

Designing a Land Restitution Programme in Kenyan Emerging Transitional Justice

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1. Introduction

Land is an emotive and volatile issue in Kenya because it bears significant political, economic, cultural and emotional value to the lives of the people. Approximately 80% of the population live in the rural area and depend on land for their livelihood.¹ Their social, cultural and economic activities are connected to land. Even those living in the urban areas, still maintain emotional ties with the rural area. During public holidays, they trek to the rural areas for a break, away from the hectic urban life. In fact, since the S. M. Otieno burial case in the 80s, it is common to refer to the urban home just as a ‘house’

¹ See, United Nations Development Assistance Framework (UNDAF), KENYA, 2004-2008
<http://www.undp.org/UNDAF.pdf>

and the rural house as the ‘home’. In addition, most Kenyans anticipate to be buried in their own land. Ownership of land is therefore emotionally important. Those buried in public cemeteries are usually considered poor and landless. In addition, for many communities, specific pieces of land also have sacred or cultural significance.²

But land has even greater significance as concerns economic activities. To the majority of the people land is the only source for financial income and subsistence. These are derived from a variety of activities on land such as farming, grazing, hunting and gathering, tourism, leasing, mining etc. Land is also important for building, housing and for public utility infrastructure such as schools, hospitals, water, recreational facilities, roads etc. Last but not least, land is used as a loan collateral and security.³ It is a source of money for development and other personal uses. Land means social and economic empowerment.

Unfortunately, land has always been a source of conflict in Kenya. The history of conflict involving land is not new and has its genesis in the colonial and post-independence internal displacements. In fact, the internal displacement of persons has been a permanent feature of Kenya history from colonial times to the present day.⁴ According to the perception by the majority of the people, the root causes of the problem are traceable in the unjust displacements of masses of African people from their indigenous lands by the colonial settlers in order to give room to settler settlement and farming during the colonial reign and the land transfer policies and legislation adopted by the independence government since 1963. Most people at independence expected a return of their ‘stolen’ land but this did not happen as the new government adopted a ‘willing buyer, willing seller’ land transfer policy prescribed by the colonial government during the transition to African rule. According to this policy, only those who were able to purchase land from the departing colonial settlers could access the land left behind. The independence government attempts through land resettlements schemes to settle the landless did not go far enough, since the land was to be paid for and it has continued to be allocated to undeserving persons under corrupt circumstances, the real victims of displacement did not benefit.⁵ The government never seriously embraced land restitution as a transitional justice solution despite the fact that the African nationalist movement and the Mau Mau rebellion were essentially motivated by land restitution claims.

The land conflict is embedded in historical injustice perceptions that opposing protagonists exploit politically and ethnically to manipulate and instigate land clashes at

² OMCT The Lie of The Land: Addressing the Economic, Social and Cultural Root Causes of Torture and Other Forms of Violence in Kenya An Alternative Report to the Committee on Economic, Social and Cultural Rights prepared by the World Organisation Against Torture (OMCT), the Centre For Minority Rights Development (CEMIRIDE) and the International Commission of Jurists (ICJ) – Kenya, in the context of the project “Preventing Torture and Other Forms of Violence by Acting on their Economic, Social and Cultural Root Causes” p. 9

http://www.omct.org/pdf/ESCR/2008/CESCR_kenya_OMCT_alt_report.pdf

³ Wanjala, Smokin C., 2000, 35.

⁴ Waki Report:

⁵ Mweseli, 2000, 22; Stavenhagen Kenya Mission Report, para 35; Ndungu Report, ; Wanjala, Smokin C., 2000, 33.

every general election year. The land clashes manifested themselves on a large scale for the first time in 1991 and have recurred every five years during general elections. These land clashes have contributed to the second wave of mass displacements experienced in Kenya. The recent displacement occurred during and in the post-election 2007 chaos.

Previous efforts to resolve land conflicts have not been successful because of political wrangling among political actors that has impeded attempts on transitional justice. But serious attempts for resolution emerged after the 2007 post-election violence and the subsequent signing of the peace agreement on national accord and reconciliation reached early in 2008 between the main Kenyan political parties. The agreement forms the basis for a transitional justice process. It focuses on implementation of a coherent and far-reaching reform agenda to address the fundamental root causes of the recurrent conflict. The consensus among the parties is that unless the deep-seated and long-standing issues on land that trigger crisis and conflict at every general election are resolved, taking interests of all the parties to the conflict into account, future encounters are inevitable. Among the measures proposed are the establishment of a Truth, Reconciliation and Justice Commission and a national land policy with reparation and land restitution as key components.

Kenya is an emerging case on transitional justice and as a new window of opportunity to redress the land conflict problems opens, the main challenge is whether the political actors will utilise or squander the chance. Legislative and policy efforts to implement the agreement are in progress. On 28 November 2008, the President signed into law the Truth, Justice and Reconciliation Commission Act. The Act establishes an independent Commission whose mandate includes seeking and promoting justice, national unity, reconciliation and peace among the people of Kenya by inquiring into gross human rights violations in the country and recommending appropriate redress for persons and communities who have suffered injury and other harm. It will adopt a historical perspective in its investigations especially as regards matters of land and ethnic violence. It will also act as a platform for truth telling for victims and perpetrators in order to chart a new moral vision and seek to create a value-based society for all Kenyans.

The work on a national land policy commenced in 2006 with financial assistance from international donor countries and on March 2007 the Draft National Land Policy⁶ was published. The draft provides for a systematic platform for addressing issues such as access to land, land use planning, and restitution of historical injustices among many others issues. The draft which has been widely published in print and electronic media was recently approved by the Cabinet⁷ and is awaiting adoption by parliament.

This paper examines the emerging transitional justice in Kenya and the limits of restitution in resolving long enduring land conflicts and displacements. The concept of restitution and its limits is discussed. It also explores the designing of transitional justice tools which bear implications on land restitution. It discusses the lack of a specific

⁶ Republic of Kenya Ministry of Lands and Housing, Draft National Land Policy, National Land Policy Secretariat, Nairobi, March 2007.

⁷ The Daily Nation, Friday, June 26, 2009.

restitution law in Kenya and its implications on land restitution claims. It also identifies the displaced persons and the causes of their displacement. The lack of reliable statistics on the displaced persons is discussed. Finally, the challenges for implementation of restitution are reviewed with a focus on the role of the international community. Their support to national institutions and actors which includes funding, advice and other assistance is crucial to the transitional process.

2. Transitional Justice Tools for Land Restitution

As Kenya seeks to embark on a transitional justice process, it is important to understand the concept transitional justice, its normative content and role. There is no firm consensus on the definition of the term transitional justice. It has been, however, defined as “a field of activity and inquiry focused on how societies address legacies of past human rights abuses” in an effort to combat impunity and advance reconciliation during a period of definitive change in the political landscape. In other words, transitional justice is an internationally accepted mechanism that seeks to address past human rights violations while allowing nations and their people to move forward towards sustainable peace and reconciliation. It is a backward looking and forward looking process. It aims at confronting the painful legacy, or burden, of the past in order to achieve a holistic sense of justice for all citizens, to establish or renew civic trust, to reconcile people and communities, and to prevent future abuses. Transitional justice measures primarily seek to establish or restore trust between the state and citizens who conform to certain parameters. In order to accomplish its aims, transitional justice employs a number of mechanisms, mainly truth-seeking, prosecutions and amnesties, reparations to victims, institutional reform, vetting, reconciliation, and constructing memorials and museums.

Traditional transitional justice has, however, been critiqued because it tends to exclusively focuses on civil and political violations of human rights and fails to include economic and social aspects of human rights. Critics argue that the root causes of the conflict that transitional justice attempts to redress are not purely political but are also embedded in social and economic inequalities. Zinaida Miller observes that divorce of social and economic justice from transitional justice mechanisms allows a myth to be formed that origins of conflict are political or ethnic than economic or resource based.⁸ The failure to address inequality as a cause of conflict, in the first place, increases the probability of re-emergence of conflict.⁹

Why is transitional justice necessary in Kenya? Kenya has undergone a series of political transitions, from colonialism to independence, from multiparty democracy to one-party autocratic rule and from one-party autocracy to multiparty democratic system, but during these transitions transitional justice issues were never given bipartisan interrogation. Successive governments have undertaken piecemeal reforms which failed in the long-term for lack of political consensus. Transitional justice is necessary in order to deal with human rights violations and historical injustices created by colonial displacements and

⁸ Miller, Zanaida, Effects of invisibility: In search of the ‘economic’ in transitional justice. The International Journal of Transitional Justice, Vol. 2, 2008, 266-391, 268.

post-independence displacements. The latter is linked to the colonial land alienation policies which were adopted by the Kenya Government after independence and the post-independence autocratic rule. After the eruption of political ethnic clashes in 1992 elections and introduction on multiparty politics, transitional justice gained prominence but failure to change the regime ensured continuity. As such no serious efforts on transitional justice occurred until 2003 when the incoming National Rainbow Coalition (NARC) government appointed a Task Force headed by Professor Makau Mutua to seek public's view on the formation of a Truth, Reconciliation Commission. The Task Force acknowledged that "the Kenyan state for the first time in its history was formally committed to transitional justice, the rule of law, and democracy."¹⁰ In its findings, the Task Force recommended the formation of a Truth, Justice and Reconciliation Commission (TJRC) to investigate inter alia ... politically instigated ethnic clashes and violation of economic, social and cultural rights. Despite the reported widespread support for it, the TRJC was not set up because of political cleavages in the NARC government.¹¹ The 2007 post-election violence, however, reinvigorated the need for a transitional justice process. The demands were expressed in the Agreement on the Principles of Partnership of the Coalition Government known as "Acting Together for Kenya", signed by the two contending political parties after the controversial 2007 presidential general election, the Party of National Union (PNU) and the Orange Democratic Movement (ODM) on 28 February 2008. It state that,

"The crisis triggered by the 2007 disputed presidential elections has brought to the surface deep-seated and long standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country.

