

5.0 Transitional justice in the Kenyan context

5.1 The Kibaki years (2002-2013): 2002 democratic transition, the rise of the transitional justice discourse and the Truth, Justice and Reconciliation Commission (TJRC) debate.

After the election of NaRC in December 2002, a task force was established in April 2003 to look into the viability of a Truth, Justice and Reconciliation Commission (TJRC). The task force recommended that a TJRC be formed by June 2004 through a presidential decree to deal with almost all the past human rights violations and economic crimes between 12 December 1963, and 12 December 2002.

While acknowledging the pre-colonial period as important to truth seeking, the task force however deemed the period too distant to provide clear data and witnesses and too expensive an undertaking. Instead, the task force recommended that a committee of prominent Kenyans be established to investigate colonial era violations.³¹ However, this never happened due to lack political will to implement the recommendation.

Through the assistance of Kenya National Human Rights Commission (KNHRC), a group of surviving Mau Mau veterans later went to court in London seeking a determination for colonial era violations meted against them by the British authorities during the colonial period prompting the British government to issue an apology and compensation to the veterans. This has caused a split among the veterans who argue the compensation is derisory and is not enough to compensate for the heinous

acts of the colonial administration and those who accept the compensation. Further, a rift has occurred among the veterans themselves on who is genuine Mau Mau and deserves compensation. This has rekindled colonial era acrimony among neighbours thereby undoing the temporal healing that Kenyatta highly advocated by his forgive and forget edict.

Despite the fact that the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission found that over 90% of Kenyans wanted a truth commission established by June 2004, the task force's recommendations were never implemented. Disagreements over power sharing led to a rift and eventual expulsion of some of the coalition members. The formation of a Government of National Unity on 30 June 2004 saw some KANU leaders, expected to be investigated by the TJRC, brought back to the cabinet.

These political divisions eventually crippled the constitutional review process that was also underway, as sacked members of the government joined hands with some KANU members to defeat the proposed constitution in a 2005 highly contested referendum. President Kibaki and his erstwhile coalition partner Raila Odinga campaigned on opposite sides of the referendum question. The triumph of Mr. Odinga's 'No' side at the referendum marked the birth of his Orange Democratic Movement (ODM). The expectation that similar electoral outcomes would be replicated in the following general elections set the stage for the hotly contested December 2007 general elections.³²

Following the post-election violence which occurred between December 2007 and February 2008, the TJRC emerged as one of the major outputs of the subsequent National Dialogue process. The TJR Act was passed by parliament on October 23 2008, and received the presidential assent on November 28 2008. The Act was gazetted for enforcement in March 17, 2009 and the commissioners were appointed on 22 July 2009 and sworn in on 3 August 2009 respectively³³

5.2 Establishment of TJRC and the amnesty debate

The 2008 post-election violence rekindled the clamour for the government to establish a truth and reconciliation commission. While there was agreement on the need for a TRC, a polarised debate raged over whether to prosecute perpetrators of the post-election violence or grant them amnesty. The amnesty debate saw the parties to the National Accord assume mutually

³⁰ Wachira George and Kamungi Prisca (2010), Noble Intentions, Nagging Dilemmas. In search of context-responsive Truth Commissions in Africa. An NPI-Africa and WANEP publication.

³¹ Republic of Kenya (2003) Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, Nairobi: Government Printer (Also called the Makau Mutua Task force after its chair prof Makau Mutua).

³² G. Wachira, P. Kamungi and K. Sillah (2014) Stretching the Truth: The Uncertain Promise of Truth and Reconciliation Commissions in Africa
³³ Kenya National Human Rights Commission (2010) Transitional Justice in Kenya: A toolkit for Training and Engagement.

incompatible positions on the best way forward: the President's PNU demanded prosecution, arguing that human rights violations and crimes of unprecedented gravity were committed and perpetrators at all levels must face the law.³⁴

The debate followed political party and ethnic fault lines of polarisation, as politicians claimed their communities were the victims; justified the violence against supporters of the rival party; and argued that the other had greater responsibility for what happened. PNU claimed that ODM had incited its supporters to displace its rivals and was causing the collapse of Kenya as a nation state: people were being killed and forced out of their homes; there were talks of overrunning the capital. What did people expect the government to do? Meanwhile, ODM charged that PNU/the government had used excessive force to quell protests, and that in the aftermath of the violence, only ODM supporters were arrested.³⁵ It is under this highly charged political atmosphere that the TJRC was began its work.

