

# Grace-Agenda

## *Grace for full recovery*

UNIVERSAL PERIODIC REVIEW

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UNITED NATIONS HUMAN RIGHTS COUNCIL

United Nations Human Rights Council (HRC)

Universal Periodic Review of the Republic of Kenya

35<sup>th</sup> Session of the Universal Periodic Review (UPR)

**Submission by:**

**Survivors of Sexual Violence in Kenya, as represented, in part, by Grace Agenda and with participation from the Survivors of Sexual Violence Network Kenya**

**Grace Agenda** is a community based organization that was registered by Ms. Jaqueline Muteere as a response to her personal experience of rape during PEV 2007/8 . A child was born from that human rights violation and inspired her walk towards justice, reparation and healing.

**Subject:**

**Justice, Accountability and Reparation for Victims of Conflict-Related Sexual Violence in Kenya**

**18 July 2019**

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*'If we as survivors do not speak for ourselves, who will fight for us?' Ms. Jaqueline Mutere, a survivor of sexual violence experienced during the 2007/08 Post Election Violence*

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# Grace-Agenda

## *Grace for full recovery*

### UNIVERSAL PERIODIC REVIEW

### UNITED NATIONS HUMAN RIGHTS COUNCIL

#### **A. INTRODUCTION**

1. Sexual violence is a recurrent feature during Kenyan elections because there has been no comprehensive and concerted efforts to effectively address past violence through justice, accountability and provision of reparations.<sup>i</sup>
2. Grace Agenda together with CSOs under Kenya Transitional Justice Network (KTJN) have tirelessly been pursuing reparations for 2007/08 PEV victims of sexual violence; including for children born of rape.
3. In 2017 electoral –related sexual violence(ERSV) occurred again, with at least 201 cases documented across 9 counties<sup>ii</sup> which are yet to be investigated and prosecuted.
4. Victims of ERSV still contend with consequences of violation that include: physical injuries; anxiety, depression, Post Traumatic Stress Disorder, mental conditions; HIV/AIDS and Sexually Transmitted Infections; stigmatization by family and community; desertion by spouses and/family members; unplanned/unwanted children; sexual dysfunction; and, economic disempowerment. These remain unaddressed by the Government.
5. Therefore, Grace Agenda and other CSOs are obliged to provide protection and rehabilitative support to victims which is inadequate and unsustainable.
6. In view of the recurrence of ERSV, the Government is obligated to establish wide-ranging, effective and necessary measures towards prevention and response to ERSV.

#### **B. KENYA’S HUMAN RIGHTS OBLIGATIONS**

7. Kenya is bound by international treaties and conventions it is State Party to, to provide adequate, effective, prompt and appropriate remedies, including reparations to victims of ERSV committed by state or non-state actors.<sup>iii</sup>

##### **I. Access to Justice and Accountability**

8. In 2008, Kenya enacted the International Crimes Act (ICA)<sup>iv</sup> that domesticated the Rome Statute and for facilitation prosecution of sexual violence committed as acts of Crimes against Humanity.<sup>v</sup> However, the Act has not been operationalized due to absence of prescribed ‘Rules of Procedure and Evidence’ thus impeding prosecution of such crimes which occurred during the 2017 Election Period.

