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## IDE DISCUSSION PAPER No. 321

### **The Gap between Recognition and the ‘Compensation Business’: The Claim against Britain for Compensation by Kenya’s Former Mau Mau Fighters**

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February 2012

**Abstract:** During the first Kibaki administration (2002-2007), a movement by the former Mau Mau fighters demanded recognition for the role that they had played in the achievement of independence. They began to demand, also, monetary compensation for past injustices. Why had it taken over 40 years (from independence in 1963) for the former Mau Mau fighters to initiate this movement? What can be observed as the outcome of their movement? To answer these questions, three different historical currents need to be taken into account. These were, respectively, changing trends in the government of Kenya, progress in historical research into the actual circumstances of colonial control, and a realization, based on mounting experience, that launching a legal action against Britain could turn out to be a lucrative initiative. This paper concludes that, regardless of the actual purpose of the legal case, neither of their objectives was certain to be achieved. Two inescapable realities remain: the doubts cast on the reputation of the government by its decision to lift the Mau Mau’s outlaw status – a decision that was widely seen as a latter-day example of the „Kikuyu favouritism“ policy followed by the first Kibaki administration – and the popular interpretation of the involvement of Leigh Day, well known in Kenya ever since the unexploded bombs case for its success in obtaining substantial compensation payments, as a vehicle for squeezing large amounts of money from the British government for the benefit of the Kikuyu people.

**Keywords:** Kenya; ethnicity; Kibaki; colonization; Kikuyu; compensation; Mau Mau

**JEL classification:**

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Miwa Tsuda\*

During the first Kibaki administration (2002-2007), a movement by the former Mau Mau fighters demanded recognition for the role that they had played in the achievement of independence. They began to demand, also, monetary compensation for past injustices. Why had it taken over 40 years (from independence in 1963) for the former Mau Mau fighters to initiate this movement? What can be observed as the outcome of their movement? To answer these questions, three different historical currents need to be taken into account. These were, respectively, changing trends in the government of Kenya, progress in historical research into the actual circumstances of colonial control, and a realization, based on mounting experience, that launching a legal action against Britain could turn out to be a lucrative initiative. This paper concludes that, regardless of the actual purpose of the legal case, neither of their objectives was certain to be achieved. Two inescapable realities remain: the doubts cast on the reputation of the government by its decision to lift the Mau Mau's outlaw status – a decision that was widely seen as a latter-day example of the „Kikuyu favouritism“ policy followed by the first Kibaki administration – and the popular interpretation of the involvement of Leigh Day, well known in Kenya ever since the unexploded bombs case for its success in obtaining substantial compensation payments, as a vehicle for squeezing large amounts of money from the British government for the benefit of the Kikuyu people.

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# **The Gap between Recognition and the ‘Compensation Business’: The Claim against Britain for Compensation by Kenya’s Former Mau Mau Fighters**

Miwa Tsuda

## **Introduction**

In the Republic of Kenya (hereinafter Kenya) in 2007, the curtain rose on the second administration of Mwai Kibaki, the country’s third president since independence. It did so at a time of unprecedented domestic turmoil. Immediately following the national elections at the end of 2007, rioting broke out simultaneously throughout Kenya. In these violent disturbances, at least a thousand people lost their lives and over 300,000 became displaced persons within their own country.

The „Kibaki re-election“ that was announced after the votes were counted was overseen by the Electoral Commission of Kenya, whose members are appointed by the serving president (in this case Kibaki), and the news of the outcome of the election caused a widespread sense of deep disillusionment as well as feelings of injustice and suspicion concerning the Commission’s procedures. Although they account for only 20 percent of the country’s population, the Kikuyu – the group to whom Kibaki belongs – form Kenya’s largest single ethnic grouping. It was they who became the main target of the violence that wracked the country in late 2007. In response, organizations that called themselves Kikuyu vigilante groups carried out attacks on non-Kikuyu people, thus contributing to a chain reaction of mounting violence.

Meanwhile, in the background, and as will be shown later, the „pro-Kikuyu favouritism“ of the president during his first term of office was often remarked on, especially as regards appointments of personnel and economic policy, and in this context, discontent among non-Kikuyus grew apace.<sup>1</sup> Perhaps inevitably, deep doubts began to be associated with the first Kibaki administration in respect of the maintenance of national integration.

During the first Kibaki administration (2002-2007), one of the developments that received particular attention and that related almost wholly to the ethnic identification of the Kikuyu was a movement that demanded recognition

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<sup>1</sup> For details, see for example Tsuda (2004b) *Uragirareta kitai* (Betrayed hopes) and Kanyinga (2006).

for the role that it had played in the achievement of independence. The same movement began to demand, also, monetary compensation for past injustices. This was the campaign by the former Mau Mau fighters – individuals who had fought during the 1950s and 1960s against colonial rule by Britain.<sup>2</sup> The beginnings of this movement were already apparent in the 1990s, but it was under the Kibaki administration, in October 2006, that the movement suddenly took concrete form in the launching of litigation against Britain. A group of former Mau Mau fighters employed British lawyers and instructed them to launch an action against the British government, claiming that Britain had acted contrary to the Geneva Conventions as regards its treatment of prisoners during the colonial period in Kenya.

Why was it that it had taken over 40 years (from independence in 1963) for the former Mau Mau fighters to initiate this movement? To answer this question, three different historical currents need to be taken into account. These were, respectively, changing trends in the government of Kenya, progress in historical research into the actual circumstances of colonial control, and a realization, based on mounting experience, that launching a legal action against Britain could turn out to be a lucrative initiative. In the context of these changing realities, there was also a suspicion that the movement organized by the former Mau Mau fighters to question Britain's „colonial responsibility“<sup>3</sup> was more than anything else a form of „compensation business“.

This paper will first present an outline of the Mau Mau insurrection and will then proceed to examine each of the aforementioned historical currents in turn. Using this approach as a basis, the main body of the paper will explore the chief implications for the post-independence history of the movement for recognition among the Mau Mau fighters and of the demands made by the fighters for

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<sup>2</sup> The term „Mau Mau“ is a name given by the British colonial authorities. It is said that the Mau Mau fighters themselves referred to their movement as the Kenya Land Freedom Army. Other suggestions for the etymology of the term include the notion that „Mau Mau“ was derived from a mis-hearing of the Kikuyu word „muma“, which means „an oath“, but post-independence groups related to the movement called themselves „Mau Mau“. In this paper, the term „Mau Mau“ will be used throughout. For a discussion of the origin of the term „Mau Mau“, see for example Kinyatti (1986) as well as pp.1-3 of the Japanese translation of Kinyatti's book entitled *Mau Mau Sensō no Shinjitsu*.

<sup>3</sup> The term „colonial responsibility“ is used by Nagahara in Jo: „Shokuminchi sekinin“ ron no kokoromi (Introduction: A tentative theory of „colonial responsibility“) in Nagahara (2007).

compensation from Britain. At the time of this writing (February 2009), the litigation being mounted by the former Mau Mau fighters can be seen as an attempt to find some form of reconciliation, and although the materials available are somewhat restricted, inasmuch as possible this paper attempts to compose an ordered survey, using sources such as newspaper articles and materials drawn from the Internet.

## **Part 1: The Mau Mau under Colonial Administration and under Independent Kenya**

Britain's early colonial administration of Kenya followed two main thrusts, namely the construction of a railway from the Indian Ocean port of Mombasa to what is now Uganda, and the opening up of the central highlands for agriculture. Large quantities of labour were needed to meet both of these objectives, and the colony's government, in order to simplify the administration of the African population, imposed restrictions on indigenous people who hitherto had been fairly flexible as regards their own ethnic identification and their ability to move from one place to another. Altering one's ethnic identity and changing one's place of residence were now forbidden. Not only were the names of ethnic groups officially determined (examples include the „Kikuyu“ and the „Luo“) but geographical boundaries were drawn to delimit the territories of these groups (Matsuda 1999: 95). The distinction between „Kikuyu“ and „non-Kikuyu“ dates from this time. Measures such as the taxation of the African people, the forced conscription of labour, the eviction of Africans from agricultural land, and the designation of „native reserves“ aggravated the severity of colonial rule. As early as 1906, legislation was passed transferring the agricultural land of the central uplands exclusively to white settlers. This marked the birth of the „White Highlands“.