5.3 The troubles surrounding the commission and its performance

The formation of the TJRC in Kenya received support from civil society, religious leaders and Kenyans in general. However, the commission never took off after its inception. The credibility of its chairman was immediately called into question by a few civil society organisations and victim groups who argued that the chairman had been implicated in perpetrating human rights abuses when serving as a high ranking official of the Moi government.

Key among the accusations levelled against the chairman was the Wagalla Massacre. He was said to have attended the meeting that organised it. Other accusations were that he had been named by the Commission of Inquiry into the Illegal/Irregular allocation of Public Land (Ndungu Commission), and his refusal to fully cooperate with the Parliamentary Select Committee of Inquiry into the murder of former minister of foreign affairs Robert Ouko, in whose docket he had been a permanent secretary.

Pressure for the chair to resign came from both within and without the TJRC. Further compounding the already injured image of the commission, internal dissent saw two commissioners (the deputy chair and one of the three international experts) asking through the media for Mr.

Kiplagat to resign. In January 2010, civil society organisations held press conferences and issued statements calling for the chair's resignation, citing provisions of the TJR Act that a commissioner 'should not have been involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated.'³⁶ Kiplagat, however, stayed on arguing that only a tribunal can recommend his removal after investigating him and finding him unsuitable for office. This controversy led to the resignation of the vice chair who was later replaced by one of the commissioners, Tecla Namachanja.

In an attempt to clear his name, the chairman gave his testimony to the commissioners and later revealed more information in a TV interview, prompting commissioners to demand that he should be a witness to the commission. The chief justice stepped in appointing a tribunal with a six month mandate to investigate the allegations against the TJRC chair. This prompted the chair to step aside allowing the commissions vice chair Tecla Namachanja to become the chair on an acting capacity and lead the commission for almost the entire period of its work.

The discord did irreparable damage to the commission as it lost its credibility and support among civil society and Kenyans in general. Despite these setbacks, the commission set its rules of procedure in the Kenya Gazette Supplement of 20 August 2010, published its hearing time table and place and commenced its hearings in April 2011 in North Eastern Province, using public and private hearings with individuals and institutions. Hearings were also organised into thematic areas.

Despite numerous challenges raging from inability to follow its programme due to poor logistical coordination and inadequate media coverage, among others, the commission managed to collect a total of 40,098 statements and 1,529 memoranda, the highest ever by a truth commission anywhere else in the world.³⁷ Like other commissions across the world, testimonies were victim dominated with huge expectations for reparations, which the commission lacked the resources to respond to. The Truth Justice and Reconciliation Commission (TJRC) submitted their report to President Uhuru Kenyatta, on 21 May 2013 after much delay and allegations of doctoring.

Immediately following this submission, the publication of the report was to be made widely available to the public pursuant to the TJR Act 48(3). This entails publishing the report in the Gazette and such other publications as the Commission may consider appropriate. The TJRC was also expected to

34 G. Wachira, P. Kamungi and K. Sillah (2014) *Stretching the Truth: The Uncertain Promise of Truth and Reconciliation Commissions in Africa*
35 Ibid

36 Ibid
37 Ibid

summarise its report and make it available to the public in at least three local newspapers with wide circulation. The latter has been realised.

Further, within 21 days of the publication, the minister responsible for matters relating to Justice and Constitutional Affairs was required by the Act to table the report before parliament (TJR Act 48(4)). This should have occurred no later than 11 June 2013. The process has since been stalled by the State's failure to undertake the administrative action of publishing the report in the Kenya Gazette.³⁸

6.0 The International Criminal Court' (ICC) role in Kenya

As previously mentioned, between 30 December 2007 and the end of February 2008, more than 1300 people were killed and an estimated 300,000 others were displaced. More than 900 women were raped.³⁹ Large amounts of private and public property were destroyed. The killings and rapes, to a large extent, appear to have targeted the Kikuyu ethnic community, who supported the incumbent President, Mwai Kibaki, and the Kalenjin and Luo ethnic communities, supporters of Kenya's former Prime Minister, Raila Odinga.⁴⁰