# Grace-Agenda

## *Grace for full recovery*

### UNIVERSAL PERIODIC REVIEW

#### UNITED NATIONS HUMAN RIGHTS COUNCIL

9. The Government's plan to establish the International Crimes Division to determine crimes committed during 2007/08 PEV that meet the threshold of international crimes, including ERSV, have stalled.<sup>vi</sup>
10. Accountability efforts by the Police and the Office of the Director of Public Prosecutions (ODPP), including a Multi-Agency Task-Force (MATF)<sup>vii</sup> formed under ODPP to review 2007/08 PEV cases did not meet prosecutorial threshold because of: late reporting by victims; no P3 or medical reports; un-identified SGBV perpetrators.<sup>viii</sup> These challenges for successful prosecutions were confirmed by President Uhuru Kenyatta in his March 2015 State of the Nation.<sup>ix</sup>
11. There is limited understanding by responsible agencies of challenges, physical/ mental trauma suffered by survivors of sexual violence. As a result some have been turned away from police stations; and handled insensitively at police stations.<sup>x</sup>
12. Agencies have not exercised diligence to investigate and prosecute higher-level perpetrators who bore responsibility for SGBV in 2007/08 PEV and were identifiable or unknown, under modes of liability such as Superior or Command Responsibility.<sup>xi</sup>
13. The Kenyan Evidence Act provides that in cases of sexual violence, where only victim's evidence is available, the court shall proceed and convict the accused if satisfied the victim's evidence.<sup>xii</sup> However, survivors are still required to produce P3 or PRC Form for investigation and prosecution.
14. Police launched the National Police Service Standard Operating Procedures on addressing Gender Based Violence (NPS SOPs on GBV) in 2019 but its effects are yet to be felt.
15. The ODPP has established a Sexual and Gender Based Violence (SGBV) Unit, an International Crimes Division, and the Prosecution Training Institute (PTI) whose efforts are yet to be felt.
16. The National Police Service Standing Orders (NPSSO) (2017) provides that PRC Forms should be utilized in lieu of P3 Forms.<sup>xiii</sup> However, police and prosecutors continue to require P3 Forms be mandatorily provided in order to conduct investigations and prosecutions making it difficult to verify victims' violations.
17. Independent Policing Oversight Authority (IPOA) approached victims of 2017 ERSV , in Kisumu County for purposes of undertaking investigations. However, victims have not received any information on investigation's progress.<sup>xiv</sup>

# Grace-Agenda

## *Grace for full recovery*

### UNIVERSAL PERIODIC REVIEW

#### UNITED NATIONS HUMAN RIGHTS COUNCIL

18. A group of 2007/08 PEV sexual violence survivors, together with four CSOs filed a Constitutional Petition No. 122 of 2013 in February 2013 seeking government to conduct prompt, independent, impartial, transparent and effective investigations and prosecutions of sexual violence witnessed during PEV.<sup>xv</sup> However, this case has been delayed due to successive transfer of judges.

#### *Recommendations*

19. The Government to undertake competency-based trainings for all Police and the ODPP at all ranks.<sup>xvi</sup>
20. The Government to adequately fund and support the ODPP specialized SGBV units including Prosecution Training Institute.
21. The Government to establish International Crimes Division and adopt Rules of Procedure and Evidence under the ICA.
22. The Government to fast-track the determination Constitutional Petition No. 122 of 2013.
23. The Government to ensure that IPOA undertakes credible and immediate investigations of ERSV of 2007/08 and 2017.

#### *II. The Right to Effective Remedies, including the Right to Reparation*

24. The Truth Justice and Reconciliation Commission (TJRC)<sup>xvii</sup> recommended establishment and provision of appropriate and comprehensive reparations framework.<sup>xviii</sup> To present, the Government has not implemented TJRC's recommendations. Following a petition to the National Assembly in 2015 by the National Victims and Survivors Network (NVSN)<sup>xix</sup>, the TJRC Report was tabled before the Justice and Legal Affairs Committee (JLAC) of the National Assembly in April 2016.
25. On 25 March 2019, Grace Agenda and NVSN filed a petition with the Senate seeking immediate implementation of the TJRC's recommendations, regarding reparations. However there is no notable progress from the Senate.
26. In March 2015, President Uhuru Kenyatta established approximately **USD 100,000,000** Restorative Justice Fund (RJF) to facilitate restorative justice processes.<sup>xx</sup> Following directive from the AG for the RJF to be anchored within the Public Finance Management Act, KTJN and KNCHR collaborated with AG to draft the 'Public Finance Management (Reparations for Historical Injustices Fund) Regulations 2017'. But these are still pending.

