

IN THE MATTER OF:-

**TRANSITIONAL JUSTICE MEASURES
TO ADDRESS THE COLONIAL LEGACY**

KERICHO AND BOMET COUNTIES, KENYA

1. The Kipsigis and Talai peoples suffered gross human rights violations and serious violations of international humanitarian law including killings, rapes, torture, and arbitrary detention, committed by or on behalf of the United Kingdom (“UK”), associated primarily with the expropriation of land in Kericho and Bomet Counties in Kenya during the colonial period (1920 – 1963).
2. The legacy of these violations is not only the physical and psychological injuries of the victims but also crippling poverty that continues to blight the lives of the victims and their descendants.
3. As developed further below, the Victims’ experience is that the colonial power – the UK – has refused to engage in any measures whatsoever to promote truth, justice, reparation or guarantees of non-recurrence. By contrast, the country in which the violations occurred – Kenya – did seek to address a part of the colonial human rights violations by creating a National Land Commission. Whilst the National Land Commission was only empowered to address historic land injustices, and therefore many colonial human rights violations lay outside its scope, it provided a model forum to investigate the dispossession of land, evictions and deportations during the colonial period, determine the truth and make recommendations as to reparations. Sadly, the National Land Commission’s recommendations in relation to these Victims have not been implemented by Kenya, the UK, or by the multi-national tea companies who presently occupy much of the affected land. No reparation has ever been provided to the Victims.
4. The County Assembly of Kericho and Bomet Counties in Kenya, led by Governor Paul Chepkwony, is determined to pursue truth, justice, reparation and guarantees of

non-recurrence on behalf of the victims. The County Assembly, on behalf of over 110,000 victims, instructed JK Bosek & Associates in Nairobi and Rodney Dixon QC, Aidan Ellis and Anne Coulon of Temple Garden Chambers in London and the Hague to represent them. We are now instructed to submit this response to the UN Special Rapporteur's Questionnaire on Transitional Justice Measures to Address the Legacy of Serious Violations of Human Rights and Humanitarian Law committed in Colonial Contexts on behalf of the 110,000 victims in Kericho and Bomet Counties.

Concerned Country

5. The Victims from Kericho and Bomet Counties note that in the colonial context there is never only one “concerned country”. The primary concerned country is the colonising State which has the power and the responsibility to redress the harm to the victims. However, in these cases the country where the violations occurred is also a ‘concerned country’ with its own obligations to the victims as set out below.
6. In these specific cases, the harm to the victims was directly perpetrated by and on behalf of the United Kingdom. Many of the perpetrators and beneficiaries of the human rights violations are domiciled in the United Kingdom. In the first instance, the obligation to provide accountability, truth, reparation and guarantees of non-recurrence must fall on the United Kingdom.
7. However, Kenya has been independent since 1963. The land which was taken from the victims is now within the Kenyan jurisdiction. As a matter of human rights law, the Kenyan Government is obliged to provide income, education, health care and homes to the victims and their descendants. Article 43(1) of the Kenyan Constitution of 2010, which addresses economic and social rights, guarantees *inter alia* the right of every person (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quantity; and (f) to education. Article 21(2) of the Constitution provides that “[t]he State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article

43”. Accordingly, the Kenyan Government must also be regarded as a ‘concerned country’.

Mechanisms to Hold Persons Accountable

8. The Victims wish to highlight that no mechanisms have been established to hold persons accountable for colonial human rights violations in Kericho and Bomet Counties. The Victims believe that at the current time alternative mechanisms are likely to prove more effective than traditional criminal trials.
9. During the colonial era, there was no effective remedy for victims of human rights violations as a result of a combination of the power held by the colonial government and the institutional barriers to victims seeking justice and asserting their rights, including in relation to education and access to the courts, and having the means to pursue any remedies. Those responsible for human rights violations often acted or appeared to act in accordance with the colonial legal system as it existed at the time (for example, the evictions of the Victims were carried out pursuant to colonial laws and hence the perpetrators could hardly be prosecuted at the time). As a result, there were no prosecutions of those responsible for human rights abuses.
10. In the years since the end of the colonial period, the Victims are not aware of any mechanism established by either the UK or Kenya to hold individuals accountable. The Victims understand that there is no prospect of establishing individual criminal accountability in Kenya today. The great majority of individual European settlers left Kenya following independence, returning to the UK or buying land in third countries such as Zimbabwe. They are no longer within the Kenyan jurisdiction. Further, Kenya gained independence 58 years ago. Given the passage of time, the individuals in senior positions within the colonial administration who bear the greatest responsibility for the human rights violations are unlikely to remain alive. If a perpetrator was identified, there would be significant evidential barriers to proving a claim against them. Accordingly, the prospects for convictions are extremely limited.
11. The Victims believe that the remote possibility of achieving individual criminal accountability, which must be the same in many other colonial situations, highlights

the importance of alternative justice mechanisms such as truth finding inquiries, group reparation projects, negotiated or mediated settlements and indeed the United Nations Special Procedures.