The Africans who handed over their lands for the creation of the White Highlands were mainly Kikuyu. In 1924, the Kikuyu Central Association (KCA), a political organization that centred on Kikuyu activists, was formed to combat, amongst other things, the legal system pertaining to land allocation in Kenya (Yoshida 2000: 132). The KCA and other African political organizations were comprehensively outlawed during the Second World War, but an association aimed at a broader mobilization, the Kenyan African Union (KAU) was formed in 1944. The KAU was a political association that asserted the rights of Africans and that

opposed colonial rule. In 1947, Jomo Kenyatta, a Kikuyu from Central Province who became independent Kenya's first president, became the KAU's leader.

In the early days, those who formed the majority of the KAU membership were moderates who supported Kenyatta's emphasis on the maintenance of a campaign that was law abiding. However, as time went on without apparent progress being made towards the affirmation of African rights, the peaceable faction gave way to a radical group that advocated liberalization through armed struggle.

Among the indigenous African groups that were following various kinds of opposition to colonial rule, KAU's radical faction was the one that adopted the most violent confrontation with the colonial authorities. At the centre of this radical group were Dedan Kimathi and his fellow warriors, all of them Kikuyus from Central Province. In the early 1950s, in the White Highlands and in Nairobi, numerous attacks thought to be associated with the radical faction were perpetrated on Africans who were considered to be loyal to the colonial government (the so-called loyalists), and the farms of white settlers were often entered and property set on fire (Yoshida 2000: 180).

Subsequently, on 9 October 1952, Senior Chief Waruhiu (Senior Chief was a post typically held by African loyalists appointed by the colonial government; Waruhiu was a Kikuyu from Central Province) was shot dead in broad daylight. Using this incident as a pretext, the Governor of Kenya on 20 October declared a state of emergency. At the same time, he outlawed „the society commonly known as Mau Mau“.<sup>4</sup> Kenyatta was arrested together with a few hundred members of the KAU leadership.

In an attempt to rid Kenya of the Mau Mau, Britain brought into the colony 50,000 regular army soldiers, together with tanks and RAF bombers. The superiority of the British side was overwhelming. Dedan Kimathi, who had become the Mau Mau commander in chief, was apprehended and after a short trial was found guilty of illegally possessing weapons and ammunition. He was hanged on 18 February 1957, his body being buried in an unmarked grave within the prison compound. By that year, the military defeat of the Mau Mau was virtually complete.

Eventually, in November 1959, Britain lifted the state of emergency. Needless to say, the damage and injuries on the African side were enormous. Even if we count only confirmed losses, over 10,000 Mau Mau fighters were killed (Matsuda 2003: 158). What is more, just under 2,000 African loyalists lost their

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<sup>4</sup> For details, see „Laws of Kenya, The Societies Act Chapter 108, Revised Edition“ (1970: 29) (Subsidiary Legislation).

lives. Among the white settlers, 90 individuals died, while the cost to Britain of quelling the insurrection amounted to 60 million pounds (equivalent in value to four years of the colony's budget). Thereupon, realizing that the independence of Kenya was inevitable, Britain set up a conference with the participation of moderate Africans for drafting a Constitution, and in 1963, Kenya finally became independent.

There can be little doubt that the fierce anti-colonial struggle of the Mau Mau was one of the mainsprings of Kenya's independence. Nevertheless, the Mau Mau activists from the radical wing of the KAU made much of procedures such as swearing-in ceremonies conducted in the Kikuyu language. Their movement was largely based among the Kikuyu, Meru and Embu peoples who had been farming in the central highlands of Kenya.<sup>5</sup> Subsequently, this development had considerable influence on the movement among former Mau Mau fighters over the question of „colonial responsibility“.

After independence in 1963, successive Kenyan governments avoided giving recognition to the role played by the Mau Mau in the independence of Kenya. Firstly, even though he himself had been a KAU leader, Kenyatta, the first president, distanced himself from Kimathi and the radical faction of KAU.<sup>6</sup> Kenyatta became well known for his retorts about the Mau Mau being „hooligans“ and about the Mau Mau movement being „a disease“. He left all mention of the Mau Mau out of his autobiography written in the 1960s and did not hide his conviction that there was no need to reward former Mau Mau fighters for their

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<sup>5</sup> Against the background of this preponderance, there has been a long-standing debate among Kenya's historians and literature specialists over whether or not the Mau Mau movement can be seen as a liberation struggle aimed at Kenyan independence. For an attempt at a systematic treatment of the discussions, see Clough (2003: 256-263).

<sup>6</sup> Kenyatta, who became President in 1964, was for a long period incarcerated as a former Mau Mau ringleader. In fact, not only did he belong to a moderate faction of Kenyan politics, but if anything, his stance was close to that of the loyalists. While in prison, he was kept in a building separate from those that housed the other Mau Mau suspects, and was permitted visits from his wife (see Elkins 2005: 196-197). In this connection, we should note that Uhuru Kenyatta, the eldest son of Jomo Kenyatta's fourth wife and a contender in the 2002 presidential election, was born in October 1961, only two months following his father's release from jail. This suggests that Kenyatta enjoyed a fair degree of privacy during his imprisonment.

contribution to independence by giving them priority in access to land.<sup>7</sup> From independence onwards, Kenyatta's stance was throughout quite consistent: he would not permit a land policy that gave priority to former Mau Mau fighters and their families.

In response, there emerged during the 1960s in Kenya a political faction centred on former vice president Oginga Odinga that advocated a redistribution policy that would give land free of charge to landless people including former Mau Mau fighters, and vigorous exchanges on this topic occurred within the government and in parliament. However, at the end of a fierce struggle for power, the side that emerged victorious was the Kenyatta faction.<sup>8</sup> Thus the post-independence government, charged with the task of managing land allocation, pushed ahead with a policy based on the free market concept of „willing seller, willing buyer“, and the demands of the former fighters, who had taken part in a long guerrilla struggle and who had fallen on hard times as a result of having lost their land, remained unheeded.

On the other hand, former loyalists and farmers, who were relatively wealthy on account of their possession of liquid assets, emerged as the winners and were the beneficiaries of the plans for settlement of the people on fertile farmland. Kenyatta himself was one of the biggest gainers from this policy. In 1968, five years after independence, a law was passed regulating the formation of societies in Kenya. Included at the time in the list of illegal societies was the Mau Mau.<sup>9</sup> Kenyatta died in his post in 1978, and Daniel arap Moi, his vice president, became the next president of Kenya. Moi, in his capacity as Minister for Home Affairs, had been deeply involved in the execution of land policy, and the Moi administration, like its predecessor, refused to acknowledge the contribution that the Mau Mau had made to independence and basically followed the Kenyatta administration's line, which was to comprehensively distance the government from the former Mau Mau fighters.

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<sup>7</sup> See Kenyatta (1968: 159). For Kenyatta's opinion of the Mau Mau, see Clough (2003: 254-256).

<sup>8</sup> For a detailed account of this matter, see for example Odinga (1967). It should be borne in mind that Odinga and his factional colleagues formed a new party in 1966. Thereafter, however, their strength was gradually weakened as a result of sustained government repression until, in the end, the party was banned outright, in 1969. Kenya then became a *de facto* one-party state under the rule of President Kenyatta and his party, KANU. For details, see Tsuda, (1993).

