POLICY BRIEF

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Reparative Justice in Kenya

Building Blocks for a Victim-centred Framework

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INTRODUCTION AND BACKGROUND

In a post-conflict State or situation, reparations have the potential to be a double-edged sword. On the one hand, and if administered effectively, reparations have the powerful effect of redressing injustices against individuals and communities, thereby increasing the likelihood of successful reconciliation within the community and subsequently contributing to national reconciliation. In Kenya, for example, following the well-documented injustices to which the Kenyan people have been subjected over the 50 years of independence, reparation efforts would certainly assist in the healing process of all involved and provide the necessary platform for dialogues on reconciliation between offenders and offended. The following would be eligible for reparations in Kenya: victims of torture by State and other entities; families who lost loved ones through murders and disappearances; and communities that were marginalised and deprived of economic resources for their development. On the other hand, providing for reparations can be a costly affair from both a financial and an administrative perspective. Difficult questions regarding who is to fund the reparations, what reparations frameworks should look like, and who would be involved in the administration of reparations are sufficient to deter any post-conflict State from addressing the issues of reparations. Yet, such failure can be a serious hindrance to the reconciliation process.

The importance of reparations in the transitional justice context has been articulated in other texts. The nexus of reconciliation and reparations, however, is less well understood. This is because there is little or no evidence to date that points to there being *only* one approach in using reparations, truth-seeking, justice or any other mechanism in isolation as a tool for reconciliation in a post-conflict State. Reconciliation is a *process*, as we have argued previously, and as such requires a multiplicity of actors in concerted efforts to achieve a society in which people can live together harmoniously.[2] ▸▸

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Reparations are an integral part of the processes that assist society's recovery from armed conflict, a repressive regime and/or a culture of human rights abuse; that ensure history will not repeat itself and that comprehensive programmes are established to achieve truth-telling, other forms of transitional justice, and an end to the culture of impunity. In order for reparations to have the maximum possible effect in the post-conflict reconstruction of a society, the perspectives of victims and their advocates must be incorporated into reparations' design, implementation and monitoring.

This Policy Brief discusses the normative framework of reparations as the appropriate remedy available under international and Kenyan laws for victims of gross violations of human rights. Thereafter it turns its focus on the Reparations Framework proposed by the Truth, Justice and Reconciliation (TJRC) Report of May 2013. In that section, the brief analyses the framework and implementation recommendations in the light of the proposed reparations principles and guidelines. While the TJRC rightly notes that reparations that are tied to a legal process may be expensive to victim and State alike, this Policy Brief proposes that reparations in Kenya be tied to existing legal frameworks and provide access to justice for the victim in a complementary manner to administrative programmes and to other international processes.

The Policy Brief proposes sector- and actor-specific recommendations for policy formulation and actions.

RECOMMENDATIONS

To the Government of Kenya

1. Recognise that the State has an obligation to provide reparations as a key component of the reconciliation process in Kenya, and make corresponding budgetary allocations.
2. Ensure that the reparations process involves victims and victim support groups in its design, implementation and monitoring.
3. Organise a national dialogue around reparations – State-funded and in the devolved structures (i.e. at county level).
4. Ensure the adoption of the TJRC Report – and particularly the Reparations Framework – by the National Assembly.
   (a) Ensure the drafting of the Implementation Committee of the Recommendations of the TJRC Bill by the Attorney General and the subsequent enactment of that Bill by the National Assembly.
   (b) In the alternative, ensure the creation of an entity or the endowment of an existing entity to implement a reparations policy that mirrors the framework and guidelines in the TJRC report, including adequate staff and resources to execute its mandate.
5. Establish standards and modalities for cooperation with different government ministries at the national and county levels and with other non-State stakeholders to ensure the implementation of services for the benefit of victims.
6. Consider a range of principles that would guide the implementation of the reparations programme.
7. Gather and develop expertise to plan for restitution, rehabilitation and compensation awards that are context specific in relation to the harm that has been caused to the victims and that in particular adopt gender- and child-sensitive approaches.
8. Take note of the funding sources and challenges highlighted in the current Policy Brief.
9. Conduct an audit of the reconciliation process in the country, paying particular attention to the reparation needs of victims and providing avenues as identified in the current Policy Brief to establish policies and legislation for the provision of reparations.

