



COMPARATIVE STUDY OF TRANSITIONAL JUSTICE IN AFRICA

# **TRANSITIONAL JUSTICE IN KENYA AS A PATH TO TRANSFORMATION**

**ANDREW SONGA**

**2018**

## TRANSITIONAL JUSTICE IN KENYA AS A PATH TO TRANSFORMATION

### A. INTRODUCTION

Transitional justice is defined as the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.<sup>1</sup> In developing a normative conception of transitional justice, De Greif agrees with this definition but frames the goals of transitional justice to be recognition and civic trust as mediate goals and reconciliation and democracy as final goals.<sup>2</sup> The measures undertaken include criminal prosecutions, truth-telling, reparations and institutional reforms (which entails vetting as well).<sup>3</sup>

While this definition envisages a holistic and integrated approach to utilizing the outlined measures, critiques on the prevailing model of transitional justice have emerged on the basis of country experiences. A key criticism is the question of impact as transitional justice is seen to address the symptoms rather than the causes of conflict.<sup>4</sup> To address this, Lambourne calls for a model of transformative justice which contextualizes transitional justice within sustainable peace-building and conflict transformation.<sup>5</sup> The aim of this is to have a long-term and expansive view of justice that includes the elements of: accountability or legal justice; 'truth' or knowledge and acknowledgement; socioeconomic justice (to encompass reparations for historical injustices and distributive justice as prospective justice); and political justice (transforming both institutions and relationships to eliminate corruption and promote a sense of fair representation and participation of the general population).<sup>6</sup>

To this end, the principles of transformative justice are symbolic justice as well as substantive justice, prospective and historical justice, local ownership and capacity building, structural transformation and institutional reform, relationship transformation and reconciliation and a holistic, integrated and comprehensive approach.<sup>7</sup>

---

<sup>1</sup> Annan, Kofi. "The rule of law and transitional justice in conflict and post-conflict societies." *UN doc. S/2004/616* 23 (2004): 4.

<sup>2</sup> De Greiff, Pablo. "A normative conception of transitional justice." *Politorbis* 50, no. 3 (2010): 21.

<sup>3</sup> *Ibid.*, 19.

<sup>4</sup> Gready, Paul, and Simon Robins. "From transitional to transformative justice: A new agenda for practice." *International Journal of Transitional Justice* 8, no. 3 (2014): 2.

<sup>5</sup> Lambourne, Wendy. "Transitional justice and peacebuilding after mass violence." *International journal of transitional justice* 3, no. 1 (2009): 34.

<sup>6</sup> *Ibid.*, 37-44.

<sup>7</sup> *Ibid.*, 46.

Gready and Robins further the conception of transformative justice and define it as follows<sup>8</sup>:

Transformative justice is defined as transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.

Some of the key motivations for this definition include the fact that despite holistic definitions of transitional justice, the dominance of legal and state-based approaches persists<sup>9</sup> in addition to an insufficient focus on socioeconomic rights.<sup>10</sup>

It is on the basis of this evolving debate on transformative justice that this report discusses Kenya's transitional justice experience as one of embarking on a path to transformation. The report notes the 2007-08 Post-Election Violence (PEV) experienced in Kenya as a key moment in the country's history since it finally brought into sharp focus, the 'deep-seated and long-standing divisions within Kenyan society, which, if left unaddressed, threatened the very existence of Kenya as a unified country'.<sup>11</sup> However, to properly situate what the chapter identifies to be a transformative transitional justice agenda emerging from the PEV, it begins by discussing the origins of the Kenyan state and the effect of colonialism on African communities whose lives were permanently altered by the establishment of the Kenyan colony and eventually the Kenyan state.

Next, the report discusses African discontent and the clamour for independence and how this shaped the emergent independent state as well as the expectations placed on the independence government. The report then takes stock of the role played by successive post-independence governments in addressing the legacies of colonialism before turning to the PEV as a pivotal turning point in Kenya's interaction with transitional justice and confronting its tumultuous history.

In reflecting on colonialism and the establishment of the Kenyan state, the report highlights the emergent legacies of impunity, land injustices, corruption, non-responsive justice systems, non-participatory governance and coercive state institutions used to further repression. On post-independent governments up to 2002, the paper notes authoritarianism, ethnic bias in governance and corruption as some of the key hindrances to addressing Kenya's colonial legacy. Thereafter, the focus shifts to the post-2002 context when the National Rainbow Coalition (NARC) as an opposition political coalition successfully ascended to power and sparked Kenya's formal

---

<sup>8</sup> Gready and Robins, 2.

<sup>9</sup> *Ibid.*, 6.

<sup>10</sup> *Ibid.*, 10.

<sup>11</sup> Truth, Justice, and Reconciliation Commission, "KNDR Documents - Statement of Principles on Long-term Issues and Solutions Updated with Implementation Matrix" (2008). *II. Pre TJRC Documents. 5.* <https://digitalcommons.law.seattleu.edu/tjrc-pre/5> (accessed September 26, 2018).

conversation on transitional justice. The argument is made for transitional justice in Kenya to be defined in the transformative terms of deconstructing the colonial state that has been preserved and utilized by successive administrations since independence. In this period attempts to undertake constitutional reform and establish a Truth, Justice and Reconciliation Commission (TJRC) are initiated, but ultimately fail with devastating consequences for the country as seen during the PEV.

The report then ventures into the Kenya National Dialogue and Reconciliation (KNDR) process which was the mediation effort that was utilized to end the PEV crisis by establishing a grand coalition government and an agenda to address the long-standing issues that were deemed responsible for causing the violence. It is at this point that the report discusses in detail, the processes utilized to address the long-standing issues as Kenya's transformative transitional justice agenda, namely: accountability for the PEV; the TJRC; and institutional reforms within the judiciary and police. In all these instances, reference is made to achievements and challenges experienced within those processes in light of their contribution to transformation.

In conclusion, the paper takes stock of Kenya's status 10 years since the KNDR was ratified and in the face of the recently concluded 2017 elections that have occasioned yet another political crisis. A key reflection is that while the KNDR successfully outlined a transformative agenda, that agenda has been inhibited by the limitations from the nature of the transition as well as limitations within the transitional justice mechanisms themselves.

## **B. CONTEXT**

### **Colonialism and the Creation of the Kenyan State**

Akinmade defined colonialism as 'a practice of domination which involves the subjugation of one people to another.'<sup>12</sup> Driven by the imperatives of the industrial revolution, European states partitioned and colonized Africa in the 19<sup>th</sup> century in what would be described as the scramble for Africa.<sup>13</sup> Kenya as we know it today is a construct of colonialism, as established by the British first as a protectorate within the British East Africa and then as a colony in 1920.<sup>14</sup> In this sense, colonialism was a highly disruptive occurrence, one which introduced boundary demarcations that divided single communities, while also arbitrarily compelling previously independent communities to be confined within a territorial entity. Mutua aptly captures the situation as follows:<sup>15</sup>

---

<sup>12</sup> Akinmade, Donald. "Colonial Legacy and the Refracted State: Africa in Motionless Motion." *Journal of Arts and Humanities* 3, no. 9 (2014): 66

<sup>13</sup> Ibid.

<sup>14</sup> Truth, Justice, and Reconciliation Commission, "Final Report - TJRC Report Volume 2A" (2013). *I. Core TJRC Related Documents*. 6.

<https://digitalcommons.law.seattleu.edu/tjrc-core/6> (accessed September 26, 2018), 3-5.

<sup>15</sup> wa Mutua, Makau. "Conflicting conceptions of human rights: rethinking the post-colonial state." In *Proceedings of the ASIL Annual Meeting*, vol. 89, pp. 487-490. Cambridge University Press, 1995.

The imposition of the nation-state through colonization balkanized Africa into ahistorical units and forcibly yanked it into the Age of Europe, permanently disfiguring it. Unlike their European counterparts, African states and borders are distinctly artificial and are not the visible expression of historical struggles by local people to achieve political adjustment and balance. Colonization interrupted this historical and evolutionary process.

In Kenya's case this translated into dismantling an era where communities organized themselves on the basis of ecological niches, low impetus for state formation and a kinship system of ownership with regard to the factors of production, namely land, livestock and labour.<sup>16</sup> In its quest to acquire territory and cement the position of the settler, the colonial forces engaged in primitive accumulation by subjecting the local African communities to appropriation of their land, confiscation of their livestock, taxation and forced labour.<sup>17</sup>

There were military expeditions mounted to deal with what were referred to as "recalcitrant tribes" and the results were often massacres alongside crimes such as theft, rape and destruction of property.<sup>18</sup> Furthermore, the British utilized manipulation to subvert indigenous systems of authority and appropriate natural resources for the duration of the colonial period; this method was used to appropriate land in favour of white settlers, for example, in the Kiambu-Thika, central Rift Valley, Kericho and Nyeri/Nanyuki areas to accommodate soldier settler schemes after the First World War.<sup>19</sup> Land alienation which came with colonialism also had the effect of dismantling the kinship system and the cultural values that went with it, while missionaries supplanted African culture with Christianity which furthered a "capitalist work ethic, inculcated individualism and acquisitive culture".<sup>20</sup>

This process of appropriating land from local communities and alienating it in favour of colonial settlers was facilitated through the utilization of legal frameworks, which included the 1894 Acquisition Act of India, the East African Land Regulations of 1897, the Crown Lands Ordinance No. 21 of 1902 and the Crown Land Ordinance of 1915.<sup>21</sup> By 1962, 7.5 million acres or half the agricultural land in Kenya had been in annexed in favour of European settlers.<sup>22</sup>

African communities found themselves relegated to native reserves which were carved out of areas deemed unsuitable for colonial settlement. Within these reserves, African communities experienced several violations such as forced male labour mobilization, overcrowding,

---

<sup>16</sup> Ndege, P. "Colonialism and its legacies in Kenya. Lecture delivered during Fulbright-Hayes group project abroad program: July 5th to August 6th 2009 at the Moi University Main Campus." (2009), 1.

<sup>17</sup> Lonsdale, John, and Bruce Berman. "Coping with the contradictions: the development of the colonial state in Kenya, 1895–1914." *The Journal of African History* 20, no. 4 (1979): 491.

<sup>18</sup> Truth, Justice, and Reconciliation Commission, "Final Report - TJRC Report Volume 2A" (2013). *I. Core TJRC Related Documents*. 6.

<https://digitalcommons.law.seattleu.edu/tjrc-core/6> (accessed September 26, 2018), 5

<sup>19</sup> *Ibid.*, 9.

<sup>20</sup> Ndege, 6.

<sup>21</sup> Syagga, Paul M. "Public Land, Historical Land Injustices And The New Constitution." (2011), 6.

<sup>22</sup> *Ibid.*, 7.

insecurity, stagnation in African agricultural production, massive landlessness and rapid land deterioration due to fragmentation, over-stocking and soil erosion.<sup>23</sup>

It was such repression that brewed resentment and birthed a political and violent agitation for independence. African political formations began to emerge in the aftermath of the First World War and were modelled to seek change through non-violent and legal means. However, the non-responsiveness of the colonial government to stated grievances and the lack of tangible political changes saw some of the movements embrace the call for forceful liberation.<sup>24</sup> One such movement was the Kenya African Union (KAU), which had amassed considerable public support and adopted radical tactics such as oath-taking of its members, which opened the door to the more militant movement, the Mau Mau.<sup>25</sup>

A lot of literature has been dedicated to the origins and motivation of the Mau Mau. Sabar-Friedman wrote of the “Mau Mau myth”, explaining that this period in Kenyan history was subjected to multiple interpretations that served various political ends.<sup>26</sup> Doherty reinforces this notion as he notes the shifting narratives of the Mau Mau over time: A positive view at its onset shared by many Kenyans as opposed to just the Kikuyu; waning popularity in the face of a declared state of emergency accompanied with harsh sanctions; as a threat in the post-independence era and; a resurgent positive memory after a democratic transition of power to the opposition in 2002.<sup>27</sup>

Lonsdale identifies the colonial government’s recognition of the Mau Mau as occurring in 1948 on account of unrest among Kikuyu labour tenants on white settler farms, ultimately leading to a ban of the group in 1950 and the declaration of a state of emergency in 1952.<sup>28</sup> Along with this declaration, 6 individuals were charged and sentenced for assisting in the management of an unlawful society (Mau Mau) and related charges on the oath-taking being undertaken by the Mau Mau; they were Jomo Kenyatta, Bildad Kagia, Ramogi Achieng Oneko, Paul Ngei, Fred Kubai and Kungu Karumba.<sup>29</sup> Notably, the sentencing of these 6 pointed to the Mau Mau involving more than the Kikuyu and created the embers for a nationalist independence movement.

The emergency period, which lasted until January 1960, was one replete with atrocities as the colonial government sought to quash what they considered a Kikuyu rebellion. The TJRC report indicates that between 150,000-320,000 Africans were detained in this time and endured torture

---

<sup>23</sup> Truth, J., op cit note 3 at p. 12

<sup>24</sup> Meyer, Kathryn. "Kenya: Decolonization, Democracy and the Struggle for Uhuru." PhD diss., 2015, 32.

<sup>25</sup> Lewis, Amanda Elizabeth. "A Kenyan Revolution: Mau Mau, Land, Women, and Nation." (2007), 15.

<sup>26</sup> See Sabar-Friedman, Galia. "The Mau Mau Myth: Kenyan Political Discourse in Search of Democracy (Le mythe mau mau: le discours politique kenyan à la recherche de la démocratie)." *Cahiers d'études africaines* (1995): 101-131..

<sup>27</sup> Doherty, Joshua. "Shifting Narratives of Kenya's Mau Mau Rebellion." (2012), 2.

<sup>28</sup> Lonsdale, John. "Mau Maus of the mind: making Mau Mau and remaking Kenya." *The Journal of African History* 31, no. 3 (1990): 394.

<sup>29</sup> Fred Oluouch. 'The Case That Immortalised Kenya's "Kapenguria Six" - The East African'. Accessed 26 September 2018. <http://www.theeastafrican.co.ke/magazine/Case-that-immortalised-Kenya-Kapenguria-Six-/434746-3995106-s8sxn5z/index.html>.

and ill treatment at the hands of non-Kikuyu, Kikuyu loyalists and European settlers retained by the colonial administration.<sup>30</sup> The Mau Mau have also been cited for committing atrocities in this period with the most notable being the Lari massacre, which targeted a largely Kikuyu loyalist village.<sup>31</sup> The number of fatalities occasioned by this conflict has been disputed but it has been stated that approximately 25,000 Kenyan Africans were killed in the violence, while 32 European settlers were murdered and 63 European combatants were killed during the war.<sup>32</sup>

Insight to the atrocities committed by British during the emergency period would eventually be drawn from the case *Ndiku Mutua & Others – v – The Foreign and Commonwealth Office Case No: HQ09X02666 of 2012*. This case was filed by five plaintiffs seeking damages from the British government for negligence, false imprisonment, trespass to the person and torture. The particulars in the case were depictive of the wider experience of 5,228 victims who had been documented by the Kenya Human Rights Commission (KHRC), the Mau Mau War Veterans Association (MMWVA) and British law firm Leigh Day; and it was anticipated that the case, if successful, would facilitate reparations for these victims in common.<sup>33</sup> In the course of proceedings, the British government conceded that its officials were culpable of torture, but sought to avoid liability on legal technicalities. When the courts dismissed British government objections to the case, they sought to negotiate with the plaintiffs and this resulted in a groundbreaking settlement which constituted of:<sup>34</sup> a statement delivered in the British Parliament, which acknowledged that Kenyans had been subjected to torture and other forms of ill treatment at the hands of colonial authorities, and which expressed “sincere regret” for the same; a compensation package of £2,600 per claimant for the 5,228 victims identified by KHRC, MMWVA and Leigh Day; and construction of a memorial in Kenya in remembrance of the victims of torture during the colonial era.

In addition to torture and ill-treatment, the emergency period also saw those associated with the Mau Mau prejudiced by the reforms advanced by the British colonial government as part of a non-military counter-insurgency.<sup>35</sup> Notably, land consolidation in Central Kenya took place during the emergency period with the consequence of locking out claims by the leadership of the revolt as well as dispossessed peasants.<sup>36</sup> The state of emergency would be lifted in 1960 and by this time, reforms had also been undertaken to enhance African participation in governance at the legislative council as well as the commencement of the Lancaster House Constitutional Conferences as the framework for ushering in independence.<sup>37</sup>

---

<sup>30</sup> Truth, Justice, and Reconciliation Commission, ‘Final Report - TJRC Report Volume 2A’, *I. Core TJRC Related Documents*, 3 May 2013, <https://digitalcommons.law.seattleu.edu/tjrc-core/6.14>.

<sup>31</sup> Meyer, 35.

<sup>32</sup> *Ibid.*

<sup>33</sup> Songa, A., ‘Reparations for Colonial Atrocities: The Case of the Mau Mau in Kenya’, *Pan-African Reparation Perspectives Special Bulletin*, no. 2 (2014): 2-3...

<sup>34</sup> *Ibid.*

<sup>35</sup> Meyer, 36.

<sup>36</sup> Syagga, 8.

<sup>37</sup> Truth, Justice, and Reconciliation Commission, ‘Final Report - TJRC Report Volume 2A’, *I. Core TJRC Related Documents*, 3 May 2013, <https://digitalcommons.law.seattleu.edu/tjrc-core/6.16>.

### *Attaining Independence but Failing to Reform the State*

The Lancaster Conferences (the first being in 1960 and the second in 1962) would be dominated by the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU), which had evolved as lead nationalist parties in the country. Upon his release from detention in 1961, Jomo Kenyatta would lead KANU as President with Oginga Odinga and Tom Mboya from the Luo community as Vice-President and Secretary General respectively. KADU was formed by minority communities with encouragement from European settlers as a response to the threat of being dominated by the Kikuyu and Luo communities who held the leadership of KANU.<sup>38</sup> The KADU leadership consisted of Ronald Ngala from the Coastal region as President, Daniel Moi from the Kalenjin as Chair and John Keen from the Maasai as Secretary.<sup>39</sup>

Ultimately, the Lancaster Conferences would yield Kenya's independence Constitution that was based on: parliamentary democracy consisting of a bicameral legislature and a Prime Minister as head of government and; the devolution of power through the establishment of regional units known as *Majimbo* that had their own legislatures, executives and guarantees such as transfer of funds from national revenues and limited powers to raise their own revenue through local taxes.<sup>40</sup> KANU and KADU would jointly steer Kenya into independence under a transitional coalition government headed by a colonial governor until elections in 1963 that would usher in self-rule. KANU emerged victorious in the 1963 elections having garnered the most seats in both chambers of the Legislature but short of an overall majority; Jomo Kenyatta was duly appointed Prime Minister and Kenya obtained its independence on 12 December 1963.<sup>41</sup> On 12 December 1964, Kenya became a republic with Kenyatta as President and Oginga Odinga as Vice-President.

The transition to independence was laced with a colonial legacy that has been documented from various thematic aspects. On the land question, colonialism was deemed responsible for inequality in land ownership and land use, landlessness, squatting, land degradation, resultant poverty and Africans' resentment of the white settlers.<sup>42</sup> Corruption was also identified as another colonial legacy through its practice of divide and rule, an administrative culture of authoritarian chiefs as representatives of colonial authority, centralized power, the lack of public participation and an expanded role for the state in the economy.<sup>43</sup> The Judiciary in the colonial context was a segregated one with a different system of justice for indigenous and settler communities; with indigenous communities subjected to exploitation and a pre-dominantly penal style of justice.<sup>44</sup> The police force which was militarized in its structure and forged as punitive tool to pacify the resistance of local communities was by independence, a violent and coercive

---

<sup>38</sup> Charles Hornsby, *Kenya: A History Since Independence* (I.B.Tauris, 2013), 61..

<sup>39</sup> Ibid.

<sup>40</sup> Constitution of Kenya Review Commission. "The final report of the constitution of Kenya review commission." *Government of Kenya: Nairobi, Kenya* (2005), 22-24.

<sup>41</sup> Hornsby, 82.

<sup>42</sup> Syagga, P.M., 2011, op cit note 11 at p. 9.

<sup>43</sup> See Munyae M. Mulinge and Gwen N. Lesetedi, 'Interrogating Our Past: Colonialism and Corruption in Sub-Saharan Africa', *African Journal of Political Science / Revue Africaine de Science Politique* 3, no. 2 (1998): 15–28.

<sup>44</sup> The Judiciary, "Judiciary Transformation Framework 2012-2016." *The Judiciary*, (2012),8.

instrument with a racial approach to law enforcement and devoid of oversight mechanisms.<sup>45</sup> The independence Constitution as secured at the Lancaster House Conference was faulted for neither making reference to the struggle for independence nor articulating a set of national values, a drafting style that obscured its understanding, inadequate provisions on separation of powers and public participation, a complex *Majimbo* system that also permitted excessive intrusion by the central government and a highly limited Bill of Rights.<sup>46</sup>

At independence, the Kenyan public placed high expectations on the Kenyatta administration. It was anticipated that the independence government would immediately embark on dismantling the colonial state through introducing social justice, egalitarian reforms, participatory democracy, prosecuting the perpetrators of mass killings and other crimes during the war of independence and the reformation of hitherto oppressive institutions.<sup>47</sup> The Kenyatta administration through its actions instead dashed all hopes for such far-reaching reforms. In a bid to assuage white settlers of their concerns for their place in a post-independent Kenya, Jomo Kenyatta began by assuring them that he would not seek to nationalize land and other foreign assets.<sup>48</sup> This was accompanied by a conscious effort to marginalize the Mau Mau narrative in terms of their contribution to the independence struggle and a disregard for their grievance related to the land they lost to white settlers.<sup>49</sup>

When the government eventually embarked on a land settlement scheme for Kenyan communities, it utilized a ‘willing buyer-willing seller’ approach in a manner that failed to benefit the landless and instead worked to the advantage of those who had access to cash through farming, small businesses, wage employment or sale of their existing holdings.<sup>50</sup> The Maasai, Ogiek and members of the Kalenjin lost lands they claimed as their indigenous lands to land buying companies that were utilized in the ‘willing buyer-willing seller’ policy. Kenyatta and the emerging African elite with a close proximity to his administration also acquired huge tracts of land on this basis; a reality that has been the source of ethnic tensions ever since.<sup>51</sup> The independence government also faced an uprising from the Somali community in the Northern region of the country, which culminated into the Shifta war. The Kenyatta administration’s response to the uprising utilized the same tactics of torture and detention that the colonial government used on the Mau Mau during the state of emergency. This served as the pretext for maintaining a colonial policy of containment and marginalization of the Northern region that endured for decades.<sup>52</sup>

---

<sup>45</sup> Japhet Biegon and Andrew Songa, ‘Kenya: The Impact of Counter-Terrorism Measures on Police Reform’, *POLICING REFORM IN AFRICA*, n.d., 200.