<sup>9</sup> For details, see „Laws of Kenya, The Societies Act Chapter 108, Revised Edition“ (1970: 29) (Subsidiary Legislation).

In fact, though the phrase „the Moi administration“ is often used, what is meant is the rule of Moi himself for a period of over twenty years from 1978 as well as the one-party rule of KANU (Kenyan African National Union) from 1982 and the rise of an extreme form of authoritarianism. The resumption of a multi-party system in 1991, and the subsequent movement towards democratization, brought about a substantial change in Kenyan politics. However, despite this change, the government’s stance towards the Mau Mau continued along the same lines as before. Land policy remained more or less unaltered and the Mau Mau continued to be outlawed.

Still, along with the further progress in democratization that occurred during the latter half of the 1990s, there was a gradual strengthening of demands, by various groups, for recognition of the Mau Mau. For example in October 1998, the Kenya Human Rights Commission became the centre of a movement that issued a statement demanding that „the whereabouts of the remains of the heroes who died in the war of independence should be determined and the bodies re-interred, compensation should be paid to the bereaved families, demands should be addressed to the British government for restitution, and a liberation memorial hall should be built“. The statement took the form of a ten-point memorandum, which included in one of its clauses a reference to recognition of the Mau Mau. It was presented to the Minister for Home Affairs, National Heritage, Culture and Social Service. This marked the beginning of the drive to persuade the government to recognize the contribution that the Mau Mau had made to the independence of Kenya, and of the formal requests for compensation payments.<sup>10</sup>

In August 2000, exactly 50 years after the outlawing of the Mau Mau, under the sponsorship of the Mau Mau War Veterans“ Association (MWVA – at the time, the Mau Mau remained outlawed and this group was not a legally registered society), a meeting was held in Nyeri district, Central Province, which had been one of the main fighting arenas of the Mau Mau struggle. The meeting, attended by 250 former Mau Mau fighters including Ndung'u Gecheru, the association’s chairman, demanded recognition of the role played by the Mau Mau, who had been outlawed for the last 50 years, in the independence of Kenya, and requested a permit to allow the construction of a Mau Mau memorial hall.<sup>11</sup>

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<sup>10</sup> Other groups that joined this movement were the Hero Recognition Committee (the committee’s representative, who also represented the KHRC, was Willy Mutunga) and the Release Political Prisoners Group. See *Sunday Nation*, 11 October 1998.

<sup>11</sup> See „Mau Mau Vets Seek Recognition“, *NZ Herald*, 14 August 2000, reproduced at <http://www.zimbabwesituation.com/aug/6a.html> (last accessed on 29 June 2006).

In October 2001, an opposition MP moved a motion in parliament calling for the establishment of a Heroes' Fund. The person who moved the motion was Shem Ochuodho, a Luo from Nyanza Province, and the motion was seconded by James Magara, a Kisii also from Nyanza Province. The purpose of the motion was to secure funds for providing relief to heroes of the independence struggle who had been reduced to poverty, the said heroes to include sportsmen and sportswomen and musicians, but it carried clear implications for the rehabilitation of the Mau Mau. The motion was supported by opposition members including the MPs Paul Muite and Beth Mugo, both of them Kikuyus from Central Province, and the debate was accompanied by statements such as „freedom fighters require recognition and respect, and not money“ and „Kimathi (should) be given a decent burial at his home in Nyeri“ and „a list of freedom fighters must be compiled“. However on this occasion, the discussion ended in confusion over what constituted „a hero“, and the motion was narrowly defeated by 28 votes to 31.<sup>12</sup>

Later, in November 2001, a Kikuyu MP who belonged to an opposition party and who represented a Nairobi constituency, asked a parliamentary question requesting that Kimathi's body be exhumed for reburial by his relatives, but in refusing the request, the Assistant Minister for Home Affairs, Heritage and Sports laughingly retorted that since it would be unlawful to re-bury or cremate „the body of a convict“, the remains of Kimathi „could not be liberated“ from Kamiti Maximum Prison.<sup>13</sup> In the end, during the ascendancy of the Moi regime, the government of Kenya did not change its stance on the recognition of the Mau Mau. From 1963 through to the first decade of the 21<sup>st</sup> century, among the rulers of Kenya, the refusal to officially acknowledge the Mau Mau remained a constant feature.

## **Part 2: From Neglect to Recognition – Changing Trends within the Kenyan Government**

However, when the Kibaki administration came to power after the 2002 general election, the reality changed substantially. The fact is that the Kibaki government adopted a more positive approach towards the former Mau Mau fighters. The change in the government's policy towards the Mau Mau formed an important underlying theme, and after 2000, quite suddenly the prospect of the former Mau

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<sup>12</sup> See „Motion on Heroes Fund is Defeated“, *Daily Nation*, 18 October 2001.

<sup>13</sup> See „Dedan Kimathi was Buried at Lang'ata“, *East African*, 10 December 2001.

Mau fighters mounting litigation against the British government took on an air of reality.

In January 2003, Kibaki created a Ministry of Justice and Constitutional Affairs, the first time in twenty years that there had been such a ministry. The first minister to be appointed was Kiraitu Murungi (a Meru from Central Province) and the assistant minister was Njeru Githae, a Kikuyu, also from Central Province. Murungi had belonged to the same opposition party (Democratic Party of Kenya) as Kibaki during the 1990s, and was a member of Kibaki's inner circle. His appointment as minister was seen as a step towards impeding the introduction of a new constitution, constitutional revision being an urgent item on the agenda in the early years of the Kibaki administration.

On 11<sup>th</sup> February, a mere month after the regime's inauguration, Murungi announced that the new government had decided to exhume Kimathi's remains and re-inter them elsewhere. Murungi declared that „he died fighting for our independence and he was killed by the colonialists and buried in a secret grave like a criminal“. This statement made clear the intention to recognize the Mau Mau. The change in heart came only fourteen months after Moi's Home Affairs Assistant Minister had laughingly dismissed a request to „illegitimately“ remove „the body of a convict“. <sup>14</sup>

Meanwhile, active moves were afoot among the former Mau Mau fighters to demand rehabilitation. In May 2003, a large rehabilitation gathering was held and was attended by 3,000 former Mau Mau fighters who formed a group called the Mau Mau Association. The government was asked to recognize this association as a legally designated society, and a steering committee was set up. <sup>15</sup>

In the latter half of May, the MWVA launched a campaign in Nyeri district, Central Province, to ask the government for recognition of the association as a legal entity. At this meeting, moreover, Gathogo Muthura (a Kikuyu also known as General Kirihinya) was elected to represent the association. The MWVA, a new association, was formed in April 2003 through the amalgamation of four groups of former Mau Mau warriors, the groups being, respectively, the Ex-Mau Mau War Council of Elders, the War Veterans Association of Kenya, the Mau Mau War Council, and the Mau Mau Original Trust. Each of these had as its main aim the demanding from the British government of compensation for torture carried out in concentration camps and jails during the period of colonial rule. <sup>16</sup>

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<sup>14</sup> See „Hero's Burial for Mau Mau Chief“, *Sunday Times*, 16 February 2003.

<sup>15</sup> See „Ex-Mau Mau Name Compensation Team“, *Daily Nation*, 19 May 2003.

<sup>16</sup> See „Former Mau Mau Demand Redress“ *Daily Nation* 27 May 2003.

