

REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION



Volume I

**REPORT OF THE TRUTH, JUSTICE AND
RECONCILIATION COMMISSION**

Volume I

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**His Excellency
President of the Republic of Kenya**

Nairobi

3 May 2013

LETTER OF TRANSMITTAL

By Gazette Notice No. 8737 of 22 July 2009 and pursuant to section 10 of the Truth, Justice and Reconciliation Act No. 6 of 2008, the undersigned were appointed to be Commissioners of the Truth, Justice and Reconciliation Commission. The Commission was established with the objective of promoting peace, justice, national unity, healing, reconciliation and dignity among the people of Kenya.

Having concluded our operations, and pursuant to section 48 of the Truth, Justice and Reconciliation Act, we have the honour to submit to you the Report of our findings and recommendations.

Please accept, Your Excellency, the assurances of our highest consideration.

Amb. Bethuel Kiplagat
Chairperson

B. A. Kiplagat

Tecla Namachanja Wanjala
(Vice Chairperson)

Tecla Namachanja Wanjala

Judge Gertrude Chawatama

Gertrude Chawatama

Amb. Berhanu Dinka

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Ronald Slye

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Foreword

It has been a long journey. From the day of our swearing in on 3 August 2009, to the handing of this Report to the President, we have experienced every emotion; from joy, to frustration, to exhilaration, to humility.

This Commission collected the largest number of statements of any truth commission in history. With the tireless help of the over 300 statement takers we hired, and the more than a hundred that were seconded to us by civil society organizations, we collected over 40,000 statements. It is difficult to discern the significance of this singular achievement. While the statement taking form was pronounced by international experts in the field as one of the best they had ever seen, we acknowledge that there is a wide variety of detail and accuracy in the statements we collected. We also acknowledge that, as far as we are aware, we deployed by far the largest number of statement takers of any other truth commission, thus perhaps contributing to the large numbers of statements we collected.

What we can say with confidence, however, is that the record number of statements collected affirms our individual perceptions as we travelled the length and breadth of the country: there is a hunger, a desire, even a demand for the injustices of the past to be addressed so that those individuals who have borne the brunt of those injustices, and the nation as a whole, may move on. The 2003 Task Force on the Establishment of a Truth, Justice and Reconciliation Commission reported that over 90 percent of Kenyans wanted a truth justice and reconciliation commission. We are not in a position to confirm that percentage, but we can with full confidence, on the basis on our collective experience, report that the vast majority of Kenyans not only wanted such a commission, but were willing to spend a significant amount of their own time, and sometimes money and other resources, to participate in a truth-telling process.

This is a Report. It is written with words, and printed on paper or converted into electronic bits and bytes. Yet it is the product of, in some cases literally, the blood, sweat and tears of the stories that were told to us as we travelled the country. The written word, no matter how poetic, cannot convey accurately the passion with which people demanded to tell their stories and the integrity and dignity with which they related their experiences. It cannot convey the silence, the tears, and the emotions that engulfed the venue at which a man described how he lost his entire family during the 2007/2008 Post Election Violence (PEV). It cannot convey the traumatic experience of a woman who was raped during the PEV and her fear that the same could happen to her

during the 2013 elections. Nor can it convey the horrid experience of a woman who had to carry the head of her slain husband all the way from Nakuru to Kisumu. It can neither convey the tears that were shed before this Commission nor the tears that were shed by the Commission's staff and Commissioners. The stories in these pages are horrid but they did happen, here on our land. In a nutshell, there has been, there is, suffering in the land.

So while this Report is the final product of this Commission, and with the passage of time will be viewed as the primary legacy of our work, we know that the work of the Commission is also written in the hearts and souls of each and every person who interacted with the Commission: the statement takers and statement givers; victims, adversely mentioned persons, and those who reside simultaneously in both categories; witnesses who testified in public, and those who testified in camera; those employed by the Commission, and those who took on the task of monitoring and reporting on the work of the Commission; and finally, the millions of others who may have viewed a news story, or read an opinion piece, or seen the Commission's truck with our logo, Tusirudie Tena! blazoned on its side. Each of these individuals, and the interactions they had with the Commission, whether positive or negative, are a part of this Report, and thus a part of the legacy of our work.

This has been a Commission that, like many that went before it, both in Kenya and abroad, has faced its challenges. Some of those challenges at times threatened the very existence of the organization, and took its toll on many of us, both physically and emotionally. We lost our original Vice Chair, Betty Kaari Murungi, because of some of those challenges. She was never replaced, and we end this process with only eight, rather than the original nine, Commissioners.

We faced the many challenges, both anticipated and unanticipated, with courage, conviction, and commitment. How well we succeeded in the end is not for us to say. Instead it is for the people of Kenya, both today and in the future, to determine how much what we have provided in these pages – and perhaps more importantly, how much our work throughout the four corners of the country over the last four years – contributes to truth, justice, national unity and reconciliation.

We know that some have been frustrated by the fact that we spent four years on a task for which we were originally given a maximum of two and a half years. At times it frustrated us. In the best of circumstances, compiling a complete and accurate history of historical injustices and gross violations of human rights (including violations of not just the traditional bodily integrity rights, but all of the aforementioned plus socio-economic rights, corruption, land, and economic marginalization) over a forty-five year period would be a daunting task to complete in four years, much less two and

a half years. In fact it was clear to us from the early days of the Commission that ours was not to provide the definitive history of the broad range of violations committed and suffered during that forty-five year period. Rather, we took our task to be making a significant contribution to our collective understanding of that past, particularly through the experiences and voices of those who experienced it first-hand. It is our hope that this Report, and the other work of the Commission, has at least done that.

After four years, we are truly humbled by the enormity of the task facing this great country of ours. While we have made a small, yet we hope significant, contribution to addressing the legacy of gross violations of human rights and historical injustices, there is much still to be done. Yet, we take faith in the reforms that have already occurred, including the adoption of the 2010 Constitution, and those currently in process. Even more importantly, we are humbled by and also draw strength from the millions of Kenyans who, in the face of sometimes insurmountable odds, struggle to provide for themselves, their families, their communities, and the nation at large. It is that spirit of perseverance in the face of adversity, the willingness and ability to rise up above such challenges with dignity and integrity, which we saw in Kenyans throughout this great land that gives us hope for the future of this beautiful country.

God bless Kenya.

Executive Summary

Introduction

The Report of the Truth, Justice and Reconciliation Commission (the Commission) has been produced at a critical moment in Kenya's history. Just two months earlier in March 2013, Kenyans concluded a largely peaceful General Election, adding impetus to the need for solutions that will entrench a lasting spirit of peace, national unity, dignity, healing, justice and reconciliation.

Established in the wake of the tragic and devastating events of the 2007/2008 Post-Election Violence (PEV), the Commission has produced this Report as the culmination of a process that lasted four years and took the Commission to all regions of the country.

The violence, bloodshed and destruction of the PEV shocked Kenyans into the realisation that their nation, long considered an island of peace and tranquillity, remained deeply divided since independence from British colonial rule in December 1963. It prompted a fresh opportunity for the country to examine the negative practices of the past five decades that contributed to a state that still holds sway in Kenya: normalization and institutionalization of gross violation of human rights, abuse of power and misuse of public office.

Although the PEV was the trigger that led to the establishment of the Commission, proposals for such a Kenyan truth commission had been on the agenda since the 1990s as part of the campaign for a new constitution. The pursuit for a national transitional justice mechanism entered official circles following the election into power of the National Rainbow Coalition (NARC). In April 2003, the NARC government established the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission to ascertain public interest in the establishment of a truth commission. After a period of collecting and collating the views of Kenyans from across the country, the Task Force concluded that indeed a truth commission was necessary. It recommended the establishment of such a commission no later than June 2004. However, this was never to be. Instead, the report and the recommendations of the Task Force were shelved by the NARC government.

The idea to establish a truth commission revived in the aftermath of the 2007/2008 PEV and in the context of the Kenya National Dialogue and Reconciliation (KNDR) process. The KNDR process resulted in the adoption of, inter alia, the Agreement on the Principles of Partnership of the Coalition Government (Coalition Agreement) on the basis of which, the National Assembly enacted the National Accord and Reconciliation Act on 18 March 2008. The National Accord paved the way for the establishment of a coalition government with a President, Prime Minister and two Deputy Prime Ministers.

As part of the KNDR process, an agreement for the establishment of a truth, justice and reconciliation commission (TJRC Agreement) was also adopted. Pursuant to the TJRC Agreement, the National Assembly enacted the Truth, Justice and Reconciliation Act (TJR Act) on 23 October 2008. The Act received Presidential Assent on 28 November 2008 and came into operation on 17 March 2009.

In terms of the TJR Act, the Commission was inaugurated on 3 August 2009. The broad mandate of the Commission was to inquire into gross violation of human rights and historical injustices that occurred in Kenya from 12 December 1963 when Kenya became independent to 28 February 2008 when the Coalition Agreement was signed.

The work of the Commission was structured into four mutual and overlapping phases: statement-taking, research and investigations, hearings and report writing. Staff at all levels were trained and prepared for their various roles to ensure that they were sensitive and observed confidentiality of all those who gave testimony to the Commission. The Commission also carried out civic education and outreach activities in partnership with civic organisations and community based bodies to permit full and active public participation in its work and processes. Gender equality was a priority in staff composition at all levels and was particularly important as a means of ensuring that men and women felt comfortable testifying before the Commission. To decentralise its presence and reach out to as many Kenyans as possible, the Commission established regional offices in Eldoret, Garissa, Kisumu and Mombasa.

Primary findings

- The Commission finds that between 1895 and 1963, the British Colonial administration in Kenya was responsible for unspeakable and horrific gross violations of human rights. In order to establish its authority in Kenya, the colonial government employed violence on the local population on an unprecedented scale. Such violence included massacres, torture and ill-treatment and various forms of sexual violence. The Commission also finds that the British Colonial administration adopted a divide and rule approach to the local population that created a negative dynamic of ethnicity, the consequences of which are still being felt today. At the same time the Colonial administration stole large amounts of highly productive land from the local population, and removed communities from their ancestral lands.
- The Commission finds that between 1963 and 1978, President Jomo Kenyatta presided over a government that was responsible for numerous gross violations of human rights. These violations included:
 - in the context of Shifta War, killings, torture, collective punishment and denial of basic needs (food, water and health care);
 - political assassinations of Pio Gama Pinto, Tom Mboya and J.M. Kariuki;
 - arbitrary detention of political opponents and activists; and
 - illegal and irregular acquisition of land by the highest government officials and their political allies
- The Commission finds that between 1978 and 2002, President Daniel Arap Moi presided over a government that was responsible for numerous gross violations of human rights. These violations include:
 - Massacres;
 - unlawful detentions, and systematic and widespread torture and ill-treatment of political and human rights activists;
 - Assassinations, including of Dr. Robert Ouko;
 - Illegal and irregular allocations of land; and
 - economic crimes and grand corruption.
- The Commission finds that between 2002 and 2008, President Mwai Kibaki presided over a government that was responsible for numerous gross violations of human rights. These violations include:
 - unlawful detentions, torture and ill-treatment;
 - assassinations and extra judicial killings; and
 - economic crimes and grand corruption
- The Commission finds that state security agencies, particularly the Kenya Police and the Kenya Army, have been the main perpetrators of bodily integrity violations of human rights in Kenya including massacres, enforced disappearances, torture and ill-treatment, and sexual violence.
- The Commission finds that Northern Kenya (comprising formerly of North Eastern Province, Upper Eastern and North Rift) has been the epicenter of gross violations of human rights by state security agencies. Almost without exception, security operations in Northern Kenya has been accompanied by massacres of largely innocent citizens, systematic and widespread torture, rape and sexual violence of girls and women, looting and burning of property and the killing and confiscation of cattle.
- The Commission finds that state security agencies have as a matter of course in dealing with banditry and maintaining peace and order employed collective punishment against communities regardless of the guilt or innocence of individual members of such communities.
- The Commission finds that during the mandate period the state adopted economic and other policies that resulted in the economic marginalization of five key regions in the country: North Eastern and Upper Eastern; Coast; Nyanza; Western; and North Rift.
- The Commission finds that historical grievances over land constitute the single most important driver of conflicts and ethnic tension in Kenya. Close to 50 percent of statements and memorandum received by the Commission related to or touched on claims over land.
- The Commission finds that women and girls have been the subject of state sanctioned systematic discrimination in all spheres of their life. Although discrimination against women and girls is rooted in patriarchal cultural practices, the state has traditionally failed to curb harmful traditional practices that affect women's enjoyment of human rights.
- The Commission finds that despite the special status accorded to children in Kenyan society, they have been subjected to untold and unspeakable atrocities including killings, physical assault and sexual violence.
- The Commission finds that minority groups and indigenous people suffered state sanctioned systematic discrimination during the mandate period (1963-2008). In particular, minority groups have suffered discrimination in relation to political participation and access to national identity cards. Other violations that minority groups and indigenous people have suffered include: collective punishment; and violation of land rights and the right to development.

Structure of The Report

The Report is structured into four volumes. This volume of the Report (Volume I) provides an account of how the Commission was formed, how it interpreted its mandate and conducted its work, and the challenges it faced in carrying out its mandate.

The second volume (Volume II) is further divided into three sub-volumes. Volume IIA focuses on the major violations of bodily integrity rights that were committed during the Commission's mandate period. These are: unlawful killings and enforced disappearances (that is, massacres, extra-judicial killings, and political assassinations); unlawful detentions, torture and ill-treatment; and sexual violence. While much of this volume is focused on violations directly committed by the state, it also includes descriptions of killings, severe injury and violence, sexual violence, detention, and other similar violations committed by non-state actors.

The volume starts with a general overview of the political history of Kenya. This chapter provides the overall political context for understanding not only the other specific violations in this chapter, but also the violations and other materials in the rest of the Report. This general political overview is then supplemented by a description of the history of the state security agencies. While other agencies of the state were responsible for historical injustices and gross violations of human rights during the mandate period, the security agencies were both primarily responsible for many of the acts of commission discussed in this volume, as well as the acts of omission (the failure to provide security) that allowed many of the violations committed by non-state actors to occur.

Volume IIB focuses on some of the unique parts of the Commission's mandate concerning historical injustices in Kenya. The volume has three chapters: land and conflict; economic marginalization and violation of socio-economic rights; and economic crimes and grand corruption.

Volume IIC focuses on the stories and narratives of groups of people that are provided special protection under domestic and international law because of a history of discrimination and oppression. These are: women, children and minority and indigenous people. Historically members of these groups were not recognized as having the same rights as others. The drafters of the TJR Act clearly had such history in mind, and empowered the Commission to put in place special arrangements and adopt specific mechanisms for addressing the experience of historically vulnerable populations. The Commission thus established a Special Support Unit that focused

on, among other things, ensuring that the Commission's activities adequately addressed and were accessible to historically vulnerable groups. The Commission also held thematic hearings that focused not only on the plight and rights of the aforementioned three groups but also the experiences of persons with disabilities (PWDs). Indeed, the Commission did put into place specific procedures in its statement taking exercise and public hearings to accommodate persons with disabilities. The experiences of PWDs are reflected across the various Chapters of this Volume.

The third volume (Volume III) of the Report focuses on issues relating to national unity and reconciliation in Kenya. The Commission was mandated to inquire into the causes of ethnic tension and make recommendations on the promotion of healing, reconciliation and coexistence among ethnic communities.

The final volume of the Report (Volume IV) provides a catalogue of the findings and recommendations of the Commission. In this volume is also included the Commission's recommendation relating to the implementation mechanism and reparation framework.

Thematic Overviews

Political History: A general overview

In order to contextualize gross violations of human rights and historical injustices that occurred during the mandate period, the Commission divided the political history of Kenya into four distinct epochs. These epochs correspond with the four political administrations that governed the country prior to and during the Commission's mandate period:

- British colonial era (1895 to 1963);
- President Jomo Kenyatta's era (1963 to 1978);
- President Daniel arap Moi's era (1978 to 2002); and
- President Mwai Kibaki's era (2002 to 2008).

A review of the colonial period by the Commission revealed a litany of offences and atrocities committed by the British administration against the people now known as Kenyans. These violations included massacres, torture, arbitrary detention, and sexual violence, most of which were committed, initially, when the British government forced its authority on the local population, and later, when it violently sought to quash the Mau Mau rebellion. Between 1952 onwards, the British administration established detention camps in which suspected members of Mau Mau and/or their sympathisers were tortured and ill-treated. Others were detained in restricted villages where they were used as forced labour under

Factors that encouraged perpetuation of gross violations of human rights

- The failure of the first government in independent Kenya (led by President Jomo Kenyatta) to dismantle the repressive state structures established by the colonial government
- The use of and subsequent enhancement of repressive laws, policies and practices initially employed by the colonial government by post-independence political administrations (President Jomo Kenyatta's and President Daniel Arap Moi's administrations)
- The creation of a de jure one party state by President Moi's administration, resulting in severe repression of political dissent and intimidation and control of the media. Repression of political speech and the media allowed many violations to occur with little public scrutiny, much less accountability.
- Consolidation of immense powers in the person of the President, coupled with the deliberate erosion of the independence of both the Judiciary and the Legislature.
- The failure of the state to investigate and punish gross violations of human rights. The Commission finds that in most cases, the state has covered-up or down-played violations committed especially by state security agencies. During the entire mandate period (1963-2008), the state demonstrated no genuine commitment to investigate and punish atrocities and violation committed by its agents against innocent citizens.

harsh and inhuman or degrading conditions. The colonial government was also responsible for massive displacement of thousands of people from their lands. More than five million acres of land were taken away from the original inhabitants. This displacement created the conflicts over land that remain the cause and driver of conflict and ethnic tension in Kenya today.

On 12 December 1963, Kenya gained independence from British rule. Independence came with high expectations and hopes. It signalled an end to practices that had been institutionalised under British rule; the end of racial segregation, detention camps, torture, massacres, unlawful killings and similar practices that had been institutionalised under colonialism. To the citizens of a new free nation, independence meant the return to lands from which they had been forcibly evicted and of which they had been dispossessed in order to pave the way for British settlers. It was supposed to be the beginning of political and economic emancipation; the start of respect for the rule of law, human rights and dignity and the laying down of the foundations and tenets of democracy. Many envisioned a newly invigorated, united nation.