# Grace-Agenda

## *Grace for full recovery*

### UNIVERSAL PERIODIC REVIEW

#### UNITED NATIONS HUMAN RIGHTS COUNCIL

27. During 2019 State of the Nation Address 2019, the President reaffirmed designation of RJF<sup>xxi</sup> but stated the Fund is for "...establishing symbols of hope across the country through the construction of heritage sites and community information centres..."<sup>xxii</sup> Victims of ERSV were disappointed as it excludes comprehensive appropriate individual reparations.
28. Hon. Gladys Boss Shollei, Woman Representative for Uasin Gishu County drafted and presented *Kenya Reparation Bill* to the National Assembly in 2019 to facilitate reparation to victims covered in the TJRC Report. However, the Bill excludes individual reparations that is critical to ERSV' sexual violence victims. Victims were also not robustly consulted.
29. Kenya has the Victims Protection Act (VPA)2014 that establishes Victim Protection Trust Funds for reparation, including compensation for victims of human rights violations but it excludes 2007/08 PEV survivors.<sup>xxiii</sup>

#### ***Recommendations***

30. The Government to immediately implement the recommendations of the TJRC towards provision of comprehensive, effective and appropriate reparation to ERSV sexual violence survivors.<sup>xxiv</sup>
31. The Government include provision of individual reparations and rehabilitative measures to 2007/08 PEV sexual violence survivors, **recognizing special interest groups such as children born as a result of rape in the RJF.**
32. The Government to review VPA 2014 to provide reparations and support to survivors of sexual violence in 2007/08 PEV.
33. The Government to fast-track the determination of Constitutional Petition No. 122 of 2013.
34. The Government to establish an Office of the Special Rapporteur on Sexual Violence as recommended by the TJRC.<sup>xxv</sup>

#### **Public Apologies**

35. During March 2015 State of the Nation Address, the President issued a public apology for past historical injustices but did not specifically acknowledge sexual violence, harm suffered and reparative measures for survivors of sexual violence.

#### ***Recommendation***

# Grace-Agenda

## Grace for full recovery

### UNIVERSAL PERIODIC REVIEW

#### UNITED NATIONS HUMAN RIGHTS COUNCIL

36. The Government to publicly acknowledge the sexual violence during the 2007/08 PEV and its survivors, apologize to them stating specific reparative measures for them.

#### **Rehabilitation**

37. Sexual violence survivors of the 2007/08 PEV<sup>xxvi</sup> and 2017 ERSV have not received comprehensive rehabilitative care from the government including humanitarian, medical and psychosocial support.<sup>xxvii</sup>

38. Gender Based Violence Recovery Centres (GBVRCs) established by the Government are inadequate to cater for the provision of comprehensive emergency medical and legal services and counselling for survivors of sexual violence. These Centres are not in all counties and are not 24-hour facilities.

#### ***Recommendations***

39. The Government to urgently provide comprehensive rehabilitative services for survivors of sexual violence from the 2007/08 PEV and 2017 ERSV and establish 24 hour service well-equipped GBVRCs in all Counties.

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<sup>i</sup> Republic of Kenya (2008). *Report of the Commission of Inquiry into the Post-Election Violence*. Nairobi: Government Printer, pp. 237 – 261. Available at: <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1004&context=tjrc-gov> [Accessed 14 July 2019].

<sup>ii</sup> See *'Silhouettes of Brutality: An Account of Sexual Violence During and After the 2017 General Elections'*, Kenya National Commission on Human Rights (KNCHR) (2018), available at: [https://www.knchr.org/Portals/0/KNCHR\\_Silhouettes\\_of\\_Brutality.pdf](https://www.knchr.org/Portals/0/KNCHR_Silhouettes_of_Brutality.pdf) [accessed 14 July 2019]; *'They Were Men in Uniform: Sexual Violence against Women and Girls in Kenya's 2017 Elections'*, Human Rights Watch (HRW) (2017), available at: [https://www.hrw.org/sites/default/files/report\\_pdf/kenya1217\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/kenya1217_web.pdf) [16 July 2019].