<sup>46</sup> Constitution of Kenya Review Commission, 26-27.

<sup>47</sup> Truth, J., p. 17.

<sup>48</sup> Ibid.

<sup>49</sup> Sabar-Friedman, 105.

<sup>50</sup> Syagga, 10.

<sup>51</sup> Ibid.

<sup>52</sup> Truth, J., p. 20.

The Jomo Kenyatta administration was also plagued with ideological fault-lines that soon triggered the quest to consolidate power. President Kenyatta and his allies positioned themselves as nationalists who preferred a constitutionalist and reformist approach to governing; while casting his erstwhile friend turned foe, Vice President Jaramogi Oginga Odinga and his allies as radicals for supporting the nationalization of foreign assets and seizing of white-settler farms.<sup>53</sup> These simmering tensions in government led to the enactment of various constitutional amendments that served to consolidate Kenyatta's power by restoring a centralist state, and strengthening the Office of the President.<sup>54</sup>

In addition, Kenya was legislatively and tactically pushed into a de facto one party state, first by the absorption of KADU into KANU and eventually the banning of the Kenya People's Union (KPU), which was formed by Oginga Odinga and his allies in 1966 after their fallout with Kenyatta and exit from government. These actions were in turn accompanied by a series of high profile assassinations that served to characterize the Jomo Kenyatta administration as totalitarian and impervious to criticism. Among the high profile personalities assassinated included Pio Gama Pinto, Tom Mboya and J.M. Kariuki.<sup>55</sup> By the close of President Jomo Kenyatta's tenure in 1978 upon his death, his legacy as a champion for independence had been tarnished by his administration's tendencies for corruption; state orchestrated repression, political assassinations and failed land distribution.

The death of Jomo Kenyatta saw the rise of his deputy at the time, Daniel Arap Moi, whose tenure would last 24 years. Driven by an impetus to consolidate power, President Moi presided over ethnically biased public appointments, politicization of the provincial administration and a series of constitutional amendments - the most significant being a 1982 amendment that made Kenya a one-party state by law in the aftermath of a failed coup attempt by officers from the Kenya Air Force (KAF) in 1982. Detention without trial and torture became permissible methods of stamping out dissent.<sup>56</sup> In reflecting on this period, High Court Judge M.S.A. Makhandia in a *Republic v Amos Karuga Karatu [2008] eKLR* as follows:

We are no longer in 1980's where the fundamental rights of the citizens were trampled upon by the police. The courts of law could not stand up to challenge such conduct. As the court of appeal said recently the courts chose to see no evil and hear no evil giving rise to the infamous Nyayo house torture chambers. The consequences of this silence of conspiracy on the part of the courts was as the court of appeal went on to observe the infamous Nyayo house torture chambers, a history which the courts can never be proud of. It should never be allowed to happen again in this country.

---

<sup>53</sup> See Truth, J., 22 and 'Ethnic or Economic Violence: The Real Cause of Kenya's 2007 Election Violence by Annalisa Leibold :: SSRN', accessed 26 September 2018, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2620514.8](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620514.8).

<sup>54</sup> Constitution of Kenya Review Commission, 2005 op cit note 33 at p. 27-30.

<sup>55</sup> Truth, J., op cit note 3 at p. 22

<sup>56</sup> See Truth, J., 24-26 and Joel D. Barkan, 'Kenya after Moi', *Foreign Affairs* 83, no. 1 (2004): 88-89. <https://doi.org/10.2307/20033831>.

The Moi Administration also presided over significant economic decline as annual per capita income from 1990 to 2002 fell from \$271 to \$239 and poverty rose from 48 to 56 percent.<sup>57</sup> Coupled with international pressure prompted by the end of the Cold War and a strong pro-democracy movement at home, President Moi would finally relent and allow a constitutional amendment that would re-introduce multi-party democracy in 1991 with elections following in 1992. Multi-party elections however, brought ‘ethnic clashes’ or ‘land clashes’ that were largely attributed to President Moi’s government, which stood accused of stoking ethnic tensions to stay in power.<sup>58</sup>

Such violence featured prominently in the 1992 and 1997 multi-party elections, which were both won by President Moi in the face of a divided opposition; Moi won the 1992 election with 36.3% of the vote in a contest with 7 other candidates and he won in 1997 with 40.12% of the vote in a contest with 14 other candidates.<sup>59</sup> Research on the 1997 elections by KHRC identified the violence as informal repression where the government exploits long-standing, latent inter-ethnic differences to instigate violence and ‘justify their claims that democracy cannot work in a multi-ethnic society and to fulfill their ‘prophecy’ that the adoption of pluralism would trigger inter-ethnic violence.’<sup>60</sup>

All in all, it has been approximated that election-related violence prior to the 2007 general elections as well as unresolved land grievances, poor governance and socioeconomic insecurity caused the displacement of a reported 470,000 persons.<sup>61</sup> President Moi would eventually vacate office in 2002 on account of having served a maximum of two terms under the constitutional amendments that accompanied the restoration of multi-party democracy. This would pave the way for a unified opposition, the National Rainbow Coalition (NARC), to ascend to power in the 2002 general elections with Mwai Kibaki as President. This is discussed further in the next section.

### **C. EMBRACING TRANSITIONAL JUSTICE AS A PATH TO TRANSFORMATION**

#### ***Hope and Despair: The Emergence and Demise of the National Rainbow Coalition and its Reform Agenda***

Before 2002, Kenya’s historical context experienced various political transitions that failed to yield the required impetus to transform the Kenyan State and dismantle its colonial legacy. Wanyande described these political transitions as consisting of the following: The establishment of British colonial rule which was an imposed political transition; the resistance to colonialism

---

<sup>57</sup> Barkan, 89.

<sup>58</sup> See Kenya Human Rights Commission and others, ‘Killing the Vote: State Sponsored Violence and Flawed Elections in Kenya’, *Nairobi: Kenya Human Rights Commission*, 1998.

<sup>59</sup> 1992 results available here: ‘EISA Kenya: 1992 Presidential Election Results’, accessed 26 September 2018, <https://www.eisa.org.za/wep/ken1992results.htm>. and 1997 results available here: ‘EISA Kenya: 1997 Presidential Election Results’, accessed 26 September 2018, <https://www.eisa.org.za/wep/ken1997results.htm>.

<sup>60</sup> Kenya Human Rights Commission, 3.

<sup>61</sup> Prisca Kamungi, *Municipalities and IDPs Outside of Camps: The Case of Kenya’s Integrated Displaced Persons* (Brookings Institution-London School for Economics Project on Internal Displacement, 2013), i..

up to the realization of independence and; the clamour for improved governance and democracy in the post-independence era up to 2002 when NARC came into power.<sup>62</sup>

Instead of a transformed State during this period, the experience was one of compounded grievances emanating from the colonial state, missed opportunities for reforms in the immediate post-independence era and a series of half-measures that failed to ameliorate the sense of victimhood among individuals who bore the brunt of repression by the State as well as communities that had been marginalized by successive administrations. Indeed, in reflecting on Kenya's fifty years of independence, Mutua characterized Kenya's history as one 'replete with a catalogue of gross human rights abuses and maladministration', while also identifying the need for a 'nation-building justice agenda', which would consist of addressing traditional human rights violations, economic crimes and undertaking a series of targeted sectoral reforms. It is this nation-building justice agenda that has formed the essence of transitional justice in Kenya.<sup>63</sup>

The opportunity to formally adopt transitional justice in Kenya came in the aftermath of the 2002 general elections when NARC ascended to power and ended KANU's thirty nine years at the helm of Kenya's politics. Having campaigned on a platform of broad-based reforms, NARC's Mwai Kibaki triumphed over KANU's Uhuru Kenyatta having secured an overwhelming mandate by garnering 3.5 million votes or 62% of the total vote, while NARC secured 125 of the 210 available elective parliamentary seats.<sup>64</sup> Barkan identified this broad reform agenda as consisting of the following thematic areas: Governance which entailed improving the civil service into one that would be efficient, well remunerated but lean so as to stem a rising wage bill; improving the economy which entailed creating 500,000 new jobs, reducing corruption and a clean-up of the Judiciary which saw 82 judges in the Court of Appeal and High Court as well as 82 magistrates suspended by October 2003 and; constitutional reform that would anchor the rest of the reform agenda.<sup>65</sup>

An underpinning and over-arching theme for NARC's reform agenda was the need to look at and confront Kenya's past. A citizenry that had endured political repression and gross human rights violations under the KANU regime expected swift and decisive action to address historical injustices. In its press statement on January 8, 2003 the KHRC outlined an agenda for President Kibaki and NARC which among other things stated as follows:<sup>66</sup>

A true democratic transition cannot simply overlook, blink at, or gloss over the gross human rights violations and economic crimes committed by the KANU government and its officials. It is

---

<sup>62</sup> Peter Wanyande, 'Civil Society and Transition Politics in Kenya: Historical and Contemporary Perspectives', *Discourses on Civil Society in Kenya* 8 (2009), 11-13.

<sup>63</sup> Makau W. Mutua, 'Why Kenya Is a Nation in Embryo', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2013), <https://papers.ssrn.com/abstract=2390796>.

<sup>64</sup> David M. Anderson, 'Briefing: Kenya's Elections 2002: The Dawning of a New Era?', *African Affairs* 102, no. 407 (2003): 331-42.

<sup>65</sup> Barkan, 94-96.

<sup>66</sup> Makau. Mutua and Willy. Mutunga, *Eyes on the Prize.*, 79 p. (Nairobi, Kenya: Kenya Human Rights Commission, 2003), [//catalog.hathitrust.org/Record/005036276](http://catalog.hathitrust.org/Record/005036276).

only by fully confronting the past – and completely accounting for it – that Kenyans can create a solid and legitimate basis for democratic development and economic renewal.

The NARC administration responded to this need in April 2003 by constituting the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission. The mandate of the Task Force was to establish whether the Kenyan public was in favour of having a truth commission as a mechanism for addressing past injustices. Through a series of provincial public hearings, as well as a national and international conference, the Taskforce discharged its mandate and submitted a final report to the Minister for Justice and Constitutional Affairs on August 26, 2003. The primary finding in the report was that of those who interacted with the Taskforce, over 90% supported the establishment of a truth commission as ‘a vehicle that will reveal the truth about past atrocities, name perpetrators, provide redress for victims, and promote national healing and reconciliation.’<sup>67</sup>

The Task Force recommended the establishment of a Truth, Justice and Reconciliation Commission (TJRC) with a temporal mandate of 1963 to 2002 and a thematic mandate to: Investigate political assassinations and killings; massacres and possible genocides; political violence and killings of democracy advocates; torture, detention, exile, disappearances, rape and persecution of opponents; politically instigated ethnic clashes and; violations of economic, social and cultural rights.<sup>68</sup> It was further recommended by the Task Force that the TJRC be empowered to make recommendations on prosecution of offenders, reparations for victims, lustration measures and conditional amnesty to offenders in exchange for full disclosure on matters of interest to the commission.<sup>69</sup>

There was reason for further optimism as the NARC administration proceeded to institute public inquiries into grand corruption such as the Goldenberg Inquiry and the Commission of Inquiry into Illegal/Irregular Allocation of Public Land known as the Ndung’u Commission.<sup>70</sup> This momentum for a transitional justice agenda however came to a screeching halt when NARC’s inherent frailties made it susceptible to the governance failings of past administrations. The NARC administration quickly succumbed to corruption scandals of their own in addition to fuelling perceptions of ethnic exclusiveness through a patronage network that benefited the President, his ethnic group and allies.<sup>71</sup>

Despite projecting a national outlook on account of the numerous legislators it had across the country, the reality was that NARC was a hastily convened coalition in the run up to the 2002 elections with varied interests that had been secured within a Memorandum of Understanding (MoU). Barkan (2004) described NARC’s process of formation as its fundamental weakness by highlighting that it was a coalition of convenience that had come together on account of what it

---

<sup>67</sup> Makau Mutua and Kiraitu Murungi, *Report of the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission* (Government Printer, 2003), ix.

<sup>68</sup> *Ibid*, 19-26.

<sup>69</sup> *Ibid*.

<sup>70</sup> Mutua, M., 2013, 58.

<sup>71</sup> John Githongo, ‘Fear and Loathing in Nairobi: The Challenge of Reconciliation in Kenya’, *Foreign Affairs* 89, no. 4 (2010): 9.

opposed rather than what it actually stood for. This sentiment was echoed by some in civil society who acknowledged that NARC was a ‘coalition of democratic reformers and hardcore conservatives, many of them KANU spiritual children’.<sup>72</sup> By October 2003, an initial assessment of the NARC administration saw it characterized as a fragile coalition consumed by personality and ideological clashes.<sup>73</sup> This coexistence was short-lived when NARC’s MoU which centered on the distribution of positions within the Executive was not upheld and in particular, the creation of the post of Prime Minister that was supposed to be accorded to Raila Odinga. The consequence was political fallout within the coalition that exposed the ethnic fault-lines within it as the dispute was characterized as one between President Kibaki and Raila Odinga and by extension their respective Kikuyu and Luo ethnic communities.<sup>74</sup>

The political fallout within NARC reached its climax within the context of the ongoing constitutional review process, which they had rhetorically promised the public would be completed within 100 days of coming into power. The review process instead became an arena to re-litigate the unfinished business of the MoU as the Kibaki-led faction within NARC opposed the introduction of a Parliamentary system of government led by a Prime Minister along with a devolved system of power to regions; a position supported by the Odinga-led faction of the coalition.<sup>75</sup> The consequence of this was a fractious and at times acrimonious process, which resulted in a draft constitution that reflected the position of the Kibaki-led faction and was subjected to a referendum in 2005. Pitted into “YES” and “NO” camps during the referendum campaigns, the “NO” team, which was christened the Orange Movement on account of its symbol for the referendum vote, and led by the Raila Odinga faction, emerged victorious over the Kibaki-led faction as a majority of voters rejected the 2005 draft constitution.<sup>76</sup>

The referendum result sounded the death knell for NARC and the transitional justice agenda that various stakeholders hoped it would undertake. The immediate consequence was the expulsion of all members of the Orange Movement from government through a cabinet reshuffle by President Kibaki. The priority had shifted to regime survival as President Kibaki courted KANU to join his ranks. The constitutional review process was left in abeyance and the Taskforce report on establishing a TJRC was not implemented. Attention was now drawn to political realignments in anticipation of the 2007 general elections. These realignments culminated into 3 major political formations that would contest the 2007 general elections namely: The Party of National Unity (PNU) led by President Kibaki, the Orange Democratic Movement (ODM) led by Raila Odinga and the Orange Democratic Movement- Kenya (ODM-K) led by Kalonzo Musyoka who

---

<sup>72</sup> Kenya Human Rights Commission, 2003 .

<sup>73</sup> Shumbana Karume, ‘Factional Intrigues and Alliance Politics : The Case of NARC in Kenya’s 2002 Elections’, *Journal of African Elections* 2, no. 2 (1 October 2003): 1–13.

<sup>74</sup> Opondo P. A, ‘Ethnic Politics and Post-Election Violence of 2007/8 in Kenya’, *African Journal of History and Culture* 6, no. 4 (31 May 2014): 59, <https://doi.org/10.5897/AJHC2013.0146>.

<sup>75</sup> ‘Moving the Kenya Constitution Review Process Forward: A Report of the Fact-Finding Mission to Kenya. | Kituo Cha Katiba’, accessed 26 September 2018, <http://www.kituoachakatiba.org/publications/fact-finding-missions/moving-kenya-constitution-review-process-forward-report-fact>.

<sup>76</sup> Denis Kadima and Felix Owuor, ‘Kenya’s Decade of Experiments with Political Party Alliances and Coalitions - Motivations, Impact and Prospects’, *Journal of African Elections* 13, no. 1 (1 June 2014): 150–80.

had been in the leadership of ODM but branched out to pursue his own candidature for the presidency.

### **The Reckoning: 2007 Post-Election Violence and the emergence of National Dialogue**

The 2007 general elections were a watershed moment for Kenya and ultimately the source of renewed impetus for Kenya to pursue transitional justice. The campaigns were dominated primarily by the fallout between President Kibaki and Raila Odinga where the former sought to campaign on the platform of a development record, while the latter sought to illuminate Kibaki's legacy as one of broken promises and ethnic exclusivity that damaged national unity. Both campaigns were opined as utilizing caustic ethnic rhetoric to advance their cause.<sup>77</sup> This charged environment yielded a very close Presidential contest akin to a zero-sum game for President Kibaki and Raila Odinga as the lead presidential candidates. After substantial anomalies encountered during the tallying of votes and announcement of results, President Kibaki was declared the winner of the close contest on December 30, 2007 by a margin of 231,728 votes.<sup>78</sup> President Kibaki was immediately sworn in for a second term that evening in an abrupt ceremony at State House as ODM rejected the results and called on their supporters to engage in mass protests. PNU on the other hand maintained that the judiciary would be the only platform for addressing electoral disputes. This stalemate degenerated into unprecedented levels of post-election violence which resulted in the estimated deaths of 1,300 persons, the internal displacement of 663,921 persons and the destruction of 78,254 houses.<sup>79</sup>

The 2007 Post-Election Violence (PEV) unfolded along the ethnic cleavages harnessed during political campaigns as the Kikuyu and Kisii communities in the Rift Valley and Coastal regions of the country were attacked on the perceived basis of being supporters of PNU. These attacks in turn saw the Kikuyu mount retaliatory attacks aimed at the Luos, Luhyas and Kalenjins in the towns of Naivasha, Nakuru and Nairobi on the perceived basis of their support for ODM. It also emerged that politicians and businessmen were facilitating criminal gangs to undertake the violence.<sup>80</sup> In addition to this character of attacks, was the role of the police and other security officers in contributing to the violence. In the fatalities registered during the PEV, 405 were attributed to shootings by security officers<sup>81</sup> and they further stood accused of exhibiting ethnic bias, which furthered the PEV through their actions in targeting some communities for violence or through their inaction where they failed to protect certain communities under attack.<sup>82</sup> This was compounded by further reports of sexual violence undertaken by both criminal gangs and security officers in the midst of the attacks.

---

<sup>77</sup> Githongo, 2.

<sup>78</sup> 'EISA Kenya: 2007 Presidential Election Results', accessed 26 September 2018, <https://www.eisa.org.za/wep/ken2007results.htm>.

<sup>79</sup> Government of Kenya. Ministry of State for Special Programmes. (2012). Progress on Resettlement of Internally Displaced Persons as at 6<sup>th</sup> January, 2012.

<sup>80</sup> 'Commissions of Inquiry - CIPEV Report (Waki Report)', n.d., 530.

<sup>81</sup> Ibid.

<sup>82</sup> See Mutuma Ruteere, 'More than Political Tools', *African Security Review* 20, no. 4 (1 November 2011): 11–20, <https://doi.org/10.1080/10246029.2011.630805>.

## D. MEDIATION AND THE FORMULATION OF A TRANSFORMATIVE TRANSITIONAL JUSTICE AGENDA

The scale of the PEV quickly attracted the attention of the international community who acknowledged its transnational consequences on account of Kenya's focal role in communication and economic activity in the East Africa region.<sup>83</sup> The heightened international attention translated into efforts at shuttle diplomacy that eventually converged around a concerted effort by the African Union (AU) to get President Kibaki and Raila Odinga to commence dialogue as a way out of the unfolding crisis. In this period, President Kibaki had strengthened his position by negotiating ODM-K into his government, naming Kalonzo Musyoka as Vice-President and appointing a partial cabinet that included ODM-K members.

The AU was able formalize a mediation process through a Panel of Eminent African Personalities that was chaired by former United Nations Secretary General Koffi Annan and had a membership that consisted of Tanzania's former President Benjamin Mkapa and Graca Machel from Mozambique. The mediation process was christened the Kenya National Dialogue and Reconciliation (KNDR) and was unveiled on January 29, 2008 with the parties being the Government of Kenya/Party of National Unity (Government/PNU) and ODM. Based on the concurrence of the parties, the agenda items for KNDR were as follows: Immediate Action to Stop Violence and Restore Fundamental Rights and Liabilities (Agenda 1); Immediate Measures to Address the Humanitarian Crisis, Promote Reconciliation, Healing and Restoration (Agenda 2); How to Overcome the Current Political Crisis (Agenda 3); and Long-term Issues and Solutions (Agenda 4).<sup>84</sup>

It was through this framework that the National Accord and Reconciliation Act 2008 was enacted as a way out of the prevailing political crisis by creating a power-sharing arrangement that could then facilitate the healing and reconciliation process for the country. Through this legislation, a grand coalition government was established with Mwai Kibaki retaining the position of President and Raila Odinga assuming the newly created position of Prime Minister along with appointing several Ministers from his ODM party to the Cabinet. This grand coalition government would subsist for the life of the 10th Parliament (2008-2013) and therefore preside over the implementation of the KNDR agenda items.