Although the government initially rejected several offers for mediation, resisting the possibility of internationalising the crisis, the African Union (AU) chair at the time, former President John Kufuor of Ghana, prevailed on the Kenyan leaders to negotiate. The AU constituted a panel of eminent African personalities that included Graca Machel, the African Peer Review Mechanism panellist in-charge of Kenya, Benjamin Mkapa, the former President of Tanzania, and former UN Secretary General, Kofi Annan, who was also the chief mediator.⁴¹

This panel set up a mediation dialogue team, the Kenya National Dialogue and Reconciliation (KNDR) mediation team, comprising the three Panel members and four representatives from each of the two parties. The KNDR mediation team began negotiations on 22 January 2008, which culminated in the signing of the Agreement on the Principles of Partnership of the Coalition Government on 28 February 2008. The Agreement, enacted as the National

Accord and Reconciliation Act, 2008, was enshrined in the constitution.⁴²

Among the reforms arrived at during the signing of the February 2008 National Accord⁴³ was to establish a Commission of Inquiry to investigate the Post-Election Violence (CIPEV)⁴⁴ that occurred between 28 December 2007 and 28 February 2008. The CIPEV was appointed in April 2008 and was required to address impunity by recommending actions on three issues: measures to be taken to prevent, control and eradicate the occurrence of similar deeds in future; measures with regard to bringing to justice those persons responsible for criminal acts; and measures to eradicate impunity and promote national reconciliation.

CIPEV recommended that a special court, to be known as the Special Tribunal for Kenya, be set up to try persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 political crisis. The framing of the commission's recommendations sought to ensure that it did not suffer the same fate as several other commission reports that were never implemented. It did this by including an automatic proviso that made it possible for the implementation of its recommendations on criminal prosecutions to lapse from Kenya's jurisdiction under certain circumstances.⁴⁵

[If] either an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted, or the Special Tribunal fails to commence functioning as contemplated, or having commenced operating its purposes are subverted, a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court (ICC).⁴⁶

CIPEV further recommended that should such an eventuality occur, 'the Special Prosecutor shall be requested to analyse the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons.'⁴⁷

38 <http://www.icj-kenya.org/index.php/media-centre/news/538-government-told-to-table-the-tjrc-report-on-historical-injustices>

39 Waki Commission Report (2008)

40 Ibid

41 South consulting Africa LTD: The impact of the ICC in Kenya-Evolving public perceptions (2012) Unpublished

42 Ibid

43 The National Accord provided for power sharing between the two parties and the constitution was amended to include provisions for a coalition government. President Kibaki remained as the president and Raila Odinga assumed office as prime minister, a new post created under the power sharing agreement. The two parties shared the cabinet posts equally.

44 Also referred to as the Waki Commission after its chair, Justice Phillip Waki

45 G. Wachira, P. Kamungi and K. Sillah (2014) *Stretching the Truth: The Uncertain Promise of Truth and Reconciliation Commissions in Africa*

46 CIPEV Report, p. 473

47 CIPEV Report, p. 473

Since the publication of this recommendation, the matter of Commission Chair Waki's 'sealed envelope'—the list that was to be forwarded to the Special Prosecutor of the ICC—and whose names were likely to be in it, aroused wide public interest and speculation. On two occasions in 2009, the government failed to mobilise enough support in parliament to set up the tribunal. In what amounted to a gamble that the matter was unlikely to be taken up by the ICC, some members of parliament came up with the slogan 'Don't be vague, go to The Hague'. The legislators claimed to prefer the ICC to a local tribunal, which some charged would be used by the powerful to eliminate political rivals and settle old scores.⁴⁸ It is in these circumstances that Mr. Kofi Annan, the head of the panel that mediated the end to the 2008 violence, reported that he had handed over the secret envelope to the ICC.

In March 2010, the ICC Prosecutor sought permission from the Pre-Trial Chamber II to open an investigation into the situation in Kenya. The Chamber granted permission and on 15 December 2010 the ICC Prosecutor named six persons suspected to bear the greatest responsibility for crimes committed during the post-election violence. On 8 March 2011 the Prosecutor issued summonses for the suspects to appear before the Court. On 7 and 8 April 2011, the six suspects made their initial appearance before the court.⁴⁹