This agreement provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all."

As part of the agreement the two parties under the mediation of the former United Nation's Secretary General Kofi Annan agreed on the agenda for mediation known as the resolution of the political crisis with an annotated agenda and timetable. The agreement prescribes both short-term and long-term solutions to the crisis. The four agenda items are a full package of transitional justice process which includes political, civil and socio-economic measures. They deal with humanitarian crisis, resettlement of IDPs, interim coalition government, accountability and impunity, constitutional and institutional reforms, land reforms, poverty, regional inequity and marginalisation, and unemployment among the youths.

The Agenda item 4 long-term solutions to the crisis is significance as it expresses transitional justice requirements. The following issues are to be addressed.

¹⁰ Republic of Kenya: Report of the Task Force on the Establishment of Truth, Justice, and Reconciliation Commission, 26 August 2003 (Matua Report), 9

¹¹ Ibid. See also, Wachira, George and Kamungi, Prisca, Truth and reconciliation commissions in transitional justice in Africa: Lessons and implications for Kenya. Nairobi Peace Initiative – Africa, Background Paper, April 2008, p. 2.

- 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 a Land Reform;
- Addressing transparency, accountability and impunity.

For our purposes the concern is with items addressing land restitution although the whole process is important for the success of land restitution. This study pays special attention to items on consolidating national cohesion and unity and undertaking land reform. Envisaged under the national cohesion and unity item is the establishment of two commissions, the National Cohesion and Integration Commission proposed by the National Cohesion and Integration Act 2008¹² and the Truth, Justice, and Reconciliation Commission proposed in the Truth, Justice, and Reconciliation Act of 2008. Under the land reform item, the formulation of National Land Reform Policy is envisaged. A draft land reform policy was drawn in 2007. These processes will be discussed in detail below.

A. The National Cohesion and Integration Commission

The recurrent land conflicts and feelings of economic dispossession and marginalisation among majority ethnic groups in Kenya have resulted in tension and dissatisfaction in the country which must be addressed for a sustainable peace and harmony in the country. The National Cohesion and Integration Act 2008, formerly the National Ethnic Cohesion and Relations Commission Bill 2008 earlier rejected by Parliament, under Section 15 (1), establishes the Commission. The objective and purpose of the Commission is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different communities of Kenya, and to advise the Government on all aspects thereof, Sec. 25 (1). In particular, it is to promote tolerance, understanding and acceptance of diversity in all aspects of national life in the social, economic, cultural and political life of other communities, Sec. 25 (c). According to the preamble, the Act is to encourage national cohesion and integration by outlawing discrimination on ethnic grounds. Discrimination for the purposes of the Act includes ethnic discrimination as defined in Sec. 3, discrimination by way of victimization Sec. 4, comparison of persons of different ethnic groups Sec. 5, and harassment on the basis of ethnicity Sec. 6. The Act also identifies acts, conditions and circumstances deemed as discriminatory which includes discrimination in employment, discrimination in membership of organisations, discrimination by other agencies including public agencies, discrimination in property ownership, management and disposal, and hate speech. Exception rules are, however, included to ensure that individuals and communities are not disadvantaged in cases where discrimination would be otherwise be beneficial to their social wellbeing especially as regards distribution of resources.

In order to safeguard its independence, the Commission is established as a body corporate able to act and function as a legal entity. Its membership consists of eleven

¹² The National Cohesion and Integration Act, No. 12 of 2008, Laws of Kenya.

commissioners. To ensure transparency in the recruitment of the commissioners, eight of the commissioners are to be recruited and appointed according to the procedure laid down in the First Schedule of the Act.¹³ Accordingly, the parliament is to nominate 15 persons from a list of competitively recruited candidates which is forwarded to the president who in turn gazettes eight commissioners from the list as appointed. The other three commissioners are the sitting chairpersons of three public commissions: the Kenya National Commission on Human Rights, the National Commission on Gender and Development and the Public Complaints Standing Committee (Ombudsman). To qualify as a commissioner the person must be a Citizen of Kenya, a person of high moral character and proven integrity, has knowledge and experience in matters relating to race, ethnic and human relations, public affairs, and human rights. A person, however, is disqualified if he or she is a member of national assembly, local authority, the executive body, or actively involved in the affairs of a political. In addition, the person should not have promoted sectoral, ethnic, racial or religious animosity or openly advocated for partisan ethnic positions or interests. The commissioners are to hold the office for a period of three years and are eligible for reappointed for another term of three years. They are guaranteed security of tenure and can only be removed from office in accordance with provisions of Section 23 of the Act.

The Act grants the Commission independence and powers to carry out its functions without interference from any person or authority. Its funding is determined by parliament and it may receive funding from any other sources as stipulated in the Act. The Commission is required to issue annual reports of its activities and results to be transmitted to the National Assembly. The Commission, however, has the mandate to publish the report in the Gazette and in other manner it may determine. It may also submit a special report to the National Assembly on matters of national interest which it may want to draw to the attention of the National Assembly.

The Commission has adjudicatory role and can receive complaints from individuals and the minister can refer matters to the Commission where the Minister considers the matter raises an issue of important public policy. The Commission is to refer a complaint for conciliation but where conciliation is not appropriate the Commission may set the complaint down for hearing. In its decision the Commission issues compliance notice where the complaint has been proven or dismisses it where it is not proven. A compliance notice requires the person concerned to comply with a duty specified in the notice and inform the Commission accordingly as specified by the Act. The notice may also require the person concerned person to furnish the Commission with written information in order to verify that the notice has been complied with. The Commission may also apply to a Magistrates Court for an order enforcing the compliance with the notice.

The Commission is also granted investigative powers and may initiate investigations on its own volition in order to enforce the provisions of the Act. A matter may be investigated if is of serious nature, concerns a possible contravention in relation to a class or group of persons and the circumstances are such that the lodging of a complaint by one person only would not be appropriate and where the commission becomes aware of

¹³ See, Procedure for nominating commissioners by the national assembly, Schedule III of the Bill.

circumstances that a contravention of the Act may have occurred (other than the contravention alleged in the complaint or the contravention being investigated).

The Act establishes offences against a person, body corporate or agency that commits an offence under the Act as stipulated in Sections 62, 63 and 64. The Act, however, does not create civil or criminal liability except to the extent expressly provided by the Act. In that sense, the adjudicatory role of the Commission is limited to criminal and civil matters stipulated in the Act. This coupled with the fact that the Commission has no powers to enforce compliance may reduce its effectiveness in ensuring national cohesion and integration.

The Act is an important document because it acknowledges ethnic relations and ethnic discrimination as a problem and attempts to prescribe a solution. Ethnic relations have been deteriorating over decades and the existing laws and institutions have not been able to curb the development. Adding a new law and institution does not mean that it will solve the problem but at least there is an acknowledgment that the problem exists and the need to address it. The Act, in a transitional justice language, is much a forward looking mechanism whose objective is to prevent future occurrence of ethnic discrimination, and where it occurs, it provides a procedure to deal with the problem. At the same time, the law and the Commission should be viewed within the larger scope of the evolving transitional justice process which includes other measures and institutions forming the Agenda four components. Ethnic relations and discrimination is an intricate issue that cannot be solved by one law and one institution but requires complimentary measures, laws and institutions. The ethnic cohesion and integration Commission complements other measures such as the TJRC and the land reform policy not to mention general institutional reforms. The need for transitional justice stems from the fact that societal problems are complex and they require multifaceted solutions.

B. The Truth, Justice, and Reconciliation Commission

The establishment of the Truth, Justice, and Reconciliation Commission was long overdue as explained above and the recommendation for its creation by the Kenyan National Dialogue and Reconciliation Mediation Team was a welcome relief as noted in the comments of the Kenya National Commission for Human Rights (KNCHR). “Kenya is in dire need for Truth and Justice as a precondition for reconciliation. We have lived in collective denial that there were serious structural fault-lines in Kenya’s make up and this façade of national unity has regrettably been laid bear resulting in gross violations of human rights.”¹⁴

The Commission is established by the Truth, Justice, and Reconciliation Commission Act 2008, Section 3. The objectives of the Commission are to promote peace, justice, national unity, healing, and reconciliation among the people of Kenya through inquiry into human rights violations, including those committed by the state, groups, or individuals. The inquiry includes but is not limited to politically motivated violence, assassinations,

¹⁴ KNCHR: Modalities for the establishment of a Truth, Justice, and Reconciliation Commission: The KNCHR Position, Nairobi 14 February 2008.

community displacements, settlements and evictions. It will also inquire into major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence. Other historical injustices are also to be investigated. Reading from the objective one would say that the TJRC has an expanded mandate that covers social and economic justice unlike a traditional truth commission which is restricted to political and civil rights.

The Commission's mandate is to inquire into such events which took place between December 12, 1963 and February 28, 2008. It will, however, as necessary look at events antecedent to this date in order to understand the nature, root causes, or context that led to such violations, violence, or crimes. Although its mandate seems limited in time-frame, it is really wide because most of the post-independence issues it will investigate have historical linkage to the colonial era violations. To understand the real causes, it will be necessary to look back to the colonial era, a period outside the Commission's mandate. The Commission as a general rule will operate for two years but it can request for extension at least three months before the expiry of the two years by submitting a progress report to the parliament together with the request for extension. The parliament after consideration of the reasons for the request for extension may decide to grant the request but the extension duration should not exceed six months. The time restriction may hamper the work and effectiveness of the Commission as its mandate is broad.

The Commission consists of nine commissioners. Three of the commissioners are to be non-citizens with one of them being a person of opposite gender. The three are selected by the Panel of Eminent African Personalities. The remainder six are to be citizens of Kenya. The transparency of recruitment of the Commissioners is ensured through a competitive procedure prescribed in the First Schedule of the Act. The principle of gender equality and regional balance is also to be observed in recruitment. The lists of the selected candidates in both instances are forwarded to the parliament for nomination by the national assembly and then transmitted to the president for appointment. Three of the commissioners must have knowledge and at least fifteen years' experience in matters relating to human rights law and the rest knowledge of and experience in forensic audit, investigations, psycho-sociology, anthropology and social relations, conflict management, religion or gender issues. All commissioners must be person of good character and integrity.