In August 2003, three months after this meeting was held, Justice Minister Murungi announced that it was the government's intention to accept the application of the former Mau Mau fighters for recognition of their new association as a legally constituted society. In the same month, the Mau Mau's status as an illegal grouping was removed. At the end of the month, Chris Murungaru, the Minister of State responsible for Provincial Administration and Public Security (a Kikuyu from Central Province and one of Kibaki's henchmen) formally lifted the ban that had been imposed on the Mau Mau by the British in 1950, opening the way for the legalization of societies related to the Mau Mau movement. According to CNN News, in November 2003 the MWVA submitted an application to be officially registered as a legally constituted society, and the application was accepted without demur by the government.<sup>17</sup>

This relaxation of the outlaw status of the Mau Mau carried an especially important significance for the launching of litigation against Britain over the question of colonial responsibility. Thanks to the government's recognition of the society, the fact was that for the first time since independence, it became possible for Mau Mau-related groups to engage in legitimate activities.

At the ceremony held to mark the approval of MWVA's application for recognition, Vice President Moody Awori (a Luhya from Western Province) and Justice Minister Murungi acted as joint chairmen. It was the first time in almost 40 years that government ministers had been present at a meeting of former Mau Mau fighters – in fact it was the first such occasion since the attendance of Kenyatta at a meeting in Nyeri county (Central Province) in 1964, when former Mau Mau fighters formally surrendered and gave up their weapons. What is more, Vice President Awori, addressing the MWVA representatives, declared that „it is a sad fact that it has taken forty years for the government to finally agree to register this group that was not afraid of death in order to earn freedom for its countrymen“.<sup>18</sup>

Important changes occurred, also, in the matter of the re-burial of Kimathi's remains, an issue that reached an impasse under the Moi regime. In this regard, very shortly after the inauguration of the Kibaki administration, there was a significant development when the outlawing of groups related to the Mau Mau was lifted. In June 2003, Murungi announced the construction of a Heroes' Corner in Nairobi and revealed that an official search had already begun for Kimathi's body

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<sup>17</sup> See „Kenya Registers Mau Mau Freedom Fighters Group“, CNN.com, 11 November 2003, <http://www.cnn.com/2003/World/africa/11/11/kenya.maumau.rent/index.html> (Last accessed 31 May 2006).

<sup>18</sup> See „Kenya Registers Mau Mau Freedom Fighters Group“, CNN.com, 11 November 2003, <http://www.cnn.com/2003/World/africa/11/11/kenya.maumau.rent/index.html> (Last accessed 31 May 2006).

which, if found, would be exhumed and reburied. It was intended that the remains of other former Mau Mau warriors would also be interred there.<sup>19</sup> To mark the 40<sup>th</sup> anniversary of independence on 12<sup>th</sup> December 2003, the construction of Heroes“ Corner was announced, and for this purpose, two committees were set up. Perhaps unsurprisingly, these committees encountered complications in defining what was meant by „hero“, but by contrast with the situation under the Moi regime, the plan was actually put into effect. In January 2004, the search for Kimathi“s remains was begun in the grounds of Kamiti Maximum Security Prison (the remains, in fact, were never found).<sup>20</sup>

In February 2004, a funeral ceremony for a former Mau Mau fighter was jointly presided over by Justice Minister Murungi and the MPs Muite and Uhuru Kenyatta, the latter being one of former president Kenyatta“s offspring. According to a press report, Murungi said that it was planned to complete Heroes“ Corner in 2005 and announced that government funds had been set aside to give aid and assistance to the bereaved family of Kimathi.<sup>21</sup> In the end (in February 2007), on the anniversary of his death, a bronze statue of Kimathi was completed on Kimathi Street in Nairobi. The unveiling ceremony was presided over by Kibaki, Vice President Awori, and the National Heritage Minister Suleiman Shakombo.<sup>22</sup>

In January 2005, an important book was published (see the next section for details) concerning the severe torture meted out during the colonial period to those suspected of being Mau Mau warriors. At a publishing party in Nairobi“s Norfolk Hotel, a building redolent of British colonial rule, among those present were Vice President Awori and Justice Minister Murungi. In a speech on this occasion, Awori declared, „Those who fought for our liberation and shed blood in the Mau Mau uprising need respect, not condemnation“. He went on to say, „The least the British can do is to apologise to Kenya for the brutality visited on (the Kenyan people) in the war for independence“. The conviction that the Mau Mau had contributed to Kenya“s independence was unmistakable. Murungi went on to make a clear reference to the problem of compensation, stating that „the British government should not only apologise but should also compensate the Mau Mau war veterans

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<sup>19</sup> In addition to „Heroes“ Corner“, other place names that were used included „Heroes Square“ and „Heroes Acre“. See for example „Mau Mau“s Dedan Kimathi to be First in Heroes Acre“, *Daily Nation*, 1 July 2003.

<sup>20</sup> See „Search for Hero“s Body Fruitless“, *Daily Nation*, 16 January 2004.

<sup>21</sup> See „Freedom Heroes to Sue Britain“, *Standard*, 14 February 2004.

<sup>22</sup> See „State Honours Kimathi, 50 Years after His Death“, *Daily Nation*, 19 February 2007.

and their families, just as the Japanese government compensated the British servicemen who suffered atrocities during the Second World War".<sup>23</sup>

The single most important reason for the Kibaki government's decision to recognize the Mau Mau was the change in the composition of the administration. After the general election of 2002, the biggest party in parliament was no longer KANU but the new National Rainbow Coalition (NARC). Holding as it did 60 percent of the seats in parliament, NARC set out with the objective of overturning the long-established stance of the Moi regime and of KANU, especially with respect to their discredited performance in matters such as rampant corruption, violations of human rights, and the poorly performing economy. At the risk of oversimplification, it can be said that the opposition parties during the time of the Moi government became the ruling party during the time of the Kibaki government. The fact was that the new ruling party of NARC included many individuals, who had been members of the opposition party during the days of the Moi administration and who had called for the rehabilitation of the Mau Mau during that period.<sup>24</sup>

Moreover Kibaki, the new president, came from a background essentially similar to that of Kenyatta (like Kenyatta, he is a Kikuyu from Central Province). Kibaki was brought up in a „loyalist“ household. As a young African in the colony of Kenya, he benefited from an outstandingly good education and graduated with a first-class degree in economics from Makerere University. He was Minister of Finance during the Kenyatta administration and held several other senior posts under the Moi regime, including those of vice president and Minister of Finance. Kibaki, in other words, was a leading Kenyan politician who had followed a „moderate“ career and was a wealthy businessman besides.

Kenyatta, however, was president at the time and occupied that position when most of the former Mau Mau warriors were active. Moreover, he had been president during the 1960s when parliament discussed a ruthless and highly controversial policy of land redistribution without compensation. Some forty years had passed since then. During that time, the former Mau Mau had aged, and memories of the redistribution of land to the Kikuyu had faded. To Kibaki, who had become president during the early years of the new millennium, the

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<sup>23</sup> See „Kenya Wants Apology from UK over Colonial Evils“, *Daily Nation*, 4 March 2005.

<sup>24</sup> For the line-up of KANU and NARC Members of Parliament, see Table 2 in *Keniateki fukusū seitō-sei* (A multi-party system, Kenya-style) (Tsuda 2004a).

recognition of the Mau Mau was a matter less relevant to his own personal experience. The Kibaki administration, subject to the strict requirement that a general election be held every five years and operating in a multi-party system, was in a different position from that of the Kenyatta regime and followed a correspondingly different line on the question of the Mau Mau. Moreover understandably, it was anxious to strengthen its electoral base in Kibaki's home area whenever an opportunity for doing so arose.

Naturally, the rehabilitation of the Mau Mau was a double-edged sword. If the administration portrayed the former Mau Mau fighters as heroes, as had been the case with the demands made in parliament, they risked attracting the criticism that all their heroes were Kikuyus. The Moi regime (in ethnic terms Moi was a Kalenjin) never recognized the Mau Mau fighters as heroes, not even in the days when it had to deal with multi-party politics. In the case of the government headed by the Kikuyu Kibaki, there was a possibility that recognition of the Mau Mau might lead to a solidifying of the non-Kikuyu opposition at future elections.