6.1 Public perceptions on the ICC intervention

Public and political discourse in support of the ICC had remained high across the country before the suspects were named⁵⁰. However, the revelation of the names of the six suspects by the ICC prosecutor changed perceptions due to two main factors: the politicisation of the ICC investigations in Kenya, and its implications for political alliances that evolved to capture political power.⁵¹ Claims that the case selection process did not include all deserving suspects dissuaded some from supporting the ICC as the country approached another election. Some were disappointed that the case selection did not include the principal political players from the 2007 presidential election—the president and the leader of ODM (who later became the prime minister). This narrative was politicised further by the argument that the ICC was arresting the suspects to make it

easy for the prime minister to win the 2013 presidential election.⁵²

After the ICC prosecutor named the six suspects, two of them—Uhuru Kenyatta (a Kikuyu) and William Ruto (a Kalenjin)—formed an ethno-political alliance and held joint rallies in different parts of the country claiming that their political rivals had framed them. The rallies, held before the April 2012 appearances at The Hague, shifted focus from how to address impunity for post-election violence crimes, to succession politics. The claim that names were removed from the secret envelope to give a particular presidential aspirant unfair advantage by preventing others from participating in the elections, changed the gist of the debate: it put those wishing to fight impunity on the defensive. Extensive media coverage of this narrative, which was repeatedly expressed in prayer meetings or peace rallies helped to shift the debate towards the political implications for the individual suspects and their communities.⁵³

The claim that the suspects and their respective communities were victimised in a grand political scheme, was reinforced by bringing up memories of the post-election violence. Recalling how communities associated with PNU were attacked and needed to defend themselves, and how the violence by ODM supporters in the Rift Valley was fought in support of 'someone else's war'—implying it was Raila Odinga's war, because he was the presidential candidate in the disputed election results.⁵⁴

The narratives of victimisation resonated powerfully with supporters in rural areas. The narratives in turn, distanced the suspects from the violence and exiated the accused in the public eye. The ICC was thought to have misunderstood the context within which the violence occurred. Recounting 'what really happened' in charged rallies, where the suspects declared their innocence, the suspects constructed a credible claim that they were victims. The claims increasingly characterised the debate with ethnic overtones, particularly against the Luo people who were perceived to support the ICC.⁵⁵

The nature of mobilisation, media coverage and messaging during the prayer rallies in 2011 contributed significantly to the view that little had changed since the post-election violence.

48 G. Wachira, P. Kamungi and K. Sillah (2014) *Stretching the Truth: The Uncertain Promise of Truth and Reconciliation Commissions in Africa*

49 Ibid

50 Ibid

51 South consulting Africa LTD: *The impact of the ICC in Kenya: Evolving public perceptions* (2012) Unpublished

52 G. Wachira, P. Kamungi and K. Sillah (2014) *Stretching the Truth: The Uncertain Promise of Truth and Reconciliation Commissions in Africa*

53 South consulting Africa LTD: *The impact of the ICC in Kenya: Evolving public perceptions* (2012) Unpublished

54 Ibid

55 Ibid

Leaders could still mobilise supporters, preach thinly veiled hate, and enjoy unfettered media coverage without censure from independent institutions that are mandated to prevent hate speech. Although the ICC issued a strong warning against renewed mobilisation of violence, silence from state institutions that are expected to censure such actions sent a clear signal that it was business as usual.⁵⁶

Pessimism and apathy increased, as Kenyans witnessed little movement towards prosecutions of even low-level perpetrators. Fear, particularly among victims of post-election violence, decreased support for the ICC: "If the ICC is the reason people are going to fight again, let us forget about it," some might say. Support for prosecution (as a deterrent) of high or lower level perpetrators of post-election violence, by either the ICC or local processes, began to decline.

As the election approached, people feared that the ICC intervention would converge with other election-related factors and result in another political conflict. In the strongholds of the main political parties, this became a script to mobilise political support and discredit rivals.⁵⁷

Interestingly, an unintended consequence of the indictments is that two of the remaining accused persons from the communities which have fought bitterly in the past, the Kikuyu and the Kalenjin, forged a political alliance ahead of the 2013 elections.⁵⁸ It is worth noting that Mr Kenyatta's case has since been dropped leaving Mr Ruto and Radio Journalist Joshua Sang as the only people still facing charges at the ICC. Analysts have already begun suggesting that Kenyatta's acquittal will break the Uhuruto political alliance, which they posit was a marriage of convenience against the ICC. At the national level, no meaningful proceedings have been attempted, save for the establishment of the CIPEV itself, whose recommendations remain to be acted on, at least with regard to the establishment of a special tribunal.