The members of the Commission have been appointed and sworn into office. The Commission is, however, in for a turbulent start because the Chairperson has been rejected by some civil society organisations and victims of human rights violation by the past President Moi's regime. The critics argue that the chairperson was a senior government official in the regime and therefore cannot be an impartial umpire in the matter which involves violation of human rights by the regime. In addition, the protest is directed to the proposal by the government to broaden the mandate of the Commission to include criminal prosecutions instead of appointing a local tribunal to try the offenders. If this happens, it will gratuitously broaden Commission's mandate and could undermine its efficiency and the people's confidence in the Commission.

The Commission has been granted independence and powers to carry out its functions without external interference. The commissioners are appointed into the office for the life of the Commission unless the office falls vacant earlier owing to any reasons specified in Sec. 16 of the Act. The funding of the Commission is to be determined by parliament and the Commission may receive funding from any other sources stated in the Act. The funds appropriated will be deposited into the Truth Justice and Reconciliation Fund administered on behalf of the Commission by the Secretary.

At the end of its operations, the Commission is to submit a report of its work to the president. The report will be the Commission's findings and recommendations as stipulated in Sec. 48(2). Immediately after submission of the report to the President, the Commission will publish the report in the Gazette and any other channels it may deem appropriate and make copies of the report, or summaries thereof, widely available to the public in at least three local newspapers with wide circulation. This measure is informed by past practice where such reports are never made or are made partially public after submission to the President. The report will also be tabled by the relevant minister in the Parliament within twenty one days after its publication.

The Act in establishing the Commission have paid special regard to the guiding principles recommended by the Kenya National Dialogue and Reconciliation Team and has observed international standards and best practices of independence, fair and balanced inquiry, appropriate powers, full cooperation and financial support. What remains to be seen is how these will be observed in practice. But going by the past experience from other recent commissions such as the Commission of Inquiry into Post Election Violence (The Waki Commission) and the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (The Kriegler Commission), the fear for interference may not be real and much will depend on the Commissioners to ensure that their independence is respected. Funding, however, could undermine the independence of Commissioners because this is a longer process and its mandate is broader and more complicated than that of the two recent commissions.¹⁵

The implementation of the report of the Commission must commence within six months upon publication. All recommendations are to be implemented and non-implementation must be reported to the parliament providing reasons for non-compliance. The implementation must be transparent and the Minister is to appoint an implementation committee to report to the public on efforts of the Government to implement the recommendations. The role of the media is important in monitoring the implementation of the recommendations. Senior editors of major media organisations, in the Mombasa Declaration, have pledged to demonstrate utmost professionalism in all matters relating to implementation of the Truth, Justice and Reconciliation Act. They also undertook to provide leadership and continue keeping the country focused in the pursuit of truth,

¹⁵ The funding is already proving to be a problem because the international community which is expected to largely fund the Commission has threatened to withdraw its financial support unless the Government recants its decision not to appoint an independent local tribunal to try post-election violence and impunity.

justice and reconciliation.¹⁶ This is significant because some media houses played a negative role during the post-election crisis.

The Commission's role in investigating historical injustices is important for restitution process. It can be envisaged that the Commission will in the process receive and investigate restitution claims but no mechanisms of restitution have been established. The Commission's mandate is limited to recommend reparations as it has no powers to implement its findings. In that case the government must put in place a mechanism for ensuring recommendations for reparations and restitution are implemented. The institutions proposed by the National Land Reform policy below may complement the work of the TJRC.

C. The National Land Reform Policy

Land and agrarian reform is not usually regarded as traditional transitional justice mechanism. But its centrality in the post-elections conflicts makes it a necessary component of transitional justice. The national accord and reconciliation agreement recognized land as being a source of economic, social, political and environmental problems in Kenya for many years and sought to address the problem comprehensively through land reform. The agreement brought land reform process into the parameters of the agreed transitional justice mechanisms. In Kenya, land is critical to the lives of the people and has major impact on their social, political and economic existence. It is inconceivable that transitional justice can be successful without tackling the problems of land. Land reform is rightly therefore a component of transitional justice. Reconciliation and justice cannot be realised without resolution of land related problems. Land is a key to self-sustenance and socio-economic survival of the displaced persons.

The country has had no properly defined or codified national land policy.¹⁷ The problem has been exacerbated by the existence of very many land laws, some which are inconsistent and incompatible giving rise to a complex land administration system.¹⁸ The draft land policy attempts to address these anomalies by developing a national land policy that will guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity.

The quest for a national land policy has endured since independence. The process for a search for a land policy was, however, triggered when the Government embarked on the policy formulation in 2004 following the recommendations of the Njonjo Commission.¹⁹ The formulation involved a wide consultative process encompassing stakeholders from public, private and civil society. They contributed towards policy formulation through thematic groups based discussions, regional workshops and written submissions. The government through the Ministry for Lands and Housing oversaw the process and was responsible for the final drafting of the policy for submission to Parliament. The

¹⁶ The Daily Nation, Tuesday 16 June 2009.

¹⁷ The Draft National Land Policy, May 2007, p. iv and 1.

¹⁸ Ibid. 1.1. para. 2.

¹⁹ Republic of Kenya: The Commission of Inquiry into the Land Law System of Kenya (Njonjo Commission)

international donor community supported and funded the formulation process. The formulation process culminated with the production of the Draft National Land Policy 2007. It was approved by the Cabinet in 2009 after a period of uncertainty as forces against the policy tried to influence the Cabinet to reject the draft. The policy now waits to be debated and adopted by the Parliament.

The overall objective of the National Land Policy is to secure rights over land and provide for a sustainable growth, investment and the reduction of poverty in line with the Government's overall development objectives. The policy aims to achieve this purpose through a framework of policies and laws designed to ensure maintenance of a system of land administration and management which offers all citizens access and use of land, ensures economically, socially equitable and environmentally sustainable allocation and use of land, efficient, effective and economical operation of the land market, and efficient and transparent land dispute resolution mechanisms. While the policy recognises that most land issues can be resolved through ordinary legal and policy reform measures, it is also aware that some land issues will require special intervention and mechanisms. It identifies these issues as historical injustices, pastoral land issues, Coastal region land issues, and rights of minority and marginalized groups, land rights in informal settlements and informal activities, land rights of internally displaced persons, among others.²⁰ The Draft National Land Policy identifies a number of measures to resolve the special issues namely, redistribution, restitution, resettlement and land banking.

The policy proposes complete overhaul of the current land administration and management framework which it terms as highly centralized, complex, exceedingly bureaucratic, corrupt, inefficient in providing services and opaque in its decision-making and replace it with a more decentralised, transparent, accountable, efficient and participatory system. Thus, the policy recommends setting up of three key land management institutions: the National Land Commission (NLC), the District Land Boards (DLBs) and Community Land Boards (CLBs). It also proposes other important supporting institutions for policy coordination; the ministry in charge of lands, a Land Reform Transformation Unit and local authorities, and for arbitration; land property tribunals, district land tribunals, Special Land Courts.

The policy adopts restitution as a solution in issues involving historical injustices and internally displaced persons. It states the purpose of restitution as to restore land rights to those that have unjustly been deprived of such rights.²¹ It calls for suitable mechanisms for restitution, reparation and compensation of historical injustices and claims, and establishment of legal, policy and institutional frameworks for dealing with the issues arising from internal displacements and resettlement all internally displaced persons.

It was, however, admitted in interviews with various stakeholders involved in the formulation of the policy that land restitution in its strict sense of return of the property may prove difficult in the Kenyan context. Historical land injustices have been going on for a long time and an approach which involves arbitrary return of property may create

²⁰ Ibid. 3.6 para. 171

²¹ Ibid. 3.6.1.2 para. 174.

new injustices and conflict. It was acknowledged that restitution of land on the basis of pre-colonial ethnic boundaries will be intricate as intervening factors of colonial land alienation, movement and resettlement of people beyond their ethnic frontiers, and economic development considerations may complicate the matter. An approach which involves restitution (where this is the best solution), reparations, and compensation may be more appropriate. In cases of recent displacements, restitution presents fewer problems because property rights may be well established and recognisable. Corruption in land registries and the linkage of those property rights and historical injustices, however, may create additional complexity.

3. Who are the Displaced Persons in Kenya?

The UN Guiding Principles of Internally Displaced Persons define internally displaced persons as:-

“persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”

The definition is broad, wide and would include all the categories of persons displaced as a consequence of causes discussed below. Internal displacement in Kenya is a complex and multi-faceted social problem that revolves around and reflects unresolved issues of land and property, as well as the struggle for the control of political and economic resources.²² The answer to the question on who are the displaced persons in Kenya depends on which period on focus as displacement has occurred over historical epochs. The first wave displacements referred to as historical displacements happened during the colonial era. The second wave of displacements has taken place during the post-independence era and has manifested itself in different forms, political and ethnic land clashes, land border and resources clashes, evictions for development purpose and urban displacement. Each kind of displacement raises peculiar problems as regards the identity of victims and the perpetrators. Sometimes the two change roles: the victims become perpetrators and vice versa. The faces of victims and perpetrators change with different epochs.