It is the KNDR agenda items that account for Kenya's post-2008 interaction with transitional justice. The analysis of the KNDR in this regard has seen it described within the spectrum of providing a framework for transitional justice on the basis of agenda items<sup>85</sup> to an imperfect transitional justice policy consisting of a package of political reforms that did not provide

---

<sup>83</sup> Karuti Kanyinga and James D. Long, 'The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution', *African Studies Review* 55, no. 1 (2012): 31–51, <https://doi.org/10.1353/arw.2012.0002>.

<sup>84</sup> 'KNDR Documents - Annotated Agenda for the Kenya Dialogue and Reconciliation', n.d., 4.

<sup>85</sup> See Thomas Obel Hansen, 'Kenya's Power-Sharing Arrangement and Its Implications for Transitional Justice', *The International Journal of Human Rights* 17, no. 2 (1 February 2013): 307–27, <https://doi.org/10.1080/13642987.2013.752949>.

sufficient clarity on the aspect of accountability.<sup>86</sup> Annotations to Agenda 2 emphasized the investigation of gross and systematic violations of human rights as a high priority. Under Agenda 4, the long-standing issues and solutions would be elaborated to entail undertaking constitutional, legal and institutional reform; tackling poverty and inequity as well as combating regional development imbalances; tackling unemployment, particularly among the youth; consolidating national cohesion and unity; undertaking land reforms and; addressing transparency accountability and impunity.

In keeping with the definitions outlined at the start of this report, the annotations to Agenda 2 and 4 of the KNDR point to the objective of establishing measures to come to terms with the legacies of massive human rights abuses (transitional justice) but in a manner that advances socio-economic justice and political justice alongside legal justice (transformative justice). It is this fusion that established Kenya's transformative transitional justice agenda meant to resume the stalled nation-building justice agenda that would confront the political despotism and social inequalities rooted in colonial legacy and identified to have underpinned the PEV.

A series of transitional justice mechanisms were established under the KNDR to achieve the goal of transformative transitional justice. The Commission of Inquiry into the Post-Election Violence (CIPEV) was established as a non-judicial body with the mandate to investigate facts and circumstances leading to the PEV, investigate acts of commission or omission by the State security agencies in the course of the PEV and recommend measures of a legal, political or administrative measure that would result in bringing those criminally responsible to account. As discussed in the next section of this report, the CIPEV report led to the opening of cases at the International Criminal Court (ICC).

The Truth, Justice and Reconciliation Commission (TJRC) was established with the broad mandate of inquiring into human rights violations, economic crimes, historical land injustices and other historical injustices over the temporal period of December 12, 1963 to February 28, 2008. Lastly, the annotations to agenda 4 opened the door institutional reforms targeting the judiciary and the police as a contribution to consolidating national cohesion, strengthening transparency and accountability to address impunity. The next sections of this report will now turn to assessing these mechanisms in terms of their contribution to Kenya's transformative transitional justice agenda.

### **Accountability for the PEV: CIPEV, Domestic Prosecutions and the International Criminal Court in the Kenya Situation**

As already highlighted, Agenda 2 of the KNDR contained a component of accountability for gross and systematic violations of human rights during the PEV which was to be commenced by CIPEV as an investigatory mechanism. CIPEV began its work on May 28, 2008 and conducted public hearings around the country from July to September 2008. CIPEV's findings were based on the testimony of 156 witnesses as well as another 144 witnesses by way of depositions and

---

<sup>86</sup> See Godfrey M. Musila, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions', *International Journal of Transitional Justice* 3, no. 3 (1 November 2009): 445–64, <https://doi.org/10.1093/ijtj/ijp018>.

recorded statements during the public hearings.<sup>87</sup> CIPEV delivered its final report to President Kibaki and Prime Minister Odinga on October 15, 2008. While the CIPEV report made far reaching recommendations for comprehensive reforms in the security sector and disaster response and humanitarian assistance, it most notably made recommendations on how to proceed with holding the perpetrators of the violence accountable.

The CIPEV report called for deeper investigations and prosecution of persons deemed to have been the masterminds of the PEV as way of ending impunity. Their proposed medium was a Special Tribunal to ‘seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya’.<sup>88</sup> This prescription had been informed by an assessment of past inquiries and their failure to result in accountability for perpetrators as well as an assessment of the judiciary, which would be overly burdened were it expected to ordinarily process PEV cases, given their complexities and objective to have them disposed of expeditiously.

It should be appreciated that CIPEV was operating against a backdrop of numerous inquiry reports that had gone unimplemented, which had led to such commissions acquiring the dubious reputation of merely serving as tools to assuage public anger at given times.<sup>89</sup> Therefore, to enhance the prospects of the implementation of its report, CIPEV also submitted it to the Panel of Eminent African Personalities along with a sealed envelope containing the names of the persons deemed to bear the greatest responsibility for the PEV as well as the evidence obtained against them. This submission came with a further recommendation that the envelope be forwarded to the Chief Prosecutor of the ICC in the event a Special Tribunal was not established.

This directive proved to be judicious as it soon became evident that the political will to ensure accountability for PEV had fast faded. While Kenya had ratified the Rome Statute in March 2005 and domesticated it through the International Crimes Act which came into force in January 2009, Parliament failed on two occasions to enact a law to establish the Special Tribunal proposed by CIPEV.<sup>90</sup> At face value, this failure was attributed to legislators’ concerns that a local accountability process would lack sufficient judicial independence as compared to an international platform such as the ICC.<sup>91</sup> However, this was more of calculated political interests than a comparative analysis on the prospects of justice; most legislators considered rejecting the

---

<sup>87</sup> CIPEV Report (Waki Report), n.d., 530.

<sup>88</sup> Ibid.

<sup>89</sup> See ‘Postponing the Truth – How Commissions of Inquiry Are Used to Circumvent Justice in Kenya | Africa Centre for Open Governance (AfriCOG)’, accessed 27 September 2018, <https://africog.org/postponing-the-truth-how-commissions-of-inquiry-are-used-to-circumvent-justice-in-kenya/>.

<sup>90</sup> See Charles Chernor Jalloh, ‘Situation in the Republic of Kenya’, *American Journal of International Law* 105, no. 3 (2011): 540–47, <https://doi.org/10.5305/amerjintelaw.105.3.0540>.

<sup>91</sup> Thomas Obel Hansen, ‘Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns’, *California Western International Law Journal* 42 (2011): 1–35.

Special Tribunal to be the best option in shielding their political allies from prosecution with the ICC considered to be a distant threat that could not easily materialize.<sup>92</sup>

The perception of the ICC would change dramatically as its intervention materialized. Kofi Annan submitted the CIPEV sealed envelope to the Chief Prosecutor of the ICC, Moreno-Ocampo who consequently invoked Article 15(3) of the Rome Statute to initiate investigations *proprio motu* on the basis of the information received from the CIPEV report. The ICC authorized the investigations into the Kenya situation to commence in March 2010 and by December 2010; Moreno-Ocampo had identified six individuals as allegedly being responsible for the commission of crimes against humanity during the PEV. Christened the ‘Ocampo six’, the individuals were: Henry Kiprono Kosgey who was at the time the chairman of ODM; William Samoei Ruto who at the time was a senior member of ODM and cabinet minister in the grand coalition government; Joshua Arap Sang who at the time was the head of operations and host of a breakfast show at Kass FM radio station (a popular Kalenjin vernacular station); Uhuru Kenyatta who at the time was the head of KANU and a Deputy Prime Minister in the grand coalition government; Francis Muthaura who at the time was the head of the Public Service and Secretary to the Cabinet and; Mohammed Hussein Ali who at the time was the Commissioner of Police.

The naming of these six individuals made the political costs that came with accountability for the PEV tangible and occasioned significant shifts on leaders’ positions in as far as the ICC was concerned. William Ruto who had personally advocated for the referral of the Kenyan situation at the ICC at the inception of the debate<sup>93</sup> now strongly opposed it as a suspect. Some of the legislators who had voted against the Special Tribunal (and implicitly for the ICC) now rescinded their stance and passed a parliamentary motion seeking to withdraw Kenya from the Rome Statute.<sup>94</sup> While President Kibaki and Prime Minister Odinga had jointly advocated for the Special Tribunal, Odinga emerged as a strong proponent for the ICC option once the suspects had been named. At the heart of these shifting positions were the political interests associated with succeeding President Kibaki at the end of his term and the fact that Uhuru Kenyatta, William Ruto and Raila Odinga had become focal features of this succession race.<sup>95</sup>

Policy decisions by the grand coalition government on proceeding with the ICC cases were therefore greatly influenced by political alignments based on safeguarding political interests in the post-Kibaki presidency. This was exemplified in the state actions aimed at ending the ICC’s

---

<sup>92</sup> “‘Back from the Brink: The 2008 Mediation Process and Reforms in Kenya” - Kofi Annan Foundation’, accessed 27 September 2018, <https://www.kofiannanfoundation.org/mediation-and-crisis-resolution/back-from-the-brink-the-2008-mediation-process-and-reforms-in-kenya/>.

<sup>93</sup> ‘Ruto: Why I Prefer The Hague Route’, Daily Nation, accessed 27 September 2018, <https://www.nation.co.ke/news/1056-533390-k79I97z/index.html>.

<sup>94</sup> ‘Parliament Pulls Kenya from ICC Treaty - Daily Nation’, accessed 27 September 2018, <https://www.nation.co.ke/news/politics/Parliament-pulls-Kenya-from-ICC-treaty/1064-1077336-us2knmz/index.html>.

<sup>95</sup> ‘They Voted for Hague but Now Pray with Suspects - Daily Nation’, accessed 27 September 2018, <https://www.nation.co.ke/news/politics/They-voted-for-Hague-but-now-pray-with-suspects/1064-1320534-67urwo/index.html>.

involvement in Kenya as assessed by Hansen and they included efforts to have Kenyan cases deferred under Article 16 of the Rome Statute and subsequently, an application challenging the admissibility of the cases on the basis of claims that domestic investigations had commenced. While both initiatives enjoyed the support of the Presidency, Odinga maintained support for the ICC process as a section of his ODM party directly intervened by corresponding with the UN Security Council to object to Kenya's deferral request.<sup>96</sup> The attempts to halt the cases did not succeed.

The politicization of the ICC intervention further crystallized when the investigations eventually resulted in the institution of two cases that confirmed charges against 4 of the initial 6 individuals, namely: William Samoei Ruto and Joshua Arap Sang for case one and; Uhuru Muigai Kenyatta and Francis Muthaura for case two.<sup>97</sup> Kenyatta and Ruto who had been on opposite sides of the political divide during the PEV now found themselves as allies in crisis. Their immediate response was to embrace a political narrative that: (1) targeted Odinga as the chief architect of their woes at the ICC and who had escaped the attention of the court despite being most responsible for the PEV crisis alongside President Kibaki<sup>98</sup> and (2) advanced the argument that their individual prosecutions were actually an indictment of the Kikuyu and the Kalenjin community that were at the epicenter of the PEV.<sup>99</sup>

With the next Presidential elections scheduled for March 2013, this narrative became the basis of a new political alliance between Kenyatta and Ruto that had the objective of capturing political power as a shield against their ongoing prosecutions at the ICC. This meant that political allegiances shifted significantly within the grand coalition government as factions within ODM supportive of Ruto abandoned Odinga to join the new Kenyatta-Ruto alliance, while the remainder of ODM and some previously supportive of PNU/ODM-K were now aligned to Odinga. By the March 2013 general election, Kenyatta and Ruto were at the helm of the Jubilee Alliance, while Odinga and Vice-President Kalonzo Musyoka were at the helm of the Coalition for Reforms and Democracy (CORD). The election was a close contest with a disputed outcome that saw Uhuru Kenyatta and William Ruto duly elected President and Deputy-President respectively after garnering 50.51% of the vote.<sup>100</sup> As discussed in a later section of this report, the electoral result had to be affirmed by the Supreme Court after Odinga filed an election petition contesting the result.

---

<sup>96</sup> 'Update Report No. 1: Kenya and the ICC : Update Report : Security Council Report', accessed 27 September 2018, <https://www.securitycouncilreport.org/update-report/lookup-c-g|KWLeMTIsG-b-6717579.php?print=true>.

<sup>97</sup> 'Background', International Justice Monitor, accessed 27 September 2018, <https://www.ijmonitor.org/kenya-cases-background/>.

<sup>98</sup> Tim Murithi, 'Ensuring Peace and Reconciliation While Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan', *Africa Development*, no. 2 (2015): 26.

<sup>99</sup> Thomas Obel Hansen, 'Kenya's Power-Sharing Arrangement and Its Implications for Transitional Justice', *The International Journal of Human Rights* 17, no. 2 (1 February 2013): 307–27, <https://doi.org/10.1080/13642987.2013.752949>.

<sup>100</sup> 'EISA Kenya: 2013 Presidential Election Results', accessed 27 September 2018, <https://www.eisa.org.za/wep/ken2013results.htm>.

This new dynamic had an immediate impact on Kenya's cooperation with the ICC on the ongoing cases. With Kenyatta and Ruto now assuming Executive power, the ICC was characterized at State level to be a threat to sovereignty and matters of peace and security.<sup>101</sup> Political and diplomatic efforts to have the cases terminated were invigorated as evidenced by a relentless campaign to have the cases withdrawn through diplomatic and procedural measures such as seeking a deferral from the UN Security Council, an African Union resolution on withdrawal of the case and immunity from prosecution for heads of state and; a series of legal challenges at the domestic level to stop the ICC prosecutor from accessing documentary evidence or enforce an arrest warrant with respect to an individual accused of tampering with witnesses<sup>102</sup>. The consequences of these actions were that the case against Uhuru Kenyatta was withdrawn on March 13, 2015 while William Ruto and Joshua Sang had their charges vacated after a decision by the Trial Chamber on April 5, 2016.<sup>103</sup> Citations of witness tampering, intimidation, non-cooperation and failure to execute arrest warrants in relation to witness tampering has resulted in a finding of non-compliance against Kenya and led to its referral before the Assembly of State Parties (ASP) under the Rome Statute in 2016.<sup>104</sup>

The capitulation of the ICC cases was matched with the similar demise of the possibility of criminal prosecutions at the domestic level for PEV crimes. The Office of the Director of Public Prosecutions (ODPP) in April 2012 established a Multi-Agency Task Force on the 2007/2008 Post-Election Violence Cases with the purpose of considering cases arising from the PEV. Its primary responsibilities entailed a re-evaluation and re-examination of the PEV cases, recommending how these cases could be dealt with expeditiously, supervise and guide any investigations and prosecutions undertaken in relation to the PEV and to make recommendations and facilitate alternative dispute resolution mechanisms.<sup>105</sup> The taskforce in August 2012 reported to have reviewed 4,005 files from a total of 6,081 files received from the police, which they deemed to be in need of further investigations for them to be prosecutable.<sup>106</sup> The report further made an assertion of 366 cases having been placed before the courts with 23 cases pending at the time, 77 withdrawn and 138 resulting in convictions; analysis of these cases however revealed inconsistencies and mischaracterizations that rendered this report unreliable in

---

<sup>101</sup> 'Aide Memoire: Kenya and the International Criminal Court', mafiadoc.com, accessed 27 September 2018, [https://mafiadoc.com/aide-memoire-kenya-and-the-international-criminal-court\\_5a312f481723ddac01fe43ba.html](https://mafiadoc.com/aide-memoire-kenya-and-the-international-criminal-court_5a312f481723ddac01fe43ba.html).

<sup>102</sup> See 'Kenya: One Year in Office for Uhuru Kenyatta and William Ruto; Human Rights Record Marred by Abuses', Worldwide Movement for Human Rights, accessed 27 September 2018, <https://www.fidh.org/en/region/Africa/kenya/kenya-one-year-in-office-for-uhuru-kenyatta-and-william-ruto-human>.

<sup>103</sup> 'Background', International Justice Monitor, accessed 27 September 2018, <https://www.ijmonitor.org/kenya-cases-background/>.

<sup>104</sup> Judge Kuniko Ozaki, Judge Robert Fremr, and Judge Geoffrey Henderson, 'SITUATION IN THE REPUBLIC OF KENYA', 2016, 18.

<sup>105</sup> 'Kenya Law | Kenya Gazette', accessed 27 September 2018, [http://kenyalaw.org/kenya\\_gazette/gazette/notice/11182](http://kenyalaw.org/kenya_gazette/gazette/notice/11182).

<sup>106</sup> 'Most PEV Cases Cannot Be Prosecuted - Tobiko', The Star, Kenya, accessed 27 September 2018, [http://www.the-star.co.ke/news/2014/02/06/most-pev-cases-cannot-be-prosecuted-tobiko\\_c892628](http://www.the-star.co.ke/news/2014/02/06/most-pev-cases-cannot-be-prosecuted-tobiko_c892628).

as far as the progress in prosecuting PEV crimes was concerned.<sup>107</sup> This would be the only substantive act undertaken by the taskforce as further prosecutions failed to materialize with the ODPP exposed for failing to complete the review of the case files received from the police and which included significant cases of sexual violence.<sup>108</sup> Instead, in 2016 the police contended that with the lapse of time and the initial state of the case files, they lacked evidence and complainants to further investigations. The ODPP insists that the files remain open; however the entire exercise has been criticized by a section of civil society as a tool that the State used to feign complementarity at a time when they were eager to have the PEV cases withdrawn from the ICC.<sup>109</sup>

The work of the Multi-Agency Task Force was augmented by another initiative within the Judicial Service Commission (JSC) to establish an International Crimes Division (ICD) within the High Court of Kenya. This was through a working committee of the JSC established in May 2012 to study the viability of an ICD within the High Court to address pending PEV cases and also deal with other international and transnational crimes. The committee submitted its report in October 2012 where it did recommend that the Chief Justice establish the ICD as a division of the High Court with the jurisdiction to try core international crimes, transnational crimes and any other international crime as may be prescribed under any international instrument to which Kenya is a party.<sup>110</sup>

The proposal however raised serious concerns as to the viability and legal standing of the proposed division.<sup>111</sup> First, on the matter of jurisdiction, there was no policy justification for grouping international crimes with transnational crimes such as terrorism and drug-trafficking as this would run the risk of inundating the ICD with numerous prosecutions other than those of PEV crimes, which had been identified as the primary motivation for the initiative. Secondly, there was no indication that the ICD as proposed would eclipse the political resistance already encountered in pursuing justice for PEV up to that point. This challenge was only further amplified by the September 2013 motion passed by Parliament to repeal the International Crimes Act and withdraw Kenya from the Rome Statute. The absence of an effective Witness Protection Agency (WPA) was also cited as a concern as the institution remained significantly underfunded

---

<sup>107</sup> See 'Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal - Pretoria University Law Press (PULP)', accessed 27 September 2018, <http://www.pulp.up.ac.za/component/edocman/human-rights-and-democratic-governance-in-kenya-a-post-2007-appraisal>.

<sup>108</sup> 'Journalists For Justice', accessed 27 September 2018, <http://www.ifjustice.net/new-study-reveals-new-evidence-of-mass-rape-during-the-2007-08-post-election-violence-in-kenya/victims-voices/>.

<sup>109</sup> See 'Kenya: 10 Years after Electoral Violences, Security and Justice Reforms Remain Key', Worldwide Movement for Human Rights, accessed 27 September 2018, <https://www.fidh.org/en/region/Africa/kenya/kenya-10-years-after-electoral-violences-security-and-justice-reforms>.

<sup>110</sup> 'JSC Committee Report on the ICD of the High Court - 30th OCT 2012 | Kenya | Government Related Organizations', Scribd, accessed 27 September 2018, <https://www.scribd.com/document/236202990/JSC-Committee-Report-on-the-ICD-of-the-High-Court-30th-OCT-2012>.

<sup>111</sup> f See 'A Real Option for Justice? The International Crimes Division of the High Court of Kenya', accessed 27 September 2018, <http://kptj.africog.org/a-real-option-for-justice-the-international-crimes-division-of-the-high-court-of-kenya/>.

despite its pivotal role in any prosecutions.<sup>112</sup> The initiative was also criticized for lacking sufficient stakeholder input and attracted concerns that it was yet another attempt to replace the ICC process rather than complement it.<sup>113</sup>

These concerns have largely been rendered academic as no progress has been made in operationalizing the ICD. Its proponents largely relegated the prospects of prosecuting PEV cases and instead emphasized its jurisdiction over transnational crimes while the Executive led initiatives counter-productive to the objectives of the ICD such as the shuttle diplomacy against the ICC cases and parliamentary motions to repeal the ICA.<sup>114</sup>

In recalling the objective of criminal accountability and more so for those bearing the greatest responsibility for crimes against humanity, Kenya's experience has been one of high friction but varied and largely underwhelming results. Kenya's commitment to criminal accountability at the execution of the KNDR agreement degenerated as the political cost became manifest. Formal compliance with the ICC was in the face of the indictments converted into non-cooperation, which in turn replaced the narrative of accountability to that of confronting neo-colonialism.<sup>115</sup> It has been suggested that albeit limited, the ICC cases had a deterrent effect on the political class as demonstrated by the relatively low levels of violence in the 2013 elections, but that such deterrence was eventually eclipsed by State actions to interfere with the cases to the extent that Kenya stands referred to the ASP under Article 87(7) of the Rome Statute.<sup>116</sup>

Kenyans for Peace, Truth and Justice (KPTJ), a coalition of more than 30 Non-Governmental Organizations (NGOs) as well as ordinary Kenyans who came together to advocate for justice with regard to the PEV, have described the Kenya experience and its outcome as a formula for impunity by outlining the actions the State utilized to frustrate prosecution of PEV crimes. These actions consisted of the following steps: (1) Playing jurisdictional shell games such as purporting to establish the ICD, (2) blocking investigations and prosecutions, (3) ignoring victims, (4) disregarding courts and established procedures, (5) rigging the system as experienced in Kenya's shuttle diplomacy on the ICC cases, (6) harnessing state resources towards the frustration of the ICC cases on the basis of defending state sovereignty and (7) silencing the critics by targeting human rights organizations and the media for undue regulation and rhetoric that characterizes them as countering national interest.<sup>117</sup>

---

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.,. 16-18.