To the Implementation Committee[3] of the TJRC Report

1. Develop a fundraising capacity for the Reparations Fund.
2. Develop guidelines on how to go about dealing with donor relations and accounting for funding both from the Consolidated Fund and other sources of income.
3. Undertake assessments of the cost of implementing certain types of awards, and develop a corresponding policy for cost-effective implementation.
4. Identify suitable partner organisations and individual experts to assist in implementing the Committee's mandate.

To the Judiciary

1. Ensure that any mechanism to ensure criminal accountability for international crimes is based on laws that are in conformity with the Constitution (2010) and rules of procedure and evidence.
2. Ensure that where rules of procedure and evidence are adopted for the mechanism on criminal accountability for international crimes, this is done in consideration of the Evidence Act (Cap 80, Laws of Kenya) and other legislation for criminal law and procedure in Kenya.
3. Ensure that the rules of procedure and evidence for the mechanism on criminal accountability take into consideration the interests of victims, and their representation in court, and provide for reparations orders issued by the court.

To the National Land Commission

1. Address the needs of victims in Categories 4 and 5 of the Reparations Framework mentioned in the TJRC Report – that is, historical and contemporary land injustices, and systematic marginalisation.
2. Prioritise and coordinate an approach (in consultation with county governance structures) towards consolidating communal land that had been alienated for private use or State-alienated land for unjustified public use, ensuring that those communities dispossessed of land are awarded full use and control of communal land.

To Civil Society

1. Civil society organisations should take note of victims' perspectives in the Reparations Framework formulation and articulate these in public forums.
2. Identify and pursue in court situations where victims are entitled to reparations.

Normative framework of reparations

Reparations are the embodiment of a society's recognition of, and remorse and atonement for, harms inflicted.[4] It is generally agreed that reparations must, as far as possible, wipe out all of the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed.[5] To an extent, reparations represent the acknowledgment that the recipient has experienced some form of harm and that there is a need to redress this harm and restore the individual to the place that (s)he was before the harm took place. It is clear, however, in so many instances that it is not possible to fully restore the individual who has gone through the trauma of an event to the State prior to the event. This is true in the case of killings, torture, rape, and even destruction of personal property which has sentimental value attached to it. In these cases, reparations are not to be seen as a replacement of what was lost, but rather as an acknowledgment of the harm inflicted and an expression aimed at assisting harmed individuals to 'move on' with their lives in a positive sense.

There has been a progressively growing legal basis for the provision of redress to victims of gross violations of human rights and serious violations of humanitarian law. Reparations have long been a recognised principle of international law and evidenced in human rights instruments as well as in the decisions of regional human rights and national courts. Reparations have a basis in both tort (a wrongful act or an infringement of a right, other than under a contract leading to legal liability) and the law governing State responsibility.[6] Van Boven describes reparations in human rights as a generic term representing 'all types of redress, material and non-material, for victims of human rights violations'.[7]

National governments bear the primary responsibility for providing remedy and reparation within environments that guarantee safety and human security. Articles 2(5) and (6) of the Constitution of Kenya (2010) provide that the general rules of international law and any treaty or convention ratified by Kenya shall form part of the law of Kenya. In essence, all international treaties that provide for reparations to victims and to which Kenya is a signatory thereby establish the right to reparations in Kenya for victims.[8]

Reparations can encompass a variety of concepts, including among others compensation, restitution, rehabilitation and satisfaction.[9] Each component represents a unique remedy to victims. Compensation refers to the amount of money awarded by a judicial or quasi-judicial body after an assessment of harm suffered. Restitution is a return to the situation before the harm occurred. Rehabilitation refers to the provision of ongoing social, medical, legal and/or psychological care to victims. Satisfaction refers to broader measures, which may be individual or societal, such as the verification of facts, the search for bodily remains, public apologies, memorialisation, institutional reforms and/or sanctioning of perpetrators.