In the first Kibaki administration, Kibaki and his inner circle actually became the targets for strong criticism from within government as well as from the opposition parties. A striking feature was that key ministers, high-ranking government officials and prominent leaders of public corporations continued to make much of their ethnic identity as Kikuyus, or Embu, or Meru. Kibaki, who turned a deaf ear to accusations of „Kikuyu centralism“, continued as before to appoint Kikuyu (and Embu and Meru) to the posts. His recognition of the Mau Mau may be interpreted not just as an attempt to strengthen his support in his home area (his personal electoral base, where many Kikuyu lived), but also as an implicit illustration of the very criticisms that were being levelled against it.

The result of all this was that, under the Kibaki government, the policy followed consistently by previous administrations was overturned, and the Mau Mau at last won recognition. This brought an entirely new current to the post-independence history of Kenya.<sup>25</sup> Under the first Kibaki administration, the

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<sup>25</sup> What needs to be taken into account here is that the first Kibaki government did nothing to tackle the problems arising from post-independence delays in redistributing resources, including land, to former Mau Mau fighters. Of the measures that were taken by the government, including the lifting of the illegal status of Mau Mau-related groups, the recognition of the said groups as legally constituted societies, the plan for exhuming and re-burying the remains of Kimathi, and the construction of a bronze statue of Kimathi, none required substantial budgetary expenditure, and none of them in any way disturbed the interests of existing income earners in Kenya. In fact in general terms, they

former Mau Mau fighters who had demanded acknowledgment over a period of very many years suddenly registered an important victory in their struggle for recognition, and the way was opened for a concerted drive to mount litigation against Britain over the question of colonial responsibility.

### **Part 3: The Historian who Became a Witness**

Another strand in the movement to launch litigation against Britain was the arrival on the scene of the American historian Caroline Elkins. Elkins began her research in Kenya in 1995 and continued thereafter with academic work that focused on the nature of the suppression employed by the British colonial authorities against the Mau Mau.<sup>26</sup> Using the techniques of a professional historian, Elkins investigated the ways in which the long-term repression of the Mau Mau was carried out in a highly degrading environment that included the use of organized torture and forced labour.

In addition to conducting documentary research, she interviewed surviving Mau Mau fighters and the families of former fighters as well as white settlers who had been colonial officials in the days before independence. Most of the interviews conducted by Elkins were preserved as recordings.<sup>27</sup> In the course of her research, she uncovered techniques of repression that were truly horrible.

Elkins shows how the British Colonial Secretary and the Governor of Kenya regarded the Mau Mau as being composed mainly of Kikuyu, Meru and Embu. Starting in 1952, almost all Africans belonging to these groups were targeted for screening, and the so-called pipeline system was instituted under martial law ordinances.

Under the pipeline system, Africans belonging mainly to the Kikuyu were forcibly removed from their homes and moved into „reception centres“ which in reality were concentration camps. Torture was used to divide the detainees into the

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were gesture-like initiatives that did not go beyond the cosmetic. Moreover, insofar as press reports provide a guide, neither the Deputy President nor the Justice Minister made any reference at all to what was arguably the most important issue in post-independence Kenya, namely the land problem. Instead, in 2005, the Justice Minister and his colleagues began to contend that Britain should pay compensation, thereby shifting the responsibility outside Kenya.

<sup>26</sup> See Elkins (2005:453), Acknowledgements.

<sup>27</sup> See Elkins (2005: 432-433), Bibliography.

three categories of black, grey and white. Those placed in the black category were moved up the pipeline to „special detention camps“; the „greys“ were sent down the pipeline to work camps in their home districts, leaving only the „white“ contingent to be released into the African reserves. At each camp, detainees were asked to confess that they were associated with the Mau Mau, and under the name of „rehabilitation“, severe methods of torture were applied. Those who perpetrated the torture were colonial officials and „loyalist“ Africans. The loyalists who took part were rewarded with various special favours and were given preferential treatment in economic policy. The discrimination between loyalists and non-loyalists opened up a fissure within the African population that was to have long-lasting consequences.<sup>28</sup>

By 1958, the pipeline system was beginning to be seen as a problem in the British parliament. Labour MPs (the Labour Party was then in opposition) started to criticize the government for infringements of human rights in Kenya. When the pipeline campaign became a topic of public discussion, the immediate effect was to intensify still further the torture that was being used to extract confessions.<sup>29</sup>

As regards the scale of the harm caused by the pipeline system, Elkins estimates that almost all of the Kikuyu – over 1.5 million people – were caught up in the campaign. Records of the deaths of Africans in screening centres and other camps were all destroyed, but it is possible that the number of deaths among Africans during the campaign ran to several tens of thousands. Elkins’s estimates of the number of deaths are ten times higher than previous estimates.<sup>30</sup>

The early 2000s, when Elkins’s research was entering into its final stages, was the time when Britain was joining the United States in the war in Iraq. It was also the period, as explained above, when Kenya was marking the 50<sup>th</sup> anniversary of the outlawing of Mau Mau groups, as well as the 40<sup>th</sup> anniversary of the country’s independence. Elkins’s research findings were widely taken up by the mass media. Britain’s BBC made a television programme on the suppression of the Mau Mau, and in this connection, BBC journalists visited Kenya for several weeks, mainly in October 2002, to conduct interviews. Elkins furnished them with relevant information and materials. The documentary programme was shown in November 2002 under the title *Kenya: White Terror*. The contents dealt with the severe methods of torture that had been employed by the colonial government

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<sup>28</sup> See Elkins (2005: Chapter 3-7 and Appendix).

<sup>29</sup> See Elkins (2005: Chapter 9 and Chapter 10).

<sup>30</sup> See Elkins (2005: xiv-xvi). It should be noted that many criticisms have been made of the methods employed by Elkins to compute the number of deaths. For a demographer’s criticism, see Blacker (2007).

against the Mau Mau, and uncovered other serious infringements of human rights. Interviews were held with former Mau Mau fighters and with former colonial officials. Elkins also made an appearance and spoke at some length.<sup>31</sup>

Elkins's book, entitled *Britain's Gulag: The Brutal End of Empire in Kenya*, was published in 2005. This was barely a year after the disclosure of details concerning the exceptionally cruel torture that was meted out to prisoners being held in the Abu Ghraib concentration camp in Iraq by American soldiers. Elkins's contribution thus appeared at the very time when the Americans were ill-treating their prisoners under the banner of a war against terror – a state of affairs that caused a worldwide wave of indignation. In these circumstances, it was perhaps not surprising that Elkins's book attracted very considerable interest, and in 2005 it was awarded the Pulitzer Prize.

Kibaki's Cabinet, which at the time was working towards recognition of the Mau Mau, was well represented at a publishing party held to mark the book's launch in Kenya. The Kenyan Vice President called upon Britain to apologize to Kenya, while the Justice Minister, who was also present, declared his belief that the British should pay compensation to former Mau Mau fighters and their families.