A. Historical Displacements

The historical displacement involved many ethnic groups whose land was alienated for colonial settlement and farming in what came to be known as the “White Highlands” and in the Coast province local communities were displaced by Arab in the “Ten Mile Strip”. Through a number of legislative, administrative and trickery tactics, the Africans in the White Highlands were forcefully pushed into overpopulated and congested native

²² Jesse Bernstein and Prisca Kamungi, I am a Refugee in My Own Country’: Conflict-Induced Internal Displacement in Kenya, IDMC 19 December 2006, p. 5 www.internal-displacement.org

reserves or forced to move into colonial settlers' farms as labourers and squatters.²³ The victims were obviously the African people from various ethnic groups whose land was taken away. The perpetrators were the colonialists and their local agents. African ethnic groups were affected differently depending on their cultural attitude and use of land. The agriculturalist groups were migratory in nature. They were willing to venture beyond their ethnic frontiers in search of farming land and labour fortunes. These groups mainly Kikuyu, Luo, Kisii, Luhya and Kamba moved into the White Highlands as squatters and labourers and when the colonialist settlers left members of this group remained there and later others joined them through post-independence resettlement. On the other hand, the pastoralist groups are non-migratory in nature. These groups mainly the Kalenjin, Maasai, Turkana, Samburu, and Somali remained within the confines of their newly created ethnic reserves. The migratory and non-migratory polarisation has engendered tension between the groups. The latter, especially the Kalenjin and Maasai who lay claim over the 'White Highlands' in the Rift Valley as their ancestral land, regards the former as "foreigner" who have occupied their land after the departure of the colonial settlers. The tension is the source of land conflict that frequently flairs into violence with a political incitement helping hand.

At the Coast province the indigenous Mijikenda groups were displaced from parts of the seashore and pushed interior to marginal lands by the Arabs before the advent of British colonialism. The establishment of the British protectorate in Kenya helped the Arabs to consolidate their control of land along the coast in disregard of the possessions of the indigenous Mijikenda communities.²⁴ The British moved ahead to recognise the property rights of the Arabs in complete disregard of the rights of the Mijikenda groups. Kanyangi notes that "a combination of legislative, administrative, and judicial tools was used to facilitate the control of land on the coast by the Arabs and the colonial state. These in turn contributed to the dispossession of the Mijikenda and squatters. As independence approached, the issues of land rights on the coast generated similar political conflicts as those experienced upcountry. The new independence government, however, undertook to recognise and protect private property rights in the ten-mile stripe disregarding customary claims by local communities. For the squatters, the government favoured establishing schemes in line with those in the upcountry on land purchased from those who were willing to sell. But the settlement of people from upcountry in the settlement schemes created conflict as the local communities felt further dispossession. This has become the historical conflict between the local communities and the upcountry African communities as well as the Arab absentee landlords who continue to own large tracks of land while the local communities residing in these farms have to pay rent to the landlords. This has enhanced the sense of dispossession among the local communities.

B. Political and Ethnic Land Displacements

The political and ethnic land displacements have taken place between 1991 and 2008. They have created the current wave of internally displaced persons (IDPs) in the country. These people are displaced from their previously settled farms in the Rift Valley and the

²³ The history of colonization and land alienation is fully documented in monumental academic works and it is not useful to recount it here.

²⁴ Kanyanga, 2000, 56.

Coast provinces. They were settled in these farms after independence. The political and ethnic land displacements are a result of the historical land conflict between the migratory and non-migratory ethnic groups in the Rift Valley province. In the Coast province the displacements are a result of the conflict between the indigenous ethnic communities and migratory African communities as well as foreign and absentee land owners. The displacements have therefore a causal link with the colonial and post-independence historical injustices. The conflict has, however, a political angle to it. They occur frequently during election years. Politicians normally manipulate the land conflict for political purposes. The displacements are justified by the local communities on the basis of land restitution. But in reality they are ethnic and politically oriented. The displaced persons are evicted not only because they own land in the regions but also because of their ethnic identity and political orientation namely the political party they supported or voted for during the general election, “allegedly” because of their ethnicity. Political parties are ethnic based in Kenya and people of one ethnic group tend to support a political party where it has dominance.

Identifying the victims and perpetrators in the political and ethnic land displacements is complex. Again here, the victims and perpetrators may have changed status becoming perpetrators and victims depending on their assumed political orientation of the time. It is also difficult to pinpoint who the perpetrators and victims are in this situation because the displacement is a continuing one from the previous colonialism displacements. It is a conflict between those who feel that they were displaced during colonialism but were not resettled back to their former farms after independence and those who had migrated from other parts of the country and were resettled in the farms claimed by the former. In an attempt to allocate responsibility, both the colonial government and the post-independence governments could be held liable because of the former’s acts of displacement of African communities and the latter’s failure to resettle all that were displaced during colonialism. The discriminate resettlement of some colonial displaced people and not others has led to a feeling of dispossession and new displacements where the some colonial displacement victims have become perpetrators and the beneficiaries of resettlement have become new victims of displacement.

C. Land Borders and Resources Dispute Displacements

In the creation of the White Highlands for colonial settlement and Native Reserves for African settlement, the colonial settlers fix land boundaries in an arbitrary manner and this has been a cause of perpetual conflict between bordering ethnic groups over land and other resources such as water. In post-independence creation of new districts and constituencies normally cause conflict when a minority group finds itself in a majority group controlled area. The tendency is for the majority group to violently evict the minority group regardless of their property rights to land. Land border conflicts perennially affect regions along administrative boundaries in Busia/Teso, Migori/Kuria Gucha/TransMara, TransMara/Migori, Meru North/Isiolo, Meru North/Tharaka, Turkana/West Pokot and Marakwet/East Baringo. A number of people have been displaced and others killed as a result of the conflict.

Resource based displacements commonly affect pastoralist areas and manifest themselves in form of cattle rustling and banditry. Pastoralist communities especially in Northern Kenya, Turkana, Pokot, Marakwet, Keiyo and Tugen practiced cattle rustling raids as a traditional passage rite into manhood and for restocking cattle after calamities such as drought and epidemic. The raids were seasonal, predictable and well controlled so as not to cause physical harm or death. As such, the communities tolerated the raids and lived harmoniously despite the practice. But with the advent of negative politics especially after the introduction of multiparty democracy and proliferation of small arms, the practice has been criminalized and has evolved into armed banditry. The communities now pile up arms for self defense and carrying out attacks and counter-raids which has exacerbated insecurity in the region. The proliferation of small arms from politically unstable neighboring countries has intensified the problem.

Northern region has also suffered from neglect both by the colonial settlers and the post independence government because the region was regarded of marginal developmental benefit. Due to its marginal character, the region is prone to prolonged droughts and aridity. The drought has caused various groups and clans to move with their animals away from their traditional grazing land in search of water and pasture, and such movement has yielded numerous violent inter-communal conflicts and subsequent displacement.²⁵ The combined effects of loss of herds of cattle to cattle rustling, violent inter-community encounters, drought and marginalization by successive governments has contributed to the impoverishment of pastoral communities and their migration to urban and town centres. Once there, the government considers these people as rural-urban immigrants and not internally displaced. As such, they fall out of considerations as IDPs and the IDPs statistics.

D. Evictions on ‘Public Interest’ Purposes

Public interest is used as a justification for human evictions in both rural and urban areas. The concept depicts a bundle of interests namely development, conservation, tourism, slum upgrading and so on. In reality, however, this is a myth as Paul D Ocheje²⁶ has demonstrated and often used as pretext for infringing on the evictees’ human rights. In Kenya evictions on these grounds has affected a number of communities and rendered their members internally displaced. For example, the Ogiek community, hunter and gatherer inhabitants of Mau forest in the Rift Valley Provence, were evicted from the forest when it was gazetted as a National Forest to be conserved. But the community blames the government for destruction of the forest because the latter condones logging by politically connected persons. The eviction was carried out forcefully, without regard to human rights, destroying property, houses, crops and food stocks. The evictees had to seek shelter on church compounds and most of them have not returned back to their homes and land. A case brought in Court by the members of the community was rejected because the complainants were not allowed to rely on their cultural connection to the

²⁵ Jesse Bernstein and Prisca Kamungi, *supra* n. 14, p. 16

²⁶ Paul D Ocheje , ‘‘In the Public Interest’’: Forced Evictions, Land Rights and Human Development in Africa. *Journal of African Law*, 51, 2 (2007), 173–214.

forest as entitling them to reside in there. The Ogiek lifestyle has serious been interrupted by being denied the use of the forest resources for their livelihood.²⁷

Another community which has suffered similar eviction is the Endorois living around Lake Bogoria in the Rift Valley Provence. In 1973 the government declared the Lake and its surroundings a wildlife sanctuary, and it was re-gazetted in 1978. This action denied the Endorois access to their traditional lands, which not only had an economic value for the grazing of livestock, but also a very strong cultural significance, and were driven to live in fragmented groups in the higher lands around the lake.²⁸ The Endorois have sued the government because they were not compensated for the loss of their land and where compensation was paid it was not adequate.

E. Urban Displacement

Urban displacement is a new phenomenon in the slums of major cities in the country. It involves property and housing rights as it pits tenants against landlords. The displacement has also an ethnic and political dimension. The problem manifested itself acutely during the 2007 post elections disturbances but it was politically tolerated since 2000. The landlords in the slums belong mainly to the Kikuyu ethnic group and the Nubians in Kibera slum and the tenants who are predominantly from Luo, Luhya and Kamba ethnic groups. Following the disturbances the tenants in some slums took over houses belonging to the Kikuyu and Nubian landlords and they are either living in them without paying rent or they are letting them out and collecting rent thereby dispossessing the landlords the enjoyment of the profits from their property. There seems to be no political will to resolve the problem and hence the situation is a time-bomb waiting to explode. It presents all the making of a new conflict because the parties involved have resources and capacity to organise. The urban displacement is compounded by overcrowding in the slums as a result of rural land displacement occurring since 1991. Many of the rural residents displaced by the violent ethnic clashes in Rift Valley and other parts of the country since 1991 still have not returned to their homes and remain displaced in urban areas.²⁹ These persons are regarded also as rural-urban immigrants not IDPs as such they fall out of the picture of the displaced persons.

Land grabbing and corruption which is rampant in Kenya has also fuelled urban displacement and evictions. Slum areas are located in “unoccupied” government land and therefore the government does not feel obliged to consider the rights of slum dwellers when alienating such land for other use and allocation to individuals. The slum settlements are situated on potentially some of the most valuable land in the city and attractive for “development”. Politically connected individuals have acquired land

²⁷ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Addendum, Mission to Kenya, A/HRC/4/32/Add. 3, §60.