12. Moreover, the Victims emphasise that much of the affected land in Kericho and Bomet Counties remains in the possession of multi-national tea companies such as Unilever Plc, Williamson Fine Tea Limited and John Swire & Sons Ltd. These companies continue to make vast profits from the exploitation of fertile tea estates which were originally stolen from the Victims during the colonial period, while the Victims must eke out a living on lesser land. The Victims note the UN Guiding Principles on Business and Human Rights require businesses to address adverse human rights impacts with which they are involved and that businesses should provide for 'remediation' where they have caused or contributed to adverse human rights impacts. The multi-national tea estates' title to the land is tainted by the colonial era human rights abuses and their continued possession of and profit from the land adversely affects the rights of the Victims. Consequently, the emphasis on individual accountability should not exclude the importance of mechanisms to hold corporations to account where they benefit from prior human rights abuses.

Mechanisms to Enquire on and Establish the Truth and Reparation

13. No mechanism has ever been established in the UK to enquire on or establish the truth in relation to colonial human rights violations. Moreover, no systemic measures have been adopted to provide reparation to victims of such violations.
14. In June 2013, the UK did provide a group compensation payment of around £20,000,000 and an apology to around 5,000 Kenyan victims who suffered human rights abuses in the specific context of the Mau Mau conflict and associated detention centres. That compensation was paid in settlement of one specific set of legal proceedings (cf *Mutua v Foreign and Commonwealth Office*). Whilst that compensation did provide reparation to that limited group of victims, the settlement of their claims before trial meant that no mechanism to establish the truth was established.

15. Since the settlement of the Mutua case, the UK has rebuffed all attempts to discuss mechanisms to establish the truth or provide reparation to victims of colonial era human rights abuses in Kenya. In a second case, *Kimathi v Foreign and Commonwealth Office*, the UK succeeded in defending group litigation by a second group of Kenya victims on the grounds that the limitation period had expired.
16. The Victims in Kericho and Bomet Counties have written to the UK to request the UK to provide reparation or establish an appropriate mechanism to establish the truth and reparation. The UK refused. It has refused even to meet with the representatives of the Victims. The approach that the UK has adopted is thus inconsistent and arbitrary; it settled the reparation claims brought by one group of victims only and apologised to them, but refuses even to meet with these Victims to discuss appropriate mechanisms to provide truth, justice and reparation to them.
17. The Victims face obstacles to suing for compensation in the UK since (1) the costs of litigation are beyond the means of the Victims; (2) as laid down in the Limitation Act 1980, the limitation period in relation to land claims has expired and the *Kimathi* case above has shown that the limitation period in relation to personal injury claims is unlikely to be extended to embrace the colonial period; and (3) there are other structural and legal barriers to an effective remedy in the ordinary court process including immunities.
18. Kenya, by contrast, did establish a National Land Commission with a mandate to investigate historical land injustices which examined at least some of the human rights abuses suffered by the Victims. However, the recommendations of that Commission remain unimplemented.
19. The National Land Commission was created in 2010 by amendment of the Constitution of Kenya. It was empowered, amongst other things, to initiate investigations into historical land injustices and recommend appropriate redress (see Article 67(2)(e) of the Kenyan Constitution).
20. Kenyan legislation including the National Land Commission Act 2012 (as amended by the Land Laws Amendment Act 2016) and the National Land Commission

(Investigation of Historic Land Injustices) Regulations 2017 provided a framework for the victims of colonial human rights violations connected to land to submit complaints to the Commission. The framework provided for the investigation of the Victims' complaints by the National Land Commission, the submission of evidence and the Commission to determine their complaints and make recommendations.

21. The Victims made written submissions to the National Land Commission and had the opportunity to make oral submissions at an investigative hearing in Autumn 2018.
22. In February 2019, the National Land Commission found that the Kipsigis and Talai communities had been the victims of historic land injustices, making detailed findings upholding their allegations of human rights abuses relating to land and property. The National Land Commission's Report is attached to this response.
23. The National Land Commission called for further investigation of other human rights abuses (which were outside its mandate) and made recommendations for appropriate reparations to the UK, Kenya and the multinational tea companies. Those recommendations included the payment of reparations, the construction of useful amenities such as hospitals or schools and recommendations in relation to the ongoing title to the affected land.
24. No investigative mechanism was ever created to enquire into the truth of the remaining human rights violations during the colonial era. The National Land Commission was confined by its mandate to "historic land injustices" and therefore could not address broader abuses.
25. The National Land Commission's recommendations regarding reparations have not been implemented. The multi-national tea companies who currently own and profit from the affected land have brought judicial review proceedings to challenge the National Land Commission's conclusions. These proceedings are currently ongoing. The UK has refused to consider the National Land Commission's recommendations and does not accept that it is bound by them.
26. More than two years after the National Land Commission published its recommendations, no steps have thus been taken to implement them by either the UK