<sup>115</sup> Lugano, Geoffrey. 2017. 'Assessing the Acceptance of International Criminal Justice in Kenya.' In *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice*, edited by Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa. Nuremberg: International Nuremberg Principles Academy, 12.

<sup>116</sup> See Asaala, Evelyne. 2017. 'The Deterrence Effect of the International Criminal Court: A Kenyan Perspective'. In *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*, edited by Jennifer Schense and Linda Carter. Torkel Opsahl Academic EPublisher, 369.

<sup>117</sup> 'Kenya's 7-Step Formula for Impunity | Kenyans for Peace with Truth and Justice (KPTJ)', accessed 27 September 2018, <http://kptj.africog.org/kenyas-7-step-formula-for-impunity/>.

The Kenya cases before the ICC have also exposed the frailties of the court and the international justice system more broadly. The Office of the Prosecutor (OTP) has been criticized for failing to appreciate Kenya's political context in a manner that saw it miscalculate the prospects of state cooperation in investigations and subsequent prosecutions. Requests for cooperation by the prosecution under Part 9 of the Rome Statute at a time when Uhuru Kenyatta had assumed the presidency was considered naïve in the face of being rebuffed previously by President Kibaki who was not before the court.<sup>118</sup>

The court was late in appreciating what Kendall defined as the Leviathan of 'UhuRuto' to denote the political narrative and alliance forged from the court's intervention in Kenya.<sup>119</sup> In this narrative as already highlighted, the theme of neo-colonialism took centre stage where the suspects were victims being persecuted on behalf of the communities they represent, namely the Kikuyu and Kalenjin.<sup>120</sup> While the OTP decried the politicization of the Kenya cases, the court has been criticized for allowing suspects to control the public narrative to devastating effect when it failed to issue timely rebuttals to political messages and inaccurate statements.<sup>121</sup> This approach has had far reaching ramifications for the ICC in its relationship with African states as the Kenyatta administration alongside that of Bashir in Sudan successfully 'pan-Africanized their criticisms of the ICC' in a manner that exploited the contradictions of international justice where powerful western states and its allies seem to be beyond the reach of the ICC when compared to the less powerful African states.<sup>122</sup>

The experience of PEV victims with Kenya's criminal accountability measures has been one of diminishing returns with little to identify as silver linings. While victims were enthusiastic at the start of the ICC cases, the length of the proceedings as well as the Kenyan government's hostility towards accountability processes saw such enthusiasm replaced with disappointment and withdrawal of support for the process.<sup>123</sup> The oscillation of victim support was influenced by the reality of the UhuRuto alliance which made victims residing in the home regions of Kenyatta and Ruto consider it dangerous to be in support of the ICC. The ICC cases further categorized

---

<sup>118</sup> 'IMPUNITY RESTORED? Lessons Learned from the Failure of the Kenyan Cases at the International Criminal Court | Kenyans for Peace with Truth and Justice (KPTJ)', accessed 27 September 2018, <http://kptj.africog.org/impunity-restored-lessons-learned-from-the-failure-of-the-kenyan-cases-at-the-international-criminal-court/>.

<sup>119</sup> Sara Kendall, "'UhuRuto" and Other Leviathans: The International Criminal Court and the Kenyan Political Order', *African Journal of Legal Studies* 7, no. 3 (12 September 2014): 399–427, <https://doi.org/10.1163/17087384-12342053>.

<sup>120</sup> Ibid.

<sup>121</sup> 'Advocacy Brief on Kenya: 15th Session of the Assembly of State Parties (ASP) to the Rome Statute of the International Criminal Court 16-24 November, 2016', accessed 27 September 2018, <http://kptj.africog.org/advocacy-brief-on-kenya-15th-session-of-the-assembly-of-state-parties-asp-to-the-rome-statute-of-the-international-criminal-court-16-24-november-2016/>.

<sup>122</sup> Tim Murithi, 'Ensuring Peace and Reconciliation While Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan', *Africa Development*, no. 2 (2015): 26.

<sup>123</sup> See Thomas Obel Hansen, 'In the Shadow of Politics: Victim Participation in the Kenyan ICC Cases', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 15 September 2016), <https://papers.ssrn.com/abstract=2839325>.

victims into case victims, situation victims, non-registered PEV victims and non-PEV political violence victims, which served to create anxiety and divisions in an environment where compensation was perceived by some victims as being contingent on one's participation in the ICC cases.<sup>124</sup> It has been stated that the ICC cases did provide a source of empowerment for victims by availing them information on the justice process and providing a platform for their experiences to be heard.<sup>125</sup> The politics around the ICC meant that the cases did not contribute to reconciliation and its effect on healing for victims especially at the individual level is yet to be determined.<sup>126</sup> On the issue of compensation the withdrawal and termination of the Kenya cases meant that the ICC did not venture into the issue of reparations, while the Trust Fund for Victims (TFV) under the court has been criticized for failing to commence its operations in Kenya.<sup>127</sup>

In the absence of domestic prosecutions, some victims with the support of human rights organizations have filed civil cases with the intent of getting the state to undertake investigations and prosecutions for the PEV as well as provide compensation for the harm suffered. These cases include: *FIDA-K and others v. A.G. and others, HC Petition 273 of 2011* that seeks accountability and reparations for Internally Displaced Persons (IDPs) as a result of electoral violence from 1992-2008 and; *COVAW and others v. A.G. and others, HC Petition 122 of 2013* that seeks to compel the state to provide reparations and undertake prosecutions in relation to Sexual and Gender- Based Violence (SGBV) committed during the PEV. Both cases were ongoing at the time of writing.

### **The Truth, Justice and Reconciliation Commission (TJRC)**

As already highlighted, the TJRC was a mechanism that arose from the KNDR as an essential mechanism to address the root causes of the conflict. The ratified agreement prescribed a TJRC established by statute with a mandate to inquire into gross human rights violations and historical injustices that occurred in Kenya from its independence on December 12, 1963 to the signing of the National Accord on February 28, 2008. The parties to the KNDR understood this to include looking into politically motivated violence, assassinations, community displacements and evictions, major economic crimes especially grand corruption, historical land injustices and the illegal or irregular acquisition of land especially in their relation to conflict or violence.<sup>128</sup> The KNDR proposed a 7-member Commission consisting of 4 national and 3 international commissioners. The international commissioners would be selected by the AU Panel of Eminent Personalities while the 4 national commissioners would be selected through a national consultative process.<sup>129</sup>

---

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> 'Kenya: 10 Years after Electoral Violences, Security and Justice Reforms Remain Key', Worldwide Movement for Human Rights, accessed 27 September 2018, <https://www.fidh.org/en/region/Africa/kenya/kenya-10-years-after-electoral-violences-security-and-justice-reforms>.

<sup>128</sup> 'KNDR Documents - Truth, Justice and Reconciliation Commission', n.d., 4.

<sup>129</sup> Ibid

The enabling legislation for the TJRC namely, the Truth Justice and Reconciliation (TJR) Act, 2008 was enacted in November of that year and commenced on March 9, 2009. The objective of the TJRC was outlined to be the promotion of peace, justice national unity, healing, and reconciliation among the people of Kenya.<sup>130</sup> The mandate of the TJRC was a broad one which consisted of investigating and generating a record on the human rights and economic violations committed by the State, public institutions and public officers over the period of December 12 1963- February 28, 2008.<sup>131</sup> Notably, this time period was expanded even further as the law allowed the TJRC to include ‘antecedents, circumstances, factors and context of such violations’, which meant that it could venture into the colonial period as a way of understanding the impact of colonial legacy in post-independent Kenya.<sup>132</sup> This would culminate in the development of a report explaining the causes of the violations and making recommendations for remedial action, which included prosecution of perpetrators and redress for victims.

As part of elaborating on the nature of violations, the legislation introduced the omnibus term ‘gross human rights violations’ to include the following: Violations of fundamental human rights, including but not limited to acts of torture, killing, abduction and severe ill-treatment of any person; imprisonment or other severe deprivation of physical property; rape or any other form of sexual violence; enforced disappearance of persons; persecution against any identifiable group or collectivity on political, racial, national ethnic, cultural, religious or gender, or other grounds universally recognized as impermissible under international law; any attempt, conspiracy, incitement, instigation, command, procurement to commit the mentioned acts carried out between 12<sup>th</sup> December 1963 and 28<sup>th</sup> February 2008; and crimes against humanity.<sup>133</sup>

Additionally, the TJR Act ventured into the realm of socio-economic rights by including within its mandate, economic crimes which though not explicitly defined, is linked to grand corruption and the exploitation of natural or public resources; the socio-economic marginalization of communities and socio-economic impact of violations that targeted individuals’ bodily integrity or their civil and political rights.<sup>134</sup> In addition to investigative powers and facilitative powers such as conducting hearings and summoning witnesses or persons of interest, the TJRC was also notably equipped with the power to facilitate the granting of conditional amnesty to persons making full disclosure of relevant facts related to acts associated with gross human rights and economic crimes and in compliance with further requirements under the Act.<sup>135</sup>

The extensive temporal and subject-matter mandate as well as the functions and powers of the TJRC placed it well within the rubric of transformative justice as it was designed to address socio-economic justice and not just violations of civil and political rights. It was also required to

---

<sup>130</sup> ‘No. 6 of 2008’, accessed 28 September 2018, <http://www.kenyalaw.org/lex//actview.xql?actid=No.%206%20of%202008>. Section 5

<sup>131</sup> *Ibid.*, section 5(a).

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*, section 2

<sup>134</sup> *Ibid.* See sections 6 (g), (n), (p)

<sup>135</sup> *Ibid.*, section 5(f) as read together with Part III of the Act

venture into structural transformation of the Kenyan state to address not just the immediacy of the PEV, but the reality of colonial legacy. In including the element of justice, the TJRC was modelled on an integrated, holistic and comprehensive transformative agenda by being tasked to further national cohesion and unity alongside furthering accountability and combating impunity; this was a departure from prior truth commissions such as South Africa's which was perceived as prioritizing reconciliation since it did not have the term justice in its title.<sup>136</sup>

The TJR Act made provision for the appointment of 9 commissioners, with 3 being non-citizens and 6 being citizens of Kenya. As stipulated in the KNDR agreement, the 3 non-citizen Commissioners were to be appointed by the Panel of Eminent African Personalities, while the Kenyan commissioners were to be appointed through a nomination process by selection panel constituted by the then Minister for Justice and Constitutional Affairs, a ratification process by the National Assembly and ultimate appointment by the President in accordance with the Act.<sup>137</sup> The selection panel was the avenue for broad-based consultation of stakeholders in the appointment of commissioners as it constituted of representation from religious groups, the Law Society of Kenya, the Federation of Kenya Women Lawyers, the Central Organization of Trade Unions and Kenya National Union of Teachers (one representative), the Association of Professional Societies of East Africa, the Kenya National Commission on Human Rights, the Kenya Private Sector Alliance and the Federation of Kenya Employers (one representative) and the Kenya Medical Association.

The TJR Act commenced on 9<sup>th</sup> March 2009 and within three weeks of the commencement, the selection panel had not only been constituted, but also processed close to 250 names for consideration, interviewed 47 of those and shortlisted 15 candidates who were forwarded to the National Assembly.<sup>138</sup> The National Assembly further trimmed the candidates to 9 with President Kibaki ultimately appointing the following as Commissioners in July 2009: Bethuel Kiplagat as was appointed Chair, Betty Murungi was appointed Deputy Chair and the other Kenyan commissioners were Margaret Shava, Techla Namachanja Wanjala, Tom Ojienda, and Ahmed Sheikh. The non-citizen commissioners appointed were Judge Gertrude Chawatama (Zambia), Ambassador Berhanu Dinka (Ethiopia) and Professor Ron Slye (USA).

The TJRC undertook its work over a close to four year period in what can only be described as a tumultuous and controversial experience. It submitted its final report to President Uhuru Kenyatta in May 2013. The report, which is a total of 2,210 pages contained in four volumes, was the result of public hearings around the country as well as 42,465 statements and 1,828 memoranda collected from Kenyans. Volume 1 outlines the mandate of the TJRC, the methodology of its work and the challenges it faced. Volume 2 is further sub-divided into three parts where: Volume 2A contains information on violations of bodily integrity rights, such as unlawful killings, torture, enforced disappearances and sexual violence, Volume 2B on violations

---

<sup>136</sup> Ronald C. Slye, 'Putting the J into the TRC: Kenya's Truth Commission', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 8 March 2017), <https://papers.ssrn.com/abstract=2929768>, 3.

<sup>137</sup> See sections 9 and 10 of the TJR Act as read with the First Schedule of the Act.

<sup>138</sup> Kimberly Lanegran, 'The Kenyan Truth, Justice and Reconciliation Commission: The Importance of Commissioners and Their Appointment Process', *Transitional Justice Review* 1 (2015); 56., 1(3), p.56.

of social and economic rights, as well as historical injustices and Volume 2C, which covers violations of the rights of special groups, such as women, children and minorities. Volume 3 covers ethnic tensions and reconciliation and the final Volume 4 is dedicated to the findings and recommendations of the TJRC, as well as a proposed implementation framework.

It is not within the scope of this report to discuss the TJRC report in substantive detail. The focus will instead be on the achievements, challenges and lessons that the TJRC can offer in reflecting on its transformative potential. On the discharge of its mandate, TJRC report is appreciated for being ‘an official record of the state’s complicity in serial human rights violations’ but with acknowledgement that it emerged from an imperfect process.<sup>139</sup> On its the venture into socio-economic rights violations, the TJRC is described as having ‘devoted far more room in its Final Report to the description and analysis of socio-economic violations and the relationship between those violations and other violations within the Commission’s mandate than the South African, or indeed any other, truth commission.’<sup>140</sup> However, this work was subject to flaws such as the absence of primary data and the over-reliance on secondary data that was largely speculative and anecdotal, biases towards bodily harm violations in the statement-taking process, and the fact that the findings and recommendations have failed to impact victims by way of redress or prevention of the recurrence of violations.<sup>141</sup>

The TJRC Act contained provisions on amnesty that ideally were meant to further the objectives of knowledge and acknowledgement in the truth seeking process. However, the TJRC did not utilize this mandate. The provisions on amnesty were in the final assessment found to have been undermined by contradictory drafting that severely restricted the very prospect of granting amnesty by: restricting the role of the TJRC to only recommending rather than granting amnesty and excluding the recommendation of amnesty for gross violation of human rights which broadened the exclusion clause to an extent that almost no crimes would qualify for amnesty.<sup>142</sup> As a result, the potential of acknowledgement by perpetrators in furtherance of restorative truth was not realized.

The TJRC’s leadership, independence and relationship with other stakeholders are also other areas of critical reflection. Despite the elaborate process laid out in the TJRC Act, the suitability of some of the selected commissioners was immediately questioned on account of their

---

<sup>139</sup> See ‘Lessons to Be Learned: An Analysis of the Final Report of Kenya’s Truth, Justice and Reconciliation Commission | International Center for Transitional Justice’, accessed 28 September 2018, <https://www.ictj.org/publication/kenya-tjrc-lessons-learned> and Gabrielle Lynch, ‘TRANSITIONAL JUSTICE: Impunity, Project Kenya and Burying the TJRC Report’, *The E Review* (blog), 8 September 2018, <https://www.theeastafricanreview.info/op-eds/2018/09/08/when-killers-become-victims-impunity-project-kenya-and-burying-the-tjrc-report/>.

<sup>140</sup> Ronald C. Slye, 15.

<sup>141</sup> Ibid., 5-16.

<sup>142</sup> See Ibid., 25-31 and Sosteness Francis Materu, ‘Alternatives and Adjuncts to Domestic Prosecutions’, in *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, ed. Sosteness Francis Materu, International Criminal Justice Series (The Hague: T.M.C. Asser Press, 2015), 141–74, [https://doi.org/10.1007/978-94-6265-041-1\\_5](https://doi.org/10.1007/978-94-6265-041-1_5).

controversial pasts or in some cases, the lack of sufficiently prominent profiles in the eyes of some.<sup>143</sup> The heart of this controversy lay with the appointment of Bethuel Kiplagat as Chair. Despite going through the process, Kiplagat's appointment was vehemently rejected by a section of civil society and victim groups. Their opposition was based on the fact that Kiplagat, who had previously served in government, would be a person of interest in a series of incidences that the TJRC would be looking into namely: The "Wagalla Massacre" of 1984 that saw atrocities visited on ethnic Somalis during a security operation that was outlined during a local District Security Committee meeting that Kiplagat participated in; the murder of Robert Ouko in 1990 who was at the time Minister of Foreign Affairs where Kiplagat served as Permanent Secretary and; the fact that Kiplagat had been adversely mentioned in relation to the illegal acquisition of three parcels of land.<sup>144</sup>

The controversy around Kiplagat's position had far reaching ramifications for the TJRC as a whole. The first effect was that it eroded public support and turned a significant section of civil society from friend to foe. The Kenya Transitional Justice Network (KTJN) a prominent coalition of civil society and victim groups epitomized the turbulent relationship that the TJRC would have with this core constituency as a result of the Kiplagat controversy. KTJN had been instrumental in shaping the TJRC Act, advocating for its operationalization, mobilizing victims groups and the public to engage with the Commission once its hearings commenced and training monitors to strengthen the documentation and research associated with the TJRC process.<sup>145</sup> KTJN's broad membership would however fracture in the face of the Kiplagat controversy as some members preferred to disengage until Kiplagat was removed from office while some sought to continue engaging with the Commission on the basis of supporting the victims who had decided to participate in the process regardless of the ensuing controversy and also as a way of salvaging the substantive public investment that had already been made.

The consequence of this was a far more subdued collaboration between civil society and the TJRC at best and outright hostility or mobilization against the commission at worst, which significantly undermined its outreach efforts to the public and other strategic partners. Indeed, this state of affairs led to the resignation of Betty Murungi as Vice-Chair in 2010<sup>146</sup> and the withdrawal of donor support to the detriment of the TJRC's operations.<sup>147</sup> In the first volume of its report, the TJRC decried the policy of non-cooperation employed by non-state actors who actively dissuaded donors from supporting the Commission and sought to engage them in

---

<sup>143</sup> Kimberly Lanegran, 56.

<sup>144</sup> Ibid., 58.

<sup>145</sup> Andrew Songa, 'Locating Civil Society in Kenya's Transitional Justice Agenda: A Reflection on the Experience of the Kenya Transitional Justice Network with the Truth, Justice and Reconciliation Commission', in *Advocating Transitional Justice in Africa: The Role of Civil Society*, ed. Jasmina Brankovic and Hugo van der Merwe, Springer Series in Transitional Justice (Cham: Springer International Publishing, 2018), 17–41, [https://doi.org/10.1007/978-3-319-70417-3\\_2](https://doi.org/10.1007/978-3-319-70417-3_2).

<sup>146</sup> 'Truth Team Boss Resigns in Protest', Daily Nation, accessed 28 September 2018, <https://www.nation.co.ke/news/Truth-team-boss-resigns-in-protest-/1056-888808-e9htb5/index.html>.

<sup>147</sup> 'TJRC Official Quits as Team Goes Broke :: Kenya - The Standard', accessed 28 September 2018, <https://www.standardmedia.co.ke/business/article/2000020812/tjrc-official-quits-as-team-goes-broke>.

endless legal battles as part of a decimation strategy; KTJN was mentioned specifically in this regard.<sup>148</sup> The resolution of Kiplagat's fate would consume approximately one and a half years of the Commission's lifespan as it had to contend with a tribunal under the TJR Act constituted to investigate Kiplagat as well as a legal challenge filed by Kiplagat challenging the mandate of the said tribunal. The duration of the tribunal lapsed without substantively looking into the particulars against Kiplagat. However, its constitution had the benefit of having him stepping aside from November 2010 to April 2012, when his return was facilitated via a truce brokered by the Ministry of Justice and Constitutional Affairs.<sup>149</sup>

During Kiplagat's absence (2010-2012), the Commission enjoyed sufficient public support that enabled them to undertake public hearings around the country and re-establish relationships with donors and the section of civil society that had disengaged from the process. KTJN for example would return to the process and provide critical support in the development of the reparations framework in the final TJRC report. The re-engagement had been bolstered by the fact that, even when Kiplagat returned, the agreement reached required him to be excluded from writing the Commission's final report and relegated him to only reviewing the report and even then not reviewing any sections pertaining to massacres, political assassinations and land.<sup>150</sup>

In addition to the Kiplagat controversy, the TJRC also had to contend with ambivalent political support for its work as well as political interference that undermined its work. At the height of the Kiplagat saga, it was notable that the government stood accused of failing to accord the commission the financial support it required to undertake its work. Furthermore, at the height of the crisis, the Minister for Justice and Constitutional Affairs pronounced the TJRC a failure and advocated for its disbandment.<sup>151</sup>

Despite the presumed safeguards included in the report-drafting process, the submission of the final report revealed yet another level of interference. In the aftermath of the report's release, Commissioners Dinka, Slye and Chawatama issued a dissenting opinion with respect to Chapter 2 of Volume 2B of the final report citing irregular alterations to various paragraphs touching on the land question. The dissenting opinion outlined an orchestrated effort by the Executive that saw them receive an advance copy of the report and unduly influence some of the Kenyan Commissioners and staff to introduce amendments to the report after it had been endorsed by the Commissioners in common and to omit the dissent of the commissioners who would not go along with the amendments.<sup>152</sup> The Commissioners would ultimately release their dissent independently rather than as part of the official report. Despite these challenges to its independence and relations with other stakeholders, it was laudable that the TJRC maintained a

---

<sup>148</sup> Truth, Justice, and Reconciliation Commission, 'Final Report - TJRC Report Volume 1', *I. Core TJRC Related Documents*, 3 May 2013, <https://digitalcommons.law.seattleu.edu/tjrc-core/7>. 142.