Reparations can be material (compensation, restitution and rehabilitation) or moral. Moral reparations can include a range of non-material measures that address the victim's felt-needs to be heard, for justice, and for measures to avoid repetition of the violating act. Measures that may be taken include the removal of those most responsible from positions of power and influence, the disclosure of the facts of a victim's mistreatment, and/or official, public apologies from government(s) for past violations.[10]

No doubt, Kenya has entered a period that is unprecedented in its development as a nation. Since independence in 1963, the history of the nation has been mired in gross violations of human rights. Its leaders created an authoritarian, oppressive and corrupt State.[11] There was an adoption by the independent and successive governments of the 'divide-and-rule' concept that positioned one ethnic group against another (and that had been employed liberally by the colonial administration prior to independence). Ethnic groups and communities were polarised on various issues – from land use and livestock to economic benefit from regional resources, to name but a few. In many cases, ethnic communities were embroiled in deep tension and conflict. The pastoralist communities in the north of the country, for example, continue to grapple with the challenge of what has been termed 'cattle-rustling', exacerbated by a proliferation in weapons availability in the form of small arms. The communities on the geographical borders with Somalia, Ethiopia, South Sudan and Uganda are constantly under threat of external warfare with communities in these neighbouring countries. The ethnic communities bordering Somalia, for example, have also to contend with harassment from Kenyan government departments and agencies relating to how these institutions view some of the population's identity as foreign (Somali) nationals rather than Kenyans. For years, Kenyans of all walks of life were denied their civic, political, economic, social and cultural rights. Arguably the worst form of violation, though, is that in the 50 years of Kenya's independence, a new generation of men, women, boys and girls have been born into and inherited a society that was so deeply divided against itself and between citizens and the State. Many in the new generation of Kenyans do not know what it is to live in a society where there is full and unconditional respect for their human rights and dignity. A traumatised nation is the result of years of individual and collective oppression.

In the course of the past five years, however, there has been a shift in the country. The fateful and tragic events during and after the December 2007 elections triggered a collective response from Kenyans and the international community to address past and present injustices. While there were numerous human rights activists who fought for regime change in the years of one-party rule, the gravitas of concerted effort and action came about during the 2008 Kenya National Dialogue and Reconciliation (KNDR). That shift in the political dispensation, in the sense that Kenyans *collectively* demanded of their leaders and institutions an increased opportunity to call for good governance and respect for the rule of law, was unprecedented in the country's history.

TJRC Reparations Framework

The KNDR proposed the establishment of a truth and reconciliation commission for Kenya, which would be responsible for investigating and documenting, by means of a variety of methods, the human rights violations visited upon Kenyans during the period between 12 December 1963 and 28 February 2008. The Truth, Justice and Reconciliation Commission (TJRC) was subsequently established by the TJRC Act (No. 8 of 2008). After a careful examination of these human rights violations, the TJRC Act empowered the TJRC to draw up a set of recommendations in a report, including recommendations relating to the redressing of human rights violations. The basis of the Reparations Framework as proposed by the TJRC Report is Section 6(k)(i) of the TJRC Act, which provides that the Commission shall:

> *make recommendations with regard to the policy that should be followed or measures that should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims.*

The TJRC Report proposes a Committee for the Implementation of the Recommendations of the TJRC (Implementation Committee) that shall manage and administer reparations. The Implementation Committee should be established by the National Assembly through a new and separate act, the proposed Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission Act, and the Act should include reparations regulations.