<sup>iii</sup> International Covenant on Civil and Political Rights (ICCPR), adopted Dec. 10, 1948, art. 2, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (acceded May 1, 1972) [hereinafter ICCPR]; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted Dec. 18, 1979, arts. 2(b), 2(c), G.A. Res 34/189, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted Dec. 10, 1984, arts. 4, 5, 14, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51 U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (entered into force June 26, 1987) (acceded Feb. 21, 1997) [hereinafter CAT]; African Charter on Human and Peoples' Rights, adopted June 27, 1981, arts. 1, 7 O.A.U. Doc. CAB/LEG/67/3, rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) (ratified Jan. 23, 1992); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2<sup>nd</sup> Ordinary Sess., Assembly of the Union, adopted July 11, 2003, art. 25, Doc CAB/LEG/66.6 (2000) (entered into force Nov. 25, 2005, (ratified Oct. 13, 2010); UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (2005), A/RES/60/147, para. 2 (c); CEDAW General Recommendation No. 35, CEDAW/C/GC/35, paras. 23 and 24.

<sup>iv</sup> International Crimes Act, No. 16 of 2008, which came into operation on 1 January 2009. Available at: <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2016%20of%202008> [accessed 17 July 2019].

# Grace-Agenda

## Grace for full recovery

### UNIVERSAL PERIODIC REVIEW

### UNITED NATIONS HUMAN RIGHTS COUNCIL

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<sup>v</sup> International Crimes Act (2008), S. 6 and Rome Statute (1998), arts. 6,7 and 8.

<sup>vi</sup> Kenyans for Peace with Truth & Justice (KPTJ), (2014). *A real option for Justice? The International Crimes Division of the High Court of Kenya*. [online] Nairobi: KPTJ, p. 7. Available at: [http://kptj.africog.org/wp-content/uploads/2014/08/A\\_Real\\_Option\\_for\\_Justice\\_The\\_International\\_Crimes\\_Division.pdf](http://kptj.africog.org/wp-content/uploads/2014/08/A_Real_Option_for_Justice_The_International_Crimes_Division.pdf) [Accessed 17 July 2019]; Judicial Service Commission, (2012). *Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya*. Nairobi: JSC, p. 143. [online] Available: <http://nation.co.ke/blob/view/-/2197994/data/682588/-/io86tn/-/JSC+Report.pdf> [Accessed 16 July 2019]. For further background, please see, Kenyans for Peace with Truth & Justice (KPTJ) and Kenya Human Rights Commission (KHRC). (May 2013). *Securing Justice: Establishing a domestic mechanism for the 2007/08 Post-Election Violence in Kenya*. [online] Nairobi: KPTJ & KHRC, pp. 16 – 53. Available at: [http://africog.org/new/wp-content/uploads/Securing\\_Justice.pdf](http://africog.org/new/wp-content/uploads/Securing_Justice.pdf) [Accessed 16 July 2019].

<sup>vii</sup> Republic of Kenya (20 April 2012). *The Kenya Gazette*, Vol. CXIV – No. 32, Gazette Notice No. 5417. Nairobi: Government Printer, p. 1352. Available at: [http://kenyalaw.org/kenya\\_gazette/gazette/notice/11182](http://kenyalaw.org/kenya_gazette/gazette/notice/11182) [Accessed 14 July 2019]. The MATF, as chaired by the Deputy Director of Public Prosecutions, Mrs. Dorcas Oduor, consisted of officials from the ODPP, National Police Service, Witness Protection Agency, State Law Office (Office of the Attorney General), Ministry of Justice and National Cohesion and Constitutional Affairs.