²⁸ OMCT The Lie of The Land, p. 12

²⁹ IDP database of the Internal Displacement Monitoring Centre (IDMC): Kenya: No Durable for Internally Displaced Yet! A profile of internal displacement situation 23 December, 2008, p. 79. <http://www.internal-displacement.org/>

occupied by slum-dwellers. In that case, the slum dwellers lose out as they are evicted on flimsy grounds of “development”.³⁰

4. Statistics of Displaced Persons

The exact number of the displaced persons in Kenya remains unknown. There are no records and data of displacements of persons during the colonial era. The displacements were, however, massive affecting many communities. As regards ethnic land clashes displacements, the estimates of the displaced persons during the period available are not conclusive as no scientific collection and correlation of data was done.³¹

The only reliable statistics available are from the internally displaced persons (IDP) profile carried out by the government after the 2007 post election violence. According to the data about 663,921 people were displaced from their homes. A total of 350,000 went to live as IDPs in 118 camps spread all over the country while another 313,921 sought refuge with their relatives as integrated IDPs.³² On 5 May 2008 the government launched the Operation Rundi Nyumbani aimed at returning all IDPs to their homes and farms. Through the programme, some 347,800 voluntarily returned to their farms and most of the camps they resided in were closed. But the return statistics have been disputed by civil societies and IDPs themselves.

The IDP profile carried out by the government did not target all IDPs in the country. IDPs from the previous years 1992, 1997 and 2002 were not included. The Akiwumi Commission appointed in 1998 to inquire into the tribal clashes that rocked the country since 1991 did not make any findings as to the number of persons displaced as a result of the clashes either in 1992 or 1997. The exact number of IDPs in Kenya is therefore unknown as most of those displaced in the earlier conflicts never return to their homes or farms. The then government policy of denying that there were any IDPs at all complicated the matters as no effort was made to keep records of the displaced persons.³³ The profile does not also include persons displaced as a result of historical injustice, land borders and resource disputes, evictions on public interest and urban displacements. Statistics should be improved so as to capture all categories of IDPs and depict the true picture of displacement on the ground.

³⁰ See also Paul D Ocheje Supra, 176: The “public interest” rationale often adduced by government officials for forced evictions barely survives close scrutiny in the particular situation under review; it is often a blanket cover for government-induced immiseration.

³¹ Oicho, John O., 2002: 178; Nowrojee, 1998: 66 puts the figure of those displaced in 1991-93 ethnic clashes to about 300,000 people. Newspapers had put the number of those displaced in the Likoni clashes in the Coast Province in 1997 to more than 120,000.

³² Ministry of State for Special Programmes: Status of Mitigation and Resettlement of Internally Displaced Persons. http://www.sprogrammes.go.ke/index.php?option=com_content&task=view&id=258&Itemid=88 accessed on 08.04.2009

³³ Kamungi, Prisca Mbura, The current situation of internally displaced persons in Kenya, Jesuit Refugee Service (E.A), March 2001. Kamungi estimated the numbers to be about 228,744, p. 22.

5. Land Restitution Claims

Despite the fact that there is no specific law on restitution in Kenya, the people either as individuals, communities or other collectives have always pressed for restitution of alienated land legally or through administrative procedure. Even when these avenues failed, restitution has been pursued through other means such as armed rebellion as in the case of Mau Mau war in the early 1950s. In fact, today's violent land conflicts are based on restitution claims justifications. Mau Mau was conceived around the concept of land and freedom. It was the clearest expression of land restitution claim. The fighters' motivation and the ideology of the movement was the return of 'stolen land' by the colonialist settlers to the African owners. But the post-independence disappointed most when the fighters and the landless were marginalized and land was allocated to African colonialist loyalists.

Early in the 1920s some Africans organised themselves and sued the colonial government for alienating African land for colonial settlement and relegating African communities to Native Reserves. But the Supreme Court reaffirmed the language of the Ordinances and declared Africans as 'Tenants at the Will of the Crown'.³⁴ With this declaration, any customary rights to land, the African people had, were extinguished at the stroke of a pen.

The Maasai community are among the African people who have consistently articulated their claim for restitution of their land alienated by the colonial government. Through two agreements in 1904 and 1911 between the British colonial government and the Maasai leaders, the latter surrendered their land to the colonial government. Subsequently, in a 1913 Maasai court case, the Maasai unsuccessfully challenged the validity of the 1911 Agreement and the authority of the Maasai leaders signatories, and demanded restitution, including the right to return to the northern highlands and compensation for loss of stock.³⁵ Lotte Hughes observes that "the Maasai's sense of loss and betrayal has not gone away. Complaints about the land alienation and its consequences have been articulated publicly on four main occasions: before the Kenya Land Commission (KLC) in 1932; in 1962 at the second Kenya Constitutional Conference at Lancaster House, London; at talks in 2003–4 on the constitutional review; and most recently in threats by Maasai activists to sue Britain again, on the hundredth anniversary of the first agreement."³⁶ August 15, 2004 was the 100 years anniversary of the signing of the controversial agreement between the British Government and the Maasai. Claiming that the agreement had expired, the Maasai demonstrated across the Rift Valley Province and in the Kenyan capital city, Nairobi. They also invaded privately owned ranches in Laikipia District. The Government, however, reacted by arresting several of them. In the process, one person was reportedly killed.

³⁴ Isaac Wainaina wa Gathomo and Kamau wa Gathomo v. Murito wa Indagara, Nganga wa Murito and Attorney General (1922-23) 9 (2) KLR 102; See also Okoth.Ogendo, Tenants of the Crown: Evolution of agrarian law and institutions in Kenya, 1991, p. 54.

³⁵ See, Hughes, Lotte. (2006) Moving the Maasai: A colonial misadventure. Basingstoke and New York: Palgrave Macmillan.

³⁶ Hughes Lotte, Malice in maasailand: the historical Roots of current political Struggles. *African Affairs*, 104/415, 207–224, p. 209.

Other communities that have unsuccessfully brought restitution legal proceedings in court are the Ogiek and Endorois. Ogiek land has been lost through government excision. Such land has sometimes been allocated to politically influential individuals under the pretext of resettling squatters or environmental conservation. Excisions have been ongoing since 1932 with 48,000 hectares of forestland converted to settlements under the Forests Act between 1963 and 1971. In a ruling of 15 March 2000, two High Court judges found that the Ogiek had renounced their ancient traditions and hence forfeited their land rights.³⁷ The Ogiek land rights in Kenya are contingent on the goodwill of others not their ancestral right, their land issue is still pending either in courts or in the hands of government, observed Ogiek People Development Program (OPDP) organisation.³⁸

The Endorois were evicted from their ancestral lands around Lake Bogoria in the Rift Valley and from the Mochongoi forest on the Laikipia Plains for the creation of game reserves and for ruby mining. The Endorois community has not received adequate compensation for this eviction, nor have they benefited from the proceeds of the reserve. They first challenged their eviction in the High Court which rejected the claim. It refused to acknowledge the Endorois claim to collective ownership of the land by referring to the people as individuals with no proper identity. The court also stated that it did not believe Kenyan law should uphold a people's ownership of land based on historic occupation or cultural rights. Subsequently, the community took its case to the African Commission on Human People's Rights (ACHPR) in 2003. In 2005, the ACHPR finally made a commitment to issue and monitor 'urgent action measures' to protect the community and its land from irreparable harm caused by mining. In June 2006, local officials tested Endorois' drinking water sources and found they were poisonously contaminated as a result of ruby mining. Mining has now stopped until the case is resolved. A final decision from the ACHPR is awaited for mid 2009.

Many other minority communities have expressed or harbored interests in making claims for restitution of the land they believe was expropriated from them during colonialism and which was not returned to them in post-independence. The land instead was allocated to other communities or expropriated by the government as public land. The Pokot, for example, claims land which today forms Trans-Nzoia District in the Western Rift. They claim that the government paid compensation to the Kenyatta government for onward transmission to the community but they never received any compensation. They have frequently agitated for compensation or resettlement. On occasions, they have threatened to re-enact the land clashes of the 1990s so as to reclaim land that historically belong to them.³⁹ Other groups, such as the Sengwer, the El Molo, and others have not vocally expressed their claims but this does not disregard the fact that given a forum such as the Truth Justice and Reconciliation Commission they will not. In the recent population census August 2009 count, many minority groups which previously were rammed

³⁷ Francis Kemai, David Sitienei & Others v. The Attorney General & Others, In The High Court Of Kenya At Nairobi Civil Case NO 238 OF 1999

³⁸ Ogiek memorandum to the committee of Experts on Constitutional Review 2009, Ogiek People Development Program (OPDP)

³⁹ Kenya Land Alliance: The national land policy in Kenya: Addressing historical injustices. Issues Paper No. 2/2004, p. 10.

together with other major ethnic groups like Kalenjin have come out vocally and demanded to be recognized as separate ethnic groups.

In the Coast Provence, the local groups lost their land during colonialism to the Crown and Arab settlers who were registered as owners. As to be expected, the individualization of title was at variance with the local communities' customary tenure system and most of them lost out. A special Lancaster House Conference held in 1962 to negotiate the status of the land in the Coast 'the ten-mile strip' resulted with the independence government undertaking to recognize and protect registered private property rights on the coast. The local communities' customary rights to land were, therefore, overridden by the statutory rights accorded the foreigners. Many locals now live as squatters on land owned by and pay land rent to non-indigenous people and absent landlords. The local communities have for many years agitated for recognition of their customary rights to land and return of the land expropriated through the statutory tenure system. Recently, Members of Parliament from the Coast Provence endorsed the draft land reform policy because they believe it will address the land problem in the region. They promised to support its adoption in the Parliament.⁴⁰

The Mau Mau fighters lost their land when the colonial government confiscated the land belong to alleged Mau Mau fighters and their sympathizers. The land was seized under the Native Land Rights Confiscation Order of the 1955 Kenya Proclamations Rules and Regulations. "Banned by the colonial regime, the Mau Mau remained a proscribed movement during the first post-colonial government of the late Jomo Kenyatta, and even during the second administration - led by former president Daniel arap Moi. This made it difficult for the rights of Mau Mau members to be addressed."⁴¹ The uplifting the ban in 2003, has allowed former fighters to register the Mau Mau War Veterans Association, which is now pushing for the rights of its members, including those pertaining to land.