As a point of departure, the TJRC recognised that, as a general rule, reparations are available through the court systems as well as through administrative programmes. It further recognised that court processes are costly to the State's legal system as well as to the victims deserving of reparations. Furthermore, in its recognition of reparations for victims, the TJRC was not 'recommending proportionate and tailored reparation measures for each individual'. The TJRC found, and rightly so, that such recommendations would be impractical and extremely expensive for the State. Nevertheless, it envisaged that certain individuals would be the recipients of individual awards, while the bulk of the recommended awards would go towards collective reparation measures. In the TJRC Report, a distinction is made between material and non-material reparations. Material reparations imply a benefit to the victim such as monetary pension, provision of health services, socio-economic measures and others. Non-material reparation measures would include redress in ways that restore the:

> *dignity of victims and survivors, through the restoration of rights (expunging criminal records, granting citizenship), the provision of critical documents (identity cards) or honouring the memory of those who have suffered violations (through monuments, naming ceremonies or days of remembrance).*[12]

In conducting its work, the TJRC was guided by its Reconciliation Policy, which includes the consultation of stakeholders and victims, particularly in this case around the methodology in terms of which the Reparations Framework would work in Kenya. It underscored the participation of victims in the Reparations Framework. It is recorded that of the 40 000 statements submitted to the TJRC, 23.2 per cent recorded that 'legal and institutional reforms' are recommended as a national reparations measure.[13]

The TJRC Report recognises five categories of violations that occurred within its temporal mandate for consideration, that is, between 12 December 1963 and 28 February 2008. These are as follows:

Category 1. Violations of the right to life (massacres, summary and arbitrary executions, political assassinations, disappearances, etc.).

Category 2. Violations of the right to personal integrity (sexual and gender-based violence, torture, inhuman and degrading treatment, etc.).

Category 3. Forcible transfer of populations (conflict-induced displacement, development-induced displacement such as large-scale development projects by the State or parastatal actors etc.).

Category 4. Historical and contemporary land injustices (illegal acquisition and occupation of communally-held land, State seizure of private, community or trust lands without sufficient public purpose or for evident personal gain, etc.).

Category 5. Systematic marginalisation (direct discrimination through State policy, including identifiable patterns of action or lack of action, violation of minority rights to language, culture and religion, violations of the right to nationality, etc.).

Determining the beneficiaries of reparations is a difficult task and can burden a reparations programme. Accordingly, the TJRC Report prioritises the following: 'extremely vulnerable individuals, groups who have suffered injustice specifically including historical land injustices, and individuals who have been victims of violations of the right to life as well as the right to personal integrity'.[14]

In terms of prioritisation of the categories of victim groups, the TJRC Reparations Framework identifies that Priority A comprises the most vulnerable individuals: these are victims who have been categorised as victims of violations of the right to life (Category 1) and violations of personal integrity (Category 2). Priority A individuals are eligible for medical care, psycho-social services and pension vouchers. In addition, if a victim dies as a direct result of a Category 3 violation (forcible transfer of populations), the victim's family is also a beneficiary under Priority A.

Priority B relates to collective reparations, which are available to victims who fall into Categories 4 and/or 5, that is, historical and contemporary land injustices, and systematic marginalisation. Such victims are eligible for land reparations, socio-economic reparations measures, government policy interventions, and non-material reparations such as restitution of rights, recognition, self-determination measures, and memorials.

Priority C relates to non-expedited individual reparations and is addressed at victims who fall into Categories 1 and/or 2 and well as Category 5 where restitution and recognition measures can be taken, such as granting of citizenship and related documents, expunging criminal records and so on. Priority C victims in Categories 1 and/or 2 are eligible for standardised pensions.

It is explicitly recognised by the TJRC that none of these remedies is able to undo the harm suffered individually or collectively. The spirit behind the reparations regime in any context is to contribute to the reconciliation process.

Victim participation is a key principle in the 'design, implementation and monitoring of the reparations programmes'. The TJRC did not develop guidelines regarding how victim participation should be structured, but charged the Implementation Committee to consider the following factors in developing victim participation policies: how victims are currently mobilised; which victims are likely to be excluded from participation and how to include them in the matrix of actors; gendered perspectives and roles of victims in the reparations process; inclusion of marginalised victims; and capacity-building and local ownership of the reparations programme by victims to ensure sustainability of the benefit to the well-being of the victims.