These expectations never materialized. President Kenyatta made no substantial changes to the structure of the state. Nor did he commit to or put in place mechanisms to redress the land problems that had been created by the colonial administration. Instead, President Kenyatta embarked on consolidating his power. Under his administration, any political dissent was met with quick rebuke and reprisals in effect forcing the populace into a silence of fear. Reprisals included harassment, various forms of intimidation, attacks on the person, detention and even assassination. Many fled into exile

for fear of their lives and to avoid the heavy hand of the Kenyatta administration. It was also during President Kenyatta's administration that Kenya waged a war in Northern Kenya to quash a desire harboured by residents of this region to secede to Somalia. This war has come to be popularly known as the 'Shifta War'. State security agencies committed various forms of atrocities during the Shifta War and the Commission has dedicated a chapter in this Report that documents those atrocities.

Under President Moi the status quo remained for a couple of years before becoming notably worse after the coup attempt of 1 August 1982. In the aftermath of the coup, members of the Kenya Air Force were rounded up and transported to prison facilities and other locations where they were tortured and subjected to inhuman and degrading treatment. Thereafter, President Moi stepped up measures aimed at controlling the state and further consolidating his power. He filled government positions with loyalists, mainly from his own Kalenjin community. His government, which had in June 1982, amended the constitution to make Kenya a de jure one party state, removed security of tenure for constitutional office holders such as judges. The patterns of violence that started under Kenyatta continued under President Moi's administration. Notably, members of state security agencies routinely committed atrocities against a people they had sworn to protect. Security operations, particularly in Northern Kenya often resulted in the massacres of innocent citizens. Almost without exception, security operations entailed the following atrocities: torture and ill-treatment, rape and sexual violence, looting of property and burning of houses. These systematic attacks against civilians have all of the attributes of a crime against humanity.

When movements arose to advocate for opening up of the democratic space and respect for human rights, President Moi's government unleashed a reign of terror. Between 1986 and 1997, hundreds of individuals were detained and tortured because they were suspected to be members of illegal organizations. The infamous Nyayo House torture chambers were designed and built during this period specifically for the purpose of terrorizing those who were critical of, or perceived to be critical of, the established regime.

In 1991, in response to local and international pressure prompted by the end of the Cold War, President Moi yielded to demands for a multi-party state. However, with the advent of multi-party politics, elections began to be identified with violence. Ethnicity became an even more potent tool for political organising and access to state resources. Like his predecessor, President Moi lacked the commitment to address grievances related to land. Instead, irregular and illegal allocation of land became rampant during his era in power.

In December 2002, KANU was dislodged from power by NARC under the leadership of President Mwai Kibaki. As a political party, NARC came to power on a platform that promised to curb and ultimately eliminate the political transgressions and human rights violations that had become so common during the 39 years of KANU's rule. NARC also pledged to address and rectify historical injustices. True to its commitment and in response to concerted calls by political activists and civil society organisations (CSOs) in the first few months of attaining power, the NARC government initiated numerous legislative and institutional reforms and a range of activities aimed at redressing past injustices.

However, it was not long before autocratic tendencies and KANU-like practices began to emerge in the Kibaki administration. An informal clique of powerful individuals who were keen on promoting narrow and regional interests formed around the President. Like President Moi before him, President Kibaki purged the public service of his predecessor's nominees and filled it with people from his Kikuyu community and the larger GEMA community. The administration paid lip service to the struggle against corruption. In 2005, all pretensions by the Kibaki administration that it was pursuing reforms and a transitional agenda faded after the rejection of the Proposed New Constitution of Kenya in 2005 by the majority of Kenyans.

The period leading up to the 2007 General Election was characterised by intense violent activities by militia groups, especially the Mungiki sect and Sabaot Land Defence Force (SLDF). The government responded to the violence with excessive force. In effect, the General Elections of 27 December 2007 were conducted in a volatile environment in

which violence had been normalised and ethnic relations had become poisoned. Fertile ground had been prepared for the eruption of violence. Therefore, when the results of the Presidential Election were disputed, and both PNU and ODM claimed victory, violence erupted.

The scale of the post-election violence (PEV) was unprecedented. It lasted for a period of two months and substantially affected all but two provinces in the country. It is estimated that 1,133 people were killed, thousands assaulted and raped, hundreds of thousands more displaced from their homes, and property worth billions of shillings destroyed. It was one of the darkest episodes in Kenya's post-independence history.

Security Agencies: The police and the military

The police and the military forces are at the centre of Kenya's history of gross violations of human rights. While other agencies of the state were responsible for historical injustices and gross violations of human rights during the mandate period, security agencies were both primarily responsible for many of the acts of commission documented in this Report, as well as the acts of omission (the failure to provide security) that allowed many of the violations committed by non-state actors to occur.

Across the country, the Commission heard horrendous accounts of atrocities committed against innocent citizens by the police and the military. The history of security operations conducted by these two institutions, either jointly or severally, is dominated by tales of brutal use of force, unlawful killings (sometimes on a large scale), rape and sexual violence, and burning and looting of property. In security operations, the police and the military often employed collective punishment: the indiscriminate rounding up of individuals in a specific area, then brutally punishing them, all with the expectation that this would yield the desired results of increased security. Thus, since independence, the police and the military in Kenya have been viewed and invariably described as rogue institutions; they are still feared and seen as perennial violators of human rights rather than protectors of the same.

In this regard, the Commission sought to trace the origins of practices employed by security agencies during security operations. What emerged is that the practices adopted by the police and military forces in independent Kenya are starkly similar to those employed by the same forces during the colonial period. In essence, Independent Kenya inherited a police force that was deeply and historically troubled. From the 1890s right through to the late 1950s and early 1960s, the Kenya police force clearly structured itself around the policing needs of a small and politically powerful elite and racial minority. Kenya's police force was from the outset built to

cater to these privileged few. When, however, the Kenya Police Force did encounter African populations it was with a force and devastating violence. Throughout the temporal period of the Commission's mandate this resort to brutality by the security agencies never changed. The police force remained a law unto itself. The Kenya Police Force of today largely resembles the Kenya Police Force of the colonial period: narrow in outlook, unclear in mission and violent in tendency.

It is therefore not surprising that the use of excessive and fatal force by security agents, especially by the police, against citizens has been a recurring theme throughout Kenya's post-independence. Indeed, incidents of extra-judicial killings go back to colonial period. The practice continued into the post-colonial period. Research and investigations conducted by the Commission, coupled with testimonies it received during its hearings, show that during the mandate period, there was a common trend and pattern of extra-judicial killings and enforced disappearances of members of illegal organizations such as Mungiki and Sabaot Land Defence Force.

Moreover, whenever the police force has had to disperse crowds or stop riots, it has used excessive and disproportionate force, an approach which has always resulted in the deaths of largely innocent citizens. Yet, successive governments have always and consistently denied any involvement by the police or other security forces in extra-judicial killings. Statements made in Parliament by successive ministers responsible for Provincial Administration and Internal Security reveal a pattern of blatant denials and mere justifications of what are otherwise horrible tragedies.

The history of the military paints a similarly grim picture. During the colonial period, and especially during the emergency period, the military was engaged in the screening and interrogating of people in order to extract information from them concerning Mau Mau. It is from these twin processes of screening and interrogation that the most astonishing evidence of widespread and institutionalized torture has emerged. The military would continue to use similar brutal tactics way into the post-independence era and as recently as March 2008 during Operation Okoa Maisha in Mt. Elgon.

Shifta war

The Shifta War, waged between 1964 to 1967, represents a period in Kenya's history during which systematic and widespread violation of human rights (including mass killings) of Kenyan citizens occurred. Officially, the death toll stands at 2,000. Unofficial estimates place the death toll at 7,000. The Shifta War acts as a bridge from the violations committed by the colonial power prior to independence and the violations

committed by the newly independent government. The War arose out of a long history of political unrest in Northern Kenya where ethnic groups resisted centralised colonial rule. After independence state security agents alongside military personnel were deployed in what was called the Northern Frontier District to quell the continuing resistance.

Witness testimonies before the Commission brought to the surface the long history of violation of human rights and related activities in Northern Kenya. From the colonial days, Northern Kenya had been administered differently from the rest of the country. Travel and movement restrictions were imposed and administrators were given extraordinary powers to arrest and detain members of what the state referred to as 'hostile tribes'.

The Commission did not get much information about the war itself because of the secrecy around military operations and the government's reluctance to provide the information in its possession. However, individuals and communities affected by the war submitted memoranda and information to the Commission which enabled it to set out the broad characteristics of the war. The Commission established that the Shifta War was characterised by unimaginable brutality. Mass killings featured prominently in the witness testimonies and narratives. Pastoralist communities lost almost 90 percent of their livestock through heavy handed strategies in which livestock were shot dead or confiscated. Many residents of the region trace the high levels of poverty experienced by communities of Northern Kenya to the excesses of the Shifta War.

Women narrated horrible stories of rape and other forms of sexual violence and the military and police were reported as major perpetrators. During the war, some communities fled to Somalia to escape the violence and only returned decades later, in 2000.

The signing of a Memorandum of Understanding in Arusha, Tanzania on 28 October 1967 between the governments of Kenya and Somalia marked the formal end of the war. Witnesses complained that they had no idea what was decided during the bilateral negotiations between the Somali and Kenyan governments as the contents of the agreement were never revealed to the people of the Northern Kenya, including the citizens residing in the north.

Massacres

The history of massacres in Kenya predates colonialism in Kenya. There were inter and intra-ethnic killings, as illustrated by the Maasai wars of the 1800s. This was the context in which the colonialists entered the scene and opened fresh horizons for mass violence.

The Commission studied the history of massacres in Kenya to identify broad trends and patterns of mass violence that have recurred throughout Kenya's history. The first properly documented massacre in Kenya's colonial past was the Kedong Massacre of 26 November 1895. Other massacres include those committed in the context of the Giriama Rebellion of 1912-1914, and the Kollowa Massacre of 24 April 1950. Other massacres were committed during the Mau Mau uprising between 1952 and 1959. In this regard, the Lari and Hola Massacres stand out. In all these massacres, the colonial state was present and was always unapologetic. Indeed, the colonial state always tried to minimise, cover up or flatly deny the occurrence of such mass killings.

At independence, the country was blood-drenched with a history of massacres and entered its future with historical baggage that was to affect future events. The Commission's research, investigations and hearings revealed that most massacres in Kenya have occurred in Northern Kenya and have always occurred in the context of what the state refers to security operations. The Commission has documented the following massacres committed by state security agents: Bulla Karatasi Massacre; Wagalla Massacre; Malka Mari Massacre; Lotirir Massacre; and Murkutwa Massacre. To date, no government official has been prosecuted or otherwise publicly held to account for these atrocities. The Commission also focused on a few massacres committed by non-state actors: Turbi Massacre and Loteteleit Massacre.

Political Assassinations

Kenya has lost some of its best and brightest to political assassination: Pio Gama Pinto, Tom Mboya, Josiah Mwangi Kariuki (popularly known as JM Kariuki), Robert Ouko, Father Antony Kaiser, Bishop Alexander Muge, and many others. A number of these deaths have been the subject of high profile investigations; in some cases they have been subject to repeated investigations. Yet despite all of the investigations in these and other similar cases, the uncertainty concerning who was responsible for the killings and why specific individuals were killed is often as unclear as it was on the day the body was found. Given the failures of past investigations, the Commission was fully aware that solving any of the mysteries surrounding these deaths would be difficult and challenging.

Nevertheless, the Commission gathered information, undertook research and investigations, and solicited testimony to understand the context in which such killings took place; the circumstances and thus probable causes of such killings; the impact of such killings, particularly on the family and friends of the victim; and the failure of investigations to solve the mystery of why a person was killed and who

was responsible. The Commission's work in relation to political assassinations confirms that the state was complicit in the assassination of Pio Gama Pinto, Tom Mboya, and Josiah Mwangi Kariuki.

Detention, torture and ill-treatment

In many ways, and despite the many challenges that it continues to face, Kenya is a country whose democratic and political space is relatively wide and dynamic. At least from 2003, the state has more often than not respected citizens' freedom of expression, assembly and the right to association. However, it was not always this way. The freedom that Kenyans enjoy today is the result of many years of activism and struggle against dictatorship and state repression or violence. It is a freedom that came at a high price for many men and women who dared criticize or oppose Jomo Kenyatta's and Daniel Arap Moi's political administrations. Many of them were detained without trial, tortured, and subjected to inhuman and degrading treatment. Their families were equally subjected to untold sorrows by state operatives. Many others succumbed to torture or were killed after undergoing torture.

Research and investigations conducted by the Commission coupled with the testimonies it received, shows that widespread and systematic use of torture occurred in the following contexts:

- during the Shifta War;
- in the aftermath of the 1982 attempted coup;
- between 1982 and 1991 purposely to quell dissenting political voices and as part of the crackdown on Mwakenya;
- between 1993 to 1997 as part of the crackdown on the February Eighteenth Revolutionary Army (FERA);
- in 1997 following a raid on a police station in Likoni; and
- most recently in 2008 during Operation Okoa Maisha, a security operation to flush out members of the Sabaat Land Defence Force (SLDF) in the Mount Elgon region.

On the basis of its research, investigations and hearings, the Commission has made, amongst others, the following findings:

- systematic use of torture was employed by the Special Branch during interrogations of detained persons in Nyayo House, Nyati House, police stations, prisons, and other locations.
- Nyayo House basement cells and the 24th, 25th and 26th floors were used for interrogations and torture after the

attempted coup of 1982, during the Mwakenya crackdown, and the FERA/M crackdown, and that the state purposely designed and built these places for torture purposes.

- the State established a task force for the specific purpose of interrogation and torture of suspects. The Commission has recommended the prosecution of the members of the this task force.
- the Judiciary frequently cooperated with the prosecution and security forces in the commitment of violations by refusing bail and by admitting evidence obtained through torture. The judiciary was also complicit in these violations to the extent that they conducted trials beyond working hours.

To prevent the recurrence of torture, the Commission has recommended the enactment of legislation prohibiting all forms of torture and other forms of cruel, inhuman or degrading treatment or punishment committed both by state and non-state actors. The Commission has also made the following recommendations:

- that the President offer a public apology to all victims of torture and unlawful detention and acknowledge the role of the state in the design and use of the Nyayo House torture cells for torture purposes
- that Nyayo House be converted into a memorial after consultation with victims of torture
- the establishment of the Office of the Independent Inspector of Prisons and All Places of Detention. This office shall be charged with the function of inspecting prison conditions and investigating allegations of torture. The Office shall also be mandated to investigate all cases of death in custody. The office shall issue periodic reports to the public on the condition of prisons in Kenya and other matters under its mandate.

The Commission has also recommended the provision of reparation for victims of unlawful detention, torture and ill-treatment as per the framework described in the Chapter on Reparation Framework.

Sexual Violence

Sexual violence is a crime that intimately impacts the victim both physically and psychologically. It uses the victim's own sexual anatomy to dominate, suppress and control. For a long time, women and girls were believed to be the main, if not the only, victims of sexual violence. Over time, there has been acknowledgement that men and boys are also victims of sexual violence.

The Commission received hundreds of statements from women, men and children outlining serious sexual violations perpetrated by individuals and groups of people including ordinary citizens and state officials. A total of 1,104 statements from adults were received in regard to sexual violations, representing a victim count of 2,646 women and 346 men. The Commission acknowledges that due to shame and stigma associated with sexual violence, many victims of sexual violence did not report sexual violence to the Commission.

Recognizing that sexual offences are ordinarily complex to investigate, the Commission adopted specific measures to ensure that sexual offences were effectively and sensitively investigated. Firstly, investigators who had previous experience in investigating sexual offences and who had undergone training on the same, including on the Sexual Offences Act, were recruited. Secondly, a set of guidelines outlining the approach to be taken in investigating sexual violence was prepared. The overall goal of the guidelines was to ensure that survivors of sexual violence were treated with dignity.

In acknowledgement of the stigma, shame and embarrassment associated with sexual violence, the Commission offered victims of sexual violence the option of testifying either in camera or in public. The idea was to provide victims of sexual violence with not only a platform to be heard, but also a safe environment in which they could share their experiences freely. The Commission also engaged the services of counsellors to offer psycho-social support before, during and after the hearings to enable the victims not only to narrate their experiences but also to cope with what they had experienced.

The Commission's research, investigations and hearings revealed the following in respect of sexual violence:

- Kenyan security forces (particularly the Kenya Police and the Kenya Army) have often raped and sexually violated women and girls during security operations;
- Sexual violence has always escalated during conflicts and periods of generalized violence;
- members of the British Royal Army stationed in Kenya for military training has been responsible for the rape and sexual violation of women and girls in Samburu and Laikipia
- in one particular case, the Commission received about 30 statements from women who were raped in Kitui during an eviction referred to as 'Kavamba Operation'. The Commission has recommended the prosecution of Nganda Nyenze who supervised the evictions and the rape of the women.

Land and conflict

For the majority of Kenyans, land is the basic, and in most cases, the only economic resource from which they eke out a livelihood. The ability to access, own, use and control land has a profound impact on their ability to feed and provide for their families and to establish their socio-economic and political standing in society. However, tensions and structural conflicts related to land have simmered in all parts of Kenya throughout the years of independence. In recent years, many land related problems have degenerated into social unrest and violence.

Illegal acquisition of large tracts of land from indigenous communities during the colonial period rendered many communities at the Coast and in mainland Kenya landless. While affected communities expected redress through resettlement, restoration of their land and compensation from the Kenyatta and subsequent post-independence administrations, the government, instead alienated more land from already affected communities for the benefit of politically privileged ethnic communities and the political elite. This led to deeply held resentments against specific ethnic communities who benefited from resettlement at the expense of those who believe they are the rightful owners of the land.

The Commission confirmed that land has been and remains one of the major causes of intra and inter-ethnic conflicts in the country. However, addressing historical and post-independence land injustices has not been genuinely prioritised by successive governments despite the critical importance of land to the country's economic development. There has never been any sustained effort to address land injustices that have occurred since colonial times.