In a number of instances, IDPs who were displaced as a result of political and ethnic land clashes have sued for return of their land. About 279 families from Miteitei sued for the return of their land after their farms were arbitrarily redistributed and their title deeds declared invalid. They also sought protection and government intervention to resettle back on their farms.⁴² In another move, a group of persons displaced during the post-election violence sued in court for recovery of their land.

Landlord and tenant disputes in the slums, except for the politicisation by politicians, should not raise major problems because the relationship between the landlords and tenants is prescribed in law. The parties to the dispute can bring the matter before the rent tribunals: the Rent Restriction Tribunal for residential premises and the Business Premises Rent Tribunal for business tribunals. Politics has, however, complicated the tenant and landlord relationship in the slums and the law has been disregarded in the process. Currently, the parties are turning to thugs and militias for protection and carrying

⁴⁰ The Sunday Nation, August, 30, 2009.

⁴¹ Joyce Mulama, Rights-Kenya: The First Land Policy - But Perhaps Not the Best Land Policy, IPS, November 24, Nairobi.

⁴² Kamungi, Prisca Mbura, March 2001 *supra*, p.

out eviction. The stalemate has increased incidents of violence while executing forceful restitution and evictions. Impartial political intervention is required to resolve the problem.

The sample of restitution claims presented above is a tinge of the problem. For along time, the government authorities have downplayed, inefficiently and corruptly handled restitution claims. As a consequence, frustration has led the victims of displacement to desperation and sometimes to breach the law in an effort to find justice. Hopefully the proposed transitional justice process will credibly deal with the problem. The task is enormous one because different narratives of dispossession and entitlement will emerge. The transitional justice process will have to sort out the genuine and deserving cases from the bogus and unrealistic ones.

6. The Concept of Restitution

Restitution here is understood as the process by which land and other property that was forcibly or arbitrary removed from its owners is restored or compensation of equivalent value provided. Priority is given to return of land and property over equivalent compensation. Compensation should be provided when restitution of property is not possible. In other words, compensation should not be seen as an easy alternative to restitution, but something which is available when restitution is impractical. This definition and understanding is extracted from the concept of restitution as expressed in the *United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (The Pinheiro Principles) Article 21.1.⁴³

All refugees and displaced person have the right to full and effective compensation as an integral component of the restitution process. Compensation may be monetary or in kind. States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation.

The significance of restitution must also be understood. Restitution is significant for two main reasons. Firstly, restitution has important socio-political implications. Conflict resulting to loss of property involves violations of human rights, political, civil and socio-economic rights. Restitution can be used as a means of achieving closure to conflicts through enabling refugees and IDPs to return home and restoration of lost property and land. "Successful restitution cases underscore the growing role of guilt, mourning, and atonement in national revival and reconciliation and the demand for new rights by historically victimized groups. Restitution transforms a traumatic national experience into a constructive political situation."⁴⁴ The closure of conflict opens new opportunities and

⁴³ See also, UN Guiding Principles on Internally Displaced Persons, Principle 28.1: Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.

⁴⁴ Barkan, Elazar, (2000) *The guilt of nations: Restitution and negotiating historical injustices*. New York London: W.W. Norton & Company, 345.

creates new rights while facilitating changes in national identities. At the same time, restitution is a means by which perpetrators of human rights abuses can make reparation and undo some of the harm that has been done.

Secondly, restitution seen from a purely economic perspective has significant implications for the functioning of the property markets in the countries concerned, including an impact on foreign investors, who have invested in real estate. It has become a truism that if trade and economic prosperity are enhanced by absence of conflict.⁴⁵

The limitations of restitution as a remedy must also be taken into account while designing a land restitution programme. Although restitution is the preferred remedy because ideally it is meant to restore the *status quo ex ante* of a society in a situation in which no compensation, symbolic or monetary, can actually accomplish the goal of restoration, it does not work in all situations and other remedies may be more appropriate. Many factors may interact to make restitution inappropriate. The obvious limitation is where the restitution property does not exist anymore as a result of destruction. Land may not be directly affected by destruction, but other properties like houses can be destroyed and cease to exist.

New occupiers' property rights may complicate restitution of land. Passage of time can impose restrictions on restitution especially in cases where many years have elapsed since the appropriation action, for example colonial alienation of land. In such cases, land ownership might have changed hands considerably. The new occupiers may feel that they acquired the land legally and therefore surrendering it would interfere with their rights of ownership. Land may also have changed form considerably through improvement and development affecting its value. The dilemma is whether restitution will be the best solution and economic and market factors may play a decisive role. In other cases it may be difficult to determine the victims or beneficiaries of restitution. Even where they are identified, they may not want restitution of the property or land and may prefer other remedies such as monetary compensation.

Restitution and reparations in general define guilt and victim-hood, contributing to the overall project of defining the citizenry in the new state and society. This may have positive and negative implications. The focus on restitution and compensation may have specific distributional effects for victims. It may also have a symbolical power shift from autocratic leadership to a democratic, participatory system. By definition, however, reparations do not redistribute either wealth or power on a scale that would dramatically alter the balance of power in the country during or after transition.⁴⁶ As Barkan adds, "a theory of restitution cannot put an end to inequality: rather its more limited aim is to improve on the existing social injustice".⁴⁷ A combination of restitution and other remedies such as developmental aid for the victims could have better distributive results.

⁴⁵ Ibid.

⁴⁶ Miller, Zanaida, (2008), *supra*, p. 284.

⁴⁷ Barkan, Elazar, (2000), *supra*, p. 349

Restitution can be costly. Countries emerging from a conflict situation are financially constrained and may not afford the massive resources required for restitution programmes. In other cases, the project of restitution could be perceived as a transfer of wealth and political power from one group in society to another. It may create victors and villains reaction in society that may increase likelihood of resurgence of violence and conflict. Restitution also creates new resources to be shared among the belligerent sides. The discourse of restitution aims at the morally possible, not at the politically utopian.

Restitution is negotiated. It is a negotiation between the narratives of the victims and perpetrators. The outcome is a shared narrative offering a shared escape route for a new beginning. In this case victims and perpetrators collaborate in searching for an exit from the bonds of history.⁴⁸ Restitution as a negotiated outcome may not completely satisfy the wishes and expectations of the victims or the perpetrators. Yet, it is through its partial outcomes that restitution accords moral justice through acknowledgement of victims' suffering and the perpetrators acceptance of responsibility.

7. Land Restitution Legislation in Kenya

A. The Status of Restitution Law

There is no specific law on restitution in Kenya.⁴⁹ But a right to restitution exists as a general principle of law that states that the breach of a duty not to cause harm gives rise to a right to restitution and, where restitution is materially impossible, to compensation. Complainants can lodge claims for restitution under relevant laws governing a particular dispute, for example under civil law; tort law, contract law, land law and criminal law. Property restitution is therefore a common law remedy. It is for the courts to determine whether a claim for restitution has been proven and to order return of the claimed property or compensation instead of the return of property.

At the independence the Kenyan government retained the British property law that had evolved during colonialism. The independence constitution entrenched the protection of property in Section 75 of the Constitution. Accordingly, the government cannot deprive a person his or her property under compulsory acquisition powers without compliance with the established legal procedures and upon payment of prompt and full compensation.⁵⁰ The constitutional protection is, however, limited because communal interests in land are not included in the protection. The property envisaged under the constitution is private property. Consequently, the clause only protects persons with title to land.

At independence the land formerly held under customary law was codified into the Registered Land Act (RLA) of 1963, Cap 300 of the Laws of Kenya.⁵¹ The intention was to bring regulation of all land under this Act, as an expression of governments' policy of individualisation of tenure.⁵² Land however, continues to be held under public tenure and

⁴⁸ Ibid., p. XL

⁴⁹ Wachira, G. M., supra 191.

⁵⁰ Section 75 of the Constitution of Kenya.

⁵¹ Wanjala, Smokin C., 2000, 32.

⁵² Ibid.

communal tenure as under the Trust Land Act. Although communal or customary interests are recognised under the Trust Land constitutional clause and the Trust Land Act, they can be defeated by statutory claims. The recognition of customary law is constrained by the constitution through the requirement that such law must not be ‘repugnant to any written law’.⁵³ The RLA epitomises the application of English property rights in Kenya. The Land (Group Representatives) Act of 1968 which provide for adjudication of group rights and was meant to assist pastoral communities in owning and operating group ranches but did not offer effective protection for commonly own land because it was based on the same individual private ownership tenure. It was not a surprise that the registered group lands were subdivided and registered under individual titles shortly thereafter. Wachira argues that the Land (Group Representatives) Act “was in fact a roundabout way of entrenching individualized tenure amongst these communities.”⁵⁴ The regulation did not therefore protect communal land from further alienation for individual tenure.

The rational of giving preference to individual land tenure system was anchored on the governments’ policy that sound agricultural development and the development of an agricultural based economy was dependent on individual tenure. So at independence individual land tenure was given priority over common ownership under customary law. This had serious consequences for claims of land restitution based on customary law by individuals and groups.

Claims of restitution under customary law have failed because the Kenyan legal framework favours and protects legal title holders. Registered land owners acquire an absolute and indefeasible title to land unless such land was obtained by fraud or mistake and subject on to encumbrances.⁵⁵ First registration of title under RLA, however, cannot be defeated by fraud or mistake. The registered owners enjoy absolute and indefeasible title.⁵⁶ Furthermore, the position of customary law is inferior to that of the Statute law under the Judicature Act and the Constitution.⁵⁷ Customary law application is also limited by the repugnancy clauses in these laws.⁵⁸ The judiciary interpretation of the laws has created a confused jurisprudence. The claims of restitution have centred on whether registration of an individual under the RLA extinguishes the customary rights of access that other people may have regarding the land. In a number of cases, the registration of one family member in exclusion of others as the sole owner of a family land has led to landlessness, conflicts and homicide in the family. In some case, those disinherited have

⁵³ Section 115 (2) of the Constitution of Kenya

⁵⁴ Wachira, G. M. supra 66.