Elkins appeared with increasing frequency in the mass media of Britain and other countries, and as will be shown in the next section, the British legal firm that had been asked by the former Mau Mau fighters to prepare litigation against Britain approached Elkins for assistance in obtaining evidence as well as in respect of other matters relating to the lawsuit. It is a sign of the degree of her

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<sup>31</sup> *Kenya: White Terror*, BBC Two television (9 November 2002). See <http://news.bbc.co.uk/1/hi/programmes/correspondent/2416049.stm>. (Last accessed 16 March 2005). The programme contained arguments for and against the allegations made by the Mau Mau groups. In the course of the programme, criticisms were made of the absence of documentary evidence sufficient to support the contentions of Elkins and others concerning torture and other violations of human rights. On 17 January 2005, Britain's Office of Communication (OFCOM) partially upheld a complaint of unfairness made by a former Kenyan prison official who had been interviewed for the programme. For details, see OFCOM (2005). It should also perhaps be noted that the programme was awarded the International Committee of the Red Cross Award at the Monte Carlo Film Festival.

cooperation with the enquiries that her name has often been mentioned as a possible witness in the forthcoming trial.<sup>32</sup>

In this manner, history and scholarly research lent support to the movement towards launching a legal action against Britain. Limitations of space do not permit a more detailed discussion in this chapter. In 2005, the year in which Elkins's book appeared, the Oxford University historian David Anderson published *Histories of the Hanged: The Dirty War in Kenya and the End of Empire*. This book contains copious information on the violation of human rights in Kenya during the colonial period. In the Kenyan daily newspapers, Anderson's book was given as much prominence as the book by Elkins.<sup>33</sup>

Thus it was that, assisted by academic work, the former Mau Mau fighters and the lawyers acting on their behalf, by referring to acts of torture and to other human rights infringements, were able to take the path that led to a questioning of Britain's „colonial responsibility“.

#### ***Section 4 The Role of Leigh Day and Company***

Even before the advent of the Kibaki administration, there had been various attempts in one form or another to recognize and compensate former Mau Mau fighters; all of them, however, ended in failure. For example, the 20 February 2000 issue of the Kenyan daily newspaper *Daily Nation* carried a letter to the editor demanding that the Kenyan government should find and rebury elsewhere the remains of the former Mau Mau fighter Dedan Kimathi.

The letter also proposed that a campaign should be launched „to free the remains of a hero of the country's liberation war from prison and re-bury them“ and stated that a ceremony to launch a petition calling on the government of Kenya „to free the heroes of our independence struggle from prison and accord them

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<sup>32</sup> See „Update of Mau Mau Claims“, 27 April 2007, <http://www.leighday.co.uk/doc.asp?doc=836&cat=850> (Last accessed 23 April 2008), and „Mau Mau Claims Set to be Heard in London“, 6 October 2006, <http://www.leighday.co.uk/doc.asp?doc=947&cat=850> (Last accessed 23 April 2008). See also „Top Writer to Testify in Mau Mau Pay Row“, *Daily Nation*, 29 May 2006.

<sup>33</sup> For example, see „Mau Mau Heroes Bank on Healthy War Chest in Their Quest for Claims“, *Daily Nation*, 1 June 2006.

decent burials“ was held on the 18<sup>th</sup> of February, the 42<sup>nd</sup> anniversary of Kimathi’s death.<sup>34</sup>

In November 2001, the MWVA held a meeting at which a demand was made for compensation from the Kenyan government, the sum being asked for amounting to a total of 6 billion shillings, equivalent at the time to 10 billion yen. The MWVA claimed that it had evidence showing that, after independence, the British government had paid the government of Kenya compensation amounting to 6 billion shillings, but there was no record of any money having been paid to the former Mau Mau fighters and their families. It is said that 1,200 people attended this meeting.<sup>35</sup>

Moreover, a news report that appeared on the Internet referred to a certain group of Mau Mau fighters (the name of the group was not divulged) which in August 2000 – the fiftieth anniversary of the outlawing of the Mau Mau – had allegedly handed a petition to the British High Commissioner then serving in Kenya. According to this report, the petition demanded compensation for the compulsory seizure of land from individuals related to the Mau Mau, as well as compensation for members of the families of former Mau Mau adherents killed in the fighting. The intention was that, were these demands to be rejected, a lawsuit should be launched against the British government.<sup>36</sup>

In August 2002, another group of former Mau Mau fighters (the Movement of Independence War Veterans Association) drew attention to the allegedly brutal behavior of 2,000 Indian troops stationed in Kenya during the colonial period and attempted to launch a legal action against the government of India for compensation amounting to 52 trillion shillings.<sup>37</sup>

In the midst of these various movements to demand compensation from the Indian and Kenyan governments, an important development that was to influence litigation against Britain came in 2002, with the engaging by a group of former Mau Mau fighters of the services of Martyn Day, representing the British solicitors“ firm Leigh Day and Company.<sup>38</sup> According to Leigh Day’s website, in 1999 and

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<sup>34</sup> See „Give Kimathi a Decent Burial“, *Daily Nation*, 20 February 2000. In fact, a thorough search of the media found no reference to this meeting, and thus it has been impossible to confirm the veracity of the letter writer’s assertion.

<sup>35</sup> See „When Parliament Failed to Honour War Heroes“, *Daily Nation*, 28 October 2002.

<sup>36</sup> See „Mau Mau Vets Seek Recognition“, *NZ Herald*, 14 August 2000.

<sup>37</sup> See „Mau Mau Veterans to Sue Britain for War Crimes“, *Daily Nation*, 28 October 2002.

<sup>38</sup> See „Mau Mau Veterans to Sue Britain for War Crimes“, *Daily Nation*, 28 October 2002.

2000, acting on behalf of clients, the firm successfully sued the German and British governments, the former in connection with the gross mistreatment of Polish slave labourers by the Nazis during the Second World War, and the latter over claims made by former British prisoners of war and internees incarcerated by the wartime Japanese government. In 2000, details were announced of what was a very considerable achievement by the firm, namely the agreement by the British government to pay £10,000 compensation to each of the claimants. The same website also carried information on litigation handled by the firm in support of victims of asbestos poisoning. In this case, the firm successfully arranged for the government of the Republic of South Africa to pay compensation amounting to £7.5 million. Through this and other cases, Leigh Day was clearly establishing a reputation as a successful practitioner of international claims and was becoming known as a firm that was prepared to go to great lengths in defence of its clients' interests.<sup>39</sup>

What made Leigh Day well known in Kenya was its litigation against the British government over injuries caused by unexploded bombs and other ammunition left behind on practice ranges that had been in use by the British army for a period of over 50 years. On the two ranges concerned (Dol Dol and Osiligi, both in dryland areas of northern Kenya), a succession of incidents had occurred involving injuries especially to the children of the livestock herders of the area by unexploded bombs and ammunition. The Kenyan Pastoralists Forum was set up, and this group, which had persistently tried to draw attention to the incidents, called on Leigh Day to negotiate on its behalf for compensation from the British government. The firm began its investigations in Kenya in March 2001 and stated in its report that at least 15 Kenyan residents had been killed and wounded on the two former practice ranges.<sup>40</sup>

Settlement of the litigation was reached in July 2002. The British Ministry of Defence agreed to pay legal costs plus 7 million dollars of compensation, and it was planned that the payments would begin in November of the same year to a group of claimants comprising 228 individuals, the lightly injured to be awarded 1,500 dollars per person, and amputees and other badly injured victims 460,000

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<sup>39</sup> See „Claims against the German Government“, n.d., <http://www.leighday.co.uk/doc.asp?cat=930&doc=132> (Last accessed 20 June 2006) and „Japanese Prisoners of War“, n.d., <http://www.leighday.co.uk/doc.asp?cat=930&doc=134> (Last accessed 20 June 2006).