<sup>149</sup> The Standard, 'Commissioners Welcome Kiplagat Back to TJRC', The Standard, accessed 28 September 2018, <https://www.standardmedia.co.ke/article/2000056078/commissioners-welcome-kiplagat-back-to-tjrc>.

<sup>150</sup>. Kimberly Lanegran, 65.

<sup>151</sup> 'Kilonzo Tells TJRC Team to Quit', Daily Nation, accessed 28 September 2018, <https://www.nation.co.ke/news/Kilonzo-tells-TJRC-team-to-quit/1056-902226-2600x4/index.html>.

<sup>152</sup> 'Final Report - Dissent by International Commissioners', n.d., 9.

good level of transparency as displayed in its documentation of these experiences in the final report.<sup>153</sup> The approach of transparency about its challenges and the presence of free-thinking commissioners who were willing to go against the grain served to restore some measure of public confidence in the TJRC process.

The implementation process for the TJRC report has also become a point of contention. After the release of the report, the National Assembly in December 2013 amended the TJR Act and fundamentally altered its implementation framework. The law was altered to allow the National Assembly to consider the report and to state that the institution of a monitoring mechanism for the implementation of the report would only happen after such consideration and in accordance with the recommendations of the National Assembly.<sup>154</sup> Furthermore, the implementation of the TJRC report was restricted to only commencing immediately after consideration of the report by the National Assembly.<sup>155</sup> The previous provisions required the report to be tabled in Parliament within 21 days of its publication but that the implementation mechanism would be in accordance with the recommendations of the TJRC and would commence within six months upon publication of the report.

These amendments drew immediate criticism from a section of civil society and some legislators during the debate in the National Assembly as it was felt they would expose the report to the mischief of alteration by perpetrators seeking to avoid accountability or enable a disinterested political class to stall the implementation of the report indefinitely. These fears were well-founded as the life of that National Assembly came to a close in August 2017 without them considering the TJRC report as required by the amended law. This was despite efforts by civil society and victim groups to engage the National Assembly through petitions and dialogue over this period where only rhetorical assurances were secured.<sup>156</sup>

One of the key consequences of the National Assembly failing to adopt the TJRC report has been the non-implementation of reparations for victims. Despite reparations being highly prioritized by victims and designated as urgent<sup>157</sup>, the reparations framework outlined in the TJRC report has not been implemented. The only notable development emerged from the Presidency when President Kenyatta in his March 2015 State of the Nation Address urged parliament to consider the TJRC report without further delay and established a fund of 10 billion Kenyan shillings (\$9.5

---

<sup>153</sup> Sosteness Francis Materu, 150.

<sup>154</sup> 'No. 6 of 2008', accessed 28 September 2018,

<http://www.kenyalaw.org/lex//actview.xql?actid=No.%206%20of%202008>. Section 48 (4)

<sup>155</sup> Ibid., section 49

<sup>156</sup> See 'Parliament to Debate the TJRC Report after Petition from Victims Is Tabled', accessed 28 September 2018,

<https://www.jfjustice.net/en/victims-voices/mps-to-debate-the-tjrc-report-after-petition-from-victims-is-tabled>.

and Kaberia, J. (2016, February 11). 'MPs Pledge to Adopt TJRC Report by March, but Fear Resistance » Capital News', accessed 28 September 2018, <https://www.capitalfm.co.ke/news/2016/02/mps-pledge-to-adopt-tjrc-report-by-march-but-fear-resistance/>.

<sup>157</sup> See "'To Live as Other Kenyans Do": A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations', International Center for Transitional Justice, 25 July 2011, <https://www.ictj.org/publication/live-other-kenyans-do-study-reparative-demands-kenyan-victims-human-rights-violations>.

million) over three years to encourage measures he described as restorative justice to ameliorate the plight of victims. In addition, the President offered a blanket apology for all past wrongs on his behalf and that of his government and all past governments.<sup>158</sup>

On the basis of the President's undertaking, the Department of Justice within the State Law Office in conjunction with the Kenya National Commission on Human Rights (KNCHR) and in partnership with the Kenya Transitional Justice Network (KTJN) by March 2017 had developed the draft Public Finance Management (Reparations for Historical Injustices Fund) Regulations, 2017, as the proposed legal framework to govern the use of President's fund. These proposed regulations anchor the fund on the Public Finance Management Act; establishes an inclusive governance framework consisting of a Board, an Advisory Reference Group and a Secretariat; provides the procedures for outreach, education, registration and verification of claims; outlines the type of reparations to be provided for under the fund and; the appellate procedures for decisions made among other relevant processes.<sup>159</sup> The priority for the incoming Parliament should be to finally consider and adopt the TJRC report as well as the draft regulations for the fund but that remains to be seen.

In the meantime, the TJRC report and the notion of historical injustices featured prominently in the campaigns for the 2017 general elections. The Presidential election, which yet again saw President Uhuru Kenyatta under the Jubilee party take on Raila Odinga under the National Super Alliance (NASA) saw these lead candidates take diametrically opposite views on the fate of the TJRC report. The Jubilee Party in its manifesto under the section of building a united and cohesive nation touted as one of its achievements that it had "closed a painful chapter in our history through the President's apology to the country for historical injustices and the resettlement of Internally Displaced Persons".<sup>160</sup> This language of finality was reinforced on the campaign trail where the Deputy President was cited as stating that the Jubilee government would not implement the TJRC report as it would re-open old wounds and cause divisions.<sup>161</sup> This was particularly stinging for a section of victims who had organized themselves under the National Victims and Survivors Network (NVSN) and developed a National Victims and Survivors manifesto around the implementation of the TJRC report in the hope that it would be

---

<sup>158</sup> 'SPEECH BY HIS EXCELLENCY HON. UHURU KENYATTA, C.G.H., PRESIDENT AND COMMANDER IN CHIEF OF THE DEFENCE FORCES OF THE REPUBLIC OF KENYA DURING THE STATE OF THE NATION ADDRESS AT PARLIAMENT BUILDINGS, NAIROBI ON THURSDAY, 26TH MARCH, 2015 | The Presidency', accessed 28 September 2018, <http://www.president.go.ke/2015/03/26/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forces-of-the-republic-of-kenya-during-the-state-of-the-nation-address-at-parliament-buildings-na/>.

<sup>159</sup> statelaw, 'KEY NOTE ADDRESS', *State Law Office and Department of Justice* (blog), accessed 28 September 2018, <http://www.statelaw.go.ke/928-2/>.

<sup>160</sup> 'Complete Jubilee Manifesto', *Daily Nation*, accessed 28 September 2018, <https://www.nation.co.ke/news/Complete-Jubilee-Manifesto/1056-3988596-gvbxlyz/index.html>.

<sup>161</sup> 'Ruto's Remarks on TJRC Report Are Callous and Fail to Move Us Forward :: Kenya - The Standard', accessed 28 September 2018, <https://www.standardmedia.co.ke/article/2001249300/ruto-s-remarks-on-tjrc-report-are-callous-and-fail-to-move-us-forward>.

incorporated by political parties.<sup>162</sup> While the Jubilee Party failed to embrace the TJRC agenda, NASA and other smaller political parties were receptive to it and committed to implement the TJRC report if elected. NASA in its manifesto under the pillar of nation-building outlined initiatives that would help Kenya come to terms with its past and they included: establishing a national remembrance framework as part of a memorialization effort; resettlement and/or compensation of all Internally Displaced Persons; addressing injustices that have persisted even in the aftermath of the 2010 Constitution such as extrajudicial killings and torture; upholding constitutional safeguards on ancestral and cultural land rights and; undertaking to review laws with the aim of eliminating impediments to the resolution of historical injustices.<sup>163</sup> Raila Odinga made undertakings to implement the TJRC report if elected.<sup>164</sup>

The 2017 elections have resulted in the election of Uhuru Kenyatta and the Jubilee Party for a second term in office albeit highly contested by Raila Odinga and NASA with all indications pointing to a protracted political crisis and the possibility of national dialogue as a pathway of resolving the crisis. While this prevailing situation does not provide clarity as to whether the TJRC report has prospects of being implemented, it is instructive that some of themes touted for the proposed dialogue agenda bear similarity to the issues addressed in the TJRC report. Themes such as strengthening of institutions, inclusivity, devolution and good governance have been propounded by the diplomatic community alongside the clergy, business and trade union leaders, while NASA has been quoted as pushing for electoral justice, strengthening of the judiciary and reforming the security sector.<sup>165</sup> Closely associated to this has been an emerging campaign for secession in NASA strongholds that has even yielded draft legislation on grounds that some of Kenya's communities have endured discrimination and suppression by successive governments.<sup>166</sup> Should a national dialogue take place, it would be prudent for the TJRC report and its implementation to be considered as one of the pathways to addressing issues that have clearly been canvassed in the report and carry the perspectives of Kenyans in terms of how to resolve them.

---

<sup>162</sup> 'NATIONAL VICTIMS & SURVIVORS MANIFESTO', accessed 28 September 2018, <http://kptj.africog.org/national-victims-survivors-manifesto/>.

<sup>163</sup> 'Nasa's Manifesto', Daily Nation, accessed 28 September 2018, <https://www.nation.co.ke/news/politics/nasa-manifesto/1064-3990154-82ht34/index.html>.

<sup>164</sup> 'Raila Vows to Implement TJRC Report If Elected » Capital News', accessed 28 September 2018, <https://www.capitalfm.co.ke/news/2017/07/raila-vows-implement-tjrc-report-elected/>.

<sup>165</sup> See '4-Point Agenda for Uhuru, Raila Talks - Daily Nation', accessed 28 September 2018, <https://www.nation.co.ke/news/politics/Envoys-pick-four-point-agenda-as-they-prepare-for-talks-/1064-4230398-dbio54z/index.htm> and 'ODINGA: It Is D-Day for Electoral Justice in Kenya in 2018', Daily Nation, accessed 28 September 2018, <https://www.nation.co.ke/oped/opinion/-It-is-D-Day-for-electoral-justice-in-Kenya-in-2018-/440808-4246538-m1ankuz/index.html>.

<sup>166</sup> 'Kaluma Drafts Bill for Secession of 40 Counties', Daily Nation, accessed 28 September 2018, <https://www.nation.co.ke/news/politics/Peter-Kaluma-secession-40-counties/1064-4185586-13tcbf3z/index.html>.

## **Institutional Reforms: The Judiciary and the Police**

The inclusion of institutional reforms in transitional justice is a more comprehensive approach aimed at making justice possible for the population of an entire country as a whole.<sup>167</sup> In transformative justice, institutional reforms are also considered to be an essential component of political justice as a pathway to promoting a sense of fair representation and participation of the general population.<sup>168</sup> In the Kenya, the KNDR identified institutional reform to be one of the key pillars of addressing the underlying causes for the PEV. The components for institutional reform included the following: Police reform, parliamentary reform, executive reform and civil service reform.<sup>169</sup> This report will restrict its discussion to judicial and police reforms as falling within Kenya's transformative transitional justice agenda.

### **i. Judicial Reforms**

The immediate impetus for judicial reforms in the post-2007 era was derived from the lack of public confidence in the institution to resolve the crisis that emerged from the 2007 Presidential election results. This was in the context of a broader legacy of the Judiciary that had up to that point been deemed inefficient, corrupt, politically biased and designed to fail.<sup>170</sup> Under the KNDR and in particular Agenda Item 4, judicial reform was conceptualized to entail the following: Financial independence; transparent and merit-based appointment, discipline and removal of judges; strong commitment to human rights and gender equity; reconstitution of the Judicial Service Commission (JSC) for inclusion of other stakeholders as well as enhancing its independence and autonomy; JSC legislation to provide for peer-review mechanisms and performance contracting and; adopting a sector-wide approach to increase recruitment, training, planning, management and implementation of programmes in the justice sector.<sup>171</sup>

The promulgation of the Constitution in 2010 served to address the fundamental aspects of the institutional and independence aspects of the Judiciary's reform agenda. The Constitution under Articles 159 and 160 affirms that judicial authority is derived from the people of Kenya and that its exercise is only subject to the Constitution and the law rather than any person or authority. The court hierarchy now includes the Supreme Court as the apex court as opposed to the Court of Appeal previously and the JSC is established to 'facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of

---

<sup>167</sup> Basil Fernando, 'Editorial: Institutional Reforms as an Integral Part of a Comprehensive Approach to Transitional Justice', *International Journal of Transitional Justice* 8, no. 2 (1 July 2014): 187–93, <https://doi.org/10.1093/ijtj/iju010>.

<sup>168</sup> Lambourne, 44.

<sup>169</sup> 'KNDR Documents - Statement of Principles on Long-Term Issues and Solutions Updated with Implementation Matrix', n.d., 15.

<sup>170</sup> Maya Gainer, 'Transforming the Courts: Judicial Sector Reforms in Kenya, 2011-2015', *Transforming the Courts: Judicial Sector Reforms in Kenya, 2011-2015*, 22 November 2015, [/publications/transforming-courts-judicial-sector-reforms-kenya..](#)

<sup>171</sup> 'KNDR Documents - Statement of Principles on Long-Term Issues and Solutions Updated with Implementation Matrix', n.d., 15.

justice' with a diverse membership including representatives of the public and the Law Society of Kenya (LSK).<sup>172</sup> The Chief Justice is the head of the Judiciary which includes being President of the Supreme Court and Chair of the JSC.

The appointment process for the Chief Justice, Deputy Chief Justice and other Judges has ceased to be a preserve of the Executive with the President required to make these appointments in accordance with the recommendations of the JSC.<sup>173</sup> The appointments of Chief Justice and Deputy Chief Justice in 2011 were lauded for being far more open processes than in the previous constitutional dispensation as there was a public call for applications and shortlisted candidates were interviewed on live television.<sup>174</sup> Willy Mutunga, long considered a reformer and with an illustrious career in civil society, emerged as the Chief Justice from this process. In reflecting on public process that led to his appointment and an acknowledgement of the people as the source of judicial authority, Chief Justice Mutunga noted that 'Even as I appeared before the JSC or the Parliament, I knew that my real audience was the Kenyan people.'<sup>175</sup> The subsequent appointments of current Chief Justice David Maraga and Deputy Chief Justice Philomena Mwilu and Justice Lenaola were undertaken under the same public scrutiny that has served to entrench the notion of the judiciary as being accountable to the people.

Another essential pillar for judicial reforms was the vetting of all sitting Judges and Magistrates within a year of the promulgation of the Constitution.<sup>176</sup> This process was actualized through the enactment of the Vetting of Judges and Magistrates Act, 2011, which in turn facilitated the establishment of the Judges and Magistrates Vetting Board (JMVB) with the mandate of undertaking the vetting exercise in accordance with the values and principles set out in Articles 10 and 159 of the Constitution. This mandate was further clarified by the Supreme Court to be restricted only to investigating the conduct of Judges and 'Magistrates who were in office on the effective date on the basis of alleged acts and omissions arising before the effective date, and not after the effective date.'<sup>177</sup> The JMVB commenced its work in February 2012 and concluded it in March 2016.

In vetting the Court of Appeal, the JMVB found 4 of its 9 judges or 44% of the bench to be unsuitable, mostly on grounds of being partial in furtherance of government repression.<sup>178</sup> In the High Court, 7 of its 44 judges or 15.9% were deemed unsuitable however 3 Judges successfully argued their review applications and were retained.<sup>179</sup> The unsuitable Judges were cited for

---

<sup>172</sup> Constitution of Kenya at Articles 172 and 171.

<sup>173</sup> Ibid at Article 16 (1)

<sup>174</sup> Maya Gainer, 1..1.

<sup>175</sup> Brian Obara, 'Former Chief Justice Willy Mutunga: Courts Do Politics and Do Politics All the Time', Text, Never Again, 15 January 2018, <https://neveragain.co.ke/former-chief-justice-willy-mutunga-courts-do-politics-and-do-politics-all-time/article>.

<sup>176</sup> Constitution of Kenya Sixth Schedule, Section 23

<sup>177</sup> 'Petition Nos 13 A, 14 & 15; of 2013 (Consolidated) - Kenya Law', accessed 28 September 2018, <http://kenyalaw.org/caselaw/cases/view/103263/>.

<sup>178</sup> Kenya Judges and Magistrates Vetting Board, *Vetting of Judges and Magistrates in Kenya: Final Report* (Judges and Magistrates Vetting Board, 2016), 78.

<sup>179</sup> Ibid., 80.

various infractions including poor temperament, lack of fairness and impartiality, lack of integrity and impropriety, lack of good judgement, denying citizens access to justice, lack of intellectual capacity and diligence and poor writing style.<sup>180</sup> At the Magistrates level only 14 of its 298 members or 4.7% were deemed unsuitable, but the JMVB was quick to point out that this was not testament to their suitability. Rather, the JMVB had experienced difficulties in vetting magistrates due to the following challenges: the low literacy levels among the citizenry engaging the courts at this level and the lack of legal representation meant that the miscarriage of justice was seldom followed-up at this level; limited court records for reference at the magistrate level; frequent transfer of magistrates from station to station, which meant they were hard to identify by those with grievances and; the limited scope introduced by *Judges and Magistrates Vetting Board v Kenya Magistrates and Judges Association & another [2014] eKLR*.

In its final report to the President, the JMVB made a series of recommendations aimed at consolidating the progress made under the vetting exercise in a manner that would further judicial reforms. These recommendations were classified into the themes of access to justice; appointments, training and mentorship and; establishing and maintaining judicial performance standards and dealing with judicial misconduct.<sup>181</sup>

While not discussing these recommendations exhaustively, it is important to note that the JMVB called for the strengthening of the judicial appointment process especially at the magistrate's level as its process has a lower threshold of scrutiny in comparison to that of Judges.<sup>182</sup> The elective nature of positions within the JSC was also an area of concern for the JMVB; this crucial oversight body within the Judiciary had registered allegations of corruption in the 2015 election of its representatives from the bodies required to forward members to JSC.<sup>183</sup> Finally, the JMVB also noted that there was demand for the administrative and other staff within the Judiciary to be vetted as well, but noted that this would be hindered by the prohibitive cost involved. To this end, the JMVB instead called for an effective disciplinary tribunal process that would incorporate Chapter 6 of the Constitution alongside the values and principles contained in Articles 10 and 159 of the Constitution.<sup>184</sup>

Alongside the vetting process, the Judiciary under Chief Justice Willy Mutunga developed the Judiciary Transformation Framework (JTF) 2012-16 as a tool to aid its reconstruction in keeping with the expectations ushered in by the 2010 Constitution. This is aptly articulated in the following passage from the framework:<sup>185</sup>

The use of the term "Transformation" in this document is, therefore, both intentional and necessary. It conveys the Judiciary's clear understanding of the vision of societal transformation mandated by the new Constitution as well as the Judiciary's role in its attainment. It conveys a clear recognition by the Judiciary that, through this Constitution, Kenyans wish to fundamentally

---

<sup>180</sup> Ibid.

<sup>181</sup> Ibid., Chapter 9.

<sup>182</sup> Ibid., 203

<sup>183</sup> Ibid., 204

<sup>184</sup> Ibid., 205.

<sup>185</sup> Kenya Judiciary, *Judiciary Transformation Framework 2012-2016* (The Judiciary, 2012), 10.

restructure and re-organize all the institutions of governance. It conveys an acute sense of urgency by the Judiciary that it must heed the call of Kenyans to radically change its practices, norms, and structures in order to serve the interests of all in the new democratic order. The Judiciary is clear that Transformation is necessary to make it the legitimate, effective and independent custodian of justice mandated by the Constitution.

The JTF was organized into 4 pillars, namely: People-focused delivery of justice; transformative leadership, organizational culture and professional staff; adequate financial resources and physical infrastructure and; harnessing technology as an enabler for justice.<sup>186</sup> At the end of its operational period, the Judiciary has cited institutional building and capacity enhancement as the most significant achievement of the JTF.<sup>187</sup> Illustratively, the Judiciary in this period established High Courts in 34 Counties, embraced the concept of mobile courts and decentralized the Court of Appeal.<sup>188</sup> Progress was also made in reducing case backlog as the total case load in the Judiciary declined from over one million cases in 2011 to less than 500,000 in 2016.<sup>189</sup>

Despite such laudable statistics, significant challenges have been encountered. The Judiciary's first major challenge under the new dispensation came in the form of the 2013 Presidential Petition filed by Raila Odinga's Coalition for Reforms and Democracy (CORD) after it disputed the results of that election.<sup>190</sup> The Judiciary was brought into the epicenter of a highly contentious political process that left it confronted by a significant segment of the population that felt aggrieved by its decision to uphold the election of Uhuru Kenyatta as President in that election.<sup>191</sup> Chief Justice Mutunga anecdotally spoke of civil society leaders who would not speak to him after that verdict, being called the 'Chief of Injustice' and carrying the burden of community expectations to which he stated:<sup>192</sup>

I got into trouble with the broad masses of the community after the 2013 presidential petition. My community, through its baron, was allied to CORD. Even my rural relatives and family expected me to rule in favour of the community baron.

The Judiciary endured and in some respects continues to endure a strained relationship with the Executive and Parliament. In addition to the disregard of court orders, the Judiciary has also

---

<sup>186</sup> Ibid., 1.

<sup>187</sup> 'Sustaining Judiciary Transformation 2017-2021 – The Judiciary of Kenya', accessed 28 September 2018, <https://www.judiciary.go.ke/download/sustaining-judiciary-transformation-2017-2021/>.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> 'Petition 5, 3 & 4 of 2013 - Kenya Law', accessed 28 September 2018, <http://kenyalaw.org/caselaw/cases/view/87380/>.

<sup>191</sup> While the Court acknowledged that the election was not perfect, it was not persuaded by the evidence presented by the petitioners and unanimously held that the threshold to nullify the election had not been met. The test applied by the Court in this instance was as follows: "Did the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent?"