⁵⁵ Sections 27 and 28 of the Land Registered Act, 1963. See also Ibid. 7.

⁵⁶ Section 143 of the Land Registered Act, 1963.

⁵⁷ Section 3(2) of the Judicature Act, Cap 8 Laws of Kenya and Section 115 (2) of the Constitution of Kenya, the Laws of Kenya, Revised Edition (1998) 1992.

⁵⁸ Section 3 (2) Judicature Act, “The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay”; Section 115 (2) the Constitution of Kenya., “Provided that no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law”.

lodged claims in the court requesting recognition as co-owners of the land under African customary law. But the interpretation of the relevant laws by the High Court has been confusing and disappointing to customary law claimants. The Court has issued equivocal decisions in the matter and has tended to remain conservative and to be progressive at the same time. In some cases, the Court has upheld the rights of registered owners and ruled that registration extinguishes customary rights to land and vests in the registered proprietor absolute and indefeasible title.⁵⁹ At the same time the Court in other cases, it has ruled that registration of title was never meant to disinherit people who would otherwise be entitled to their land. The court has on these occasions imposed a duty of a trust upon the registered proprietor and maintained that he or she held the land as a trustee for the other entitled parties under customary law.⁶⁰ The Court has relied on the devise of a trust as known in English law and in other instances the Court has come up with hitherto unknown notion of an institution it has called the “customary trust”.⁶¹

Group claims under customary law have not fared any better either as manifested by the outcome of the group claims by the Ogiek and the Endorois ethnic groups. In both cases, the communities’ claims for recognition of the land they had occupied under customary law were defeated because they could not tender documentary evidence as proof of ownership of the land. The oral evidence submitted by Ogiek community was disregarded on the grounds that their cultural and economic activities had substantially changed and did not necessarily depend on their continuous presence in the forests.⁶² Their ancestral and customary title to the land they were evicted from has never been recognised. In the Endorois case the High Court refused to acknowledge the Endorois claim to collective ownership of the land by referring to the people as individuals with no proper identity. The court also stated that it did not believe Kenyan law should uphold a people’s ownership of land based on historic occupation or cultural rights. Neither the Ogiek nor the Endorois communities were compensated adequately as required by law for the loss of their land. The two cases exemplify the obstacles of sustaining group customary claims to land under the current legal framework and practice which is well inclined to the protection of private and public land interests over group interests to land.

The general principle of law to the right of restitution is also present at the international level. Its applicability in the context of state liability under international law can be traced back, at least, to a dictum by the Permanent Court of International Justice in *Chorzow Factory*.⁶³ The Court observed that restitution was a ‘natural’ redress for violation of or failure to observe the treaty provisions. The right to restitution is also articulated in a number of international instruments. Most of the instruments are in form of non-binding declarations, principles and standards and therefore their legal effect may be limited. At the same time, the legal effect of the instruments depends on their domestication on the national level by the member states.

⁵⁹ See, *Obiero vs. Opiyo* (1972) E.A. 227; and *Esiroyo vs. Esiroyo* (1972) E.A. 388.

⁶⁰ See, *Muguthu vs. Muguthu*, H.C Civil Case No. 377 of 1968 in (1971) Kenya High Court Digest No. 16.

⁶¹ Wanjala, *supra*, 43.

⁶² Ogiek case *supra*2, 8, 9.

⁶³ (1927), PCIJ, Sr. A., no. 8, p. 28; See also Brownlie, Ian, (1990) Principles of public international law (fourth edition). Oxford: Clarendon Press, p. 463.

In Kenya the general principle on the application of international standards and norms, as in other common law jurisdictions, is that unless international instruments are domesticated they do not have the force of law.⁶⁴ In absence of domestication, the domestic law applies. But the Courts also take into consideration international norms and standards that have been ratified but not domesticated where there is no inconsistency with the Constitution and domestic law.⁶⁵ But in the event that the domestic law is inconsistent with international norms and standards, the Courts follow Bangalore Principles⁶⁶ and give effect to the domestic law and draw the inconsistency to the attention of the appropriate authorities for possible reform. The role of international standards and norms on the right to restitution in the Kenyan context depends on whether they have been ratified and domesticated. Unfortunately, Kenya has not domesticated most of the international instruments that it has ratified. The role of international law will, therefore, be limited and dependent on the courts' willingness to adopt a progressive interpretation and seeking guidance from the international instruments.

B. New Law on Restitution?

The exposé on the law of restitution in Kenya above indicates the inadequacy of common law approach as the jurisprudence of the court on land restitution claims is not settled. Common law lacks clear solutions to historical claims of land based on customary law because the latter is subordinate to statutory law. There is need for a property restitution law that gives equal recognition to customary law and statutory law. It is expected that the land reform and the TJRC processes will interrogate this dilemma.

The new law must also comply with international standards. It makes no sense for the country to ratify international instruments and then fail to domesticate them because it denies litigants a chance to present their claims based on such laws. In addition, in order to protect IDPs, the new law must incorporate the international and regional standards on the protection of internally displaced person and refugees. The law as it stands today disadvantages IDPs because they can only bring their claims of restitution on the bases of statutory law on land ownership but cannot exploit the extra protection provided by the international standards. Lack of a legal framework to guide the process also adversary affected the resettlement programme. Kenya has no national legislation on IDPs. Even a general policy in the area does not exist. The Operation Rudi Nyumbani, which is based on two legal notices, did not include all IDPs. Only 2007 post-elections violence IDPs were targeted in this operation. Persons displaced in previous post-elections violence were not included for resettlement and they felt the narrow government policy discriminated against them. Though the government and humanitarian organizations were aware of the UN Guiding Principles on Internally Displaced Persons and regional

⁶⁴ See RM and another v. AG, High Court of Kenya Nairobi Civil case no 1351 of 2002; See also Okunda v. Republic (1970) EA, 453; Pattni v Republic, Miscellaneous Civil Application Nos 322 and 810 of 1999 (consolidated) Kenya Law Reports (2001) LLR, 246. See also Wachira, G.M, *supra* 104.

⁶⁵ RM and another v. AG, *Ibid.*

⁶⁶ The Bangalore Principles were released as a summary of issues discussed at a Judicial Colloquium on "The Domestic Application of International Human Rights Norms", held in Bangalore, India from 24 - 26 February 1988. Reprinted in Commonwealth Secretariat Developing Human Rights Jurisprudence vol 3 151 and in 1 African Journal of International and Comparative Law/RADIC (1989) 345

protocols in the area, especially the Great Lakes Protocol on Internally Displaced Persons and the Protocol on the Property Rights of Returning Populations, the instruments were not helpful because they are not domesticated. International humanitarian organizations such as UNHCR, Oxfam, and the Save the Children raised the issues of UN Guiding Principles. The legislation gap, according to an official of the Ministry for Special Programs, may have meant that the standards for protection of IDPs were not met. He continued to say that lack of a legal framework affected fundraising, coordination of key players, and IDPs who did not know their rights and where to seek assistance.

The Waki Report after reviewing the situation of IDPs expressed concern on the lack of legal framework on IDPs. It said that,

there exists sufficient basis for enacting a clear policy and legal framework for dealing with the IDPs. While there are coordinating organs for dealing with emergency situations', it is now imperative to put the problem of IDPs on a sound statutory footing where lines of authority and responsibilities are assigned. The successful return of IDPs will be based on three outcomes namely the safety of returnees, restitution, and return of property to the displaced and the creation of an economic, social political environment that sustains them.

The new law will also need to reform institutions for processing land claims. The current land claim process is odious, slow and corrupt. The courts are clogged up with unfinished cases and the magistrates and judges are too few to tackle the backlog. Land disputes and cases take as much as fifteen years before they are decided.⁶⁷ The draft national land policy is cognisant of these problems and has proposed setting up land property tribunals, district land tribunals and special land courts and new administrative bodies namely national land commission, district land boards, and community land boards to speedup and decentralise the process. These institutions can speed up the settlement of past injustices.

8. Implementation Challenges

Designing a restitution system is one thing but the test is in the implementation. Although it may be difficult to anticipate all the challenges which may confront an emerging transitional justice process, a number of issues can be highlighted. Among the issues that may influence the outcome of a restitution programme in Kenya are political will for support of reforms, funding, balancing of interests of parties concerned, identifying victims and perpetrators, role of the international community, and reconciliation and security.

A. Political Support for Reforms

The willingness of the government to undertake reforms is clearly an essential prerequisite for the success of any transitional justice process. Transition justice in Kenya has unduly delayed due to lack of political will and commitment for reforms by the successive ruling governments. The fate of the current process lies within the willingness of the ruling coalition government to implement the reforms as stipulated in the national accord and reconciliation agreement. So far the government has shown commitment in

⁶⁷ See, Africog Report

establishing the legislative and institutional building blocks for reforms as discussed in preceding sections. The legislation and institutions are not, however, adequate by themselves. The government must give full political support to the implementation of the legislation and the working of the institutions. The fear is that the ruling elite may withhold political support when their interests are adversely affected by the reforms. Already the parliament has rejected the passage of a crucial Bill for establishing the local tribunal to try impunity. There was also apprehension that the Cabinet would fail to approve the draft national land policy because most members of the Cabinet own large tracks of land which are targeted by the policy and a result of intensive lobbying by large farm foreign owners and their governments. The fear, however, became unfounded when the Cabinet approved the document. This has boosted the confidence that the government supports the reforms but the problem still looms because the parliament has demonstrated to be a stumbling block to reforms. An ensuing struggle for supremacy between the Executive and the Parliament could derail reforms. The rejection of an Executive local tribunal Bill by the Parliament only for it to introduce its own Bill that fundamentally is no different from the former portends danger for the reform process. The land reform policy waits to be tabled in parliament for approval. The foul relationship between the two institutions may mean further delay in the approval of the policy.