The Akiwumi Commission of Inquiry established in 1998 to look into the ethnic clashes related to the 1997 General Election vividly demonstrated how the skewed land allocation and ownership has fuelled ethnic tension and led to violent conflicts throughout Kenya and particularly in the Rift Valley and Coast regions. During the mandate period, land-related grievances led to the emergence of militia groups in some parts of the country. The stated aims of these militia groups often relates to the reclamation of lands, and the removal by violent means, of current occupants who they claim rendered them squatters. The Sabaot, for example, took up arms in 2006 in the Mount Elgon region to reclaim what they consider to be their land.

Politicians often exploit the real or perceived land injustices especially around election time, for personal gain. The

dangerous mix of land-related claims with political aspirations of specific groups or individuals remains a tinderbox that could ignite at any time.

The Commission found that the 'willing-buyer, willing-seller' land tenure approach was grossly abused and is one of the major factors causing disinheritance and landlessness, especially in the face of rising human populations.

The unresolved land injustices have led to discriminatory and exclusionary practices that work against nationhood. The increasing feeling among the long-disadvantaged pastoral communities and the Kalenjin in particular (both herders and farmers) that they should fight at all cost to reclaim their 'stolen' land from the rich 'foreign' (non-Kalenjin) settlers is one example. Although no attempt was made by President Moi's government to revoke the land settlements of President Kenyatta's regime, it became increasingly difficult for 'non-indigenous' people to buy land north of Nakuru. Non-Kalenjin individuals and groups who bought parcels of land in Kalenjin-dominated areas found it hard to get them demarcated or obtain title deeds.

Negative ethnicity appears to be reflected even in the settlement of internally displaced persons; those who get resettled often come from communities able to access political power.

The litany of historical injustices relating to land involves a complex variety of permutations. Almost every type of public land was affected: from forest land, to water catchments, public school playgrounds, road reserves, research farms, public trust lands and land owned by public corporations and private individuals. Perpetrators of the injustices were equally varied and include holders of public office and government leaders at every level, the political and economic elite, church organisations, individuals and communities. Those who held sway usurped the institutions of government to their bidding including the legislature, the executive and the judiciary.

Officials who were supposed act as custodians of public land under the public trust doctrine, became the facilitators of illegal allocation, increasing landlessness and land scarcity. The practice of land grabbing in many cases resulted in violence, as squatters resisted eviction from government land that was often subsequently lost to land grabbers. State corporations became conduits for 'get-rich-schemes' in which public lands were transferred to individuals and then quickly bought off at exorbitant prices by state corporations.

Economic marginalisation and violation of socio-economic rights

The TJR Act mandated the Commission to ‘inquire into and establish the reality or otherwise of perceived economic marginalisation of communities and make recommendations on how to address the marginalisation’.

Evidence shows that while the majority of Kenyans may not have been detained without trial or subjected to torture and other physical integrity violations, government’s exclusionary economic policies and practices in the distribution of public jobs and services inflicted suffering on huge sections of society at different historical moments. As the Commission travelled the country collecting statements and conducting public hearings, the pervasiveness of socio-economic violations was evident.

In terms of its mandate, the Commission identified a number of regions as economically marginalised in the post-independence era:

- North Eastern (including Upper Eastern) Province;
- Nyanza;
- North Rift;
- Coast;
- Western Province.

Although poverty was found to be prevalent all over the country it was disproportionately so in these marginalised areas. By definition the Commission noted that marginalisation involves direct and indirect discrimination in the distribution of social goods and services. The economically marginalised also tend to be marginalised culturally, socially and politically. The Commission found that in almost all cases, the state played a direct role in increasing or decreasing inequality in communities.

The Commission experienced a challenge in getting reliable and quality data, particularly on state funding of social programmes and infrastructure over the years in regions identified as marginalised. In making its assessment the Commission used a number of indicators of marginalisation including physical infrastructure, employment (especially in the public sector), education, health, housing, access to land, water, sanitation and food security.

Although Central, Nairobi, South Rift Valley and Lower Eastern provinces were not profiled as economically marginalised regions, this does not mean that poverty is not evident in these regions. In fact, some residents of these regions

also considered themselves marginalised at one time or another.

Other examples of marginalisation include narratives from within specific regions based on local rather than national forces. In Nyanza, the Kuria blamed their plight on the Luo and the Abagusii, while in Nyandarua the residents considered themselves marginalised by their neighbours within the region. In the Western region, Bungoma and Vihiga were seen as beneficiaries of the limited social goods through co-option of individuals by the Moi regime. Co-option of leaders from the region often camouflaged the reality of marginalisation giving the sense of political inclusion that did not necessarily translate to economic inclusion.

Marginalisation has been used deliberately as a political tool to punish recalcitrant politicians by punishing their ethnic group or region. The 1966 fallout between Jomo Kenyatta and Jaramogi Oginga Odinga was the beginning of the disintegration of the Kikuyu-Luo alliance, which was at the core of KANU at independence. It marked the start of the marginalisation of Nyanza and the first blatant use of negative ethnicity at a political level. Later similar disagreements between Raila Odinga and Mwai Kibaki led to the blacklisting of Luo Nyanza both in terms of access to capital development and appointments to public positions. Testimony before the Commission suggested that Nyanza had been in the economic and political cold for all but 10 years since independence. This isolation increased poverty and left various social and economic problems unaddressed.

In the case of North Eastern Province, employment, land, infrastructure, poverty, education and the institutional framework and capacity were the key indicators of the marginalisation of the region. One of the greatest impediments to development of the region is the lack of land registries in the region. As for infrastructure, which includes public utilities and is a major determinant of development and progress, the region has no tarmac road except the Isiolo-Moyale road, which is still under construction. The region has the highest rural population living under the poverty line at 70 percent, compared to 32 percent for Central province. Lack of food security is compounded by the erratic and low rainfall and declining pastures and other resources. This in turn creates conflict over these resources, further depleting the limited resources and the livestock. The paucity of schools and their relatively prohibitive cost in an area of widespread poverty has affected access to the limited education opportunities. School enrolment stands at about 18 percent for primary schools and 4.5 percent for secondary schools compared to the national average of about 88 percent and 22 per cent respectively for primary and secondary schools respectively.

Service delivery for health, water and sanitation were also way below the national average figures.

The face of marginalisation was found to be different in different regions. The relatively fertile land and relative security of Western province tended to underplay the indicators and perceptions of marginalisation. While marginalisation has not reached the extent of that in North Eastern or Nyanza, Western was found to be forgotten in the development agenda with cash crops and related industries (cotton, sugarcane, rice and fisheries) completely ignored or badly mismanaged when compared to those of other regions.

The North Rift Valley region was found to have been marginalised from colonial times through to the present. Insecurity, a harsh climate and regular inter ethnic and cross border conflict make the region difficult to live in. Absence of security personnel has led to a localised small arms race as groups accumulate arms to protect themselves. Successive governments maintained the same closed area policies as the colonialists preventing interaction with the rest of the country effectively marginalising the region. Indicators for education, health, infrastructure, water, housing and sanitation were very low compared to the rest of the country. Only one hospital serves the six districts of Turkana.

Landlessness is the major indicator of marginalisation at the Coast; land is the most intractable of the problems because of its historical origins. The original local inhabitants were dispossessed of their land, first by the colonialists, and later by fraudulent transactions that again ignored the original owners of the land. This left most of the land in the 10-mile Coastal Strip in the hands of absentee landlords. After independence, the dispossession of the local people was confirmed and certified instead of being rectified, which led to a palpable sense of a conspiracy against coastal communities orchestrated by people from up-country.

Hearings of the Commission were dominated by this problem. The most affected areas were Taita Taveta, Lamu, Malindi and Tana River districts. The Coast lags behind in terms of almost all indicators from infrastructure to health, education, housing, water and sanitation. The regions also exhibits gender marginalisation attributed to religious and cultural dynamics of the region. Rural areas are served by dilapidated road networks compared to Mombasa, Kilifi, Malindi and Kwale.

Grand corruption and economic crimes

The fight against corruption is central to the struggle for human rights. Corruption has always greased the wheels of exploitation and injustice which characterize our world. As

such, corruption is not just a crime that provides an undeserved benefit to a private individual (often an enormously large such benefit). It is a crime that lessens the availability and access to the fundamental needs of human life: food, education, health care, shelter, etc. In other words, the crime of corruption is directly related to the violations of socio-economic rights.

While corruption violates the rights of all those affected by it, it has a disproportionate impact on people that belong to vulnerable groups. Examples of these are minorities, indigenous people, persons with disabilities, persons living with HIV/AIDS, refugees, prisoners, the poor, women and children. They are more exploited and less able to defend themselves. Their vulnerability makes them easy victims of corruption.

Kenya's post-independence history has been marred by successive cases of huge scandals. In order to appreciate the magnitude and scale of grand corruption in Kenya, the Commission resorted to documented cases of grand corruption from as early as the KenRen scandal in the 1970s up to the IEBC's procurement of biometric voter registration kits in 2013. In the last two decades, the media and civil society exposed numerous multimillion dollar financial scams in Kenya including the following: Ken Ren Scandal; Goldenberg Scandal; Charter House Bank Scandal; and Anglo Leasing Scandal.

In its Chapter on Grand Corruption and Economic Crimes, the Commission has demonstrated the linkages between these crimes and the enjoyment of human rights and the huge cost that Kenya is paying through corruption and economic crimes.

Women

Men and women experience violations of human rights and injustices differently. Building on the provisions of the TJR Act, the Commission adopted policies and took measures that ensured that the experiences of and violations suffered by women were appropriately and comprehensively covered both in its work and this Report. These policies and measures related to the Commission's statement-taking process, hearings, focus group discussions, and other activities undertaken by the Commission.

Perhaps most importantly, the Commission held separate hearings for women in order to encourage women to speak about their own experiences. The women's hearings were framed as 'conversations with women'. They were presided over by female Commissioners and staff, and were thus designed to be safe spaces where women could freely talk about violations that were specific to them. The women's

hearings were conducted in all regions of the country. In total, over 1000 women attended the women's hearings across the country, with an average of 60 women in each hearing.

The Commission's chapter on gender deliberately focuses on the various injustices that women faced during the mandate period. Although women have always constituted half of Kenya's population, they have been traditionally relegated to a subordinate status by patriarchal cultural norms and practices. Harmful traditional practices in Kenya include, amongst others, preference for male children, early or forced marriages, wife beating, female genital mutilation and widow inheritance. These norms were normal and sanctioned by law in the greater period covered by the Commission's mandate. As such the Commission has found that women were the subject of systematic discrimination and/or gender-based persecution throughout the mandate period.

An important finding made by the Commission is that in situations of conflicts women are specific targets of violence, particularly sexual violence which is often accompanied by other forms of violations. The Commission has documented atrocities committed against women during the following three selected conflicts: Mau Mau War; Mount Elgon conflict and the 2007/2008 Post-Election Violence.

Conflicts always result in the forced displacement of populations. The Commission's hearings revealed that the state's response to the plight and needs of internally displaced women was less than satisfactory. Generally, the state's response fell short of its obligations as stipulated in relevant human rights instruments.

Although most women who testified before the Commission were victims of displacement occasioned by the 2007/2008 PEV, many of them had been victims of prior evictions and displacement. During the PEV, women suffered violations during flight to the camps or to places where they hoped they would find refuge. On resettlement of IDPs under Operation Rudi Nyumbani, the Commission's hearings revealed that the corruption and mismanagement which marred the entire process had a particularly devastating impact on women. A considerable number of displaced women told the Commission that they received neither the start-up capital nor the payment in lieu of housing.

Kenyan Refugee women in Uganda face a peculiar problem. During its women's hearings, it became evident that many women found themselves in a dilemma as to whether they should return to Kenya or not. While some women were willing to return, their husbands were not. As such, they could not return to Kenya without straining or breaking

their marriages. The general feeling among the Kenyan refugees in Uganda is that of a people who have been neglected and abandoned by their government.

Kenyan women were also victims of state repression during the mandate period. As primary victims of state repression, scores of women, especially politicians, academics or human rights activists, were targets of state violence both during Kenyatta's and Moi's administrations. A number of female members of parliament who were vocal in their opposition to repressive rule would be subjected to trumped-up charges, detained, or even tortured. The vast majority of women were however secondary victims of state repression. Many women were widowed after their husbands were killed in security operations or died in police custody after undergoing torture. Some were subsequently thrown into destitution since husbands are the main breadwinners in many households in Kenya. Those whose husbands or sons were detained faced similar fate

In sum, women have suffered terrible atrocities just because of their sex and gender. The Commission has documented these atrocities not only for historical purposes, but also as a bold statement to political leaders and policy makers that achieving a just and fair Kenya partly depends on the initiatives they will take to heal the soul of the Kenyan woman. As of now, the vast majority of women feel abandoned by the state. Although in recent years many reforms have taken place to ensure women's empowerment, much more still needs to be done for these reforms to make substantive and real contributions in the lives of women. There is need for special attention to the most vulnerable among women: women in rural and slum areas, internally displaced and refugee women, women with disabilities, women living with HIV/Aids and women belonging to minority and indigenous groups.

Children

Children occupy a special place in any effort to understand the impact of gross human rights violations and historical injustices. Children are, on the one hand, some of the most vulnerable people in a community and as such are less able to defend themselves against those who would do them harm, and are more likely to suffer both short- and long-term effects from gross violations of human rights. At the same time, children are the future of the country. Their experiences of their community, of their peers, of officials, and of other people in authority have profound impacts on their future, including how they trust, or don't trust, those in authority. In addition, experience throughout the world confirms that children who are themselves the victims of abuse are more likely themselves to be abusers of others when they become adults. Some, as the Commission discovered,

were both victims and perpetrators while still under the age of eighteen; being forced, for example, to join a militia and then committing violations as a member of that militia.

Thus, while the mandate of the Commission did not have a child-specific focus, the Commission made deliberate efforts to facilitate participation of children and young people in its proceedings and to ensure that their interests and views both as direct and indirect witnesses and victims of human rights violations were captured. The Commission designed child-friendly processes to promote the participation and protection of children. Most notably, the Commission held a thematic hearing in Nairobi that included an opportunity for children to testify in their own words in an environment that was safe and supportive.

The Commission heard horrific and heart-rending stories of abuse, violence, and other gross violations of the rights of children. The Commission also heard the anger of some of these children – some going so far as to say they wanted to kill the people who had abused them. As such, the children's chapter provides a cautionary tale for the future of the nation. The roots of tomorrow's conflicts and violations are found in part in the treatment of our children today.

Minority groups and indigenous people

Testimony before the Commission clearly indicated that the rights of minorities and indigenous people have been violated repeatedly since independence. The problem is systemic.

Many oppressive laws sanctioned the collective punishment of minority and indigenous communities. While the laws were supposed to apply across the country in practice they only applied to communities in Northern Kenya where a significant number of minority groups and indigenous people are to be found. The anti-stock theft law, for instance, legalised the collective punishment of a community for the offences of individual members of that community.

Witness testimony before the Commission showed minorities and indigenous peoples routinely had their collective identity marginalised. National data classified them as 'others' creating deep-seated feelings of exclusion among groups such as the Munyoyoya, Nubians, Suba, Waata, Ogiek, Sabao, Kuria, Kona, Bajuni, Hara, Saakuye, Burji, Isaak, Sengwen whose existence was effectively denied by the state and unknown to the majority of Kenyans. Yet the right to identity is an important right as it is associated with several other rights such as the right to culture.

The forced displacement of pastoralists and hunter-gatherers from their ancestral lands also increased their

marginalisation, deepened their poverty and created conflict with neighbours. For instance, the Endorois were brutally evicted from the trust land they inhabited around lake Bogoria when the government declared the area a game reserve. They were displaced, lost property and denied access to traditional cultural and religious areas.

The small population size that characterises minorities and indigenous groups has denied them influence and left them out of policy and decision making – even where decisions directly affect them. During the mandate period, minority groups and indigenous people were unable to access justice at many levels frustrating their efforts to protect other rights. Minority and indigenous women suffered multiple forms of discrimination. They bore the brunt of inter-ethnic conflicts and insecurity and had difficulty accessing social services and goods from education to health services.

The 2010 constitution has several provisions aimed at securing an efficient legal framework for the protection and promotion of the rights of minorities and indigenous people. However, it needs statutory and institutional mechanisms for the realisation of these objectives.

Ethnic tension

The Chapter on Ethnic Tension documents the main causes and effects of ethnic tension in Kenya. The chapter is based mainly on testimonies that the Commission heard during its hearings across the country. In addition to holding such hearings, the Commission also organized a thematic hearing on ethnic tension and violence on 2 February 2012 in Nairobi. During this thematic hearing the Commission heard presentations by experts and relevant institutions such as the National Cohesion and Integration Commission (NCIC).

Through its research and hearings, the Commission identified several causes and drivers of ethnic tension in the country. The roots of most of these causes are traceable to the practices of colonial administration. Firstly, the colonial government pursued a policy of 'divide and rule' in order to consolidate their hold on the country, and to lessen the possibility that the African population would resist colonial rule. To that end, they magnified the differences between the various communities and regions, and stereotyped each community in a manner that would sow suspicion, hatred and create a sense of 'otherness'.

Secondly, the colonial government created ethnically defined administrative boundaries. In determining such boundaries, little serious thought, if any, was given to historical inter-ethnic interactions and relations. Thirdly, the colonial

government focused on developing infrastructure and social services in productive areas of the country (the so called 'white highlands') at the expense of the rest of the country. The resulting inequality remained largely unaddressed in the policies and practices of independent Kenya. The preferential treatment given to some areas of the country because of their clear productivity thus led to differential treatment of ethnic communities that were patterned around the ethnic enclaves created by the colonial government.

Fourthly, the colonial land policy, particularly in the so-called 'white highlands' contributed enormously to regional and ethnic marginalisation from the economy. Colonial land policies resulted in displacement, the creation of 'native reserves', as well as the movement of masses of people from areas of their habitual residence to completely different regions and settling them on lands that traditionally belonged to other communities.

Thus, Kenya entered the era of independence with a heightened sense of ethnicity that continued to divide rather than unite the country. However, ruling elite in independent Kenya did not have the political will or commitment to create a truly democratic and prosperous Kenya for all its citizens. The result was the worsening of ethnic relations such that by 2007, long standing grievances erupted into an unprecedented scale of violence.