A framework for court-led reparations award in Kenya: Reparative complementarity

The framework proposed by the TJRC has set the platform for a national reparations policy. The details and nuances of the various analyses conducted should inform the State in embarking on the task of providing reparations to victims. As a complementary mechanism and in keeping with international norms of linking reparations to a judicial process, an as yet unexplored avenue through the court system exists to ensure that the principle of providing redress to victims of human rights violations is entrenched in State-led processes.

Kenya remains a State Party to the Rome Statute of the International Criminal Court (ICC).[15] In domesticating the Rome Statute, the Kenyan Parliament enacted the International Crimes Act, or ICA (No. 16 of 2008). The objective of the ICA is to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to cooperate with the ICC in the performance of its functions. Currently, the ICC has exercised its jurisdiction in Kenya in the trial of three Kenyans pertaining to the 2007/2008 post-election violence. Consequently, victims of the crimes that occurred in the course of the post-election violence – crimes that have been legally characterised as being against humanity – have available to them the right to reparations and the right to participate in legal proceedings at the ICC.

The focus in the current Policy Brief is on the right to reparations and an advancement of the argument that the domestication of the Rome Statute in Kenya through the ICA has the potential to provide a framework for reparations – for victims not only of the post-election violence but more generally of gross violations of human rights – through the institution of the Kenyan judiciary. The proposed International Crimes Division (ICD) of the High Court of Kenya (whose parent law would be the ICA) would have the capacity to make orders for reparations based on a system of accountability and satisfying the international requirement that reparations be tied to judicial processes.[16] Reservations have been expressed regarding the proposed ICD, and these include challenges as to the non-retroactivity of the proposed parent law, questions as to the adoption of the ICC Rules of Procedure for the ICD by the Judicial Service Commission, or JSC (which rules and procedure are drawn from legal systems around the world, some of which are currently incompatible with Kenyan law) and, more recently, the challenge of the withdrawal from the Rome Statute motions by both the National and Senate Assemblies.

The exercise of jurisdiction by the Kenyan judiciary to redress harm to victims can be seen in the light of the international criminal law concept of *reparative complementarity*. Moffett articulates the concept of reparative complementarity to the extent that he reiterates that the primary responsibility for providing reparations for victims of international crimes lies with the State, and that the ICC's principles on reparations may guide national processes to ensure that there are effective remedies for victims.[17]

The ICC has developed principles that will guide decisions on the awarding of reparations, which may be insightful for a judicial determination of reparations in Kenya. The ICC Trial Chamber in the case *Prosecutor vs. Thomas Lubanga Dyilo* noted that for purposes of application of principles of reparations under the Rome Statute, the Court will adopt a *broad and flexible* interpretation to give the *widest possible remedies* available to victims, and evaluations on a case-by-case basis.[18]

The Chamber established the following principles:

a) **Principle of Dignity, Non-discrimination and Non-stigmatisation** – all victims, regardless of their participation in the trial proceedings or not, will be treated fairly and equally. This principle is tied to the right of victims to participate in legal proceedings at the ICC. Unlike the ICC processes, Kenyan law does not allow for victims to participate directly in legal proceedings, save for participation as complainant(s) or witness(es) in criminal proceedings and applicants in civil proceedings aimed at recovering damages from a convicted person. To contextualise this principle to Kenya: the courts may hear and award complainants/witnesses reparations,

but in cases where the crimes under consideration by the court affect multiple victims or a community not present at the trial, reparations awards would target a wider group than are represented in court. This is the case where the principles are publicised effectively to victims and affected communities that reparations will be applied in a non-discriminatory manner.

b) **Principles on Beneficiaries** – 'beneficiaries' of reparations can refer to direct and indirect victims alike. While a direct victim status may be clear, an indirect victim status may be less so. The court would determine an indirect victim as being, for example, the child(ren) of a murdered person. Legal entities may also benefit as victims but priority may be given to certain victims in vulnerable situations, such as victims of sexual and gender-based violence. In this case, Kenyan courts may want to benefit from the matrix identified by the TJRC Report on categorisation of victims.