<sup>40</sup> See „Kenya to Sue UK army“, BBC news, 23 March 2001, <http://news.bbc.co.uk/2/hi/africa/1238236.stm> (Last accessed 11 June 2008), and “UK Army Denies Kenya Cover-up“, 4 May 2001, <http://news.bbc.co.uk/2/hi/africa/1312675.stm> (Last accessed 11 June 2008).

dollars per person. These were very substantial sums, and the case attracted widespread interest, being reported by the BBC and by the Kenyan *Sunday Nation* newspaper.<sup>41</sup>

Another incident involving British troops in Kenya concerned accusations of rape perpetrated by British soldiers over a long period of time on Masai and Samburu women.<sup>42</sup> According to the Leigh Day website, a group representing women claiming to be victims of rape contacted the firm in October 2002, only a few months after the conclusion of the negotiations that were held over compensation for the injuries caused by unexploded ammunition. Judging by the timing, it seems very likely that the recent success of these negotiations had persuaded the women to contact Leigh Day.<sup>43</sup> On behalf of Leigh Day, Martyn Day said that while he was willing to examine the rape allegations, the passage of time and the paucity of the evidence were likely to pose problems in any prosecution of legal action.<sup>44</sup>

The beginning of the movement that culminated in the former Mau Mau fighters engaging Leigh Day to act on their behalf can be traced back to the same period – in other words to October 2002. The Kenyan newspaper *Daily Nation* disclosed that discussions had been held at Nairobi Airport between a group representing the former Mau Mau fighters and Martyn Day, over the possibility of litigation for compensation from the British government.<sup>45</sup> Independently, the BBC reported that former Mau Mau fighters intended to meet with Martyn Day in November 2002.<sup>46</sup> According to the Leigh Day website, the firm was first approached by the former Mau Mau fighters in early 2003, when the Mau Mau

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<sup>41</sup> See „UK Pay-out for Kenya Bomb Victims“, BBC News, 19 July 2002, [http://news.bbc.co.uk/2/hi/uk\\_news/2139366.stm](http://news.bbc.co.uk/2/hi/uk_news/2139366.stm) (Last accessed 11 June 2008) and „UK to Pay Munitions Victims £ 4.5m“, *Sunday Nation*, 21 July 2002.

<sup>42</sup> See for example „Britain Opens Inquiry into Rape Claims against Troops“, *Daily Nation*, 9 April 2003.

<sup>43</sup> According to the Leigh Day website, human rights groups in Kenya informed Leigh Day staff about the rape allegations during the period when Leigh Day representatives were in Kenya investigating the background to the case of the damage caused by unexploded bombs. („Body Exhumed in Kenya Rape Case“, 4 October 2004, <http://www.leighday.co.uk/doc.asp?cat=921&doc=494> (Last accessed 28 June 2006)).

<sup>44</sup> See „British Troops Gang Raped Masai Women: Victims claim that shame – and blond Kenyans – are the legacy of soldiers“ reign of terror, now revealed after 20 years“, *Observer*, 20 October 2002.

<sup>45</sup> See „Mau Mau Veterans to Sue Britain for War Crimes“, *Daily Nation*, 28 October 2002.

<sup>46</sup> See „UK Begins Paying Kenya Compensation“, BBC News, 20 November 2002, <http://news.bbc.co.uk/2/hi/africa/2495847.stm> (Last accessed 20 June 2006).

were still outlawed in Kenya.<sup>47</sup> Because of the Mau Mau's illegal status, there was a strong possibility that no formal contract could be signed, but from that time onwards, there were frequent meetings between the solicitors and the former fighters, with Leigh Day beginning its preparations for litigation.<sup>48</sup>

As has already been explained, Kibaki (ethnically a Kikuyu) was elected President at the end of 2002, the first Kibaki administration took office, and the outlawing of groups related to the Mau Mau came to an end. In November 2003, the MWVA was registered as a legally constituted association, and for the first time in history, former Mau Mau fighters were able to become active not just as individuals but as members of groups. In mid-December 2003, the MWVA formally asked Leigh Day to demand compensation from the British government.<sup>49</sup> In Kenya, meanwhile, human rights groups such as the KHRC lent their support to the MWVA.

Upon receiving the request from the MWVA, Leigh Day, in view of the contacts that it had been making with the former Mau Mau fighters, responded by stating that „the methods used in the litigation against the governments of Kenya and India, and attempts that have been made to win compensation by condemning the land policies of the colonial government and by considering the fate of individuals already dead, are not likely to bear fruit“. Leigh Day made clear its opinion that it would be necessary to launch a lawsuit aimed directly at the British government.<sup>50</sup> The firm also suggested that, if the Mau Mau struggle were to be regarded as a „war“, the terms of Article 3 of the Geneva Convention of 12<sup>th</sup> August 1949 would apply.<sup>51</sup> Leigh Day subsequently adopted the new approach of demanding compensation in respect of surviving victims of torture carried out during the colonial period and indicated that the target of the litigation should be the British government. The demand for compensation and for an apology would be made on behalf a group of ten elderly surviving victims, now in their 70s and 80s, and would centre on allegations of torture and other violations of human

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<sup>47</sup> See „Mau Mau Case Investigated by Leigh Day & Co.“, 16 March 2005, <http://www.leighday.co.uk/doc.asp?doc=590&cat=850> (Last accessed 23 April 2008).

<sup>48</sup> The continuation of the illegal status of the Mau Mau had several adverse consequences for the movement's demand of compensation. See for example Mathenge (2002).

<sup>49</sup> See „Will ex-Mau Mau Veterans Win Battle for Compensation?“, *Daily Nation*, 15 December 2003.

<sup>50</sup> See „Mau Mau Veterans to Sue Britain for War Crimes“, *Daily Nation*, 28 October 2002.

<sup>51</sup> See „British Face Legal Action from Mau Mau Torture Victims“, 14 July 2004, <http://www.leighday.co.uk/doc.asp?doc=101&cat=921> (Last accessed 23 April 2008).

rights perpetrated by the British in detention camps and other similar penal establishments.<sup>52</sup>

Leigh Day began by collecting testimony in support of their group of claimants, by interviewing Professor Elkins and retired colonial officials resident in Kenya in connection with instances of castration, rape, and floggings carried out in concentration camps and the like in Kenya during the colonial period.<sup>53</sup> As was mentioned in the previous section, in October 2006 the firm's website indicated an expectation that Elkins would be a witness in any forthcoming trial,<sup>54</sup> and it is recorded that in mid-October, she was planning to visit Leigh Day so that arrangements could be made for the presentation of evidence.<sup>55</sup>

In May 2006, the KHRC announced, „On the 20<sup>th</sup> of October 2006, to mark the anniversary of Kenyatta's arrest, we plan to launch litigation against Britain“,<sup>56</sup> but in the end, this attempt was not carried forward and did not result in a trial. Seven months later, in May 2007, in an attempted rebuff to the claimants in the action being organized by Leigh Day, the British government publicly stated its opinion that „the governor of the Crown Colony of Kenya and its protectorates, and other colonial officials, were not appointed by today's British government“. The British side, moreover, indicated that in its view, the behavior of individuals

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<sup>52</sup> See „Mau Mau Heroes Bank on Healthy War Chest in Their Quest for Claims“, *Daily Nation*, 1 June 2006, and „Untold Horror of Britain's War against the Mau Mau“, *Daily Nation*, 17 October 2006.

<sup>53</sup> See „British Face Legal Action from Mau Mau Torture Victims“, 14 July 2004, <http://www.leighday.co.uk/doc.asp?doc=101&cat=921> (Last accessed 23 April 2008).

<sup>54</sup> See „Mau Mau Claims Set to be Heard in London“, 6 October 2006, <http://www.leighday.co.uk/doc.asp?doc=947&cat=850> (Last accessed 23 April 2008).

<sup>55</sup> Moreover it seems that finding money to pay for the litigation soon turned out to be a difficult enterprise. At the end of 2002, Leigh Day, acting as agent for the former Mau Mau fighters, applied to Britain's Legal Services Commission for legal aid, but the application was dismissed. (See „War Veterans' Plea Rejected“, *Daily Nation*, 29 April 2003.) In February 2005, Leigh Day applied to the same committee for the award of a sum of 1.9 million dollars, but again the application was turned down ( „We Won't Fund Mau Mau to Sue Us – Britain“, *East African*, 7 February 2005). In response to these setbacks, in Kenya the KHRC and the then Member of Parliament Paul Muite, who was also a human rights lawyer and who had been active in the drive to win recognition of the Mau Mau, tried with the backing of other MPs to gather funds to support the litigation. However, it seems that by May 2006 only a sixth of the necessary amount of money (one million Kenyan shillings) had been collected. (See „Ex –Mau Mau Set Date to File Case against UK“, *Saturday Nation*, 6 May 2006).