In the post-independence period, causes of ethnic tension include the following:

- **Insider/Outsider dynamics:** Ethnic tension and violence occur when communities assert a superior claim over a territory at the expense of or to the exclusion of others. Such superior claims are based on the assumption that ownership or occupation at some point in the past created an exclusive claim for such ownership or occupation in the present. Such exclusive claims to territory inevitably create classes of 'insiders' and 'outsiders'. This perception of people as outsiders as opposed to fellow citizens often lead to increased tension based on ethnicity which, in turn, create the potential for ethnic violence.
- **Of names and their meaning:** In Coast and Rift Valley alike, a thorny issue that is intricately tied to the notion of insiders and outsiders relates to names of places. In particular, local communities in these two regions are aggrieved that places occupied by those they consider outsiders have been given 'outside names'.
- **State sanctions of outside/insider notions:** The designation of a community as 'other' or as an outsider has sometimes found support in state policy. In the northern

region of the country, particularly in those areas that made up the former North Eastern Province, the Government has institutionalised the disparate treatment of Kenyans based on ethnicity by requiring that Kenyans of Somali origin carry a special pass

- **Negative perceptions and stereotypes:** Negative perceptions and stereotypes are a major cause of ethnic tension in the country. Labels have been put on certain communities, portraying them in broad, often negative terms that generalise certain traits and apply them to all individuals belonging to the described community, regardless of how individuals perceive themselves. For example, the Kikuyu are sometimes described as thieves, the Maasai as primitive, the Somali as terrorists, etc.
- **Culture and stereotypes:** While the colonial government played an important role in cultivating ethnic stereotypes, the Commission also received evidence that some stereotypes are drawn from and driven by traditional cultural beliefs and practices. For instance, the Commission heard that men from communities that do not practice male circumcision have always been stigmatised and regarded as lesser or weaker men, and therefore, incapable of or unsuitable to take political leadership of the country.
- **Ethnicity and access to public office:** The perception that ethnic representation in government results in direct economic and other benefits to the represented community is pervasive in Kenya. While the Commission acquired evidence that such benefits do not necessarily accrue to those communities who are represented - even in the highest offices of the land - the perception that they do leads to intense competition for such representation, and thus increases the likelihood of violence during elections.

To demonstrate the complicated mix of land, ethnicity, politics and violence, the Commission includes an analysis of ethnic violence in the Mt. Elgon region. While the history of violence in Mt. Elgon is unique, many aspects of the causes of violence and its impact are typical in many other parts of the country.

Reconciliation

For decades, Kenya has remained a nation in which communities stand divided along ethnic and regional lines suspicious and distrustful of one another. Over the decades feelings of inter-communities distrust, even hatred, have festered mainly because a myriad of issues which are at the core of nation building have largely remained unresolved. These issues include conflicts over land, inequality and regional imbalances, and impunity combined with a lack of transparency and accountability. These issues have eroded a sense of

belonging, nationhood, and public trust in political and governance institutions.

Since independence, successive governments have employed silence, denial and selective amnesia whenever individuals and agencies have raised the need to address these fundamental issues. Painful memories of have been passed from one generation to another, and as a consequence, present generations continue to hold grudges for violations and historical injustices meted against their forefathers and mothers. Until now, the scale and impact of human rights violations and historical injustices have neither been fully acknowledged nor sufficiently addressed.

In its work, the Commission recognised that meaningful reconciliation is not an event, but rather a long process. At the individual level, the decision to reconcile is a personal one, aimed at setting the stage and establishing the basis for the beginning of a reconciliation process. Accordingly, the Commission worked towards ensuring that its activities in the course of its life and the result of its work would substantially contribute to the process of reconciliation.

As part of its reconciliation activities, the Commission conducted reconciliation workshops across the country. It also conducted Workshops on Trauma Healing and Strategy Formulation in selected places in the country.

The Commission found that the views of victims on reconciliation are varied. There are those who willingly forgave their perpetrators and did not even need to meet them. There are those who simply wanted to know why atrocities were committed against them. But there are also those who were unwilling to forgive and wanted to see their perpetrators prosecuted for the wrongs they committed. Adversely mentioned persons, on the other hand, were largely unwilling to acknowledge any responsibility for events that resulted in unspeakable atrocities.

Implementation Mechanism

Past experiences with the work of truth commissions and commissions of inquiry around the world have shown that a major challenge lies in the implementation of the recommendations contained in the reports of these commissions. More often than not, the life of these commissions ends at the point of submission of their final report, leaving the implementation to other actors who often do not follow through with the recommendations. This challenge has also characterized the work of many commissions of inquiry in Kenya in the past.

The consequences of this challenge have been to limit the impact of the work of these commissions and to contribute

to public fatigue and disappointment about such commissions after expectations were raised. The drafters of the TJR Act must have had this challenge in mind when they empowered the Commission to recommend an implementation mechanism to ensure its recommendations are duly and timely implemented, and to monitor progress in that implementation. The government is expressly obligated under the TJR Act to create the implementation mechanism as set out in this Report.

The Commission was sensitive to balancing a number of important objectives in its recommendation for an implementation mechanism. First, it is imperative that the Commission's Report, the result of close to four years of work, be widely disseminated and accessible to the Kenyan public, and in particular to the thousands of Kenyans who directly participated in and contributed to the Commission's work.

Second, it is imperative that the Commission's recommendations, including but not limited to recommendations related to reparations, be fully implemented. Third, given the importance of many of the recommendations of the Commission, including the recommendations related to reparations, the Commission realized that the implementation mechanism would need to be independent of those bodies to which such recommendations are directed in order to monitor them effectively. In addition, the Commission was concerned that the implementation mechanism be sufficiently resourced in terms of time and staff to ensure effective monitoring and that its recommendations were in fact implemented.

Based upon these and other considerations, the Commission decided to recommend the establishment of a Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission (the "Implementation Committee"). The Implementation Committee shall be established by legislation.

Reparation Framework

The TJR Act required the Commission to make recommendations with regard to the policy that should be followed or measures that should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims. In this regard, the Commission has recommended the establishment of a reparation fund that shall be used to compensate victims of gross violation of human rights and historical injustices. The Reparation Framework recommended by the Commission sets out the categories of victims who would access the fund and the criteria for such access.

List of Abbreviations

ACCORD	African Centre for the Constructive Resolution of Disputes	KAG	Kenya Assemblies of God
ASK	Agricultural Society of Kenya	KANU	Kenya African National Union
CAJ	Commission on Administrative Justice	KBC	Kenya Broadcasting Corporation
CEO	Chief Executive Officer	KMA	Kenya Manufacturers Association
CIPEV	Commission of Inquiry into the Post Election Violence	KNCHR	Kenya National Commission on Human Rights
CKRC	Constitution of Kenya Review Commission	KNDR	Kenya National Dialogue and Reconciliation
CoE	Committee of Experts	KNUT	Kenya National Union of Teachers
COTU	Central Organization of Trade Unions	KTN	Kenya Television Network
CSOs	Civil Society Organizations	LSK	Law Society of Kenya
FDGs	Focus Group Discussions	NARC	National Rainbow Coalition
FKE	Federation of Kenya Employers	NCIC	National Cohesion and Integration Commission
HURIDOCS	Human Rights Information and Documentation Systems	ODM	Orange Democratic Movement
ICT	Information Communication Technology	OHCHR	Office of the High Commission for Human Rights
ICJ	International Commission of Jurists	PEV	Post Election Violence
FIDA	Federation of Women Lawyers	PWDs	Persons with Disabilities
IEC	Information Education Communications	TJRC	Truth, Justice and Reconciliation Commission
IDPs	Internally Displaced Persons	UN	United Nations
IOM	International Organization for Migration		
IREC	Independent Review Committee on the 2007 General Elections		



Members of the TJRC with the Chairperson of the KNDR process, H.E. Kofi Annan.

Background to the Commission

Introduction

1. The horrific violence that followed the disputed 2007 Presidential Election results deeply shocked Kenyans. It forced the tragic realisation that long-standing resentments and historical grievances had left communities so deeply divided that it threatened the stability of the nation and the ability to move forward together.
2. Long considered an island of peace and stability, Kenya tottered on the brink of collapse, begging for answers. Why at all did it become necessary that as a nation Kenya should confront its past through the establishment of a truth commission and other mechanisms? The short answer to this question lies in the preamble to the Truth, Justice and Reconciliation Act,¹ the legislation which established the Truth, Justice and Reconciliation Commission (TJRC'). The preamble reads as follows:

Desirous that our nation achieves its full potential in social, economic and political development; Concerned that since independence there has occurred in Kenya gross violation of human rights, abuse of power and misuse of public office;

Concerned that some transgressions against our country and its people cannot be properly addressed by our judicial institutions due to procedural and other hindrances and conscious, however, that we must as a nation address the past in order to prepare for the future by building a democratic society based on the rule of law;

¹ Truth, Justice and Reconciliation Act, No. 6 of 2008 [Hereinafter TJR Act].

Aware that the process of achieving lasting peace and harmonious co-existence among Kenyans would be best served by enabling Kenyans to discard such matters in a free and reconciliatory forum;

Deeply concerned that the culmination of the polarisation of our country and the feeling of resentment among Kenyans was the tragic post-election violence that followed the announcement of the 2007 Presidential election results;

Desirous to give the people of Kenya a fresh start where justice is accorded to the victims of injustice and past transgressions are adequately addressed:

Now, therefore, be it enacted by the Parliament of Kenya [the Truth, Justice and Reconciliation Act].

3. This Chapter is structurally divided into two broad parts. The first part traces the historical background leading to the establishment of the Commission. The second part describes the actual establishment of the Commission. This includes a description of the following: the selection and appointment of Commissioners; and the management and administration of the Commission.



Historical Context

Independence, high expectations and hopes

4. Few events in Kenya's history are as memorable as the Independence Day celebrations across the country on 12 December 1963 when British colonial rule came to an end. The joy, pride, excitement and euphoria witnessed that Thursday morning was unprecedented. Independence was made possible by the gallant Kenyan men and women who risked and sacrificed their lives and limbs fighting for freedom from colonial rule. With relentless courage they fought and died, not only for their own freedom, but also for the freedom of their children and their children's children – the generations not yet born.
5. Independence came not only at a great price but also with high expectations and hopes. Independence signified an end to practices that had been institutionalised under British rule; the end of racial segregation, detention camps, torture, massacres, unlawful killings and similar practices that had been institutionalised under colonialism.
6. To the citizens of a new free nation, independence meant the return to lands from which they had been forcibly evicted and of which they had been dispossessed in order to pave way for British settlers. It was supposed to be the beginning of political and economic emancipation; the start of respect for the rule of law, human rights and dignity and the laying down of the foundations and tenets of democracy. Many envisioned a united nation. The high expectations and hopes of Kenyans at independence were succinctly summarised in the national anthem:

Oh God of all creation
 Bless this our land and nation
 Justice be our shield and defender
 May we dwell in unity
 Peace and liberty
 Plenty be found within our borders

Let one and all arise
 With hearts both strong and true
 Service be our earnest endeavour
 And our homeland of Kenya
 Heritage of splendour
 Firm may we stand to defend

Let all with one accord
In common bond united
Build this our nation together
And the glory of Kenya
The fruit of our labour
Fill every heart with thanksgiving

7. What followed this moment of renewal and optimism was a history of political repression, blatant injustices and widespread, systematic violation of human rights.

Lost dreams

8. The first political administration in independent Kenya – under the leadership of President Jomo Kenyatta – gradually returned to the ways of the colonial master. The government and the ruling political party, Kenya African National Union (KANU), not only retained repressive colonial laws, but also became increasingly intolerant of political dissent and opposition. Political assassinations and arbitrary detentions were turned into potent tools for silencing dissenting voices and ultimately for dismantling opposition political parties. For the larger part of Kenyatta's reign Kenya was a *de facto* one-party state.
9. In addition to these vices, the resettlement of Kenyan citizens on lands that they previously owned and lived on was riddled with corruption. As a consequence, many including those who had put their lives on the line for liberty were left landless. Moreover, ethnicity became rooted in political governance. By the time President Kenyatta died in August 1978, the high expectations and hopes that accompanied independence had been effectively dashed.
10. Following the death of President Jomo Kenyatta, the then Vice-President, Daniel Toroitich arap Moi, took over the presidency as directed by the constitution. Upon his ascension to power, Moi ordered the release of political prisoners detained during the Kenyatta era. This action suggested the entry of a leader who had the political will to respect and protect human rights. However, his apparent goodwill did not last long.
11. The larger part of President Moi's reign was characterised by intolerance to political dissent. In June 1982, the government pushed through Parliament a constitutional amendment that made the country a *de jure* one party state. In effect, KANU became the only lawful political party in the country. Following an attempted coup in August 1982 the government resorted to even more vicious and repressive ways of dealing with dissent.



A meeting between donors and TJRC international commissioners.

12. Political activists and individuals who dared oppose President Moi's rule were routinely detained and tortured. Security agencies systematically committed untold atrocities against citizens they were sworn to protect. The judiciary became an accomplice in the perpetuation of violations, while parliament was transformed into a puppet controlled by the heavy hand of the executive. Corruption and especially the illegal and irregular allocation of land became institutionalised and normalised. Political patronage and centralisation of economic power in the hands of a few characterised the Moi era.
13. In 1991, in response to local and international pressure prompted by the end of the Cold War, President Moi yielded to demands for a multi-party state. However, political and ethnic violence, reportedly orchestrated by the state became integral to multi-party elections held in 1992 and 1997. Ethnicity was used as a political tool for accessing power and state resources and for fuelling violence.
14. By 2002, when KANU was dislodged from power by the National Rainbow Coalition (NARC), Kenya was a ravaged state with a history burdened by ghastly accounts of gross violations of human rights and historical injustices. In effect, the KANU government had created an authoritarian, oppressive and corrupt state. It created a traumatised nation of thousands of individuals living with physical and psychological wounds in a country that had no time or space for their experiences and stories. It

was a nation in which communities stood divided along ethnic and regional lines suspicious and distrustful of one another. It was a nation that had to confront the truth of its painful past and heal in order to chart the path towards a shared future.

The Road to Establishing a Truth Commission

15. The road to establishing a truth commission in Kenya was bumpy, long and marked by several false starts. Advocacy for a truth commission initially emerged as part of the campaigns for a multi-party system of governance. With the reintroduction of a multi-party state in 1991, the campaign for a mechanism to address past injustices was integrated into the wider campaign for a new constitution. It was, however, only after KANU's fall from power in 2002 and the ascendancy to power of the NARC government that the official quest for a national transitional justice agenda began to take root. Several key events led to the creation of the Truth, Justice and Reconciliation Commission. A discussion of these events follows hereunder.

NARC and the promise of a truth commission

16. The 2002 general election, unlike preceding multi-party elections in 1992 and 1997, was not characterised by political violence. Significantly, President Moi did not contest the transfer of power to Mwai Kibaki. NARC came to power on a platform that promised to curb and ultimately eliminate the political transgressions and human rights violations that had been regularised during the 39 years of KANU's rule. NARC also pledged to address and rectify historical injustices. In his inaugural speech to the country on the day he was sworn in as the third president of the Republic of Kenya, Mwai Kibaki spelt out the vision of the new government - a vision that embodied the pursuit of transitional justice:

One would have preferred to overlook some of the all too obvious human errors and forge ahead, but it would be unfair to Kenyans not to raise questions about deliberate actions or policies of the past that continue to have grave consequences on the present [...] We want to bring back the culture of due process, accountability and transparency in public office. The era of 'anything goes' is gone forever. Government will no longer be run on the whims of individuals. The era of roadside policy declarations is gone. My government's decisions will be guided by teamwork and consultations. The authority of Parliament and the independence of the Judiciary will be restored and enhanced as part of the democratic process and culture [...] Corruption will now cease to be a way of life in Kenya, and I call upon all those members of my government and public officers accustomed to corrupt practices to know and clearly understand that there will be no sacred cows under my government.

17. True to its commitment and in response to concerted calls by political activists and civil society organisations (CSOs) in the first few months of its operations the NARC Government initiated numerous legislative and institutional reforms and a range of activities aimed at redressing past injustices. These reforms and activities included, but were not limited to:
- establishment by the President, in February 2003 of the Judicial Commission of Inquiry into the Goldenberg Affair;
 - establishment by the Chief Justice in March 2003 of the Integrity and Anti-Corruption Committee of the Judiciary (Justice Aaron Ringera Committee) to, amongst other things, investigate and report on the magnitude of corruption in the Judiciary;
 - lifting of the ban on operations of the Mau Mau movement, a ban that had been imposed by the British government during the colonial era;
 - initiation of an inquest into the murder of Father John Kaiser who was killed in 2002 under circumstances that had raised suspicion of a political assassination;
 - establishment by Parliament of a Select Committee to inquire into the death of Dr Robert Ouko, who at the time of his death was the Minister of Foreign Affairs in President Moi's government;
 - establishment by the President, in June 2003, of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land; and
 - enactment of legislation creating the Kenya National Commission on Human Rights.

The people of Kenya have spoken, and the Task Force is privileged to report that Kenyans want a truth, justice, and reconciliation commission established immediately

The Task Force on Establishment of a Truth, Justice and Reconciliation Commission

18. Of great importance was the establishment of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission in April 2003. The Task Force, chaired by Professor Makau Mutua, was mandated to recommend to the Minister for Justice, National Cohesion and Constitutional Affairs whether the establishment of a truth, justice and reconciliation commission was necessary for Kenya and if so to recommend:
- how and when such a commission should be established;

- the membership of such a commission;
 - the terms of reference of such a commission;
 - the powers or privileges to be conferred upon the commission in execution of its mandate; and
 - the historical period to be covered by the commission's investigations.
19. The Task Force was officially launched in May 2003. Soon thereafter it began to conduct public hearings to solicit views that would form the basis of its findings and recommendations. The Task Force commissioned research papers from individuals who had studied truth commissions to inform its work. In addition, it convened an international conference where experiences of truth commissions from around the world were shared and explored.
20. After a period of collecting and collating the views of Kenyans from across the country, the Task Force concluded that a truth commission was necessary. It recommended that a commission to be referred to as the 'Truth, Justice and Reconciliation Commission', be established no later than June 2004. It summarised the views of Kenyans thus:
- The people of Kenya have spoken, and the Task Force is privileged to report that Kenyans want a truth, justice, and reconciliation commission established immediately. The overwhelming majority of Kenyans, over 90 per cent of those who submitted their views to the Task Force, want the government to establish an effective truth commission, a vehicle that will reveal the truth about past atrocities, name perpetrators, provide redress for victims, and promote national healing and reconciliation. Kenyans believe that a truth commission will renew the country's morality in politics, law, in the economy, and throughout the society. They want a state founded on the rule of law and respect for the human rights of every individual who resides in Kenya. In other words, Kenyans want a human rights state.²
21. The recommendation by the Task Force that a truth commission be established not later than June 2004 was informed by comparative experience that had shown that truth commissions are effective when established within the first two years of regime change. Studies suggest that where a truth commission is not formed soon after regime change, the possibility that a government in office will consolidate power and revert to practices that had in the first place warranted the creation of a truth commission is high. Unfortunately, this turned out to be the case in Kenya.