B. Funding the Process

The transition justice process is a costly affair and societies emerging from conflict may lack adequate resources to allocate to the process. The transitional justice in Kenya involves appointment of numerous commissions which compete for government and donor funding. Apart from the two concluded commission: the Kriegler Commission and Waki Commissions, there are five other commissions which require funding namely the Interim Independent Boundaries Review Commission; Interim Independent Electoral Commission; the Committee of Experts on Constitution Review; the Truth, Justice and Reconciliation Commission and the National Cohesion and Integration Commission. In addition, the trial of perpetrators of post-election violence through, either the establishment of a local tribunal or other local procedure that may be adopted, and the implementation of the land reform policy will require funding. It is to be expected that, the government may prioritise other social development projects with immediate benefit to the people such as infrastructure, unemployment, and feeding the nation in the wake of current drought and food shortage. Furthermore, persons interviewed in Kenya expressed concern that the government might stifle the process through withholding allocation of adequate funding to the process where it perceives the process to be in conflict with the interests of the ruling elite.⁶⁸ In the circumstances, the role of international donors in funding the process is crucial. In Kenya, the international community was instrumental in the funding of crucial commissions the Kriegler Commission and Waki Commission. They have also pledged to contribute in the financing of the TJRC, local impunity tribunal and the Constitutional Reform Committee. The Constitutional Reform Committee could not have started its work if it were not for donors because the

⁶⁸ The author carried extensive interviews in Kenya in two periods in October 2008 and February 2009. He interviewed government officials, civil society organizations, religious and faith bodies, individuals, and internally displaced persons (IDPs).

government has not released its portion of finances so far.⁶⁹ The international donors, through The Development Partners Group on Land in Kenya⁷⁰ (DPGL), exclusively financed the national land reform policy formulation process. This support is likely to continue for a number of years also to assist with the implementation of the National Land Policy. The implementation of the policy will require KES 9.6 billions over the first six years. Unless the international donor community provides the money, the process may stall. The resettlement of IDPs for example, has stalled, in part, because the international donors did not fully honour their pledges to provide funding and the government contribution was just a trickle of the required amount.

C. Identification of Victims and Perpetrators

Restitution entails identification of victims or beneficiaries and perpetrators. In the Kenyan context, this could prove to be a complicated task. Firstly, in the context of historical injustices it may be problematic and even unfair to identify some ethnic groups as victims while colonial displacements affected many ethnic African groups. Individual members of an ethnic group could be regarded as victims and beneficiaries at the same time. The question is whether the term victim would be limited to individuals or should encompass communities. At the same time why would some individuals and communities feel aggrieved and others not? Can one ethnic community claim ownership of large tracks of land while pre-colonial boundaries were contested and flux? In a situation where the colonial government has left the scene, to what extent does the post-independence government bear responsibility of the sins of the former? What are the sins of the post-independence governments? In a situation where historical injustices have assumed ethnic interpretation, how does one define injury and guilt? How are different narratives of dispossession and entitlement that will emerge to be resolved? Secondly, in the context of post-independence land clashes there has been reconstruction of victim-hood. Individuals and communities played double roles as victims and perpetrators. The TJRC has colossal responsibility of extricating the labyrinth of victim-hood and guilt.

D. Role of International Community

The international community played a commendable role in mediating the agreement that led to return of relative peace in Kenya after the 2007 post-election crisis. Even now at the implementation stage their engagement in the process is still crucial. As Odindo Opiata puts it, they have influential role firstly, to put pressure on the political class to act. After the role they played in the formation of the government of coalition between PNU and ODM, the international community leverage with the government is enormous. They should use it to coerce the government into action in these matters. Secondly, the international community could influence the process by financing it. So far they have

⁶⁹ The Daily Nation, Monday, August 17, 2009, internet edition.

⁷⁰ The Group is composed of three different categories of Development Partners, i) Development Partners that provide un-earmarked funds through a joint funding arrangement, managed by a Financial Management Agent (FMA), ii) Development Partners that provide earmarked funding with specific accounts of tracking mechanisms for their contribution, and iii) Development Partners subscribing to the general principles agreed to by the group and the Ministry of Lands (MoL). See Development Partners Group on Land Kenya: Sector Strategy and Programme 10th of May 2006

exclusively funded the land reform policy. The implementation of the policy and the TRJC will require substantial funding but the government may not avail adequate resources to the processes. International community funding is therefore crucial. But he cautions, of the danger of the process being wholly international donor driven. In case the donors slow down, the process will also slow down. To avoid such an eventuality, the local actors should be there to support the process. After the dust has settled and the foreign donors have left, it is the local actors who will sustain the process. It is crucial that local ownership of the process be established from the beginning. The problem is that local governments do not invest in matters of policy and long term solutions. Money may be there but the priorities are different. In that case there is need to empower the civil society who will sustain the pressure on the government to implement the process.

E. Reconciliation and Security

Government's priority on the return of the IDPs to their farms and home is well placed but lack of reconciliation and security on the ground may hinder the return. Fear of fresh attacks on returnees may mire restitution. Reconciliation between the returnees and the local community should be given priority but few and limited resources is being availed for the purpose. The historical injustice problem which led to displacement in the first place should be resolved. Consequently, the recent displacements have linkage with the issue of historical injustices. Successful restitution in these displacements may depend on the successful resolution of the historical injustices. The two processes are interconnected.

The restitution programme code named '*Operation Rudi Nyumbani*' (Operation Return Home) though well intended by the government was perceived a failure by the civil societies and IDPs themselves. The aim of the operation was to encourage IDPs to return to their homes. PeaceNet Kenya, civil organisation, observed that "although the displaced people in some of the IDP camps welcomed the move, most of them were concerned about the guarantee of their safety and access to basic necessities (food, shelter, health, education and sources of livelihoods) once they return to their farms." Peace and religious based organisations involved in reconciliation of the warring communities in the some parts of the country were of the opinion that inter-community dialogue should have been given a priority to allow the warring communities a chance to discuss their differences before the resettlement exercise is undertaken. The IDPs in Molo camps confided to this author that they feared venturing back to their farms and homes because of insecurity and hostility shown by the local community. Similarly, in a report titled *A Tale of Force, Threats and Lies: "Operation Rudi Nyumbani" in Perspective*, the Kenya Human Rights Commission says most IDPs had not gone back to their homes because of insecurity and landlessness. Understanding the context would help identify insecurity and lack of reconciliation among the communities as the main obstacle to resettlement and restitution.

Land restitution in IDPs cases should not be problematic if security is resolved. The displacements are recent and involve land with well established legal rights. The original owners have titled deeds to the land and ownership rights should not be difficult to establish. But issues of corruption could further complicate the matter because the new

occupants may have acquired title deeds illegally or irregularly in order to dispossess the original owners.

9. Conclusion

The context of conflict determines the solutions adopted to resolve the problem. Barkan observes that “not all political settlements were born equal”.⁷¹ The success of restitution programme in Kenya will depend much on the prevailing context. The problem of land and displacement is historical, legal and transitional in nature. These factors are constraints that must be overcome by the restitution programme.

The land conflict and displacements have historical injustices characteristics. The problem can be traced to the colonial land alienation policies where African land was alienated for colonial settlement and farming and the post-independence land policies which did not redress the problem by returning the land to the affected communities but rather issued it to new settlers from migratory communities but far worse to politically correct elite. This has perpetuated a sense of dispossession among the local communities who blame their predicaments on the migrant communities. Their anger is expressed through political and ethnic land evictions during elections. As such there is a causal link between the historical injustices and the political and ethnic land displacement. The linkage gives credence to the claim that historical injustices are continuous injustices and should not be treated as bygones.⁷²

The post-independence government opted for continuation of colonial property rights without reforming them to accommodate demands for land by African communities. This has created tension between individualised title ownership and customary land rights. Under the current law, individual rights to land are given priority over customary rights. Land restitution claims based on customary rights, such as the claims by Ogiek and Endorois communities, stand no chance of success under the current common law restitution jurisprudence which inclines to individual property rights. Even international law principles have no meaningful place in the judicial system due to lack of domestication. For instance, lack of a national legislation on IDPs hampers restitution and resettlement of the displaced persons in the country. Legal administration of justice in land matters is also complicated by institutional inefficiency. The process is ineffectual, slow and corrupt. Legal and institutional reforms as recommended by the Draft National Land Policy are urgent.

The agreement on national accord and reconciliation 2008 set out the transitional justice agenda for resolution of the political crisis identifying both short-term and long-term issues and solutions. The agreement prescribes a comprehensive transitional justice process that incorporates both political civil and social economic rights. Although restitution is not explicitly identified as one of the solutions, it is implied both in the immediate and long-term solutions which encompass political, civil and social economic human rights measures. In Agenda item 2 the agreement calls for *immediate measures to*

⁷¹ Ibid., p. 345

⁷² Ibid., p 344.

address humanitarian crisis, promote reconciliation, healing and restoration and in Agenda Item 4 the agreement identifies concrete measures on political civil and social economic spheres.

Restitution, however, is a negotiated process focused on local specific solutions agreed upon by the parties to the conflict. Three institutions will play major role in the shaping of a common narrative to the restitution process: the National Cohesion and Integration Commission will be critical for reconciliation and reducing conflict in society, the Truth Justice and Reconciliation Commission is also important in identifying restitution claims and restoration, and the National Land Policy will play the core role in resolving land conflicts by effecting necessary legal and institutional reforms. The strength of the policy is that it attempts to temper idealism with realism as it adopts both restorative and distributive solutions to land conflict. As the process moves from the design to implementation stage the success of the work of these institutions will depend on other external factors such as political will from the political class in carrying out necessary legal and institutional reforms, funding, and roles played by the international community and the local civil society.