<sup>viii</sup> Kiplang'at, J. (2012) 'Lack of evidence derails local trials'. *Daily Nation* (online edition), 17 August. [online] Available at: <https://www.nation.co.ke/news/Lack-of-evidence-derails-local-trials-1056-1482054-12dp1uq/index.html> [Accessed 20 Jan. 2019].

<sup>ix</sup> Kenyatta, U. (2015), 'President Uhuru Kenyatta Speech during State of the National address at Parliament' *The Star* (online edition), 26 March. [online] Available at: [https://www.the-star.co.ke/news/2015/03/26/president-uhuru-kenyatta-speech-during-state-of-the-nation-address-at\\_c1108742](https://www.the-star.co.ke/news/2015/03/26/president-uhuru-kenyatta-speech-during-state-of-the-nation-address-at_c1108742) [Accessed 20 Jan. 2019].

<sup>x</sup> Patterns and cases of sexual violence during the 2017 electoral period were documented by the Kenya National Commission on Human Rights (KNCHR) in 'Silhouettes of Brutality: An Account of Sexual Violence During and After the 2017 General Elections (2018) and by Human Rights Watch (HRW) in 'They Were Men in Uniform: Sexual Violence against Women and Girls in Kenya's 2017 Elections (2017); Republic of Kenya (2008). *Report of the Commission of Inquiry into the Post-Election Violence*. Nairobi: Government Printer, pp. 245 – 246 and p. 400. Available at: <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1004&context=tjrc-gov> [Accessed 18 Jan. 2019]. For further information on challenges faced by SGBV victims of the 2007/08 Post-Election Violence to report and access services, please see, The Centre for Rights, Education and Awareness (CREAW). (2008). *Women Paid the Price: Sexual and Gender-based Violence in the 2007 Post-Election Conflict in Kenya*. Nairobi: CREAW.

<sup>xi</sup> International Crimes Act, No. 16 of 2018 (Kenya), s. 7 (1) (f), available at: <http://www.kenyalaw.org/lex/actview.xql?actid=No.%2016%20of%202008> [accessed 15 July 2019]; UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, art. 28. Available at: <https://www.refworld.org/docid/3ae6b3a84.html> [accessed 14 July 2019].

<sup>xii</sup> Evidence Act, Chapter 80 of the Laws of Kenya (Cap 80), s. 124. Available at: <http://kenyalaw.org/lex/actview.xql?actid=CAP.%2080> [accessed 9 May 2019]. This amendment was introduced in 2003 through The Criminal Law (Amendment) Act, 2003, s. 103. Available at: <file:///Users/lydiamuthiani/Downloads/No.%205%20of%202003.pdf> [accessed 9 May 2019].

<sup>xiii</sup> NPSSO (2017), Chapter 42 – Guide to Criminal Investigations, para. 3 (5).

<sup>xiv</sup> Victim Protection Act, No. 17 of 2014, s. 19 (1). Available at: <http://www.kenyalaw.org/lex/actview.xql?actid=No.%2017%20of%202014> [accessed 9 May 2019]. Please also see, UN Basic Principles and Guidelines on the Right to a Remedy (2005), paras. 11 (c) and 24.

<sup>xv</sup> opensocietyfoundations.org, (2013). *Briefing: Survivors of Sexual Attacks in Kenya Seek Justice for Post-Election Violence*. [online] Available at: <https://www.opensocietyfoundations.org/briefing-papers/briefing-survivors-sexual-attacks-kenya-seek-justice-post-election-violence> [Accessed 20 Jan. 2019]; opensocietyfoundations.org,

# Grace-Agenda

## Grace for full recovery

### UNIVERSAL PERIODIC REVIEW

### UNITED NATIONS HUMAN RIGHTS COUNCIL

(2017). Coalition on Violence Against Women and Others v. the Attorney-General of Kenya and Others. [online] Available at: <https://www.opensocietyfoundations.org/litigation/coalition-violence-against-women-and-others-v-attorney-general-kenya-and-others> [Accessed 20 Jan. 2019]; covaw.or.ke, (2018). SGBV VICTIMS FILE SUIT AGAINST AG, DPP, IG & OTHERS FOR PEV FAQs. [online] Available at: <https://covaw.or.ke/sgbv-victims-file-suit-against-ag-dpp-ig-others-for-pev-faqs/> [Accessed 20 Jan. 2019].