² Government of Kenya *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission* (2003) 9 [hereinafter referred to as the Makau Mutua Report]

Retrogression to the past

22. The NARC government entered into office with a publicly declared commitment to address past injustices through reform and a number of stated activities. Indeed, the Task Force cited some of these reforms and activities and concluded that they were 'irrefutable testimonials of a break with the past and the undeniable transition which the state has embarked on'.³ Expectations were therefore high that a truth commission would be established in accordance with the recommendations of the Task Force.

23. As time passed, it became clear that the promise of change and the fanfare around it were not to be. It did not take long for observers and analysts to begin to point out that a number of old practices had started to slowly but steadily become part of the NARC government. Writing shortly after NARC came to power, Professor Crispin Odhiambo-Mbai (who would later be assassinated) warned that autocratic tendencies had begun to emerge in the Kibaki regime.⁴ He indicated that 'a cabal of shadowy behind-the-scenes operating self-seekers' were already building around Kibaki to promote narrow and regional interests and if this group were to succeed in its mission, then it would most likely 'promote patronage and intrigue politics, which are some of the key characteristics of an autocratic state'. He proceeded to predict that:⁵

The emergence of this cabal around the president is already creating intense power rivalry and division in the Kibaki government. If the bickering and divisions continue, the government will obviously fail to fulfil countless campaign pledges it made to the electorate and, therefore, the high expectations that the majority of Kenyans invested in the NARC government. This is bound to create discontent among the population who would react by challenging the government in various ways. To counter the challenges, the government may be tempted to result to repressive tendencies – another characteristic of an autocratic state.

24. It was, therefore, not surprising that June 2004 – the deadline that the Makau Mutua Task Force had set for the establishment of a truth commission – passed without the establishment of such a commission. Despite a *de jure* regime change it appeared the government was gradually retrogressing to past practices. In this particular case, the new government fell back on an old practice perfected under the previous regime: the government of President Moi had consistently and deliberately failed to implement recommendations of task forces and commissions of inquiry.

³ Makau Mutua Report (n 2 above) 12.

⁴ See C Odhiambo-Mbai 'The rise and fall of the autocratic state in Kenya' in W Oyugi et al *The politics of transition in Kenya* (2003) 51, 93-94

⁵ As above.

25. Subsequent events confirmed the return to past practices and pointed to an unspoken but evident decision to abandon the transitional justice agenda. Most of the reforms and activities initiated in 2003 were abandoned midway or were pursued with substantially reduced rigour and commitment. For instance:
- The 'Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Land' was presented to the President in June 2004, but no immediate or prompt actions were taken to implement its recommendations;
 - The Parliamentary Select Committee investigating the Death of Dr Robert Ouko was dogged by controversy throughout its operations (including the resignation of a number of Committee members and the refusal of other Committee members to sign the final report). The Committee did not table its Report before Parliament despite concluding its investigations in March 2005. The Report was later tabled in Parliament in December 2010.
 - The inquest into the murder of Father John Kaiser was inconclusive. However, the Presiding Magistrate recommended further investigations. Such further investigations have never been conducted.

The Constitution of Kenya Review Process

26. An important process which returned Kenya to the old ways related to the process of adopting a new constitution and the aftermath of this process. Upon coming into power, the NARC government sought to bring to completion the constitutional review process that had started but stalled under the previous government. As part of its political campaign, NARC had promised to deliver a new constitution within 100 days if elected to power. On being elected, the NARC government reconvened the National Constitutional Conference at Bomas of Kenya, Nairobi, for purposes of discussing, debating, amending and adopting a draft constitution.
27. Despite delays and many challenges that threatened to scuttle the renewed constitutional review process, including the assassination of one of the delegates, Prof Odhiambo-Mbai, the National Constitutional Conference adopted the Draft Constitution of Kenya (popularly known as the 'Bomas Draft') on 23 March 2004.
28. The constitutional review process revived calls for a transitional justice mechanism to redress past injustices. In particular, during CKRC's public hearings across the country, Kenyans had asked for the creation of a commission which would deal with past abuses and injustices.⁶ In response, the CKRC recommended the formation of a

⁶ Government of Kenya *The final report of the Constitution of Kenya Review Commission* (2005) 314 [Hereinafter CKRC Report]

Commission for Human Rights and Administrative Justice. It would comprise of three individuals – the People’s Protector (Ombudsman), a Human Rights Commissioner, and a Gender Commissioner – with the general mandate to, *inter alia*:⁷

- investigate and establish, as complete a picture as possible, of the nature, causes and extent of gross violations of human rights;
- give an opportunity to victims and their families to relate the violations they suffered through hearings or other means;
- address the question of granting of amnesty to persons who were involved and who make disclosure of all the relevant acts associated with the crimes;
- make recommendations on reparation and the rehabilitation of the victims or families of the abused;
- propose measures aimed at the restoration of the human and civil dignity of victims; and
- report its findings to the nation.

29. Essentially, it had been envisaged that the Commission for Human Rights and Administrative Justice would have the mandate and discharge the functions of a truth commission. This recommendation was incorporated into the Draft Constitution of Kenya. The seventh schedule of the Bomas Draft addressed issues relating to the transitional period following the adoption of the Draft Constitution. Article 18 in particular dealt with the question of ‘past human rights abuses’ and provided as follows:

Parliament shall, within six months after the effective date, enact a law to empower the Commission on Human Rights and Administrative Justice to –

- (a) investigate all forms of human rights abuses by any person or group of persons before the effective date;
- (b) investigate the causes of civil strife, including massacres, ethnic clashes and political assassinations, and identify those responsible; and (c) make appropriate recommendations regarding –
 - (i) the prosecution of those responsible;
 - (ii) the award of compensation to victims;
 - (iii) reconciliation; and
 - (iv) reparations.

⁷ CKRC Report (n 6 above) 317.

30. On receiving the Bomas Draft, however, the government altered its contents and pushed through Parliament a revised draft (popularly known as the 'Wako Draft' - in reference to the then Attorney-General Amos Wako, who crafted it). In contrast to the Bomas Draft, the Wako Draft watered down legislative powers and retained most of the presidential powers that many had hoped would be shared out to other arms of government. It also diluted the devolution framework that had been proposed in the Bomas Draft.
31. The revision and dilution of the Bomas Draft led to a split of opinion in the government, necessitating a referendum. Seven Cabinet members joined the opposition in rallying the country to reject the Wako Draft. The members of government supporting the adoption of the watered down draft campaigned vigorously for the ratification of the Wako Draft. The campaign was filled with distortions and ethnic-based incitements. Long standing political grievances were revived during the referendum campaigns for or against the Draft.
32. At the National Referendum held on 21 November 2005, 57 percent of Kenyans rejected the Wako Draft. While the outcome of the referendum was accepted, the referendum process had effectively exacerbated ethnic divisions in the country. Following the conclusion of the referendum, the Kenya National Commission on Human Rights (KNCHR) issued a report in which it concluded that:

The referendum was about a new constitutional dispensation only in name. Rather, it was a moment to settle various political scores, up-end different political players, and assert political superiority. And in this zero-sum game between politicians, ethnicity, patronage and incitement became the preferred tools of the trade, with the people of the country bearing the brunt of their antics.⁸
33. Following the rejection of the Wako Draft, all pretensions by the government that it was pursuing reforms and a transitional agenda faded. President Kibaki dissolved his Cabinet and formed a government of national unity which incorporated prominent members of the previous KANU government. The NARC members who had opposed the proposed Constitution were dropped from Cabinet. They subsequently formed the Orange Democratic Movement (ODM), while politicians and political parties allied to the government, and President Kibaki in particular, formed the Party of National Unity (PNU). The two parties, under the leadership of Raila Odinga and President Mwai Kibaki respectively, would later be at the centre of the disputed 2007 Presidential election.

⁸ Kenya National Commission on Human Rights *Behaving badly: Referendum report* (2006) 5.

34. With the government having reneged on its general promise to pursue transitional justice, the Kenya National Commission on Human Rights (KNCHR) and civil society organisations continued to push for the formation of a truth commission. In particular, the KNCHR organised a series of events to honour and celebrate the life of prominent individuals who had been assassinated since Kenya's independence. The first such event recalled the life of Tom Mboya and his assassination.⁹ The expectation of this particular event was two-fold:

- to educate the public on who Tom Mboya was and why his assassination must not be forgotten; and
- to enable the country to begin to understand the need to push for a truth commission to bring out the truth or as much of it as possible, regarding the assassination of Tom Mboya and others who had suffered in defence of human rights and political freedoms, as part of the mechanisms of transitional justice in Kenya.

However, these efforts did not yield any immediate results. In addition, the KNCHR and CSOs continued to work with victim groups in pushing for the establishment of a truth commission. In June 2006, they organized an international conference on transitional justice with the main objective of creating a forum for sharing comparative lessons on transitional justice mechanisms.

The 2007/2008 Post-Election Violence

35. Public debate on transitional justice resurfaced in the period running up to the 2007 general election. On 7 December 2007, Kituo cha Katiba organized a workshop in Nairobi on the theme '*Revisiting Transitional Justice: A non-partisan and non-governmental engagement*'. The objective of the workshop was to make truth and justice 'an election issue Kenyans could vote on during the December 2007 elections and to pressure politicians to state their stand on the issue'.¹⁰
36. Instead, political campaigns leading up to the general election were dominated by corruption, hate speech and negative ethnicity. In December 2007, the KNCHR published its second periodic report entitled '*Still Behaving Badly*'.¹¹ The Report documented blatant violations of the electoral code, including misuse and misappropriation of public resources, the participation of public officers in political campaigns and incitement to and incidences of violence.

⁹ Kenya National Commission on Human Rights *An evening with Tom Mboya* (2006).

¹⁰ Kituo cha Katiba *Report of the convening on transitional justice in Kenya*, Nairobi, 7 December 2007.

¹¹ Kenya National Commission on Human Rights *Still behaving badly: Second periodic report of the Election-Monitoring Project* (2007).

37. The period towards the general election was also characterised by intense violent activities by militia groups, especially the Mungiki sect and Sabaot Land Defence Force (SLDF). The government responded to the violence with great force. In November 2007, the KNCHR published a report on extra-judicial killings. The report concluded that the police could be complicit in the killing of an estimated 500 individuals suspected to be members of the outlawed Mungiki sect,¹² which had wreaked terror in many parts of Central Kenya and areas of urban informal settlements in the capital city Nairobi.
38. Thus, the general elections of 27 December 2007 were conducted in a volatile environment in which violence had been normalised and ethnic relations had become poisoned. In effect, fertile ground had been prepared for the eruption of violence. Therefore, when the results of the presidential election were disputed, and both PNU and ODM claimed victory, violence erupted. The scale of the post-election violence (PEV) was unprecedented. It lasted for a period of two months and affected all but two provinces in the country.¹³ It is estimated that 1,133 people succumbed to the violence while approximately 350 000, were displaced from their homes¹⁴ and property worth billions of shillings destroyed through arson and other forms of attacks. It was the darkest episode in Kenya's post-independence history.

Kenya National Dialogue and Reconciliation

39. News of the PEV quickly spread across the world. Shocking images of a nation engulfed by violence were splashed on local and international media outlets. Yet, the protagonists at the centre of the disputed presidential election, President Mwai Kibaki of PNU and Raila Odinga of ODM (hereinafter referred to as the Principals), took hard-line positions, each insisting they had won.
40. The international community, with the African Union (AU) taking a lead, responded almost instantly, with all efforts channelled towards unlocking the political gridlock and bringing to cessation the violence that was steadily pushing the country towards disintegration.¹⁵ From 8 to 10 January 2008, then AU Chairman, His Excellency John Agyekum Kufuor, President of Ghana, visited the country and initiated a mediation process between the Principals. After he

¹² KNCHR *The cry of blood: Report on extra-judicial killings and disappearances* (2008).

¹³ See Republic of Kenya *Report of Inquiry into Post Election Violence* (2008) (hereinafter CIPEV Report).

¹⁴ CIPEV Report (n 12 above) 346, 352.

¹⁵ Prominent individuals who visited Kenya with a view to broker peace included former Presidents Ahmad Tejan Kabbah of Sierra Leone, Benjamin Mkapa of Tanzania, Ketumile Masire of Botswana and Kenneth Kaunda of Zambia. Others included Archbishop Desmond Tutu of South Africa and the then Assistant Secretary of State for Africa, Jendayi Fraser.

left, and with the blessings of the two Principals, the mediation process was taken over by a three-member Panel of Eminent African Personalities (hereafter referred to as the Panel) composed of three African icons: former United Nations (UN) Secretary-General Kofi Annan, former Mozambican Minister and First Lady Graça Machel and former President of the United Republic of Tanzania Benjamin Mkapa.

41. The Panel, chaired by Kofi Annan, arrived in Kenya on 22 January 2008 and immediately proceeded to hold meetings with relevant stakeholders. Two days later, on 24 January 2008, the Panel managed to convene a meeting between the two Principals. A few days later, on 29 January 2008, the Kenya National Dialogue and Reconciliation (KNDR) was formally launched by the Principals in the presence of the Panel.
42. With the Panel as mediators, the KNDR negotiations were conducted by representatives of the two opposing sides: the PNU side was represented by Cabinet ministers Martha Karua, Sam Onger, Moses Wetangula and Mutula Kilonzo, while the ODM side was represented by Musalia Mudavadi, James Orengo, William Ruto, and Sally Kosgei.
43. The negotiating team agreed on an agenda comprising four main items:¹⁶
 - immediate action to stop the PEV and restore fundamental rights and liberties;
 - immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration;
 - how to overcome the political crisis; and
 - address long-term issues and solutions.
44. In respect to Agenda Items 1 to 3, the negotiation team concluded a series of public agreements, laying out the agreed modalities for implementing the broader objective of the KNDR process, which was 'to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights'.
 - **Agreed Statement on Security Measures, 1 February 2008.** Under this Agreement, the parties committed themselves to take action to halt the violence. The Agreement called on the police to act in accordance with the law and to carry out their duties and responsibilities with impartiality. It called

¹⁶ 'Annotated Agenda for the Kenya National Dialogue and Reconciliation' reprinted in AU Panel of Eminent African Personalities & The Kofi Annan Foundation *Kenya National Dialogue and Reconciliation: Basic Documents* (2010) 1.



Photo: The Nation online

on all leaders to embrace and preach peace and further listed a range of measures to be taken towards restoring fundamental rights and civil liberties.

- **Agreed Statement on Measures to Address Humanitarian Crisis, 4 February 2008.** This Agreement laid out measures for the assistance and protection of internally displaced persons (IDPs). It also proposed the operationalisation of the Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post-2007 Election Violence. With respect to immediate measures to promote reconciliation, healing and restoration, the Agreement proposed that a truth, justice and reconciliation commission that includes local and international jurists should be established.
- **Agreed Statement on How to Resolve the Political Crisis, 14 February 2008.** This Agreement, in the first instance, outlined a number of options that were available for resolving the political crisis, with the strengths and weaknesses of each option. It then charted the way forward, including: a forensic audit of the electoral process; comprehensive constitutional reform; establishment of a truth, justice and reconciliation commission; and the identification and prosecution of perpetrators of PEV.

45. On 28 February 2008, after 41 days of intense mediation,¹⁷ the formal negotiations were concluded with the signing of the *Agreement on the Principles of Partnership of the Coalition Government* (hereinafter referred to as the Coalition Agreement) between the Principals. Upon the signing of the Coalition Agreement the PEV ceased.

¹⁷ See E Lindenmayer & J Kaye *A choice for peace? The story of forty-one days of mediation in Kenya* (2009).

46. On the basis of the Coalition Agreement, the National Assembly enacted the National Accord and Reconciliation Act on 18 March 2008. The National Accord paved way for the establishment of a coalition government and the offices of Prime Minister as well as those of two Deputy Prime Ministers.
47. Following the signing of the Coalition Agreement, the Panel appointed Ambassador Oluyemi Adeniji, a former Minister of Foreign Affairs of Nigeria, to conclude negotiations on Agenda Item Four. On 4 March 2008, the following agreements were signed.

- **General Principles and Parameters for the Independent Review Committee on the 2007 General Elections (IREC).** Pursuant to this Agreement and the Commissions of Inquiry Act, the Independent Review Commission headed by Justice Johann Kriegler of South Africa was appointed on 14 March 2008. After conducting a forensic audit of the electoral process IREC concluded that the polling process was undetectably perverted and that the recorded and reported results were so inaccurate as to render any reasonably accurate, reliable and convincing conclusion impossible.¹⁸

- **General Principles and Parameters for the Commission of Inquiry into the Post Election Violence (CIPEV).** This Agreement, together with the Commissions of Inquiry Act, formed the basis for the appointment of a Commission of Inquiry into Post Election Violence (CIPEV) headed by Justice Philip Waki on 22 May 2008. The CIPEV carried out investigations and issued its report in October 2008. The Report found that while the PEV was spontaneous in some areas, it was planned and financed in other places.¹⁹

CIPEV generated a sealed list of individuals alleged to have borne the greatest responsibility for the PEV and recommended the formation of a special tribunal, within a specified time, for the prosecution of these individuals, failing which the list would be handed over to the Prosecutor of the International Criminal Court (ICC) for appropriate action. Parliament failed to establish such a tribunal within the specified time and the sealed list of names was as a result handed over to the then ICC Chief Prosecutor Luis Moreno-Ocampo. A series of events followed thereafter, leading to the indictment of six Kenyan individuals before the ICC.