<sup>192</sup> Brian Obara, 'Former Chief Justice Willy Mutunga: Courts Do Politics and Do Politics All the Time', Text, Never Again, 15 January 2018, <https://neveragain.co.ke/former-chief-justice-willy-mutunga-courts-do-politics-and-do-politics-all-time/article>

experienced sustained budget cuts in the midst of a politicized budgeting process.<sup>193</sup> These strained relations would only escalate once the Supreme Court was once again called upon to hear a Presidential Petition in relation to the August 2017 Presidential election. In a repeat of the 2013 situation, Raila Odinga once again petitioned the Supreme Court to nullify the re-election of President Kenyatta citing that the elections were neither free, fair nor credible.<sup>194</sup> In a departure from 2013 however, the Court in this instance deemed that there were sufficient grounds to nullify the election and call for fresh Presidential elections.<sup>195</sup> What followed were unprecedented attacks on the Judiciary by President Kenyatta and his supporters in which the President threatened to ‘deal with’ and ‘revisit’ the Judiciary in the aftermath of the fresh Presidential election.<sup>196</sup> Protests bordering on violence within court precincts also took place and this led to the Chief Justice as Chair of the JSC issuing an unprecedented statement which in part read:<sup>197</sup>

The Judiciary is an arm of Government equal to the Executive and the Legislature. If leaders are tired of having a strong and independent judiciary, they should call a referendum and abolish it altogether. Before that happens, the Judiciary will continue to discharge its mandate in accordance with the Constitution and individual oaths of office.

The fresh Presidential election took place in October 2017 albeit without the participation of Raila Odinga who boycotted the election on the grounds that nothing had been done to rectify the anomalies from the last election.<sup>198</sup> Undertaken under a cloud of protests, violence and voter

---

<sup>193</sup> ‘Kenya: 10 Years after Electoral Violences, Security and Justice Reforms Remain Key’, Worldwide Movement for Human Rights, accessed 27 September 2018, <https://www.fidh.org/en/region/Africa/kenya/kenya-10-years-after-electoral-violences-security-and-justice-reforms>, 47.

<sup>194</sup> ‘Presidential Petition 1 of 2017 - Kenya Law’, accessed 28 September 2018, <http://kenyalaw.org/caselaw/cases/view/140420/>.

<sup>195</sup> Ibid. In this case, the Court in a majority decision of 4-2, was persuaded by the evidence adduced that was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void. This was on account of irregularities and failures in the technology associated with the results transmission system. Notably, the majority decision stated as follows: “Have we in executing our mandate lowered the threshold for proof in presidential elections? Have we made it easy to overturn the popular will of the people? We do not think so. No election is perfect and technology is not perfect either. However, where there is a context in which the two Houses of Parliament jointly prepare a technological roadmap for conduct of elections and insert a clear and simple technological process in Section 39(1C) of the Elections Act, with the sole aim of ensuring a verifiable transmission and declaration of results system, how can this Court close its eyes to an obvious near total negation of that transparent system?”

<sup>196</sup> ‘Uhuru Kenyatta to Court: “We Shall Revisit This”’, accessed 28 September 2018, <https://www.aljazeera.com/news/2017/09/uhuru-kenyatta-court-revisit-170902130212736.html>.

<sup>197</sup> ‘Kenya: Statement of Hon. Chief Justice Maraga – Kenya Judiciary on Threats Against the Judiciary’, *IAPL Monitoring Committee on Attacks on Lawyers* (blog), 19 September 2017, <https://defendlawyers.wordpress.com/2017/09/19/kenya-statement-of-hon-chief-justice-maraga-kenya-judiciary-on-threats-against-the-judiciary/>.

<sup>198</sup> ‘Raila Quits: Nasa’s Full Statement - Daily Nation’, accessed 28 September 2018, <https://www.nation.co.ke/news/Raila-Odinga-quits-repeat-presidential-election-Kenya-Nasa/1056-4133616-tr6we4z/index.html>.

boycotts, the election yet again attracted petitions challenging its outcome.<sup>199</sup> In this instance, the Supreme Court unanimously upheld the election and Uhuru Kenyatta was sworn in for a second term in office. The fallout from this decision in terms of the relations between the Judiciary and the political class cannot be fully ascertained at this juncture, but it is clear that the desire to influence appointments and operations within the Judiciary has increased in terms of political imperatives.

Another major challenge encountered during the JTF cycle was the question of transition within the Supreme Court. Chief Justice Mutunga decided in the interest of a smooth transition to retire in 2016, a year before attaining the age of 70 years upon which he would be required to constitutionally step down from office.<sup>200</sup> Deputy Chief Justice Kaplana Rawal and Justice Philip Tunoi on the other hand, filed a case challenging the applicability of the constitutional provision that required them to retire upon attaining the age of 70 years and the case made it all the way to the very same Supreme Court they sat on.<sup>201</sup> The proceedings developed factions within the bench and the wider JSC. This culminated in Chief Justice Mutunga and two other Justices recusing themselves from hearing the case with the consequence that a decision previously issued by the Court of Appeal affirming the retirement age at 70 years, was upheld.<sup>202</sup> This created a public perception of discord within the highest court of the land ahead of the 2017 elections.

Evidently, the Judiciary since the promulgation of the 2010 Constitution has made great strides in reinventing itself institutionally and in terms of its capacity to deliver justice. It promises to make even further progress under the successor framework to the JTF namely, Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda 2017-2021. Through the SJT, the Judiciary seeks to shift its focus to completing and consolidating the reforms undertaken during the JTF, while also attending to the matters of efficiency, effectiveness and individual accountability.

However, the inherent challenge for the Judiciary remains the reactions of other organs of government and political actors to its increased independence and the extent to which it will enjoy public confidence as it continues to intervene in the country's fractious political environment, primarily by way of election petitions. Recent experiences indicate that the Judiciary risks major regression as the Executive and Parliament scarred by some court decisions, seek to subjugate the Judiciary through rhetoric, legislation and even constitutional amendments. It for this reason that former Chief Justice Mutunga asserts that the Judiciary must be alive to the fact that interpretation of the Constitution and law is a political project in need of brave and progressive forces constituting of judicial officers, members of the bar and citizens intent on utilizing the Constitution and law to advance society towards fundamental

---

<sup>199</sup> 'Petition 2 & 4 of 2017 (Consolidated) - Kenya Law', accessed 28 September 2018, <http://kenyalaw.org/caselaw/cases/view/145261/>.

<sup>200</sup> Constitution of Kenya, Article 167 (1).

<sup>201</sup> 'Civil Application 11 & 12 of 2016 - Kenya Law', accessed 28 September 2018, <http://kenyalaw.org/caselaw/cases/view/123000/>.

<sup>202</sup> Ibid.

transformation.<sup>203</sup> Rather than recoil in the face of threats from various quarters, judicial officers must remain assured that their authority is derived from the people and must be exercised in accordance with the Constitution's outlined National values and principles on judicial authority. Admittedly, this remains a contested space within and without the judiciary; between active forces keen on maintaining an old order based on regime power and authority, and activist forces that would seek to utilize judicial power in furtherance of the transformation agenda that places peoples right at the centre and more so the marginalised and disadvantaged.<sup>204</sup>

## ii. Police Reforms

The current phase of police reforms had its origins in the NARC administration, which had prioritized this matter within its economic recovery strategy of 2003.<sup>205</sup> Under governance, security and the rule of law, the strategy proposed to equip the police with modern equipment and technology, increase recruitment to attain international standards, strengthen specialized units, introduce a framework for cross-border policing and collaboration and improve the welfare of the disciplined forces.<sup>206</sup> This approach was however criticized for failing to give due cognizance to improving accountability, performance and thereby inculcating rights-based policing.<sup>207</sup>

In its own process of introspection at the time, the Kenya Police in its Strategic Plan (2003-2007) undertook to reorient itself by 'focusing its efforts on providing service to the Kenyan people through the promotion of the respect of the rule of law and human rights'.<sup>208</sup> The strategic plan however fell short in articulating clear action plans to realize this objective and instead stood criticized for overly focusing on operational efficiencies.<sup>209</sup> Underpinning these initiatives were: a Task Force on Police Reforms (2002-2005), which was credited with kick-starting a series of administrative and operational reforms and; the implementation of the Governance, Justice, Law and Order reforms programme (2006-2009), which was credited for 'integrating soft and hard reform areas that accelerated administrative, operational preparedness sand logistical capacity reforms in the Police'.<sup>210</sup>

---

<sup>203</sup> brianobara, 'Former Chief Justice Willy Mutunga: Courts Do Politics and Do Politics All the Time', Text, Never Again, 15 January 2018, <https://neveragain.co.ke/former-chief-justice-willy-mutunga-courts-do-politics-and-do-politics-all-time/article>

<sup>204</sup> Ibid.

<sup>205</sup> Kenya Government, *Kenya: Economic Recovery Strategy for Wealth and Employment Creation ; 2003-2007*, 2003.

<sup>206</sup> Ibid.

<sup>207</sup> M. Kagari et al., *The Police, the People, the Politics: Police Accountability in Kenya* (Commonwealth Human Rights Initiative, 2006), ) 59.

<sup>208</sup> Kenya Police, *The Regular Police Service: Strategic Plan 2003-2007* (Nairobi: Government Press, 2004), 24.

<sup>209</sup> M. Kagari et al., 61.

<sup>210</sup> Ministry of Interior & Coordination of National Government Revised Police Reforms Program Document 2015-2018 (2015) 2.

It is the PEV that injected fresh impetus to the police reform agenda with a stronger emphasis on accountability than in the previous phases. Given the noted culpability of the police through their actions and omissions during the PEV, police reforms were made a focal issue within the KNDR agenda items. The CIPEV report noted that 962 people were shot by the police, of which 405 were fatalities.<sup>211</sup> This translated into 35.7% of the deaths registered during the PEV.<sup>212</sup> Analysis of police conduct during the PEV pointed to the inherent challenges that had long plagued the police force namely, political interference, limited capacity to respond to security threats such as large-scale violence, the proliferation of specialized police units that turned into vigilantes and profiteers and the challenge of ethnic bias within the police force that saw officers fuel the ethnic violence through their actions and inactions.<sup>213</sup> As already highlighted, the CIPEV report identified the culpability of the police and other security agencies in the PEV. While it made recommendations on the police's use of force as well on accountability for the criminal acts they committed, the task of elaborating the measures for police reforms fell to the National Taskforce on Police Reforms which was established in 2009.

The 2009 Taskforce which was commonly referred to as the Ransley Taskforce, was established as a mechanism to further police reforms as envisioned within the KNDR process, which was defined to include the establishment of an independent Police Service Commission, a review of laws and issues related to security and policing so as to align them with modern democratic norms, finalizing and operationalizing a National Security Policy and the recruitment and training of police so as to raise the police-to-population ratio.<sup>214</sup>

The Ransley Taskforce would run from May-September 2009 and issue a final report that contained over 200 recommendations, which this report cannot exhaustively discuss. The following recommendations were however emphasized: The establishment of an Independent Policing Oversight Authority; replacing a centralized command structure with one that devolves powers and responsibilities to lower levels as well as greater independence for a Directorate of Criminal Investigations; a code of ethics for police officers and prohibiting their involvement in certain businesses such as public transport; coordinating the then Kenya Police and Administration Police under a National Policing Council; improving the conditions of service, welfare benefits and greater security to police officers and their families; re-orienting the police from a force to a service based on transparency and professionalism; finalization of a National Security Policy and National Policing Policy and; the establishment of a statutory Police Reforms Implementation Commission to implement the Taskforce recommendations.<sup>215</sup> The Police Reforms Implementation Committee (PRIC) was subsequently constituted to preside over the reforms process from 2010-2012 where it both facilitated and provided technical support to

---

<sup>211</sup> Republic of Kenya Report of the Commission of Inquiry into Post Election Violence (CIPEV) (2008) 346.

<sup>212</sup> Ibid.

<sup>213</sup> Mutuma Ruteere, 'More than Political Tools', *African Security Review* 20, no. 4 (1 November 2011): 11–20, <https://doi.org/10.1080/10246029.2011.630805>, 17-19.

<sup>214</sup> National Task Force on Police Reforms (Kenya), *Report of the National Task Force on Police Reforms*. (Nairobi : Govt. Printer, 2009). 2.

<sup>215</sup> Ibid., xxvii-xxviii

the implementation of police reforms.<sup>216</sup> To ensure the police reforms agenda would become part and parcel of the country's developmental agenda moving forward, it was included in the Kenya's development blue print Vision 2030 Medium Term Plan II 2013-2017 as constituting of the following pillars: legislative and institutional reforms; police accountability reforms; police professionalism reforms and; administrative, operational preparedness, logistical capacity, police tooling and kitting reforms.

Since 2010, significant normative and institutional changes have taken place. The 2010 Constitution introduced a robust bill of rights and anchored National Security on the principles of respect for the rule of law, democracy, human rights and fundamental freedoms.<sup>217</sup> The police force became the National Police Service (NPS) consisting of the Kenya Police Service and Administration Police Service under the joint command of an Inspector General and two Deputies. In addition, the 2010 Constitution established the National Police Service Commission (NPSC) as being the body responsible for recruitment, appointment to various offices, determining promotions and demotions, disciplinary control and removal of persons within the NPS.<sup>218</sup> The emphasis in these changes was to create a professional and operationally independent NPS as opposed to the old order of a disjointedly stratified police force with undue influence from the Executive.

To operationalize these constitutional provisions, a series of laws were enacted and they include: the National Police Service Act, 2011 (NPS Act), National Police Service Commission Act, 2011 (NPSC Act), and the Independence Policing Oversight Authority Act, 2011 (IPOA Act). It should also be noted that an Internal Affairs Unit (IAU) was established under the NPS Act as an internal accountability mechanism while also empowering the NPSC to vet officers in the service to assess their suitability and competence.<sup>219</sup> Despite this significant progress in legal, policy and institutional reforms, commentaries and evaluations on the state of police reforms describe the situation as that of an ongoing concern with several setbacks and indications that there is yet to be a paradigm shift in the behaviour and practices of security officers.

Extrajudicial killings remain a reality within Kenya's counter-terrorism measures<sup>220</sup> and in police operations within informal settlements.<sup>221</sup> It has been documented that 204 persons were shot and killed by the police in 2016 and that 41 of those fatalities were unarmed at the time of being confronted by the police.<sup>222</sup> In the aftermath of the August 8, 2017 elections, the Kenya National

---

<sup>216</sup> Ministry of Interior & Coordination of National Government, 2.

<sup>217</sup> Article 238 (1)(b)

<sup>218</sup> Article 246

<sup>219</sup> NPS Act Section 7(2)

<sup>220</sup> See Japhet Biegon and Andrew Songa, 'Kenya: The Impact of Counter-Terrorism Measures on Police Reform', *POLICING REFORM IN AFRICA*, n.d., 197

<sup>221</sup> 'We Are Living in a Police State! Families of Youth Slain by Rogue Cops Speak Out', The Star, Kenya, accessed 28 September 2018, [http://www.the-star.co.ke/news/2017/06/21/we-are-living-in-a-police-state-families-of-youth-slain-by-rogue-cops\\_c1579228](http://www.the-star.co.ke/news/2017/06/21/we-are-living-in-a-police-state-families-of-youth-slain-by-rogue-cops_c1579228).

<sup>222</sup> 'DEADLY FORCE DATABASE', Daily Nation, accessed 28 September 2018, <https://www.nation.co.ke/newsplex/deadly-force-database/2718262-3402136-ms1o0nz/index.html>.

Commission on Human Rights (KNCHR) documented 37 fatalities in the midst of heavy security presence to quell unrest in opposition strongholds<sup>223</sup> while Amnesty International and Human Rights Watch in their joint report over the same period documented the deaths of 33 people as result of action by the police.<sup>224</sup> In the period leading up to the October 2017 repeat Presidential election, KNCHR documented 5 deaths as a result of excessive use of force by the police as well various injuries to more than 90 persons including a 2-year old child.<sup>225</sup>

Operationalizing the IAU was deemed to be an excessively slow process with the consequence of placing an undue burden on IPOA.<sup>226</sup> IPOA since its inception in June 2012 to its latest report issued in December 2017 stated that it had completed 674 investigations, had 292 active investigations, had 53 cases before the court and had only secured 1 conviction.<sup>227</sup> The police vetting process was envisaged as one that would bring the NPS in line with the new constitutional dispensation and restore the public trust that had previously been lost. However, an evaluation by the International Centre for Transitional Justice (ICTJ) in 2017 pointed to a process lacking in credibility, undermined by the Executive and as a consequence, characterized by apathy and loss of confidence.<sup>228</sup> The exercise embarked in 2013 with the task of vetting approximately 77,500 officers<sup>229</sup> and as at September 2017, the NPSC reported that it had only successfully vetted over 4,000 police officers and intended to vet over 10,000 Inspectorate Directorate of Criminal Investigations police officers by April 2018.<sup>230</sup>

In this time, the following challenges have been cited as plaguing the vetting process: Serious allegations of corruption levelled at the NPSC secretariat in relation to the vetting process; the failure of the NPSC to independently and competitively recruit staff, which has seen them rely on personnel seconded from various government departments and thus vitiating the prospects for impartiality; extremely high retention of officers, which serves as an indicator of weak investigative processes; a poor vetting model and implementation plan as demonstrated by a lack

---

<sup>223</sup> 'Mirage at Dusk: A Human Rights Account of The 2017 General Election', Kenya National Commission on Human Rights, accessed 28 September 2018, <http://www.knchr.org/Articles/ArtMID/2432/ArticleID/17/Mirage-at-Dusk-A-Human-Rights-Account-of-The-2017-General-Election>.

<sup>224</sup> Human Rights Watch | 350 Fifth Avenue, 34th Floor | New York, and NY 10118-3299 USA | t 1.212.290.4700, "'Kill Those Criminals' | Security Forces Violations in Kenya's August 2017 Elections', Human Rights Watch, 15 October 2017, <https://www.hrw.org/report/2017/10/15/kill-those-criminals/security-forces-violations-kenyas-august-2017-elections>.

<sup>225</sup> 'Still a Mirage at Dusk - A Human Rights Accounts of the 2017 Fresh Presidential Elections', Kenya National Commission on Human Rights, accessed 28 September 2018, <http://www.knchr.org/Articles/ArtMID/2432/ArticleID/1031/Still-a-Mirage-at-Dusk-A-Human-Rights-Accounts-of-the-2017-Fresh-Presidential-Elections>.

<sup>226</sup> Kenya National Commission on Human Rights & Centre for Human Rights & Peace (University of Nairobi) Audit of the Status of Police Reforms in Kenya (2015) (Hereinafter: KNCHR & CHRP) at 33

<sup>227</sup> 'DOWNLOADS | The Independent Policing Oversight Authority', accessed 28 September 2018, <http://www.ipoa.go.ke/other-documents/>.

<sup>228</sup> 'Failure to Reform: A Critique of Police Vetting in Kenya', International Center for Transitional Justice, 21 November 2017, <https://www.ictj.org/publication/reform-police-vetting-kenya>.

<sup>229</sup> Ibid.

<sup>230</sup> 'Publications - Publications', accessed 28 September 2018, <https://www.npsc.go.ke/index.php/2014-03-25-12-08-21/publications>.

of clear timelines and an inefficient, time-consuming process; senior officers already vetted and cleared later being implicated in wrongdoing by their juniors but being retained nonetheless; barring of the media from covering vetting proceedings and thereby inhibiting the right to information; the absence of an effective complaints mechanism that can among other things respond to queries regarding complaints that the NPSC has decided not to investigate and; lack of public engagement and outreach on the process.<sup>231</sup>

In a 2015 audit conducted by the Kenya National Commission on Human Rights & Centre for Human Rights and Peace (CHRP), 76.4% of police officers interviewed were of the opinion that the vetting process did not have a positive impact on the police service. Furthermore, officers decried the lengthy period it took to receive feedback and the fact that the process did not improve staff rationalization and deployment according to qualification and training.<sup>232</sup>

The aggregate experience of police reforms thus far points to a major dissonance in actions, results and impact. KNCHR and CHRP in their 2015 audit described the progress made as accomplishments on paper that have failed to change the mindset and institutional culture of the police.<sup>233</sup> A study undertaken by Usalama Forum in 2014 pointed to a public skeptical of the impact of police reforms thus far. In this study, while 60% of reform issues were deemed to have been implemented; only 15% were deemed to be reform issues that had shown significant impact on policing.<sup>234</sup> The report also placed public confidence in the police at 36% and the belief that the police were committed to public welfare at 23%.<sup>235</sup> Other analysts have come to question the dominance of legalistic jargon over social change and the lack of political will to underwrite full implementation of police reforms.<sup>236</sup> While there has been a successful track-record on the enactment of legislation, there have also been numerous instances of actions by the Executive that have undermined their successful implementation and demonstrated ambivalence towards rights-based policing.

One of the starkest examples of reversing the reform agenda has been the Security Laws (Amendments) Act which has reintroduced the dominance of the Executive and diminished the role of the NPSC as the appointing authority for the top echelons of the police service. This legislation amended the NPS Act to exclude the NPSC from the appointment of the Inspector General of the NPS, now leaving it to be a preserve of the President and Parliament without sufficient avenues for public participation.<sup>237</sup> Similarly, the appointment process for the Deputy

---

<sup>231</sup> Failure to Reform: A Critique of Police Vetting in Kenya',

<sup>232</sup> KNCHR & CHRP, 42.

<sup>233</sup> Ibid at 62.

<sup>234</sup> Usalama Reforms Forum *Status of the Police Reforms: A Progress Monitoring Report – Preparedness of the Police to Combat Insecurity and Crime* (2014) 9.

<sup>235</sup> Ibid at 10.

<sup>236</sup> Douglas Kivoi, *The Achilles' Heel of Police Reforms in Kenya*, vol. 2, 2013, <https://doi.org/10.11648/j.ss.20130206.13>, 191-192.