<sup>xvi</sup> This includes training on: investigation and prosecution of CRSV as international crimes; investigation and prosecution of higher-level perpetrators whether or not identities of direct perpetrators are known; evidentiary requirements in sexual violence cases; the utilization of PRC Forms in lieu of P3 Forms; the application of Customary International Law or the Rome Statute to investigate and prosecute CRSV which occurred during the 2007/08 PEV as international crimes; and, use of the 2019 NPS SOPs on addressing GBV amongst the Police *inter alia*.

<sup>xvii</sup> The TJRC was set up through the TJRC Act 2008, which was assented to on 28 November 2008 and came into operation on 17 March 2009. Please see The Truth, Justice and Reconciliation Act, No. 6 of 2008. [online] Available at: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TruthJusticeandReconciliationCommissionAct.pdf> [Accessed 15 July 2019]; Truth, Justice and Reconciliation Commission, (2013). *Report of the Truth, Justice and Reconciliation Commission: Volume I*. Nairobi: TJRC, pp. vi and 21. [online] Available at: <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1000&context=tjrc-core> [Accessed 15 July 2019].

<sup>xviii</sup> Truth, Justice and Reconciliation Commission, (2013). *Report of the Truth, Justice and Reconciliation Commission: Volume IV*. Nairobi: TJRC, pp. 97 – 125. [online] Available at: <https://www.jfjustice.net/downloads/1460970274.pdf> [Accessed 15 July 2019].

<sup>xix</sup> Journalists for Justice, Parliament to Debate TJRC Report after Petition from Victims is Tabled (19 January 2016), available at <https://www.jfjustice.net/en/victims-voices/mps-to-debate-the-tjrc-report-after-petition-from-victims-is-tabled> [Accessed 15 July 2019].

<sup>xx</sup> Speech by His Excellency Hon. Uhuru Kenyatta, during the State of the Nation Address at Parliament Buildings at para. 80–81 (26 March 2015), available at <http://www.president.go.ke/2015/03/26/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forces-of-the-republic-of-kenya-during-the-state-of-the-nation-address-at-parliament-buildings-na/>

<sup>xxi</sup> Speech by His Excellency Hon. Uhuru Kenyatta, during the State of the Nation address at Parliament Buildings 4 April 2019), available at: <http://www.president.go.ke/2019/04/04/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-during-the-2019-state-of-the-nation-address-at-parliament-building/> [accessed 11 July 2019].

<sup>xxii</sup> As above.

<sup>xxiii</sup> Victim Protection Act, No. 17 of 2014. Available at: <http://www.kenyalaw.org/lex/actview.xql?actid=No.%2017%20of%202014> [accessed 11 July 2019].

<sup>xxiv</sup> UPR of Kenya - Second Cycle: List of Recommendations, recs. 142.101 and 142.102, available at: <https://lib.ohchr.org/HRBodies/UPR/Documents/Session21/KE/KenyaMatriceRecommendations.pdf> [accessed 14 July 2019].

<sup>xxv</sup> Truth, Justice and Reconciliation Commission, (2013). *Report of the Truth, Justice and Reconciliation Commission: Volume IV*. Nairobi: TJRC, p. 64. [online] Available at: <https://www.jfjustice.net/downloads/1460970274.pdf> [Accessed 21 Jan. 2019].

<sup>xxvi</sup> Human Rights Watch Report, 'I Just Sit and Wait to Die' 2016.

<sup>xxvii</sup> KNCHR Report 'Silhouettes of brutality' 2017