- **General Principles and Parameters for the Truth, Justice and Reconciliation Commission (TJRC Agreement).** This Agreement formed the basis for the

¹⁸ Republic of Kenya *Report of the Independent Review Commission* (2008).

¹⁹ CIPEV Report.

establishment of the Truth, Justice and Reconciliation Commission (TJRC). The details of the Agreement are discussed in detail below.

- **Roadmap for a Comprehensive Constitutional Review Process.** This Agreement outlined a five-step process for the enactment of a new constitution. It formed the basis for the enactment of the Constitution of Kenya Review Act 2008 and the appointment on 23 February 2009 of a Committee of Experts (CoE) charged with the function of spearheading the constitutional review process. After an elaborate consultative process, the CoE produced the proposed new Constitution of Kenya, which was subjected to a national referendum on 4 August 2010. The referendum returned positive results, leading to the promulgation of the new Constitution of the Republic of Kenya on 27 August 2010.

48. On May 28 2008, the KNDR parties signed another agreement in which they reaffirmed their commitment to address long-term issues listed under the KNDR Agenda Item Four.²⁰ The KNDR process came to a formal end on 30 July 2008, with the adoption of an Implementation Framework. The Implementation Framework indicated action points, timeframes and focal points for each of the issues identified under Agenda Item Four.

The TJRC Agreement

49. The TJRC Agreement spelt out the general parameters, guiding principles and the broad rules that would govern the creation and operation of the Commission. In particular, the following general parameters were agreed upon:
 - A truth, justice and reconciliation commission was to be created through an Act of Parliament and adopted by the Legislature within four weeks.
 - The Commission would inquire into human rights violations, including those committed by the State, groups or individuals. Such inquiry was to include but not be limited to politically-motivated violence, assassinations, community displacements, settlements and evictions. The Commission was also to inquire into major economic crimes, in particular grand corruption, historical land injustices and the illegal and irregular acquisition of land, especially as related to conflict or violence. Other historical injustices were also to be investigated.
 - The Commission was to inquire into events which took place between December 12, 1963 and February 28, 2008. However, it was also mandated to

²⁰ Statement of Principles on Long-Term Issues and Solutions reprinted in AU Panel of Eminent African Personalities & The Kofi Annan Foundation *Kenya National Dialogue and Reconciliation: Basic Documents* (2010) 885.

look at antecedents to this period where necessary in order to understand the nature, root causes, and context that led to such violations, violence, or crimes.

- The Commission was to receive statements from victims, witnesses, communities, interest groups, persons directly or indirectly involved in events, or any other group or individual; undertake investigations and research; hold hearings; and engage in activities as it determined to advance national or community reconciliation. The Commission was permitted to offer confidentiality to persons upon request, in order to protect individual privacy or security, or for other reasons. The determination as to whether to hold its hearings in public or in camera was left to the sole discretion of the Commission.
- Blanket amnesty would not be provided for past crimes. Provision was made for the proposed commission to recommend individual amnesty in exchange for the full truth. Serious international crimes including crimes against humanity, war crimes, or genocide were not amnestied, nor were persons who bore the greatest responsibility for crimes that the Commission would cover.
- The Commission was to complete its work and submit a final report within two years. The final report was to state its findings and recommendations which would be submitted to the President, and made public within fourteen (14) days before being tabled in Parliament.

50. It was also agreed that the proposed Commission would reflect the following principles and guidelines, taking into account international standards and best practices:

- *Independence:* The Commission was to operate free from political or other influence. It would determine its own specific working methodologies and work plan, including those adopted for investigation and reporting. It would also set out its own budget and staff plan.
- *Fair and balanced inquiry:* In all its work, the Commission was to ensure that it sought the truth without influence from other factors. In representations to the public through hearings, statements, or in its final report, the Commission was to ensure that a fair representation of the truth was provided.
- *Appropriate powers:* The Commission was given powers of investigation, including the right to call persons to speak with the Commission and powers to make recommendations to be considered and implemented by the government or others. These recommendations could include measures to advance community or national reconciliation; institutional or other reforms, or whether any persons were to be held to account for past acts.

- *Full cooperation:* Government and other state offices were to provide information to the Commission on request, and to provide access to archives or other sources of information. Other Kenyan and international individuals and organizations were also urged to provide full cooperation and information to the Commission on request.
- *Financial support:* the parties were to encourage strong financial support to the Commission. The Government of Kenya was expected to provide a significant portion of the Commission's budget. Other funding could be obtained by the Commission from donors, foundations, or other independent sources.

51. On the composition of the Commission, the TJRC Agreement stated that:

- The Commission would consist of seven members, with gender balance taken into account. Three of the members were to be international. The members were to be persons of high moral integrity, well regarded by the Kenyan population, and to possess a range of skills, backgrounds, and professional expertise. As a whole, the Commission was to be perceived as impartial and no member was to be seen to represent a specific political group. At least two and not more than five of the seven commissioners were to be lawyers.
- In keeping with international best practices and to ensure broad public trust in and ownership of the process of seeking the truth, the national members of the Commission were chosen through a consultative process. The Commissioners were to be named no more than eight weeks after the passage of the Act that established the Commission.
- The three international members were to be selected by the Panel of Eminent African Personalities, taking into account public input.

The legislative process

52. Parties to the TJRC Agreement had anticipated that the Commission would be created within four weeks of signing the Agreement. This timeline was both ambitious and impractical for two significant reasons. Firstly, four weeks was too short a period for the legislative cycle to run full course, considering that the National Assembly was required to enact several other pieces of legislation emanating from the KNDR process.
53. Secondly, and perhaps more importantly, four weeks was too short a period to allow for sufficient consultations with and meaningful participation of stakeholders in the legislative process. The legislative process officially commenced on 9 May 2008,

In keeping with international best practices and to ensure broad public trust in and ownership of the process of seeking the truth, the national members of the Commission were chosen through a consultative process.

with the publication in the *Kenya Gazette* of the Truth, Justice and Reconciliation Commission Bill by the Ministry of Justice, National Cohesion and Constitutional Affairs (Ministry of Justice).²¹ This was slightly more than one month outside the timeline given in the TJRC Agreement.

54. The publication of the Bill was greeted with much criticism, especially because stakeholders claimed that they had not been meaningfully engaged in its drafting. Moreover, several of its provisions on the mandate and operations of a truth commission (such as provisions on amnesty) did not reflect internationally accepted standards. This prompted civil society organizations to prepare reviews of the Bill for consideration by the Ministry of Justice and the National Assembly.
55. The Multi-Sectoral Task Force on the TJRC, an umbrella body of CSOs which later evolved into the Kenya Transitional Justice Network, prepared a detailed memorandum proposing amendments to the TJRC Bill, especially in relation to its provisions on the following: objectives and functions of the Commission; economic crimes; independence of the Commission; amnesty; and implementation of the recommendations of the Commission.²² Amnesty International raised similar issues and even expanded the concerns.²³
56. Some of the concerns and proposals made by the various CSOs were taken up by the Ministry of Justice and ultimately by the National Assembly. For example, the hitherto broad amnesty provisions were amended to allow for conditional amnesty for a very narrow list of crimes.
57. After going through the full legislative cycle, the Truth, Justice and Reconciliation Act became law on 23 October 2008. The Act received Presidential Assent on 28 November 2008 and came into operation on 17 March 2009.

²¹ Special Gazette Notice No. 23 of 2008.

²² The Multi-Sectoral Task Force on the Truth, Justice and Reconciliation Process *Memorandum on the proposed amendments to the TJRC Bill, 2008*.

²³ Amnesty International Kenya: *Concerns about Truth, Justice and Reconciliation Commission Bill*, May 2008, AFR 32/009/2008.

Establishment of the Commission

58. There were three milestones in the establishment of the Commission: the selection and appointment of Commissioners, their inauguration, and the setting up of the Commission. These three milestones are discussed here in turn.

Selection and appointment of Commissioners

59. The TJR Act provided for the appointment of nine Commissioners; six Kenyan citizens appointed through a national consultative process and three non-citizens selected by the African Union Panel of Eminent African Personalities. The Act required gender equity (and geographical balance in the case of Kenyan citizens) in the selection of the Commissioners.²⁴
60. The selection of the Kenyan Commissioners was done through a broadly consultative process that involved civil society and Parliament.²⁵ The process began with the creation of a Selection Panel composed of nine individuals nominated by various religious and professional organisations in the following proportion:
- two individuals nominated by a joint forum of religious organisations;
 - one person nominated by the Law Society of Kenya (LSK);
 - one person nominated by the Federation of Women Lawyers (FIDA Kenya)
 - one person jointly nominated by the Central Organisation of Trade Unions (COTU) and the Kenya National Union of Teachers (KNUT);
 - one person nominated by the Association of Professional Societies of East Africa;
 - one person nominated by the Kenya National Commission on Human Rights (KNCHR);
 - one person jointly nominated by the Kenya Private Sector Alliance and the Federation of Kenya Employers (FKE); and
 - one person nominated by the Kenya Medical Association (KMA).²⁶

²⁴ TJR Act, sec 10.

²⁵ But see C Alai 'Truth, Justice and Reconciliation Commission' in L Mute & L Young (eds) *Transitional justice in Kenya: Looking forward, reflecting on the past* (2011) 111, 120 (noting that 'the selection process was void of public participation and had limited input or scrutiny from civil society and victims' groups'.

²⁶ TJR Act, sec 9.

61. In April 2009, the Selection Panel placed an advertisement in the *Kenya Gazette* and in three daily newspapers inviting applications from persons who met the qualifications set forth in the Act for nomination as commissioners. The Act required that the Commissioners include individuals with knowledge and experience in human rights law, forensic audit, investigations, psycho-sociology, anthropology, social relations, conflict management, religion and gender issues.
62. The Act also included a broadly worded qualification designed to protect the process and the broad mandate of the Commission from any interference due to conflict of interest. The Act thus required that commissioners be persons who had 'not in any way been involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated under this Act.'²⁷
63. The Selection Panel sub-contracted a human resources firm to conduct short-listing of applicants on its behalf. The firm received a total of 254 applications. Out of these, 47 applicants were selected for interview by the Panel. After conducting interviews, 15 names were forwarded to the National Assembly for consideration. The National Assembly deliberated the suitability of the 15 individuals and narrowed the number of candidates to nine.²⁸ The Panel of Eminent African Personalities forwarded three names to the National Assembly, which in turn forwarded those names together with those of the nine Kenyans to the President.
64. By Gazette Notice dated 22 July 2009, the President appointed the following nine individuals to serve as members of the Commission:²⁹
 - Bethuel Kiplagat (Kenya);
 - Kaari Betty Murungi (Kenya);
 - Tecla Namachanja Wanjala (Kenya);
 - Gertrude Chawatama (Zambia);
 - Berhanu Dinka (Ethiopia);
 - Ahmed Sheikh Farah (Kenya);
 - Tom Ojienda (Kenya);

²⁷ TJR Act, sec 10(6) (b).

²⁸ Prior to the amendment of the Act in July 2009, the First Schedule did not specify the number of individuals to be forwarded from the National Assembly to the President. As such, the National Assembly forwarded nine (9) names to the President from whom he was required to appoint six as commissioners. Later, the Act was amended to require Parliament to forward only six names to the President, but this amendment was of no effect because it had been overtaken by events.

²⁹ See Appendix 1 for the personal profiles of the Commissioners.

- Margaret Shava (Kenya); and
- Ronald Slye (United States).

65. From among the Commissioners, the President appointed Ambassador Bethuel Kiplagat as Chairperson to the Commission. The President also appointed Betty Murungi as Vice-Chairperson, though the Act made it clear that the Vice-Chairperson was to be chosen by the Commissioners themselves and not the President.³⁰ Shortly after the members of the Commission were appointed, the Cabinet issued a statement indicating that instead of establishing a special tribunal to try those who were allegedly responsible for the 2007/2008 Post Election Violence, it would be seeking an expansion of the Commission's to include dealing with these cases. This decision was highly criticized by a broad sector of Kenyan society and would later have an impact on the work of the Commission although the decision never saw the light of day. Firstly, the decision created the impression that the government was inclined to using the Commission as a shield against those who were alleged to bear responsibility for the PEV. Secondly, a section of CSOs and donors resolved not to work with or fund the Commission until the Cabinet's decision is reversed.

Inauguration of the Commission

66. The Commissioners were sworn into office on 3 August 2009. As is discussed in Chapter Four of this Report, the oath of office taken by the Commissioners was one of the grounds on which a group of activists filed legal suit challenging the existence of the Commission.³¹
67. During their inaugural meeting, and in accordance with Section 11(2) of the TJR Act, Commissioners elected Betty Murungi as the Vice-Chairperson. However, as will be discussed in detail later, Betty Murungi subsequently resigned, first as Vice-Chairperson and then as a Commissioner. While the President was required to gazette her vacancy within seven days of her resignation so that a replacement could be chosen, such notice was never published and thus no replacement was ever provided.
68. From mid-April 2010 the Commission operated with only eight full-time Commissioners. When Ambassador Kiplagat stepped aside in November 2010 for sixteen months, the Commission operated with only seven full-time Commissioners.

³⁰ TJR Act, sec 11(2).

³¹ *Augustine Njeru Kathangu & 9 Others v TJRC & Bethuel Kiplagat*, High Court Miscellaneous Application No. 470 of 2009.

69. With the resignation of Betty Murungi as Vice Chairperson, Tecla Namachanja Wanjala was elected the Commission's Vice-Chairperson. She later served as the Commission's Acting Chairperson from 2 November 2010 to 27 February 2012 while Ambassador Kiplagat had temporarily stepped aside from office.

Foundational Tasks

70. The TJR Act Setting up the Commission involved four foundational tasks:
- establishing the Commission's secretariat;
 - developing internal policy and procedural documents to guide the work of the Commission;
 - conceptualising and interpreting the Commission's mandate; and
 - informing the public about the Commission's existence and the purpose of its work.
71. Chapter Two of this volume of the Report discusses in detail the Commission's interpretation of its mandate while Chapter Three outlines the Commission's endeavour to inform the public of its existence and work.
72. The detailed aspects of these foundational tasks were performed by nine thematic working groups. Initially, budget constraints delayed the recruitment of staff and the working groups were each composed of three or four Commissioners. The working groups were as follows:
- Structure Working Group
 - Gender Working Group
 - Stakeholder Collaboration Working Group
 - Rules of Procedure Working Group
 - Human Resources Working Group
 - Security Working Group
 - Outreach and Public Awareness Working Group
 - Internal Rules and Policy Working Group
 - Communications and Media Working Group
 - Legal Affairs Working Group

Internal Policies

73. The administrative operations of the Commission were guided by, among others, the following internal policy and procedural documents: Staff Employment Policy; Staff Code of Conduct and Confidentiality Agreement; and Security Policy.
- **Employment Policy:** The Employment Policy was the basic policy document which defined the relationship between the Commission and its employees, including the rights and responsibilities of each party. It served as a rich source of information about the Commission's working conditions, benefits and policies. Each staff member was expected to be acquainted with and abide by the Employment Policy in the conduct of their duties and in their general deportment.
 - **Code of Conduct and Confidentiality Agreement:** Employees of the Commission were required to abide by a code of conduct and take an oath of confidentiality. In signing the document Commission staff undertook:
 - not to reveal any information that they came across in the course of their work. Such information included, but was not limited, to the names of the victims and witnesses or adversely mentioned persons and the specific details of their statements, pictures, reports, and documents of the Commission. This restriction would apply both during the period of their employment and thereafter;
 - to deal with witnesses with compassion and respect for their dignity;
 - not to reveal or otherwise discuss with anyone outside the Commission information regarding the internal operations and activities of the Commission;
 - to bring to the immediate attention of the Director of Finance and Administration or Chief Executive Officer any breach of the Code of Conduct that they become aware of;
 - to promptly deliver to the Commission all property of the Commission whenever requested or in any event upon termination of employment;
 - not to engage in other employment or activities that could result in a conflict of interest (including the reasonable perception of a conflict of interest) with their employment in the Commission.
 - not to give press or other media interviews, on or off the record, without express written authority from the Director of Communications or the Chief Executive Officer.
 - **Security Policy:** This document laid out measures relating to the security of the Commissioners, the Commission's staff, and witnesses who interacted with the Commission.

Management and Administration

Organisational structure

74. The Commission's organisational structure was designed with the assistance of an independent consultant. Later, a five-member team comprising officers from the Ministry of Justice, National Cohesion and Constitutional Affairs (Ministry of Justice) and Ministry of State for Public Service was assigned to support the Commission with this task. However, as is discussed below in detail, the Commission's organizational structure was not approved.
75. The functions and objectives of the Commission were discharged by Commissioners who were positioned at the apex of the Commission's organisational structure. According to the TJR Act, the overall task of supervising and directing the work of the Commission rested with the chairperson.³² It also indicated that the chairperson would preside over all meetings of the Commission and was its spokesperson.³³
76. The TJR Act allowed the Commission to establish such committees as it considered necessary for the better performance of its functions. Pursuant to this provision, the Commission established seven committees that fell under two broad categories: mandate and administrative committees. Mandate committees were responsible for guiding, both conceptually and practically, the Commission's execution of its substantive mandate. There were four such committees:
 - Human Rights Violations Committee;
 - Reparations and Rehabilitation Committee;
 - Reconciliation Committee; and
 - Amnesty Committee.
77. Administrative committees provided policy guidance for the daily functioning of the Commission. Three committees and one sub-committee were established for this purpose:
 - Committee on Finance and Administration and its sub-committee on Recruitment and Human Resources;
 - Committee on Logistics, Security and Procurement; and
 - Committee on Communications and Civic Education.

³² TJR Act, sec 10(4)(c).