<sup>237</sup> See Section 12 of the NPS Act Revised Edition 2016 [2015] as against Section 12 of the NPS Act Revised Edition 2012 [2011]

Inspector General were made less elaborate by deleting provisions that enhanced transparency in the selection process and by extension, public scrutiny.<sup>238</sup>

The impact of these amendments was felt recently when President Kenyatta in January 2018 made new appointments to the two positions of Deputy Inspector General of Police and head of the Directorate of Criminal Investigations (DCI); the President named his nominees for each position and they were subsequently in 3 days, shortlisted and interviewed by the NPSC as the only candidates for each position and sworn in to their respective offices even before the window for collecting public views had closed.<sup>239</sup> In this instance, soliciting public views on the appointments was nothing beyond cosmetic and the NPSC was hard-pressed to explain whether they were truly an independent constitutional body or subservient to the Presidency.

Police oversight has also been an area that has come under significant assault from the Executive and a compliant National Assembly. In 2015, the then Cabinet Secretary for Interior was on record calling for the disbandment of IPOA and NPSC terming them to be an impediment to police work alongside the vetting exercise.<sup>240</sup> IPOA has also been subjected to reduced budgetary allocations and several unsuccessful attempts to limit their mandate via statutory amendments.<sup>241</sup> While the Constitution envisages the NPS under the Inspector General with operational independence, the period covering the 2017 elections and its aftermath saw allegations of the NPS acting at the behest of and the undue operational supervision of the Executive. The Cabinet Secretary for interior stood accused of unduly banning and disrupting assemblies by the opposition while also issuing threats of violence on the campaign trail.<sup>242</sup> In the aftermath of the fresh Presidential election being upheld by the Supreme Court, President Kenyatta applauded the conduct of the police during the electoral period without acknowledging the excessive use of force and deaths witnessed in quelling unrest following his election.<sup>243</sup>

Ultimately, despite close to 15 years of embarking on the journey of police reforms, a culture of regime policing as opposed to independent, rights-based policing still exists. This has been attributed to ambiguous political support that has endorsed only aspects of reform that fail to

---

<sup>238</sup> See Section 13 of the NPS Act Revised Edition 2016 [2015] as against Section 13 of the NPS Act Revised Edition 2012 [2011]

<sup>239</sup> 'Recruitment Farce Seals Uhuru's Grip on Police', Daily Nation, accessed 28 September 2018, <https://www.nation.co.ke/news/Recruitment-farce-seals-President-Kenyatta-s-grip-on-police-/1056-4271860-vad5uhz/index.html>.

<sup>240</sup> 'Repeal Act on National Police Service Commission and IPOA, CS Urges Parliament | Kenya News Agency', accessed 28 September 2018, <http://kenyanewsagency.go.ke/en/?p=53506>.

<sup>241</sup> 'Kenya: 10 Years after Electoral Violences, Security and Justice Reforms Remain Key', Worldwide Movement for Human Rights, accessed 27 September 2018, <https://www.fidh.org/en/region/Africa/kenya/kenya-10-years-after-electoral-violences-security-and-justice-reforms>, 31-32..

<sup>242</sup> See 'Petition 2 & 4 of 2017 (Consolidated) - Kenya Law', accessed 28 September 2018, <http://kenyalaw.org/caselaw/cases/view/145261/>.

<sup>243</sup> 'Uhuru Praises Police for Job Well Done in Election', The Star, Kenya, accessed 28 September 2018, [http://www.the-star.co.ke/news/2017/12/02/uhuru-praises-police-for-job-well-done-in-election\\_c1678720](http://www.the-star.co.ke/news/2017/12/02/uhuru-praises-police-for-job-well-done-in-election_c1678720).

alter power dynamics and do not substantially enhance effective and impartial policing.<sup>244</sup> This has occasioned stabilization rather than true reform<sup>245</sup> and with a public that remains uncertain of what professional policing should entail, a transformation in the relationship between the public and the police towards political justice cannot be achieved. Yet even with the limited impact that has arisen from the establishment of new policing institutions, an expanded civic space has been created within policing that has the potential to enhance public participation and shift the balance of power within the relationship. However, as the amendments to the security law and the recent office appointments by the Executive have demonstrated, a significant pushback will be experienced as political structures resist what they consider to be a diminishing of power over a critical tool of coercive governance. Therefore, the transformative agenda for police reforms will in the immediate future be more about holding the line rather than advancing the gains until such a time the political tide again shifts towards reform.

## E. CONCLUSION

This report has sought to establish the nexus between Kenya's origins in colonialism, its transitional justice experience and the impact of transitional justice measures on where the country is today. In considering the 2017 elections and the political crisis in its wake, as well as reflecting on 10 years since the ratification of the National Accord following the PEV, this report concludes that Kenya's present challenges are intrinsically linked to its colonial legacy. The themes of non-participatory governance, inequality, land injustices, corruption a non-responsive justice system and ethnic divisions are some of these colonial legacies that have replayed themselves in successive post-independence regimes that either perpetuated them or failed to adequately address their consequences.

Kenya's transitional justice goals have therefore been defined in terms of the ambition to deconstruct the colonial state that has been preserved and utilized by successive administrations since independence. It is for this reason that the report identifies Kenya's experience as one of pursuing transformative transitional justice. This is evidenced by the KNDR process which established measures to come to terms with the legacies of massive human rights abuses but in a manner that advances socio-economic justice and political justice alongside legal justice. While one can point to the TJRC, the ICC cases and a series of institutional reforms as evidence of setting on the path of transformative transitional justice, the reality is that their outcomes are yet to match the ambition of the KNDR. As discussed in earlier sections of the report, the goal of transformation is seemingly stuck in a vortex of progress, regression and inertia.

McAuliffe aptly describes the situation as follows<sup>246</sup>:

---

<sup>244</sup> Anneke Osse, 'Police Reform in Kenya: A Process of "Meddling Through"', *Policing and Society* 26, no. 8 (16 November 2016): 907–24, <https://doi.org/10.1080/10439463.2014.993631>.

<sup>245</sup> Ibid.

<sup>246</sup> Pádraig McAuliffe, 'Weighing Domestic and International Impediments to Transformative Justice in Transition', *London Review of International Law* 3, no. 1 (1 March 2015): 169–97, <https://doi.org/10.1093/lril/lrv003>, 197.

The conceptual parameters of transitional justice may expand, but it does not necessarily follow that the material opportunities for redressing economic violence will do so as well. The limits imposed by national political economy factors may undermine the most reformed, transformational approach to justice on the part of international actors and domestic civil society to the point that it represents merely a symbolic salve for a gaping wound.

In Kenya's context, while the PEV provided an opportunity to articulate a transformative transitional justice agenda that was embraced by civil society and international actors, the political economy remains one where there are inextricable links between political and economic actors in a manner that favours the maintenance of status quo rather than reforms.<sup>247</sup> This reality has replayed itself in the way that the political class has undermined the transitional justice mechanisms discussed within the criminal accountability, truth seeking and institutional reforms sections of the report.

Additionally, the report has also pointed to the inherent limitations of transitional justice mechanisms in furthering a transformative agenda. On criminal accountability, the effectiveness of the ICC was blunted by politics and state power where it is unable to effectively sanction Kenya for non-cooperation. Similarly at the domestic level, investigations and prosecutions have failed in the absence of political will and undermined efforts to establish the ICD. The TJRC while designed to undertake a broad-based transformative agenda, had structural shortcomings that limited its ability to address socio-economic rights and rendered it unable to utilize the power of amnesty. Leadership of transitional justice mechanisms has also emerged to be an important factor in realizing transformative objectives. CIPEV's milestone of setting the stage for criminal accountability was attributed to the foresight of its commissioners who devised a process that would compel action on its recommendations for prosecutions in relation to the PEV. The TJRC on the other hand was plagued by a leadership crisis that cost it public support, time and resources. Institutional reforms in the Judiciary benefited from leadership that jealously guarded its independence and boldly articulated transformation as a key objective.

Finally, the Kenya experience illuminates how essential reform movements rooted in local ownership are in sustaining and reviving transformative agendas in the absence of political will. While the specific merits and demerits of civil society engagement has been the extensive focus subject of other literature,<sup>248</sup> this report has drawn attention to the central role of civil society in relation to criminal accountability and the TJRC process. Through coalitions such as KPTJ and

---

<sup>247</sup> Karuti Kanyinga and James D. Long, 'The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution', *African Studies Review* 55, no. 1 (2012): 31–51, <https://doi.org/10.1353/arw.2012.0002>, 37.

<sup>248</sup> See for example Andrew Songa, 'Locating Civil Society in Kenya's Transitional Justice Agenda: A Reflection on the Experience of the Kenya Transitional Justice Network with the Truth, Justice and Reconciliation Commission', in *Advocating Transitional Justice in Africa: The Role of Civil Society*, ed. Jasmina Brankovic and Hugo van der Merwe, Springer Series in Transitional Justice (Cham: Springer International Publishing, 2018), 17–41, [https://doi.org/10.1007/978-3-319-70417-3\\_2](https://doi.org/10.1007/978-3-319-70417-3_2). and Lydia Kemunto Bosire and Gabrielle Lynch, 'Kenya's Search for Truth and Justice: The Role of Civil Society', *International Journal of Transitional Justice* 8, no. 2 (1 July 2014): 256–76, <https://doi.org/10.1093/ijtj/iju002>.

KTJN, civil society has revealed itself as advocates for transformative transitional justice, authors of the frameworks that guide transitional justice mechanisms, critics to transitional justice mechanisms and government and as vanguards in defence of the agenda and the interests of victims. Beyond organized civil society are victim network groups such as NVSN that possess powerful agency as seen in the campaign to revive implementation of the TJRC report as a 2017 election priority. While the realm of civil society is far from homogenous in its vision for reforms, they remain a key bridge to either enhancing or curtailing local ownership or participation which is an essential pillar to transformative transitional justice. Kenya has made definite progress on laying the foundation of transformation through transitional justice. However, the re-emergence of familiar crises with every electoral cycle since 2008 demonstrates that a lot more needs to be done in altering the lived experiences of its citizens if the aspiration of transformation is to be achieved. This phase of the path to transformation calls not for the domination of a political class eager for compromise to maintain the status quo, but an active an enlightened and empowered people and civil society who view themselves as sovereign and hold public institutions accountable to the national values and principles articulated in the Constitution.

## BIBLIOGRAPHY

‘4-Point Agenda for Uhuru, Raila Talks - Daily Nation’. n.d. Accessed 28 September 2018. <https://www.nation.co.ke/news/politics/Envoys-pick-four-point-agenda-as-they-prepare-for-talks-/1064-4230398-dbio54z/index.htm>.

‘A Real Option for Justice? The International Crimes Division of the High Court of Kenya’. n.d. Accessed 27 September 2018. <http://kptj.africog.org/a-real-option-for-justice-the-international-crimes-division-of-the-high-court-of-kenya/>.

‘Advocacy Brief on Kenya: 15th Session of the Assembly of State Parties (ASP) to the Rome Statute of the International Criminal Court 16-24 November, 2016’. n.d. Accessed 27 September 2018. <http://kptj.africog.org/advocacy-brief-on-kenya-15th-session-of-the-assembly-of-state-parties-asp-to-the-rome-statute-of-the-international-criminal-court-16-24-november-2016/>.

‘Aide Memoire: Kenya and the International Criminal Court’. n.d. Mafiadoc.Com. Accessed 27 September 2018. [https://mafiadoc.com/aide-memoire-kenya-and-the-international-criminal-court\\_5a312f481723ddac01fe43ba.html](https://mafiadoc.com/aide-memoire-kenya-and-the-international-criminal-court_5a312f481723ddac01fe43ba.html).

‘AIDE\_MEMORIE\_KENYA\_ICC\_(2).Pdf’. n.d. Accessed 27 September 2018. [http://iccnw.org/documents/AIDE\\_MEMORIE\\_KENYA\\_ICC\\_\(2\).pdf](http://iccnw.org/documents/AIDE_MEMORIE_KENYA_ICC_(2).pdf).

Akinmade, Donald. 2014. ‘COLONIAL LEGACY AND THE REFRACTED STATE: AFRICA IN MOTIONLESS MOTION’. *Journal of Arts and Humanities* 3 (9): 66–73. <https://doi.org/10.18533/journal.v3i9.557>.

Anderson, David M. 2003. ‘Briefing: Kenya’s Elections 2002: The Dawning of a New Era?’ *African Affairs* 102 (407): 331–42.

Annan, Kofi. 2004. ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’. *UN Doc. S/2004/616* 23: 80–82.

Avenue, Human Rights Watch | 350 Fifth, 34th Floor | New York, and NY 10118-3299 USA | t 1.212.290.4700. 2017. ‘“Kill Those Criminals” | Security Forces Violations in Kenya’s August 2017 Elections’. Human Rights Watch. 15 October 2017. <https://www.hrw.org/report/2017/10/15/kill-those-criminals/security-forces-violations-kenyas-august-2017-elections>.

“‘Back from the Brink: The 2008 Mediation Process and Reforms in Kenya” - Kofi Annan Foundation’. n.d. Accessed 27 September 2018. <https://www.kofiannanfoundation.org/mediation-and-crisis-resolution/back-from-the-brink-the-2008-mediation-process-and-reforms-in-kenya/>.

‘Background’. n.d. International Justice Monitor. Accessed 27 September 2018a. <https://www.ijmonitor.org/kenya-cases-background/>.

———. ‘Background’. n.d. International Justice Monitor. Accessed 27 September 2018b. <https://www.ijmonitor.org/kenya-cases-background/>.

- Barkan, Joel D. 2004. 'Kenya after Moi'. *Foreign Affairs* 83 (1): 87–100. <https://doi.org/10.2307/20033831>.
- Biegon, Japhet, and Andrew Songa. n.d. 'Kenya: The Impact of Counter-Terrorism Measures on Police Reform'. *POLICING REFORM IN AFRICA*, 197.
- Bosire, Lydiah Kemunto, and Gabrielle Lynch. 2014. 'Kenya's Search for Truth and Justice: The Role of Civil Society'. *International Journal of Transitional Justice* 8 (2): 256–76. <https://doi.org/10.1093/ijtj/iju002>.
- Brankovic, Jasmina, and Hugo van der Merwe (eds.). 2018. *Advocating Transitional Justice in Africa: The Role of Civil Society*. 1st ed. Springer Series in Transitional Justice. Springer International Publishing. <http://gen.lib.rus.ec/book/index.php?md5=f9de6a4a02419c20adc0484d07d5c83f>.
- brianobara. 2018. 'Former Chief Justice Willy Mutunga: Courts Do Politics and Do Politics All the Time'. Text. Never Again. 15 January 2018. <https://neveragain.co.ke/former-chief-justice-willy-mutunga-courts-do-politics-and-do-politics-all-time/article>.
- 'Civil Application 11 & 12 of 2016 - Kenya Law'. n.d. Accessed 28 September 2018a. <http://kenyalaw.org/caselaw/cases/view/123000/>.
- Commission, Constitution of Kenya Review, and others. 2005. 'The Final Report of the Constitution of Kenya Review Commission'. *Government of Kenya: Nairobi, Kenya*.
- Commission, Kenya Human Rights, and others. 1998. 'Killing the Vote: State Sponsored Violence and Flawed Elections in Kenya'. *Nairobi: Kenya Human Rights Commission*.
- 'Commissions of Inquiry - CIPEV Report (Waki Report)'. n.d., 530.
- 'Complete Jubilee Manifesto'. n.d. Daily Nation. Accessed 28 September 2018. <https://www.nation.co.ke/news/Complete-Jubilee-Manifesto/1056-3988596-gvbxlyz/index.html>.
- 'De Greiff, Pablo. 2010. 'A Normative Conception of Transitional Justice'. *Politorbis* 50 (3): 17–29.
- 'DEADLY FORCE DATABASE'. n.d. Daily Nation. Accessed 28 September 2018. <https://www.nation.co.ke/newsplex/deadly-force-database/2718262-3402136-ms1o0nz/index.html>.
- Doherty, Joshua. 2012. 'Shifting Narratives of Kenya's Mau Mau Rebellion'. SSRN Scholarly Paper ID 2230226. Rochester, NY: Social Science Research Network. <https://papers.ssrn.com/abstract=2230226>.
- 'DOWNLOADS | The Independent Policing Oversight Authority'. n.d. Accessed 28 September 2018. <http://www.ipoa.go.ke/other-documents/>.
- 'EISA Kenya: 1992 Presidential Election Results'. n.d. Accessed 26 September 2018. <https://www.eisa.org.za/wep/ken1992results.htm>.

- ‘EISA Kenya: 1997 Presidential Election Results’. n.d. Accessed 26 September 2018. <https://www.eisa.org.za/wep/ken1997results.htm>.
- ‘EISA Kenya: 2013 Presidential Election Results’. n.d. Accessed 27 September 2018. <https://www.eisa.org.za/wep/ken2013results.htm>.
- ‘Ethnic or Economic Violence: The Real Cause of Kenya’s 2007 Election Violence by Annalisa Leibold :: SSRN’. n.d. Accessed 26 September 2018. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2620514](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620514).
- ‘Failure to Reform: A Critique of Police Vetting in Kenya’. 2017. International Center for Transitional Justice. 21 November 2017. <https://www.ictj.org/publication/reform-police-vetting-kenya>.
- Fernando, Basil. 2014. ‘Editorial: Institutional Reforms as an Integral Part of a Comprehensive Approach to Transitional Justice’. *International Journal of Transitional Justice* 8 (2): 187–93. <https://doi.org/10.1093/ijtj/iju010>.
- ‘Final Report - Dissent by International Commissioners’. n.d., 9.
- Fred Oluouch. n.d. ‘The Case That Immortalised Kenya’s “Kapenguria Six” - The East African’. Accessed 26 September 2018. <http://www.theeastafrican.co.ke/magazine/Case-that-immortalised-Kenya-Kapenguria-Six-/434746-3995106-s8sxn5z/index.html>.
- Gainer, Maya. 2015. ‘Transforming the Courts: Judicial Sector Reforms in Kenya, 2011-2015’. *Transforming the Courts: Judicial Sector Reforms in Kenya, 2011-2015*, November. </publications/transforming-courts-judicial-sector-reforms-kenya>.
- Government, Kenya. 2003. *Kenya: Economic Recovery Strategy for Wealth and Employment Creation ; 2003-2007*. <https://books.google.ch/books?id=ovoItAEACAAJ>.
- Gready, P., and S. Robins. 2014. ‘From Transitional to Transformative Justice: A New Agenda for Practice’. *International Journal of Transitional Justice* 8 (3): 339–61. <https://doi.org/10.1093/ijtj/iju013>.
- Hansen, Thomas Obel. 2011. ‘Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns’. *California Western International Law Journal* 42: 1–35.
- . 2015. ‘Complementarity in Kenya? An Analysis of the Domestic Framework for International Crimes Prosecution’. SSRN Scholarly Paper ID 2696089. Rochester, NY: Social Science Research Network. <https://papers.ssrn.com/abstract=2696089>.
- . 2016. ‘In the Shadow of Politics: Victim Participation in the Kenyan ICC Cases’. SSRN Scholarly Paper ID 2839325. Rochester, NY: Social Science Research Network. <https://papers.ssrn.com/abstract=2839325>.
- Hornsby, Charles. 2013. *Kenya: A History Since Independence*. I.B.Tauris.

‘Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal’. n.d. Accessed 27 September 2018a. <http://www.pulp.up.ac.za/edited-collections/human-rights-and-democratic-governance-in-kenya-a-post-2007-appraisal>.

‘Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal - Pretoria University Law Press (PULP)’. n.d. Accessed 27 September 2018. <http://www.pulp.up.ac.za/component/edocman/human-rights-and-democratic-governance-in-kenya-a-post-2007-appraisal>.

‘IMPUNITY RESTORED? Lessons Learned from the Failure of the Kenyan Cases at the International Criminal Court | Kenyans for Peace with Truth and Justice (KPTJ)’. n.d. Accessed 27 September 2018. <http://kptj.africog.org/impunity-restored-lessons-learned-from-the-failure-of-the-kenyan-cases-at-the-international-criminal-court/>.

‘Impunity Watch’. n.d. Accessed 27 September 2018. <https://www.impunitywatch.org/html/index.php?alineaid=348>.

Jalloh, Charles Chernor. 2011. ‘Situation in the Republic of Kenya’. *American Journal of International Law* 105 (3): 540–47. <https://doi.org/10.5305/amerjintelaw.105.3.0540>.

‘Journalists For Justice’. n.d. Accessed 27 September 2018. <http://www.jfjustice.net/new-study-reveals-new-evidence-of-mass-rape-during-the-2007-08-post-election-violence-in-kenya/victims-voices/>.

‘JSC Committee Report on the ICD of the High Court - 30th OCT 2012 | Kenya | Government Related Organizations’. n.d. Scribd. Accessed 27 September 2018. <https://www.scribd.com/document/236202990/JSC-Committee-Report-on-the-ICD-of-the-High-Court-30th-OCT-2012>.

Judges, Kenya, and Magistrates Vetting Board. 2016. *Vetting of Judges and Magistrates in Kenya: Final Report*. Judges and Magistrates Vetting Board. <https://books.google.ch/books?id=4jBsAQAAAJ>.

Judiciary, Kenya. 2012. *Judiciary Transformation Framework 2012-2016*. The Judiciary. <https://books.google.ch/books?id=pbKzoAEACAAJ>.

‘Judiciary Transformation Framework – The Judiciary of Kenya’. n.d. Accessed 26 September 2018. <https://www.judiciary.go.ke/download/judiciary-transformation-framework/>.

Kagari, M., S. Thomas, Commonwealth Human Rights Initiative, and Kenya Human Rights Commission. 2006. *The Police, the People, the Politics: Police Accountability in Kenya*. Commonwealth Human Rights Initiative. [https://books.google.ch/books?id=4vHvU\\_sunJ8C](https://books.google.ch/books?id=4vHvU_sunJ8C).