c) **Principle on Accessibility and Consultation with Victims** – the Chamber endorsed a gender-inclusive approach to all principles, with sufficient consultations with victims in locations where they live and paying particular attention to their priorities.

d) **Principle on Victims of Sexual Violence** – victims include women and girls, and boys and men alike. Reparations awards for this group of victims require a specialist, integrated and multidisciplinary approach, particularly to meet obstacles faced by women and girls when seeking access to justice.

e) **Principle on Child Victims** – reparations decisions will be guided by the fundamental principle of the 'best interests of the child' enshrined in the Convention on the Rights of the Child. Where child soldiers are victims, reparations programmes must include their reintegration into society and their rehabilitation, to promote reconciliation within society.

f) **Principle on the Scope of Reparations** – the Chamber recognised the uncertainty in the number of victims in the case and that, despite the high volumes of applications from victims, these numbers are not representatives of the totality of victims. The Chamber endorsed the use of both individual and collective reparations, noting that the two are not mutually exclusive and may be awarded concurrently.[19] When collective reparations are awarded, they should address the harm suffered by victims on an individual and collective basis.

g) **Principle on the Modalities of Reparations** – a comprehensive approach to reparations was adopted, including restitution, compensation (requires broad application consistent with international human rights law assessments of harm and damage), and rehabilitation. The Chamber reserved a non-exhaustive list of the forms of reparations not excluding those with symbolic, preventative and transformative value.

h) **Principle on Proportional and Adequate Reparations** – reparations should support programmes that are self-sustaining, and benefits should be paid by periodic instalments rather than by way of a lump sum.

i) **Principle on Causation** – the Court should not be limited to 'direct' harm or the 'immediate effects' of the crime, particularly in cases involving child soldiers; rather, the Court should apply the standard of 'proximate cause'. The Court must be satisfied that there exists a 'but/for' relationship between the crime and the harm.

j) **Principle on the Standard and Burden of Proof** – as the trial stage is concluded when an order of reparations is considered, the appropriate standard of a balance of probabilities is sufficient. Where the reparations award emanates from the ICC's Trust Fund for Victims (TFV), a more flexible approach is to be taken. These kinds of awards are akin to what have become known as the 'second mandate operations and assistance' of the TFV in situation countries of the Court outside of a judicial determination of guilt or innocence of an accused person.

Principles (f) to (j) above relate to determinations of eligibility; procedures to be followed by victims and other parties in the process of awarding reparations; and assessment, which includes consultation with victims and other stakeholders as well as establishing the standard of proof to establish the identity of and harm to a victim. In this context, the Kenya Transitional Justice Network identifies the standard as a preponderance of evidence or balance of probabilities ('more likely than not').[20] The ICD in Kenya, if established, will need to develop rules of procedure and evidence and corresponding regulations to guide it in reaching reparation orders and decisions regarding their enforcement.

Funding a Reparations Fund in Kenya

The UN Basic Principles and Guidelines tie reparations to a judicial process, and therefore reparation funds can come from assets recovered from perpetrators. Seizure of local assets of perpetrators may be less difficult than the tracing of resources and assets in foreign jurisdictions. In such cases, Kenya should rely on mutual cooperation agreements on criminal matters with foreign jurisdictions. This horizontal form of cooperation among states contributes to positive complementarity on reparations issues.

The TJRC Report proposes that a Reparations Fund be created and that it be appropriated annually from the Consolidated Fund. There needs to be multiple sources of funding for the Reparations Fund. It is recommended that assets recovered through corruption proceedings of the Ethics and Anti-Corruption Commission and the Kenyan courts should be directed to the Reparations Fund. Funding can also be sourced through institutions such as the World Bank, and donors (foreign debt reduction schemes). It is crucial that creative efforts be taken to fund reparations in a post-conflict society. It is also important that the State, when evaluating options for funding reparations initiatives, recognises that reparations are not a question of diverting resources from other areas, particularly development funds, but rather of looking for means that can generate new funding for reparations purposes.