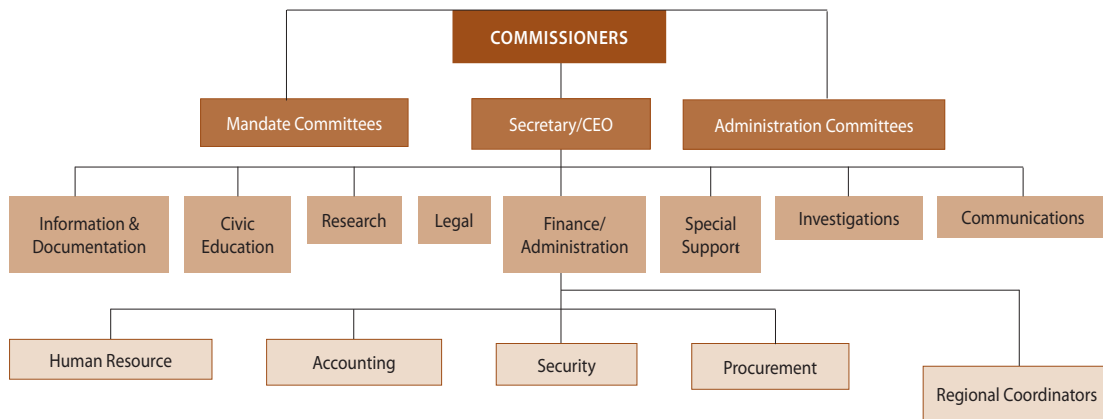
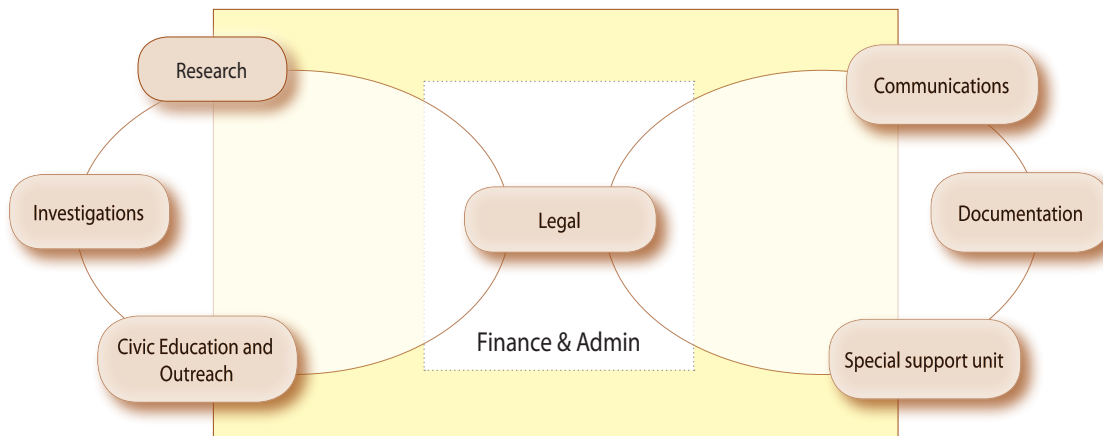
³³ TJR Act, sec 10(4)(a).

78. The Commission's Secretariat was headed by the Secretary to the Commission who was also its Chief Executive Officer.³⁴ The CEO was responsible for the day-to-day administration and management of the affairs of the Commission.³⁵
79. The technical operations of the Commission were carried out by eight departments, each headed by a Director responsible for directing, supervising and coordinating work within their respective departments. The eight departments were as follows:
- Civic Education and Outreach;
 - Research;
 - Investigations;
 - Legal Affairs;
 - Special Support Services;
 - Communications;
 - Finance and Administration; and
 - Documentation and Information Management.
80. Although the various units had specific terms of reference, their operations were harmonised to ensure coherence and efficiency in the execution of the Commission's mandate. The work of each department fed into and informed the work of the other units. This was facilitated by periodic meetings of all Directors which allowed each department to learn about and contribute to the work of the other departments.
- **Civic Education and Outreach Department:** This Department was responsible for educating, engaging, and encouraging the public to contribute positively to the achievement of the objectives of the Commission. In particular, the Unit: (a) coordinated the dissemination of information about the Commission to the general public through education and public awareness campaigns and other forums; (b) coordinated reconciliation initiatives; and (c) developed and updated the Commission's civic education and advocacy materials. The Department became operational in August 2010, with the hiring of the Director Civic Education and Outreach, together with two programme officers.
 - **Research Department:** The Research Department was responsible for three broad tasks: conducting research into all aspects of the Commission's substantive mandate; servicing the research needs of other departments of the Commission; and coordinating the writing of the Report of the Commission.

³⁴ TJR Act, sec 13(1).

³⁵ TJR Act, sec 13(2).

- **Investigations Department:** The Investigations Department's primary role was to collect, analyze and provide accurate information to enable the Commission to build a complete historical record and picture of gross human rights violations. In particular, the Department was responsible for: identifying and interviewing victims and witnesses; collection and recovery of evidence from victims and witnesses; and mapping out areas identified as scenes of gross violations of human rights for the Commission's site visits.
- **Legal Affairs Department:** The Legal Affairs Department was responsible for handling all legal matters related to the Commission's execution of its mandate. The Department was also responsible for organizing and coordinating the conduct of the Commission's hearings. It was also involved in training of relevant stakeholders (e.g. lawyers) on matters pertaining to the Commission's mandate.
- **Special Support Department:** This Department was established pursuant to section 27 of the TJR Act, which provided that the Commission could put in place special arrangements and adopt specific mechanisms and procedures to address the experiences of women, children, persons with disabilities (PWD), and other vulnerable groups. Its primary role was to ensure that the situation and experiences of these vulnerable groups were consistently and adequately addressed in all the processes of the Commission. In this regard, it was responsible for coordinating the provision of counselling services to victims and witnesses and generally catering for their welfare, including their accommodation and travel needs. The Department was also responsible for the organisation of the women's hearings and the thematic hearings on children and persons with disabilities.
- **The Communications Department:** This Department was the link between the Commission and the media and by extension between the Commission and the general public. The Department managed the Commission's media and public relations.
- **The Finance and Administration Department:** The Department of Finance and Administration was responsible for provision of logistical and administrative support to the Commission. This included the procurement of goods and services and the preparation and management of the Commission's budget and finance.
- **ICT and Documentation Department:** the ICT and Documentation Department was responsible for the management and provision of the Commission's information and communication technology needs. It was also charged with the custody of all records and documents and the creation and maintenance of the database and the Commission's website.

Chart 1: *Organogram*Chart 2: *Inter-departmental synergies*

Recruitment of staff

81. The Commission was permitted by its enabling legislation to appoint officers and other staff as considered necessary for the proper performance of its functions.³⁶ However, due to lack of funds, the Commission operated with neither a secretary nor a secretariat during its first fiscal year (2009-2010). During this period, Commissioners performed most of the administrative and organisational work with the assistance of a 17 member support staff seconded to the Commission by the Ministry of Justice.

³⁶ TJR Act, sec 30(1).

82. The Commission commenced its recruitment process in February 2010 with the hiring of the Secretary/Chief Executive Officer. Most line directors and staff were hired in August 2010 and the various departments commenced operations around September 2010. At the height of its operations, the Commission had a total of 150 members of staff.³⁷ This number was gradually reduced as the Commission approached the conclusion of its term. Thus, as at 4 November 2012, the initial date for its closure, the Commission had a total of 60 members of staff. However, upon receiving a further extension of its term, and as part of its efforts to finalize all pending mandate operations, the Commission in January 2013 re-hired staff.

■ ***Victims as staff***

83. In August 2010, the Commission recruited 304 statement takers and deployed them across the country to take statements from victims, their families and witnesses. Amongst those recruited were individuals who were victims of violations that fell under the Commission's mandate and scope of inquiry. Sections of civil society and others raised the concern that engaging victims as staff of the Commission was inappropriate. They argued that victims would be partial by virtue of their experience and their engagement as staff of the Commission would compromise the statement taking process.
84. The Commission did not take these concerns lightly. The decision to engage victims as staff members was based on comparative experience. Many truth commissions across the world have involved victims. Some of the best known truth commissions have had victims as Commissioners and Chairpersons; for example, Archbishop Desmond Tutu chaired the South Africa's Truth and Reconciliation Commission. Truth commissions are designed to be victim-centred, though not victim-dominated, processes. Engagement of victims facilitates access to victim communities, and promotes ownership and legitimacy of the process. The right to effective remedy requires that victims are involved in the processes of finding solutions to and redress for violations.
85. Therefore, the question before the Commission was not whether to engage victims but in what capacity and under what terms. Firstly, victims had to qualify for the position they applied for just like any other applicant and go through the interview process. Secondly, the Commission limited the recruitment of victims to statement takers and civic educators. In the area of statement taking the Commission also adopted the policy that any individual could request a different statement taker

³⁷ For the list of staff see Appendix 2.

than the one before them, thus ensuring that individuals who gave statements were provided the safest and most effective environment in which to tell their stories. Victims were not hired as investigators or as researchers, or in any positions which involved analysis of violations and identifying those responsible for such violations. In addition, the Commission took measures to ensure that cases of conflict of interest were minimised.

86. The engagement of victims by the Commission also had an important reparatory dimension to it. It symbolised restoration and affirmation of the dignity of victims and their right to access employment in formal institutions. As documented in the 'Torture and Detentions' Chapter in Volume Two of this Report, the majority of victims of torture and detention under President Moi's regime remained unemployed, decades later. Those who were university students at the time of their detention and torture had their education and careers abruptly and indefinitely cut short. Members of the Kenya Air Force who were suspected to have been behind or supported the 1982 attempted *coup d'état*, had their careers in the armed forces abruptly terminated and the stigma surrounding their discharge from the Force made it impossible to secure employment in any formal institution.
87. The small number of victims that the Commission engaged as statement takers and civic educators expressed gratitude that such an opportunity had been offered to them.³⁸

■ **Database Manager and Director Investigations**

88. Due to the sensitive nature of the information collected by the Commission and the unfortunate ethnic suspicions that have traditionally greeted public appointments in Kenya, the Commission decided that the positions of Database Manager and Director Investigations would be held by non-Kenyans. It was important for the Commission to take this position given that perceptions of bias could be heightened if Kenyan citizens were to hold these offices. In line with this policy decision, the Commission hired a national of India as its Database Manager and a national of New Zealand as its Director of Investigations.
89. The remaining professional positions within the Commission were filled by Kenyans. It is noteworthy that at no point did the Commission have reason to be concerned about the actual bias of any staff member, whether Kenyan or foreign.

³⁸ See e.g. TJRC/Hansard/Thematic Hearing on Torture/28 Feb 2012/p. 52.

■ **Staffing and gender balance**

90. In line with the TJR Act,³⁹ and its Gender Policy, the Commission ensured that all its appointments were made with regard to the principle of gender equality. The Commission maintained a gender balance in its staff composition, not simply in keeping with a statutory requirement, but more importantly because it wished to ensure that women accessed its processes with relative ease. Studies and the experience of truth commissions have shown that having more women on staff may make a commission less alienating for female victims.⁴⁰ In this regard, gender as a factor in the Commission's recruitment process, was particularly important for positions involving certain responsibilities such as statement taking, investigations, victim support, and leading evidence.
91. To ensure that it lived up both to its own expectations and those of the TJR Act, the Commission periodically assessed its staff composition in terms of gender. Throughout the life of the Commission, the representation of women in its staff body was consistently above 40 percent. At the decision making level, the Commission was led by a female Chief Executive Officer from February 2010 to September 2012, and the ratio of female decision-makers (director level), stood at 50 percent during the same period.

National and regional offices

92. The TJR Act designated Nairobi as the Commission's headquarters. Between 2009 and 2010 the Commission had its offices at Delta House, Westlands. The office space at Delta House was found to be inadequate accommodation for the Commission's staffing and other needs. In January 2011, the Commission moved to NHIF Building, where it was housed for the remainder of its tenure.
93. In order to decentralise its presence and reach out to as many Kenyans as possible, the Commission established regional offices in Eldoret, Garissa, Kisumu and Mombasa. Each regional office had a regional coordinator and an assistant regional coordinator of the opposite gender. The regional offices were responsible for facilitating all administrative support services of the Commission within the respective regions. They took the lead in mobilising individuals to attend the Commission's processes. They also served as central collection points for statements and memoranda within the regions.

³⁹ TJR Act, sec 30(2).

⁴⁰ V Nesiha *et al* (ed) *Truth commissions and gender: Principles, policies and procedure* (2006) 10.

94. The Eldoret and Mombasa offices served Rift Valley and Coast Provinces respectively. The Kisumu office served Western and Nyanza Provinces, while the Garissa office served North Eastern Province and the upper region of Eastern Province. The Commission's headquarters in Nairobi was host to the regional office for Central Province, Nairobi Province (including Kajiado County) and the lower region of Eastern Province.

Finance

95. Sections 43 to 47 of the TJR Act provided for the establishment and management of the Commission's funds, which consisted mainly of monies appropriated from the Consolidated Fund. The Commission's funds were managed by the Ministry of Justice during the first fiscal year of establishment and by its Secretary during the remainder of its tenure. The Accounts Unit, comprising an Assistant Director, an accountant and two assistants, was responsible for running the day-to-day financial operations of the Commission. At the level of the Commissioners' the Finance and Administration Committee was responsible for formulating financial policies and exercised an oversight role in relation to all matters of finance and administration.
96. In accordance with International Financial Reporting Standards, as read with the TJR Act and the Government Financial Management Act, the Commission prepared financial statements for each fiscal year of its existence with the exception of fiscal year 2009-2010 during which - as earlier mentioned- the Ministry of Justice managed the Commission's funds. These financial statements were submitted for audit to the Kenya National Audit Office (Auditor-General), in compliance with the provisions of section 20 of the Public Audit Act.⁴¹
- **Year 2010-2011:** the Auditor General was of the opinion that the financial statements as submitted to the National Audit Office were a fair representation, in all material respects, of the financial position of the Commission as at the close of that year. However, the opinion was qualified as the Auditor-General raised concerns in relation to specific issues which were subsequently addressed by the Commission.
 - **Year 2011-2012:** As at the time of submission of this Report, the Office of the Auditor General had not issued its report concerning the Commission's financial position for the year 2011-2012.

Allegations of corruption and financial improprieties

97. In July 2011, the Commission was accused of corruption and other financial improprieties. Reports surfaced in the media alleging corruption within the Commission. The media reports appeared to reference internal documentation

⁴¹ See Appendix 3 for the Audited Statement of Financial Position for the Years 2010-2011 and 2011-2012.

of the Commission although sourced through other organisations. This prompted the Commission to undertake urgent internal investigations. It was found that the media reports were unfounded. The investigations were undertaken with the generous cooperation of an organisation in which the individual who released the false information worked. The Commission was dismayed to learn that the information was based on selective release of misleading information from within the Commission by individuals linked to Ambassador Kiplagat.

98. Near the end of 2011 and into early 2012, new stories of financial mismanagement at the Commission surfaced in the press again. These stories were based on a confidential management letter that had been sent to the Commission by its external auditor. The letter from the auditors was a typical management letter – written after an initial review of the Commission's accounts and requesting clarification on a number of matters. As part of the auditing process, and not the end of it, management letters do not provide a reliable indication of the state of an organisation's financial affairs.
99. Unfortunately copies of the management letter were leaked from inside the Commission to numerous media houses. Established media houses contacted the Commission and when the nature of the document they had been given was explained to them, they declined to publish the story. Some papers, however, did publish a series of stories alleging that the Commission's auditors had found massive fraud and corruption within the Commission. In fact, the Commission had already responded to the management letter answering each of the queries raised by the auditors, which eventually resulted in an audit report that raised absolutely no concerns relating to financial mismanagement or improprieties, much less corruption. The Commission immediately posted the audit report on its website.
100. Even after the audit report was published on the Commission's website, the *Nairobi Law Monthly* printed a story based on the misinformed media reports appearing several months earlier in segments of the alternative media commonly known as the gutter press. Even more disappointing was the fact that *Nairobi Law Monthly* did not contact the Commission for a comment, or try to verify its story. This was particularly unfortunate as the *Nairobi Law Monthly* went on to name specific Commissioners and staff members as having stolen money from the Commission. The ironic reality is that the Commissioners had in fact lent money to the Commission at a time when it had not received quarterly funding from the Treasury to enable the Commission to perform its core functions. Those who reported on the matter misread the financial documents given to them – or were relying upon the interpretation of those documents given by individuals who wanted to harm the reputation of the Commission. Thus, those Commissioners who were the most generous were the ones most unjustly vilified in publications such as the *Nairobi Law Monthly*.

Operational Period

101. In line with the TJRC Agreement, the TJR Act required the Commission to operate for a period of two years,⁴² preceded by a three-month establishment phase.⁴³
102. The two-year operational period granted to the Commission was ambitious even in the best of circumstances, considering the breadth and complexity of the Commission's mandate. The Commission's material mandate was by far the broadest of any truth commission ever established, encompassing inquiry into violations of civil and political rights as well as socio-economic rights. Its temporal mandate was similarly wide, spanning 12 December 1963 to 28 February 2008, a period of just less than 45 years.
103. Beyond the magnitude of the task the Commission faced several challenges and difficulties that had the effect of hampering its work and slowing implementation of its mandate. In particular, the Commission lost considerable time and credibility at the beginning of its term due to the controversy that surrounded the suitability of its Chairperson which lasted fifteen months from the appointment of the Commissioners in August 2009, to the stepping aside of the Chairperson in November 2010. The Commission also suffered financial and resource constraints that stalled its operations for the better part of its first year of operations. As a result, the Commission was not able to begin operating substantively and effectively until September 2010, a full year after its establishment.

The first extension (*November 2011 to May 2012*)

104. As the end of the operational period approached, the Commission assessed the progress it had made in executing its mandate and the outstanding workload *viz à vis* its capacity. The Commission concluded that it would be unable to finalise its work within the two years statutory limit. By June 2011 the Commission had conducted hearings in North Eastern Province and partially in Western Province. With six (6) provinces to go and a series of other mandate operations that had not been executed, the Commission reached the considered opinion that it would not finalise its work within the remaining three months.
105. Thus, on 24 June 2011, pursuant to section 20(3) of the TJR Act, the Commission requested the National Assembly to extend its tenure for a period of six months as expressly provided for by the Act. The National Assembly did not consider this request until two months later, on 18 August 2011, whereupon it voted to extend the Commission's term as requested.