or Kenya. This is an ongoing disappointment for the Victims because the National Land Commission had begun as a model procedure for establishing the truth and recommending reparations. However, the failure to implement its recommendations has entirely neutered its effectiveness as a remedy.

Measures Established to Memorialise the Victims

27. No measures have been taken in the UK or in Kenya to memorialise these Victims.
28. Nonetheless, the Victims wish to highlight the measures that they submit should be taken to memorialise the human rights abuses in the colonial period.
29. First, the Victims submit that a fitting memorial to the Victims of colonial era human rights violations will often be for the concerned countries to build or finance the building of vital community buildings such as schools, colleges or hospitals. Such a project would provide a lasting memorial to the Victims, which could be ensured through the naming of the building. But it would also provide a useful service to the Victim community which would help to alleviate the legacy of these violations.
30. Second, the Victims submit that the concerned countries should consider constructing a museum to address the colonial legacy. The Victims believe that a museum should not only house objects and archive documents from the colonial era, but could also tell their story through audio and visual presentations so that their suffering is not forgotten.
31. Third, the Victims highlight that considerable academic research is being done on colonial era human rights violations and their legacy. In relation to Kenya, the work of Caroline Elkins, David Anderson and many others have shone a spotlight on the history of human rights abuses by the UK in colonial Kenya. This academic research should be encouraged and fostered by the concerned countries as a way to memorialise the Victims.

Measures Established to Guarantee Non-Recurrence

32. No measures have been taken in the UK or in Kenya to guarantee non-recurrence.
33. The Victims note that from one perspective it might be argued that guarantees of non-recurrence are less important in the colonial context, since the UK is no longer in the position of a colonial power and Kenya has long been a fully independent country.
34. Nonetheless, the Victims believe that it remains vital fully to acknowledge the suffering of the colonial period in order to allow the Victims and their descendants to break through the legacy of these terrible violations. The direct Victims of colonial human rights violations in Kenya are old men and women who have lived their lives struggling with the physical and psychological scars caused by these violations. They are now in ill-health. The longer it takes to achieve truth, justice and reparations, the more their numbers will dwindle. It is vital to achieve a measure of truth, justice, and reparation before the last of this generation die.
35. Moreover, the legacy of the colonial human rights violations continues to bind the Victims' descendants to a life of poverty. In Kericho and Bomet Counties, fertile land was progressively taken from the Kipsigis and Talai peoples and given to white settlers. The dispossessed Victims were forced to live in native reserves such as Belgut, Bureti and Sotik (or deported out of Kericho altogether to inhospitable land in the case of the Talai). The land that was taken from them is now valuable tea estates, controlled by multi-national companies. The Victims have to struggle to survive on lesser land. Not only is the ongoing loss of land an ongoing human rights violation, but living lives of poverty in the shadow of the wealth of the tea estates is a constant source of tension in the Counties which could, if unaddressed, lead to conflict. In order to guarantee the non-recurrence of conflict (which leads to human rights violations), the issue of the land and the inequality which has resulted from the colonial human rights violations must be addressed. There can be no guarantee of non-recurrence whilst the victims remain dispossessed and the successors in title to colonial abuses continue to draw all the profit from the land.

Conclusion

36. The Victims believe that the National Land Commission in Kenya could have been a model example of a national mechanism to investigate, uncover the truth and provide reparation in relation to colonial human rights violations. However, its mandate was limited to land injustices and the opportunity to investigate other human rights violations was missed. Moreover, its conclusions and recommendations have not been implemented by the UK or by Kenya, in part due to opposition from vested interests in the form of the current occupiers of the land concerned.
37. Furthermore, the UK has taken no steps whatsoever to engage with the Victims. The UK has not established any mechanism to investigate the truth of historic human rights abuses in the colonial context, still less provide reparation or guarantees of non-recurrence. Instead the UK takes its stand on legal technicalities such as limitation periods. The refusal of the former colonial power even to meet with the representatives of the Victims highlights its lack of interest in establishing the truth, let alone ensuring accountability and providing reparation to the victims and guarantees of non-recurrence. If former colonial powers are to acknowledge the harms that they caused and their ongoing legacy, novel and effective international mechanisms may need to be considered.

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