Should the Implementation Committee be set up, such an entity needs to develop its fundraising capacity, given that sole dependence on taxes to fuel the Reparations Fund may be counter-productive to measures undertaken by the State aimed at addressing economic burdens on the part of its citizens.

Conclusion

Over the past five years, much has been said about the operational, procedural and substantial challenges and difficulties of the Kenyan TJRC process. Nevertheless, there are a number of practices of the TJRC that can inspire the work of the institutions of the State in contributing to reconciling Kenya. For example, the Reconciliation Policy adopted by the TJRC emphasised 'the conceptual and practical links between reconciliation and ... justice'.[21] Reconciliation is achievable where redistributive, retributive and reparative forms of justice are implemented nationally. The Reconciliation Policy paves the way for the implementation of a reparative scheme or programme at the national level and devolved to county level to provide victims with access to redress for the injustices visited upon them. The policy's operative clauses 9 (a) and (f) remind us that 'dialogues and spaces for exchange by and around individuals, communities and institutions' are necessary to 'restore dignity of victims through public acknowledgment, reparations and prosecutions'. In the conduct of establishing a reparations policy and designing institutions that would be victim-centred, there needs to be consultation with the victims of gross violations of human rights. Involving this group of individuals is crucial. While the objectives of development projects and programmes may overlap with the objectives of reparations programmes, the right to reparations presupposes that State initiatives must include consultations with victims and contain elements of acknowledgement and State responsibility, followed by responsive, specific and programmatic reparative interventions.[22]

Moreover, it is clear that there are potential challenges to achieving reparative justice in Kenya and which the TJRC Report identifies as challenges to national reconciliation, cohesion and integration.[23] These include:

1. Lack of political will – the Commission concludes that there is limited political will among Kenya's political leaders to embark on reconciliation because of vested and other interests.
2. Reconciliation and access to social goods – there is an absence of structures and institutions that would support reconciliation efforts. This is in relation to living conditions that continually remind people of the suffering they underwent.
3. Victim participation and follow-up mechanism – in relation to uncoordinated reconciliation efforts and lack of ownership of efforts on the part of locals.
4. Root causes and priorities – focusing on perpetrators in areas such as Tana Delta when violence erupted is counter-productive to reconciliation among the communities of the Delta. There should be efforts focused on addressing the root causes, to avoid a resurgence of violence.

These challenges speak to the need for an integrated and coordinated transitional justice framework for the country. Isolated efforts to address individual elements relating to post-conflict recovery are doomed to failure. The government needs to coordinate such efforts and clearly indicate the importance of the matter. As recommended by the TJRC Report, a public apology from government to the people of Kenya for past and present injustices would be a good start.

There is a need for policies that would ensure a nation that prioritises reconciliation. Along with the necessary political will to implement them, these policies should be clear, concise, focused and have strong guidelines for implementation. Existing institutions must be strengthened as well as new ones created to support the implementation of these policies. Given that reconciliation is a process, the nation should seriously embark on capacity-building of individuals who will take on the task of ensuring national reconciliation. In this connection, education and skills development must be prioritised. The Kenyan school curriculum must reflect national values that entrench reconciliation and national cohesion and integration. Scholars must be motivated through skills development, where they would learn and implement reconciliatory programming in the coming generations.