As noted above, the ICC's involvement in Kenya is taking place within the context of heightened suspicion on the part of African governments against what it perceives as the capture of the ICC by western interests and its utilisation as a tool of domination. Africa's position is curious, given that thirty out of fifty-three countries on the continent ratified the Rome Statute with much enthusiasm. One commentator has

pointedly observed that: 'Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and kicking to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the court portray an international will, of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.'⁵⁹

Considering that the bulk of the ICC's present case portfolio in Africa was referred to it by states, the criticism of the court as neo-imperialist is unjustified.⁶⁰ Political leaders, however, will take advantage of such sentiments to adopt a more intransigent strategy that could undermine ICC investigatory work as has allegedly happened in the Kenyan case.

As follows from this outline, it is extremely improbable that ICC investigations into the 2007 post-election violence in Kenya would lead to justice for the victims, as noted above, all but two of the six persons named by the ICC as bearing the greatest responsibility for the post-election violence have already had their cases dropped by the prosecution for lack of evidence. Apart from this disappointment, the ICC has faced enormous criticism for externalising justice because those affected by mass violence, including victims, have little influence on (and perhaps understanding of) the proceedings; because trials take place far away from the communities affected, thus making them inaccessible to the general public; and because those notions of justice that international tribunals enforce are not necessarily corresponding with notions of justice in the communities affected by violence.

Prosecutions in The Hague failed to lead to the conviction of four suspects out of the six named by the prosecutor to bear the greatest responsibility for the 2008 post-election violence. This sends a strong signal to those holding the highest offices: chances of being caught and convicted for future political violence are small indeed. The Kenyan state is unwilling to deal with political violence domestically and will not prosecute nor collaborate with international instances if it does not suit

59 Hassan Jallow & Fatou Bensouda (2008) *International Criminal Law in the African Context*, in African Guide to International Criminal Justice 16 (Max du Plessis ed., (quoting P. Mochokocho (2005) *Africa and the International Criminal Court*, in African Perspectives on International Criminal Justice 243 (Ankuma & Kwakwa eds.).

60 Of the four situations under consideration by the Court (Uganda, Central African Republic, Sudan, and Democratic Republic of the Congo), three of the investigations were commenced as a result of referral by African States themselves under Article 14 of the Rome Statute. It is only the Sudan situation that was referred to the ICC through a resolution of the UN Security Council pursuant to Article 13(b) of the Rome Statute.

56 Ibid

57 Ibid

58 G. Wachira, P. Kamungi and K. Sillah (2014) *Stretching the Truth: The Uncertain Promise of Truth and Reconciliation Commissions in Africa*

current political interests. And the ICC, while willing, is practically and politically unable to deal with these cases.

7.0 Conclusions and recommendations

Lessons from Kenya's history indicate that for any transitional justice process to succeed, it must take into consideration historical violations and injustices that shape how society coexists. The pre-independence, independence and post-independence periods in Kenya are marked by egregious human rights, social and economic violations that left a broken society, and while there was dire need for the establishment of a truth seeking mechanism, the process of implementation was compromised by leadership wrangles, political imperatives and the need to avoid expensive reparations. The need to examine and learn from these lessons to avoid deferment of the objectives of learning the truth and achieving community reconciliation is therefore an issue that remains largely unresolved in Kenya, more so because the findings of the TJRC are yet to be implemented.

While the values that inform and guide transitional justice efforts in Kenya appear good, the process is widely believed to be inconsistent with principles of human rights such as accountability and criminal responsibility. The Truth and Reconciliation process in Kenya, for example, was highly criticised as a vehicle of impunity for perpetrators. Indeed, perpetrators tended to stay away while victim-friendly recommendations are yet to be implemented. Moreover, the Truth Commission in Kenya is yet to address socio-economic and legal-historical distributive justice questions such as poverty, inequality and marginalisation.

The involvement of the ICC in Kenya is important in fighting impunity. Senior and politically powerful individuals are seldom held to account. However, the perception that the ICC is meant for high level perpetrators risks perpetuating impunity among the low and middle-level perpetrators.