‘Kaluma Drafts Bill for Secession of 40 Counties’. n.d. Daily Nation. Accessed 28 September 2018. <https://www.nation.co.ke/news/politics/Peter-Kaluma-secession-40-counties/1064-4185586-13tcbf3z/index.html>.

Kamungi, Prisca. 2013. *Municipalities and IDPs Outside of Camps: The Case of Kenya's Integrated Displaced Persons*. Brookings Institution-London School for Economics Project on Internal Displacement.

Kanyinga, Karuti, and James D. Long. 2012a. 'The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution'. *African Studies Review* 55 (1): 31–51. <https://doi.org/10.1353/arw.2012.0002>.

Kendall, Sara. 2014. "'UhuRuto" and Other Leviathans: The International Criminal Court and the Kenyan Political Order'. *African Journal of Legal Studies* 7 (3): 399–427. <https://doi.org/10.1163/17087384-12342053>.

'Kenya: 10 Years after Electoral Violences, Security and Justice Reforms Remain Key'. n.d. Worldwide Movement for Human Rights. Accessed 27 September 2018. <https://www.fidh.org/en/region/Africa/kenya/kenya-10-years-after-electoral-violences-security-and-justice-reforms>.

'Kenya Law | Kenya Gazette'. n.d. Accessed 27 September 2018. [http://kenyalaw.org/kenya\\_gazette/gazette/notice/11182](http://kenyalaw.org/kenya_gazette/gazette/notice/11182).

'Kenya: One Year in Office for Uhuru Kenyatta and William Ruto; Human Rights Record Marred by Abuses'. n.d. Worldwide Movement for Human Rights. Accessed 27 September 2018. <https://www.fidh.org/en/region/Africa/kenya/kenya-one-year-in-office-for-uhuru-kenyatta-and-william-ruto-human>.

'Kenya: Statement of Hon. Chief Justice Maraga – Kenya Judiciary on Threats Against the Judiciary'. 2017. *IAPL Monitoring Committee on Attacks on Lawyers* (blog). 19 September 2017. <https://defendlawyers.wordpress.com/2017/09/19/kenya-statement-of-hon-chief-justice-maraga-kenya-judiciary-on-threats-against-the-judiciary/>.

'Kenya's 7-Step Formula for Impunity | Kenyans for Peace with Truth and Justice (KPTJ)'. n.d. Accessed 27 September 2018. <http://kptj.africog.org/kenyas-7-step-formula-for-impunity/>.

Kiarie, Maina. n.d. 'Political History | Enzi'. Accessed 23 September 2018. <http://www.enzimuseum.org/after-the-stone-age/independent-kenya>.

'Kilonzo Tells TJRC Team to Quit'. n.d. Daily Nation. Accessed 28 September 2018. <https://www.nation.co.ke/news/Kilonzo-tells-TJRC-team-to-quit/1056-902226-2600x4/index.html>.

Kivoi, Douglas. 2013. *The Achilles' Heel of Police Reforms in Kenya*. Vol. 2. <https://doi.org/10.11648/j.ss.20130206.13>.

'KNDR Documents - Annotated Agenda for the Kenya Dialogue and Reconciliation'. n.d., 4.

'KNDR Documents - Statement of Principles on Long-Term Issues and Solutions Updated with Implementation Matrix'. n.d., 15.

'KNDR Documents - Truth, Justice and Reconciliation Commission'. n.d., 4.

- Lambourne, Wendy. 2009. 'Transitional Justice and Peacebuilding after Mass Violence'. *International Journal of Transitional Justice* 3 (1): 28–48. <https://doi.org/10.1093/ijtj/ijn037>.
- Lanegran, Kimberly. 2015. 'The Kenyan Truth, Justice and Reconciliation Commission: The Importance of Commissioners and Their Appointment Process'. *Transitional Justice Review* 1: 32.
- 'Lessons to Be Learned: An Analysis of the Final Report of Kenya's Truth, Justice and Reconciliation Commission | International Center for Transitional Justice'. n.d. Accessed 28 September 2018. <https://www.ictj.org/publication/kenya-TJRC-lessons-learned>.
- Lewis, Amanda Elizabeth. n.d. 'A Kenyan Revolution: Mau Mau, Land, Women, and Nation.', 87.
- 'Locating Civil Society in Kenya's Transitional Justice Agenda: A Reflection on the Experience of the Kenya Transitional Justice Network with the Truth, Justice and Reconciliation Commission | SpringerLink'. n.d. Accessed 23 September 2018a. [https://link.springer.com/chapter/10.1007%2F978-3-319-70417-3\\_2](https://link.springer.com/chapter/10.1007%2F978-3-319-70417-3_2).
- Lonsdale, John. 1990. 'Mau Maus of the Mind: Making Mau Mau and Remaking Kenya'. *The Journal of African History* 31 (3): 393–421. <https://doi.org/10.1017/S0021853700031157>.
- Lonsdale, John, and Bruce Berman. 1979. 'Coping with the Contradictions: The Development of the Colonial State in Kenya, 1895–1914'. *The Journal of African History* 20 (4): 487–505. <https://doi.org/10.1017/S0021853700017503>.
- Lynch, Gabrielle. 2018. 'TRANSITIONAL JUSTICE: Impunity, Project Kenya and Burying the TJRC Report'. *The E Review* (blog). 8 September 2018. <https://www.theeastafricanreview.info/op-eds/2018/09/08/when-killers-become-victims-impunity-project-kenya-and-burying-the-tjrc-report/>.
- Materu, Sosteness Francis. 2015a. 'Alternatives and Adjuncts to Domestic Prosecutions'. In *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, edited by Sosteness Francis Materu, 141–74. International Criminal Justice Series. The Hague: T.M.C. Asser Press. [https://doi.org/10.1007/978-94-6265-041-1\\_5](https://doi.org/10.1007/978-94-6265-041-1_5).
- McAuliffe, Pádraig. 2015. 'Weighing Domestic and International Impediments to Transformative Justice in Transition'. *London Review of International Law* 3 (1): 169–97. <https://doi.org/10.1093/lril/lrv003>.
- Meyer, Kathryn. 2015. 'Kenya: Decolonization, Democracy and the Struggle for Uhuru'. Thesis. <https://ida.mtholyoke.edu/xmlui/handle/10166/3675>.
- 'Mirage at Dusk: A Human Rights Account of The 2017 General Election'. n.d. Kenya National Commission on Human Rights. Accessed 28 September 2018. <http://www.knchr.org/Articles/ArtMID/2432/ArticleID/17/Mirage-at-Dusk-A-Human-Rights-Account-of-The-2017-General-Election>.

- ‘Most PEV Cases Cannot Be Prosecuted - Tobiko’. n.d. The Star, Kenya. Accessed 27 September 2018. [http://www.the-star.co.ke/news/2014/02/06/most-pev-cases-cannot-be-prosecuted-tobiko\\_c892628](http://www.the-star.co.ke/news/2014/02/06/most-pev-cases-cannot-be-prosecuted-tobiko_c892628).
- ‘MPs Pledge to Adopt TJRC Report by March, but Fear Resistance» Capital News’. n.d. Accessed 28 September 2018. <https://www.capitalfm.co.ke/news/2016/02/mps-pledge-to-adopt-tjrc-report-by-march-but-fear-resistance/>.
- Mulinge, Munyae M., and Gwen N. Lesetedi. 1998. ‘Interrogating Our Past: Colonialism and Corruption in Sub-Saharan Africa’. *African Journal of Political Science / Revue Africaine de Science Politique* 3 (2): 15–28.
- Murithi, Tim. 2015. ‘Ensuring Peace and Reconciliation While Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan’. *Africa Development*, no. 2: 26.
- Musila, Godfrey M. 2009. ‘Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions’. *International Journal of Transitional Justice* 3 (3): 445–64. <https://doi.org/10.1093/ijtj/ijp018>.
- Mutua, Makau., and Willy. Mutunga. 2003. *Eyes on the Prize*. 79 p. Nairobi, Kenya: Kenya Human Rights Commission. <//catalog.hathitrust.org/Record/005036276>.
- Mutua, Makau W. 2013. ‘Why Kenya Is a Nation in Embryo’. SSRN Scholarly Paper ID 2390796. Rochester, NY: Social Science Research Network. <https://papers.ssrn.com/abstract=2390796>.
- Mutua, Makau wa. 1995. ‘Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State’. *Proceedings of the ASIL Annual Meeting* 89: 487–90. <https://doi.org/10.1017/S0272503700085116>.
- ‘Nasa’s Manifesto’. n.d. Daily Nation. Accessed 28 September 2018. <https://www.nation.co.ke/news/politics/nasa-manifesto/1064-3990154-82ht34/index.html>.
- National Task Force on Police Reforms (Kenya). 2009. *Report of the National Task Force on Police Reforms*. Nairobi : Govt. Printer,.
- ‘NATIONAL VICTIMS & SURVIVORS MANIFESTO’. n.d. Accessed 28 September 2018. <http://kptj.africog.org/national-victims-survivors-manifesto/>.
- Ndege, Peter O. 2009. ‘Colonialism and Its Legacies in Kenya’. *Lecture Delivered during Fulbright–Hays Group Project Abroad Program: July 5th to August 6th*.
- ‘No. 6 of 2008’. n.d. Accessed 28 September 2018. <http://www.kenyalaw.org/lex//actview.xql?actid=No.%206%20of%202008>.
- Obel Hansen, Thomas. 2013a. ‘Kenya’s Power-Sharing Arrangement and Its Implications for Transitional Justice’. *The International Journal of Human Rights* 17 (2): 307–27. <https://doi.org/10.1080/13642987.2013.752949>.

‘OCHA Kenya: Frequently Asked Questions on IDPs - Kenya’. n.d. ReliefWeb. Accessed 26 September 2018. <https://reliefweb.int/report/kenya/ocha-kenya-frequently-asked-questions-idps>.

‘ODINGA: It Is D-Day for Electoral Justice in Kenya in 2018’. n.d. Daily Nation. Accessed 28 September 2018. <https://www.nation.co.ke/oped/opinion/-It-is-D-Day-for-electoral-justice-in-Kenya-in-2018-/440808-4246538-m1ankuz/index.html>.

‘Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions - GSDRC’. n.d. Accessed 27 September 2018. <http://gsdrc.org/document-library/options-for-transitional-justice-in-kenya-autonomy-and-the-challenge-of-external-prescriptions/>.

Osse, Anneke. 2016. ‘Police Reform in Kenya: A Process of “Meddling Through”’. *Policing and Society* 26 (8): 907–24. <https://doi.org/10.1080/10439463.2014.993631>.

Ozaki, Judge Kuniko, Judge Robert Fremr, and Judge Geoffrey Henderson. 2016. ‘SITUATION IN THE REPUBLIC OF KENYA’, 18.

‘Parliament Pulls Kenya from ICC Treaty - Daily Nation’. n.d. Accessed 27 September 2018. <https://www.nation.co.ke/news/politics/Parliament-pulls-Kenya-from-ICC-treaty/1064-1077336-us2knmz/index.html>.

‘Parliament to Debate the TJRC Report after Petition from Victims Is Tabled’. n.d. Accessed 28 September 2018a. <https://www.jfjustice.net/en/victims-voices/mps-to-debate-the-tjrc-report-after-petition-from-victims-is-tabled>.

‘Petition 2 & 4 of 2017 (Consolidated) - Kenya Law’. n.d. Accessed 28 September 2018. <http://kenyalaw.org/caselaw/cases/view/145261/>.

‘Petition 5, 3 & 4 of 2013 - Kenya Law’. n.d. Accessed 28 September 2018. <http://kenyalaw.org/caselaw/cases/view/87380/>.

‘Petition Nos 13 A, 14 & 15; of 2013 (Consolidated) - Kenya Law’. n.d. Accessed 28 September 2018. <http://kenyalaw.org/caselaw/cases/view/103263/>.

Police, Kenya. 2004. *The Regular Police Service: Strategic Plan 2003-2007*. Nairobi: Government Press.

‘Political History | Enzi’. n.d. Accessed 23 September 2018. <http://www.enzimuseum.org/after-the-stone-age/independent-kenya>.

‘Postponing the Truth – How Commissions of Inquiry Are Used to Circumvent Justice in Kenya | Africa Centre for Open Governance (AfriCOG)’. n.d. Accessed 27 September 2018. <https://africog.org/postponing-the-truth-how-commissions-of-inquiry-are-used-to-circumvent-justice-in-kenya/>.

‘Presidential Petition 1 of 2017 - Kenya Law’. n.d. Accessed 28 September 2018. <http://kenyalaw.org/caselaw/cases/view/140420/>.

‘Publications - Publications’. n.d. Accessed 28 September 2018. <https://www.npsc.go.ke/index.php/2014-03-25-12-08-21/publications>.

‘Raila Quits: Nasa’s Full Statement - Daily Nation’. n.d. Accessed 28 September 2018. <https://www.nation.co.ke/news/Raila-Odinga-quits-repeat-presidential-election-Kenya-Nasa/1056-4133616-tr6we4z/index.html>.

‘Raila Vows to Implement TJRC Report If Elected » Capital News’. n.d. Accessed 28 September 2018. <https://www.capitalfm.co.ke/news/2017/07/raila-vows-implement-tjrc-report-elected/>.

‘Recruitment Farce Seals Uhuru’s Grip on Police’. n.d. Daily Nation. Accessed 28 September 2018. <https://www.nation.co.ke/news/Recruitment-farce-seals-President-Kenyatta-s-grip-on-police-/1056-4271860-vad5uhz/index.html>.

‘Repeal Act on National Police Service Commission and IPOA, CS Urges Parliament | Kenya News Agency’. n.d. Accessed 28 September 2018. <http://kenyanewsagency.go.ke/en/?p=53506>.

Ruteere, Mutuma. 2011. ‘More than Political Tools’. *African Security Review* 20 (4): 11–20. <https://doi.org/10.1080/10246029.2011.630805>.

‘Ruto: Why I Prefer The Hague Route’. n.d. Daily Nation. Accessed 27 September 2018. <https://www.nation.co.ke/news/1056-533390-k79197z/index.html>.

‘Ruto’s Remarks on TJRC Report Are Callous and Fail to Move Us Forward :: Kenya - The Standard’. n.d. Accessed 28 September 2018. <https://www.standardmedia.co.ke/article/2001249300/ruto-s-remarks-on-tjrc-report-are-callous-and-fail-to-move-us-forward>.

Sabar-Friedman, Galia. 1995. ‘The Mau Mau Myth: Kenyan Political Discourse in Search of Democracy (Le Mythe Mau Mau: Le Discours Politique Kenyan à La Recherche de La Démocratie)’. *Cahiers d’Études Africaines* 35 (137): 101–31.

Schense, Jennifer, and Linda Carter. n.d. ‘Two Steps Forward, One Step Back: The Deterrence Effect of International Criminal Tribunals’, 379.

Slye, Ronald C. 2017. ‘Putting the J into the TRC: Kenya’s Truth Commission’. SSRN Scholarly Paper ID 2929768. Rochester, NY: Social Science Research Network. <https://papers.ssrn.com/abstract=2929768>.

Songa, Andrew. 2014. ‘Reparations for Colonial Atrocities: The Case of the Mau Mau in Kenya’. *Pan-African Reparation Perspectives Special Bulletin* (2): 8.

‘SPEECH BY HIS EXCELLENCY HON. UHURU KENYATTA, C.G.H., PRESIDENT AND COMMANDER IN CHIEF OF THE DEFENCE FORCES OF THE REPUBLIC OF KENYA DURING THE STATE OF THE NATION ADDRESS AT PARLIAMENT BUILDINGS, NAIROBI ON THURSDAY, 26TH MARCH, 2015 | The Presidency’. n.d. Accessed 28 September 2018. <http://www.president.go.ke/2015/03/26/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forces-of-the-republic-of-kenya-during-the-state-of-the-nation-address-at-parliament-buildings-na/>.

Standard, The. n.d. 'Commissioners Welcome Kiplagat Back to TJRC'. The Standard. Accessed 28 September 2018. <https://www.standardmedia.co.ke/article/2000056078/commissioners-welcome-kiplagat-back-to-tjrc>.

statelaw. n.d. 'KEY NOTE ADDRESS'. *State Law Office and Department of Justice* (blog). Accessed 28 September 2018. <http://www.statelaw.go.ke/928-2/>.

'Still a Mirage at Dusk - A Human Rights Accounts of the 2017 Fresh Presidential Elections'. n.d. Kenya National Commission on Human Rights. Accessed 28 September 2018. <http://www.knchr.org/Articles/ArtMID/2432/ArticleID/1031/Still-a-Mirage-at-Dusk-A-Human-Rights-Accounts-of-the-2017-Fresh-Presidential-Elections>.

'Sustaining Judiciary Transformation 2017-2021 – The Judiciary of Kenya'. n.d. Accessed 28 September 2018. <https://www.judiciary.go.ke/download/sustaining-judiciary-transformation-2017-2021/>.

'The Mau Mau Myth: Kenyan Political Discourse in Search of Democracy (Le Mythe Mau Mau: Le Discours Politique Kenyan à La Recherche de La Démocratie) on JSTOR'. n.d. Accessed 23 September 2018. [https://www.jstor.org/stable/4392578?casa\\_token=5BhWdN0hV74AAAAA:xa6jWwgKmmQswcVRXHiPzEEzdmEy5njJ2Q6oLUkpNPgMegR\\_brd6vhoFwXtCC1JTAxdvJLpG6ek2QrsTyhNgVgyMThATMYNmjXNDJb\\_tYziQCjgOBI&seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/4392578?casa_token=5BhWdN0hV74AAAAA:xa6jWwgKmmQswcVRXHiPzEEzdmEy5njJ2Q6oLUkpNPgMegR_brd6vhoFwXtCC1JTAxdvJLpG6ek2QrsTyhNgVgyMThATMYNmjXNDJb_tYziQCjgOBI&seq=1#metadata_info_tab_contents).

'They Voted for Hague but Now Pray with Suspects - Daily Nation'. n.d. Accessed 27 September 2018. <https://www.nation.co.ke/news/politics/They-voted-for-Hague-but-now-pray-with-suspects/1064-1320534-67urwo/index.html>.

'TJRC Official Quits as Team Goes Broke :: Kenya - The Standard'. n.d. Accessed 28 September 2018. <https://www.standardmedia.co.ke/business/article/2000020812/tjrc-official-quits-as-team-goes-broke>.

'"To Live as Other Kenyans Do": A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations'. 2011. International Center for Transitional Justice. 25 July 2011. <https://www.ictj.org/publication/live-other-kenyans-do-study-reparative-demands-kenyan-victims-human-rights-violations>.

Truth, Justice, and Reconciliation Commission. 2008. 'Commissions of Inquiry - CIPEV Report (Waki Report)'. IX. *Government Documents and Regulations*, January. <https://digitalcommons.law.seattleu.edu/tjrc-gov/5>.

———. 2013a. 'Final Report - TJRC Report Volume 1'. *I. Core TJRC Related Documents*, May. <https://digitalcommons.law.seattleu.edu/tjrc-core/7>.

———. 2013b. 'Final Report - TJRC Report Volume 2A'. *I. Core TJRC Related Documents*, May. <https://digitalcommons.law.seattleu.edu/tjrc-core/6>.

———. 2013c. 'Final Report - TJRC Report Volume 2B'. *I. Core TJRC Related Documents*, May. <https://digitalcommons.law.seattleu.edu/tjrc-core/5>.

———. 2013d. ‘Final Report - TJRC Report Volume 2B (Pre-Interference)’. *I. Core TJRC Related Documents*, May. <https://digitalcommons.law.seattleu.edu/tjrc-core/153>.

———. 2013e. ‘Final Report - TJRC Report Volume 2C’. *I. Core TJRC Related Documents*, May. <https://digitalcommons.law.seattleu.edu/tjrc-core/4>.

———. 2013f. ‘Final Report - TJRC Report Volume 3’. *I. Core TJRC Related Documents*, May. <https://digitalcommons.law.seattleu.edu/tjrc-core/3>.

———. 2013g. ‘Final Report - TJRC Report Volume 4’. *I. Core TJRC Related Documents*, May. <https://digitalcommons.law.seattleu.edu/tjrc-core/2>.

‘Truth Team Boss Resigns in Protest’. n.d. Daily Nation. Accessed 28 September 2018. <https://www.nation.co.ke/news/Truth-team-boss-resigns-in-protest-/1056-888808-e9htb5/index.html>.

‘Uhuru Kenyatta to Court: “We Shall Revisit This” | Kenya News | Al Jazeera’. n.d. Accessed 28 September 2018. <https://www.aljazeera.com/news/2017/09/uhuru-kenyatta-court-revisit-170902130212736.html>.

‘Uhuru Praises Police for Job Well Done in Election’. n.d. The Star, Kenya. Accessed 28 September 2018. [http://www.the-star.co.ke/news/2017/12/02/uhuru-praises-police-for-job-well-done-in-election\\_c1678720](http://www.the-star.co.ke/news/2017/12/02/uhuru-praises-police-for-job-well-done-in-election_c1678720).

‘Update Report No. 1: Kenya and the ICC : Update Report : Security Council Report’. n.d. Accessed 27 September 2018. <https://www.securitycouncilreport.org/update-report/lookup-c-glKWLemTIsG-b-6717579.php?print=true>.

Wanyande, Peter. 2009. ‘Civil Society and Transition Politics in Kenya: Historical and Contemporary Perspectives’. *Discourses on Civil Society in Kenya* 8.

‘We Are Living in a Police State! Families of Youth Slain by Rogue Cops Speak Out’. n.d. The Star, Kenya. Accessed 28 September 2018. [http://www.the-star.co.ke/news/2017/06/21/we-are-living-in-a-police-state-families-of-youth-slain-by-rogue-cops\\_c1579228](http://www.the-star.co.ke/news/2017/06/21/we-are-living-in-a-police-state-families-of-youth-slain-by-rogue-cops_c1579228).