Notes

1. This Policy Brief is authored by Allan Ngari, Project Leader, Kenya and International Justice Desk (IJR), South Africa , and is part of a series of policy briefs in the tripartite project between the Institute for Justice and Reconciliation (IJR), National Cohesion and Integration Commission (NCIC) and Folke Bernadotte Academy (FBA) on 'Promoting National Reconciliation in Kenya'. The author would like to thank the following individuals for their comments and suggestions in the writing of this Policy Brief: Guyo Liban, Assistant Director, Reconciliation and Integration Department, NCIC; Munini Mutuku, Senior Programme Officer, Reconciliation and Integration Department, NCIC; Elvi Agunda, Project Officer, Reconciliation and Integration Department, NCIC; Peter Nordström, former Programme Officer, Conflict Prevention in Practice, FBA; and Therese Jönsson, Training and Project Leader, Conflict Prevention in Practice, FBA.
2. See Ngari, A. 2012. Reconciling Kenya: Opportunities for constructing a peaceful and socially cohesive nation. *Policy Brief No. 1*, July. FBA, IJR and NCIC.
3. Or whatever entity is created by government for purposes of implementing the recommendations of the TJRC Report.
4. Roht-Arriaza, N. 2004. Reparations decisions and dilemmas. *Hastings International and Comparative Law Review 27*, 157–219 [hereinafter Roht-Arriaza].
5. See Redress Trust. 2003. *Redress. Reparation: A sourcebook for victims of torture and other violations of human rights and international law* [online]. Available from: www.redress.org/downloads/publications/SourceBook.pdf [accessed 18 July 2013], [hereinafter Redress Trust].
6. Redress Trust.
7. Van Boven, T. 1993. Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. In: *UN Doc E/CN.4/Sub.2/1993/8 of 2 July 1993* [hereinafter Van Boven], para. 13.
8. Article 2(3), 9(5) and 14(6) International Covenant on Civil and Political Rights (1966); Article 6 International Convention on the Elimination of All Forms of Racial Discrimination (1965); Article 39 Convention on the Rights of the Child (1989); Article 14 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984); Article 21(2) African Charter on Human and Peoples' Rights (1981); Article 75 Rome Statute of the International Criminal Court (1998).
9. Van Boven, *supra* note 7; See also Saul, B. 2004. Compensation for unlawful death in international law: A focus on the Inter-American Court of Human Rights. *American University International Law Review 19*, 523–584, at 541.
10. Roht-Arriaza, *supra* note 4, 159.
11. TJRC (Truth, Justice and Reconciliation Commission) Kenya. 2013. Healing and Reconciliation. In: *Report of the Truth, Justice and Reconciliation Commission, Volume III*. Chapter III, 81 [hereinafter TJRC Report].
12. TJRC Report, Vol. III, 99.
13. TJRC Report, Vol. III, 100.
14. TJRC Report Vol. III, 104.
15. Kenya deposited its instrument of ratification to the Rome Statute of the International Criminal Court, UN Doc A/CONF, 183/9, on 15 March 2005.
16. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN General Assembly Resolution A/RES/60/147, Principle 11 [hereinafter Basic Principles and Guidelines].
17. Moffett, L. 2013. Reparative complementarity: Ensuring an effective remedy for victims in the reparation regime of the International Criminal Court. *The International Journal of Human Rights*, Vol. 17(3), 368–390.
18. See Decision establishing the principles and procedures to be applied to reparations in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, 7 August 2012, ICC-01/04-01/6, paras 180–254.
19. Reparations Decision, *supra* note 132, paras 217–220; See also Appeals Chamber Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 36.
20. Kenya Transitional Justice Network. 2013. Transitional justice approaches in the context of the implementation of Agenda Item Number 4. *Kenya Transitional Justice Network Policy Brief* [online], 13. Available at: http://www.icj-kenya.org/dmdocuments/books/transitional%20justice%20approaches%20in%20the%20context%20of%20the%20implementation%20of%20agenda%20item%20number%204.pdf [Accessed 01 October 2013].
21. Reconciliation Policy. In: *TJRC Report*, Chapter III, Vol. III, 85–86.
22. McClain, L. & Ngari, A. 2011. Pay us so we can forget: Reparations for victims and affected communities in northern Uganda. *IJR & JRP Policy Brief 2*, August, 6.
23. Healing and Reconciliation. In: *TJRC Report*, Chapter III, Vol. III, paras 57–68, 104–107.

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