All these not only make reconciliation more difficult, but also obscure any real success achieved by the TJRC and the ICC in the long term. Key stakeholders in the transitional justice debate in Kenya including government, civil society, international community and ICC among others can attempt to avoid these pitfalls by adopting the following recommendations;

7.1 Recommendations: for government, civil society and the international community

To the Kenyan government

- The government should implement the Makau Mutua taskforce recommendation that a committee of prominent Kenyans be established to investigate colonial era violations. Investigating these violations and allowing the public to air their grievances will help delineate between the colonial era and the current government's willingness to bring closure. Failure to do so has created a feeling that the previous and current governments are an extension of the colonial evils.
- The government should ensure that transitional justice mechanism(s) do not become vehicles perpetuating impunity. Any government should refrain from explicitly or tacitly providing amnesty to political actors. While the Kibaki government undertook a purge in the judiciary after taking power, no action was taken against politicians affiliated with the Kenyatta and Moi regimes under whose whims the corrupt judiciary had served. This selective application of transitional justice measures serves only to preserve political figures who had perpetrated heinous acts under Kenyatta and Moi governments thereby perpetuating impunity. It can also lead to a feeling of there being a witch hunt against certain individuals.

To Kenyan civil society

- CSO's should lobby the government to implement the Makau Mutua taskforce recommendation that a committee of prominent Kenyans be established to investigate colonial era violations.
- Civil society must put pressure on newly elected governments to ensure that those who served and implemented abusive policies under the old regimes are not re-appointed, Reinstating them could allow them to sabotage transitional justice measures that can bring them to account and offer closure to victims. It is unlikely that the same individuals who oversaw egregious human rights violations in previous regimes will turn around and pursue justice for their own wrongs.

To the international community

- In the Kenyan case, most corrupt individuals within the Kenyatta, Moi and Kibaki governments facilitated capital flight involving huge amounts of corruptly obtained money stashed in foreign accounts. The international community must assist in the tracing and returning of such monies, and deny refuge to rich but corrupt individuals who might want to take refuge in foreign countries while enjoying the loot.
- The international community should support the government in building a strong transitional justice mechanism that can deal with historical injustices right

from the colonial era. This should include the Makau Mutua taskforce recommendation to investigate colonial era violations.

- The international community should support such a mechanism through funding and expertise. The mandate of the TJRC in Kenya was not extended to cover colonial era violations because this was deemed too expensive, the international community, using funds like the United Nations Voluntary Fund for victims of Torture should help address the lacuna left in Kenya by failure to investigate colonial era violations.



GPPAC

Policy Note

The Global Partnership for the Prevention of Armed Conflict

GPPAC (pronounced “gee-pak”) is a member-led network of civil society organisations (CSOs) active in the field of conflict prevention and peacebuilding from around the world. Founded in 2003, the network consists of fifteen regional networks of local organisations; each region having its own priorities, character and agenda.

GPPAC members collaborate on issues of common interest. As part of its mission to work towards a shift from reaction to prevention of violent conflict, the network supports multiactor collaboration and advocates for local ownership of conflict prevention strategies. Together, GPPAC members create greater synergy in the field of conflict prevention and peacebuilding by strengthening the role of local civil society groups in conflict regions and connecting them on the national, regional and global level.

Nairobi Peace Initiative - Africa

A Peace Resource Organization

NPI-Africa is a pan African resource organisation committed to the promotion of peaceful transformation of conflict and reconciliation in Africa. Founded in 1984 and registered in Kenya as a Charitable Trust, its work has evolved over the years. Its initial focus in the 80s was the stimulation of the interest and action on the transformation of the many violent conflicts then ranging on the continent. It then shifted to programmatic engagement with peace building in various countries in Central, East and West Africa, including undertaking mediation, dialogue facilitation, reconciliation support and capacity building through training and accompaniment. In the last ten years, NPI-Africa has enhanced its role in research and documentation and seeks to influence policy and practice in areas relevant to its peace building mission.



NPI - Africa

A Peace Resource Organisation

Contact



Global Partnership for the Prevention of Armed Conflict (GPPAC)

Global Secretariat

Laan van Meerdervoort 70 | 2517 AN The Hague |

The Netherlands

Chamber of Commerce number 4121740

T +31 (0)70 311 0970

www.gppac.net | www.peaceportal.org

Nairobi Peace Initiative – Africa (NPI-Africa)

5th Floor, New Waumini House

Chiromo Road - Waiyaki Way, Westlands

Nairobi Kenya

T +254 (20) 4441444; +254 (20) 4440098

www.npi-africa.org