<sup>56</sup> See „Ex –Mau Mau Set Date to File Case against UK“, *Saturday Nation*, 6 May 2006.

during the 1950s had been rendered irrelevant by the passage of time (the reference was to the terms of an official Statute of Limitations).<sup>57</sup>

In May 2007, the KHRC and the MWVA made it clear that they wished to press ahead with litigation against Britain, with November 2007 as the deadline for action. But at the end of December 2007, Kenya was plunged into a long and searing period of large-scale civil unrest, with widespread rioting targeted mainly at the Kikuyu people. The matter of litigation on behalf of the surviving Mau Mau fighters quickly dropped out of the headlines of Kenya's daily newspapers, and at the time of this writing (February 2009), virtually no mention was being made of the formal launching of the legal action.

## **Section 5: 'Colonial Responsibility' and the 'Compensation Money**

### **Business'**

Needless to say, the initiative leading to litigation against Britain over the former Mau Mau fighters carries with it the possibility of a re-evaluation of the role of armed conflict in the history of the independence movement in Kenya. Moreover, it is not unlikely that there will be a re-igniting of the vigorous arguments over the political and economic policies of successive post-independence administrations. As regards historical research, too, the field of scholarly discussion has given considerable support to the movement towards litigation.

Be that as it may, preparations for the legal action got into their stride after the official recognition of the Mau Mau groups conferred by the Kibaki administration. Furthermore, rather than there being a possibility of achieving fresh perception in studies of Britain's „colonial responsibility“ in Kenya, the matter tended to be trivialized into a question of how much money the solicitors might be able to win on behalf of the claimants because the litigation was discussed in terms of „Leigh Day, the firm that won the vast sum of money in the unexploded bomb case“. For example in Kenyan news reports of the litigation, Leigh Day has been frequently introduced as the firm „capable of winning seven million dollars from Britain“.<sup>58</sup>

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<sup>57</sup> See „Mau Mau to Fight On As UK Denies Blame“, *Standard*, 23May2007, reproduced at <http://allafrica.com/stories/printable/200705221373.html> (last accessed on 2 April 2008).

<sup>58</sup> See for example „We Won't Fund Mau Mau to Sue Us – Britain“, *East African*, 7 February 2005; „Mau Mau Veterans to Sue Britain for War Crimes“, *Daily Nation*, 28

Moreover, when litigation became a certainty, there emerged several shadowy groups whose relationship with the long-standing associations of former Mau Mau fighters was unclear. These groups reportedly took advantage of the situation by demanding substantial subscription fees.<sup>59</sup> Whether this behavior was fraudulent, or whether it was an attempt by part of the population to secure a share of the compensation money (in respect of which the said groups offered to act as intermediaries) are questions that cannot be answered with clarity, but what is certain is that reports of this kind provided an image of a „compensation money business“ at work.

What is more, there is considerable irony in the fact that it was the Kibaki government that gave recognition to the Mau Mau. As was mentioned earlier, on 18 February 2007, the day of the 50<sup>th</sup> anniversary of Kimathi’s execution, the prime minister of Kenya was present at the official completion of a bronze statue of Kimathi erected in Kimathi Street, Nairobi. President Kibaki, moreover, put in an appearance at the unveiling ceremony. The recognition of the Mau Mau began with the lifting of the outlaw status that had been imposed on Mau Mau-related groups and made rapid progress under the Kibaki government.

However, from its inauguration in 2002 onwards, the Kibaki administration broke the pledges that had been given by NARC before the election and chose instead to give clear priority to the requirements of what had been the Kibaki-led faction within NARC. One of the results was that, when it came to filling senior appointments, Kikuyu (and Meru and Embu) were favoured, a policy that drew yet more fierce criticism of the government. In turn, the criticisms that were levelled at the Kibaki government were linked to the wave of „anti-Kikuyu“ feeling that was gathering pace throughout the country. Thus it was that the first Kibaki administration paved the way for the violent rioting, aimed largely against the Kikuyu, that broke out simultaneously in many parts of Kenya immediately after the announcement of the results of the Presidential election, held at the end of 2007, which showed Kibaki to be the winner.

Regardless of what the political objective of lifting the outlaw status of the Mau Mau may have been, one cannot help but conclude that the recognition of the Mau Mau was widely seen throughout Kenya as an example of another „pro-Kikuyu policy by a pro-Kikuyu government“. The Mau Mau may have

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October 2002; „UK Lawyers Coming for Mau Mau Case“, *Daily Nation*, 1 October 2006; and „Britain Ready for Battle in Mau Mau Suit“, *Daily Nation*, 13 October 2006.

<sup>59</sup> See for example „Taskforce to Identify and Honour Uhuru Warriors“, *Daily Nation*, 9 November 2006; „Claim of ex-Mau Mau Funds is being Probed“, *Daily Nation*, 20 July 2006; and „Mau Mau Heroes Bank on Healthy War Chest in Their Quest for Claims“, *Daily Nation*, 1 June 2006.

obtained official recognition thanks to the Kibaki government, but so far as Kenya as a nation was concerned, real recognition remained as far away as ever. For the reasons given above, this development may be interpreted, ironically, as an outcome of the recognition given by the Kibaki government to the Mau Mau fighters. To reiterate, the government may have acted with the best of intentions in recognising the Mau Mau, but the end result was the opposite of what had been hoped for.

Regardless of the actual purpose of the legal case, two inescapable realities remain: the doubts cast on the reputation of the government by its decision to lift the Mau Mau's outlaw status – a decision that was widely seen as a latter-day example of the „Kikuyu favouritism“ policy followed by the first Kibaki administration – and the popular interpretation of the involvement of Leigh Day, well known in Kenya ever since the unexploded bombs case for its success in obtaining substantial compensation payments, as a vehicle for squeezing large amounts of money from the British government for the benefit of the Kikuyu people.

For any individual former Mau Mau fighter, or for the family of a fighter, the litigation against Britain may have represented not just a longed-for award of cash, but an attempt to win due recognition for the Mau Mau's contribution to the struggle for the independence of Kenya. At the present stage, it has to be said, neither of these objectives is certain to be achieved. At the time of this writing (2009), the legal case on behalf of the Mau Mau plaintiffs has not yet succeeded and signs among Kenyan intellectuals of a movement to re-write the history of Kenya in light of newly discovered evidence cannot be detected. Moreover, as has been shown by this account of the long and complicated history of the movement to win acknowledgement and compensation, real recognition of the Mau Mau in Kenyan society has yet to be achieved.

## **Acknowledgements**

This research has been supported financially by the Research Institute for Languages and Cultures of Asia and Africa (ILCAA) at Tokyo University of Foreign Languages. In Japanese, this research is entitled „*Shokuminchi sekinin*“ *ron-karamiru datsu shokumintika-no hikaku rekishigaku-teki kenkyu*, and it was initiated and funded by the Ministry of Education Culture, Sports, Science and Technology (2004-2006). This paper is a fully revised and translated version of *Fukken to „hoshōkin bijinesu“no hazama de: Kenya no moto „Mau Mau“tōshi ni yoru tai-ei hoshō seikyū soshō* in *Shokuminchi sekinin: Datsu-shokuminchika no*

*hikaku-shi* (Colonial responsibility: A comparative history of decolonization) edited by Y. Nagahara and published in Tokyo by Aoki Shoten in 2009. The author wishes to record her sincere gratitude for Professor Nagahara's very kind assistance. It was thanks to Professor Nagahara's guidance that the author first became aware of the Mau Mau compensation lawsuit, and without Professor Nagahara's assistance, this paper would not have been written.

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