⁴² TJR Act, sec 20(1).

⁴³ TJR Act, sec 20(2).


The second extension (*May to August 2012*)

106. Despite the fact that the Commission had been granted an extension, the outstanding workload remained enormous and demanding. Although it adhered to a compact timetable, the Commission concluded hearings in April 2012 having conducted 220 well attended hearing sessions during which more than 680 individuals testified before the Commission. In March 2012 when the Commission concluded its individual hearings, it had less than a month to finalise and submit its report. This proved to be an impossible task. The one month period was only sufficient to process transcripts of hearings that the Commission had conducted in January and February 2012, leaving the key task of report writing undone.
107. Faced with this challenge, the Commission requested that the three-month statutory winding up period provided to the Commission (3 May to 3 August 2012) be reallocated to its operational period to give the Commission an additional three months to work on the report. Under the circumstances obtaining then, this was the best request that the Commission could make. To effect the request an amendment to the TJR Act had to be made.
108. While the Commission expressed its request towards the end of April, it was only on 7 August 2012 that Parliament considered and approved the request. By that time, the relevant period over which an extension had been sought had already lapsed.
109. In essence, the Commission operated in legal limbo for three months as it waited for Parliament to consider its request. Although the Commission continued to write its report during this period, the uncertainty over its legal status impacted negatively on its operations. Firstly, the Commission could neither conduct certain mandate operations (such as notifying adversely mentioned persons of their right to respond to allegations levelled against them) nor incur expenditures on mandate related operations. Secondly, the Commission suffered high turn-over of staff during this period. As a result, its capacity to operate at an optimal level was significantly reduced, especially as it had a lean staff complement to begin with.

The third extension (*August 2012 to May 2013*)

110. With a second extension, the Commission was expected to deliver its report on 3 August 2012. However, as it has been indicated above, Parliament did not consider the Commission's request for an extension until 7 August 2012. This was mainly due to the fact that the Commission was compelled to review its position on passing on various aspects of its mandate to the implementation mechanism to be established at the end of the life of the Commission.
111. For the above reason, the Commission once again requested an extension of tenure to enable it finalise its report. On 27 November 2012, the National Assembly unanimously voted to extend the Commission's operational period to 3 May 2013.





CHAPTER TWO

Interpretation of Mandate

Introduction

1. This Chapter presents the Truth, Justice and Reconciliation Commission's (the Commission) understanding of its overriding objectives and interpretation of its mandate, both material and temporal. The Commission adopted a purposive and liberal interpretation of its objectives and functions; an approach that accorded with established principles and rules of international human rights law and best practices in the field of transitional justice.
2. In interpreting its mandate, the Commission took into account relevant official documents that preceded and informed its establishment. These documents include:
 - Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, 2003;
 - General Principles and Parameters for the Truth, Justice and Reconciliation Commission (TJRC Agreement);
 - Memorandum of Objects and Reasons (attached to the Truth, Justice and Reconciliation Bill, 2008);
 - Truth, Justice and Reconciliation Act No. 6 of 2008 (TJR Act); and
 - Parliamentary Hansard reports relating to the enactment of the TJR Act.



3. The Commission also benefitted immensely from the experiences of other truth commissions and the writings of scholars and practitioners. Moreover, the Commission drew inspiration from United Nations' work in transitional justice. In particular, the Commission used the following UN documents as interpretative guides: Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies;¹ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity;² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law;³ and the Report of the Special Rapporteur on the Promotion and Truth, Justice, Reparation and Guarantees on Non-Recurrence.⁴
4. This Chapter is structured as follows: The second section after this introduction explains how the Commission understood the core concepts that were central to its mandate and operations. These concepts are truth, justice and reconciliation. The third section explores the scope of the Commission's objectives and functions. The fourth and fifth sections deal respectively with the Commission's temporal and subject matter mandate. The final three sections address the following themes: breadth and complexity of the mandate; responsibility for violations and injustices; and other relevant aspects of the Commission's mandate.

¹ S/2004/616, 23 August 2004.

² UN Commission on Human Rights, Sixty-first session, Item 17 of the provisional agenda, E/CN.4/2005/102/Add.1, 8 Feb 2005.

³ Adopted by the UN General Assembly, 21 March 2006, A/RES/60/147.

⁴ UN Human Rights Council, Twenty-first session, Agenda item 3, A/HRC/21/46, 9 Aug 2012.

Core Concepts

Truth

5. The right to truth is now an established right in international human rights law. Indeed, there is a burgeoning jurisprudence and literature recognising and affirming the right of victims of gross violations of human rights to know and be informed of the truth. However, what constitutes the truth in a particular context and society is often subject to contestations and multiple conflicting narratives. Thus, the role of a truth commission in this regard is to 'set the record straight'. That it was envisaged that the Commission would play such a role is evident from its title.
6. However, apart from its title, the TJR Act does not make reference to the term 'truth'. As such, the mandate of the Commission in relation to establishing the truth is drawn from the spirit and totality of the Act and in particular, from the provisions of sections 5(a) and (b) of the Act.
7. Although section 5(a) and (b) does not make reference to the term 'truth', it was understood that the provisions thereof conferred on the Commission the obligation to establish the truth relating to gross violations of human rights and historical injustices in Kenya. Section 5(a) provides that the Commission's mandate includes 'establishing an accurate, complete and historical record of violations and abuses of human rights and economic rights during the mandate period. Section 5(b), on the other hand, states that the mandate of the Commission includes 'establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights and economic rights.
8. By requiring the Commission to establish a *complete* historical record of violations and abuses committed within a 45-year period, section 5(a) imposed on the Commission an ambitious and almost insurmountable task. Section 5(b) took a more permissive language as it required the Commission to establish '*as complete a picture as possible*'. In essence, section 5(b) implicitly recognised that establishing a complete picture of the causes, nature and extent of violations could not be practically achieved. On the whole, however, given the fact that the Commission was a temporary body with limited resources, the contents of this Report are not exhaustive in terms of establishing a complete record of gross violations of human rights or painting a complete picture of the causes, nature and extent of these violations.

9. In addition to its institutional limitations, there are myriad other factors that worked against the Commission's efforts to come close to satisfying the demands of section 5(a) and (b). Some of the events that the Commission was required to investigate or constituted antecedents to those events, happened many decades ago. As such, victims had already died and relevant evidence was no longer available or accessible. Even where some victims were still alive, their memory was hazy. Although the Commission received more than 40 000 statements and memoranda from individual victims and communities, it could not feasibly investigate each and every of these cases. As such, it relied on windows cases and statistical patterns to reach its conclusions on the extent of violations during the mandate period.⁵ Moreover, like any other truth commission, the Commission relied on the self will of individuals to present their cases to it. As indicated below, the Commission is aware that many victims of violations and injustices did not present their cases to the Commission.

10. The challenge the Commission faced in establishing a complete record and picture of gross violations committed in Kenya from 1963 to 2008 is not unique. Many truth commissions have had to contend with the fact that they cannot practically establish complete records of human rights violations that have occurred within their respective societies. For instance, the Sierra Leone Truth and Reconciliation Commission observed as follows in relation to its mandate:

Given the resources available to the Commission, in terms of professional researchers and investigators, not to mention its very short lifespan, Parliament was surely ambitious in thinking that the Commission could create anything resembling a comprehensive historical record of the conflict in Sierra Leone.⁶

11. That truth commissions are practically unable to and should not be expected to produce a complete document of violations and abuses is also acknowledged by scholars. According to Hayner, a leading transitional justice scholar, '[it] is impossible for any short-term commission to fully detail the extent and effect of widespread abuses that took place over many years, or, for most, to investigate every single case brought to it'.⁷

12. Against this backdrop, what this report contains is the truth as it was presented to the Commission through the various ways discussed in the next chapter. By using the stories that it received and through its research and investigations, the Commission has been able to irrefutably establish that certain events that resulted

⁵ See Chapter Three of this Volume.

⁶ *Report of the Sierra Leone Truth Commission, volume one* (2004) 32.

⁷ P Hayner *Unspeakable truths: Transitional justice and the challenge of truth commissions* (2011) 84.

in gross violations of human rights and injustices to individuals and communities did in fact take place. Therefore, the reality and occurrence of these events cannot and should not be denied any more, at least in official circles and by the state.

13. In finding the truth, the Commission was not just interested in what happened. Many (though not all) of the violations within its mandate had already been documented quite extensively by other institutions and individuals. Rather the Commission was particularly interested in why things happened the way they did, what was their impact and who was responsible. The Commission also wanted to contribute to the narrative truth of these violations, providing an opportunity for Kenyans to share and hear their individual and collective experiences of such violations.
14. In the debates that preceded the creation of the Commission and indeed for the larger part of its tenure, critics argued that everyone knows the truth about historical injustices and violations. Some wondered whether it was at all important to invest both time and resources in establishing what they considered to be matters of public knowledge. While the Commission can see that there is some basis for this position, ultimately the value of the Commission and its work goes far beyond what is currently in the public record. In the first place there is much of Kenya's past that is not a matter of public knowledge. The Commission was tasked with investigating matters buried deep in Kenya's history and providing answers to numerous questions. Secondly, some of what was considered public knowledge was often based on rumour, innuendo and bias. It was an important mission of the Commission to separate fact from fiction and to debunk myths.
15. In so doing, the Commission hoped to contribute to building a new social truth and shared understanding of the past for all Kenyans. A truth that not only narrated key events of Kenya's past, but a truth that identified the underlying fault lines that serve to explain why it has been that Kenyans have turned on Kenyans repeatedly in the past, most recently and significantly after the 2007 General Election. It is the Commission's fervent hope that the truth established herein will assist in the establishment of a re-energised and united Kenya in which the violations and injustices relayed in the chapters of this report will never happen again.
16. The stories related in this Report are largely the stories of ordinary Kenyans. Over 40 000 Kenyans shared their stories of violations and injustices with the Commission. Like most truth commissions, however, the Commission did not receive many statements or much cooperation from high ranking public officers, politicians and government officials. The Commission approached a number of such high-profile individuals who have held numerous positions of responsibility in the past (and many of whom still

hold positions of responsibility). With a few notable exceptions, most declined to file statements with or otherwise provide information to the Commission.

17. Moreover, many ordinary citizens did not file statements with the Commission. Thus, the Commission is acutely aware that for every statement it received and every story it heard, many more statements and stories, in their thousands, remain unwritten and unheard. The Commission tried to reach out to victims and witnesses in all parts of Kenya. Their stories are reflective of the array of experiences and the suffering of victims across the land.

Justice

18. The concept of justice in the context of transitional justice has been defined as:

[...] an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.⁸
19. ‘Formal judicial mechanisms’ usually refers to a criminal justice system that results in the punishment of those found responsible for offences. Such systems of retributive justice focus on individual criminal responsibility and on forms of punishment that are proportional to the wrongs committed.
20. Truth commissions have traditionally been viewed as providing an alternative to the more traditional retribution-based view of justice. They are one of a number of institutional innovations that further restorative rather than retributive justice. The Commission followed in the footsteps of many of its international predecessors in emphasizing an approach to justice that weighs more towards restorative than retributive justice. Some of these previous truth commissions have been criticised as for foregoing completely foregoing any element of retributive justice. While such commissions furthered restorative justice, the absence of any retributive elements often led individuals within the countries within which such commissions operated to complain that ‘justice’ had not been. While the Commission adopted a notion of justice that encompasses more than its retributive elements such as punishment, it also recognises the important role that retributive criminal justice systems can have in furthering not only justice, but also truth and reconciliation.

⁸ The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, United Nations, 23 August 2004, page 4.

21. The drafters of the TJR Act were sensitive to the criticisms aimed at previous truth commissions concerning their perceived lack of focus on justice and thus made sure to both include the word 'justice' in the title of the Commission as well as to empower the Commission to further justice by engaging with the more traditionally retributive criminal justice system. Most importantly, the Commission was empowered by the Act to 'identify any persons who should be prosecuted for being responsible or involved in human rights and economic rights violations and abuses'.⁹
22. One of the most important contributions the Commission hopes to make towards justice in Kenya is the establishment of an authoritative record of past abuses. Justice will be furthered in this Report through the identification of individuals and institutions found to be responsible for human rights violations and historical injustices. Even where there is no prospect of criminal justice the conduct of rights violators will be held up for close scrutiny. They will be held to public account and their roles forever recorded in history.
23. History will be guided by this Report in judging and assessing the conduct of perpetrators. In publicly identifying those it found to be responsible for human rights violations and historical injustices, the Commission invites Kenyans and the world to hold these individuals to account for their actions.
24. In addition to embracing its mandate relating to justice in the traditional sense, the Commission also adopted restorative and social elements of justice in its work and in this Report. Retributive justice mechanisms, because of their focus on perpetrators and punishment, are often ill-equipped to cater to the needs of victims. While restorative justice does not preclude accountability and even punishment for perpetrators, it is equally focused on repairing the harm done to victims and the greater community. Recognising and acknowledging the suffering and experiences of victims and searching for ways to move forward as a nation, are crucial to restorative justice. Social justice, on the other hand, is linked to equality and respect for human rights. Social justice

generally refers to the idea of creating a society or institution that is based on the principles of equality and solidarity, that understands and values human rights, and that recognises the dignity of every human being [...] Social justice is based on the idea of a society which gives individuals and groups fair treatment and a just share of the benefits of society.¹⁰

*To tell you
the truth, I do
not have any
expectations.
Talking about
it, praise to
God, is
good enough. I
never thought
I would see a
Commission
looking for the
truth.¹⁶*

⁹ TJR Act, sec 6(f).

¹⁰ MoJNCCA & NCIC *National Cohesion and Integration Training Manual* (2011)141.

25. Some aspects of the Commission's mandate inevitably required the Commission to adopt restorative and social conceptions of justice. In particular, the TJR Act required the Commission to determine ways and means of redress for victims of gross violations of human rights.¹¹ More specifically, section 42 of the TJR Act provided for the procedure for recommending reparation and rehabilitation of victims of gross violations of human rights. Moreover, in assessing and recommending ways of redressing violations of socio-economic rights and the legacy of economic marginalisation in respect to certain regions or communities, the Commission adopted a restorative and social conception of justice.

Reconciliation

26. Reconciliation is a complex concept. As the South African Truth and Reconciliation Commission learnt in its work, reconciliation is not only a highly contested concept, but it also has no simple definition.¹² As such, it was satisfied, justifiably so, with outlining the essential elements of reconciliation rather than defining the term. The elements it identified include that: reconciliation is both a goal and a process; it is experienced at different levels (intra-personal, inter-personal, community and national); and that reconciliation has linkages to redistribution in terms of material reconstruction and the restoration of dignity. Similarly, the Sierra Leone Truth and Reconciliation Commission conducted its reconciliation work on the premise that 'there is no universal model of reconciliation that can apply to all countries'.¹³
27. The Commission took a similar approach which it spelt out in its Reconciliation Policy and which is discussed in detail in the chapter on National Unity, Healing and Reconciliation in this Report.
28. In essence, the Commission understood reconciliation to be a process rather than an event. It is a process undertaken by individuals who have committed or suffered violations and as such can be intensely private and personal. It is also a process that can be encouraged and even undertaken at the community and national level. Thus, the Commission saw its role in relation to reconciliation as that of laying the foundation for a long-term process. This approach finds validity when one considers the products of the KNDR negotiations.
29. The KNDR team wisely laid the foundation for the creation of two institutions to further reconciliation: this temporary Commission and the permanent National Cohesion and Integration Commission (NCIC). Entrusting reconciliation in a

¹¹ TJR Act, sec 5(e).

¹² *Report of the South African Truth and Reconciliation Commission, volume one* (1998) 106.

¹³ *Report of the Sierra Leone Truth and Reconciliation Commission, volume 3B* (2004) 433.

permanent commission dedicated to national cohesion acknowledges that reconciliation is not only a process, but a continuous process. Reconciliation, like freedom, democracy, national unity and many other fundamental values to which modern Kenya aspires, must always be nurtured and cared for. This Commission, therefore, does not claim to have achieved reconciliation for the nation. Rather, the hope of the Commission is that by uncovering the truth, providing a forum for individuals to share their experiences and by providing some accountability, the Commission will have placed the nation on a path to further reconciliation and national cohesion and unity.

30. While the Commission could not in its short lifespan reconcile the nation, its hearings provided the opportunity for many to commence a healing process. Many victims appreciated the opportunity to relate their stories to an official body that would record and acknowledge their experiences and suffering. Many victims expressed relief after publicly sharing their stories and experiences. For such witnesses, public testimony was part of their own personal healing process and provided some assistance as they attempt to bring closure to the bitterness of the past.

31. For the vast majority of witnesses whose rights had been violated, the oral testimony they gave before the Commission marked the first time they had spoken publicly about their pain and suffering. Many individuals said the Commission was the first public agency to show concern for their situation. In this regard, a witness of the Malka Mari Massacre said:

I never thought this Commission or anybody would ask about what happened to me. If I knew anybody would want to know the truth, I would have come forward [much earlier].¹⁴

32. A survivor of the security operation that became the Wagalla Massacre had similar sentiments:

If you [the Commission] are taking statements, I have written ten statements before but nobody did anything for me. This is the first time I have been told to talk openly about it and I thank you very much for that.¹⁵

33. Another witness observed as follows when he was asked about his expectations following his testimony before the Commission:

To tell you the truth, I do not have any expectations. Talking about it, praise to God, is good enough. I never thought I would see a Commission looking for the truth.¹⁶

¹⁴ TJRC/Hansard/Public Hearing/Mandera/25 April 2011/p. 42.

¹⁵ TJRC/Hansard/Women's Hearing/Wajir/19 April 2011/p. 4.

¹⁶ TJRC/Hansard/Public Hearing/Mandera/26 April 2011/p. 44.

34. For others, the platform the Commission provided for a public narration of violations they had suffered contributed to lessening the social stigma associated with their violations. As an example, Omar Qutara, whose story is told in detail elsewhere in this report, was arrested in 1982, detained, tortured and later sentenced to three years imprisonment for allegedly participating in the 1982 attempted coup. For close to 30 years following his release from prison, he lived with the shame of being referred to as a 'rebel' or 'fugitive'. His children also suffered stigma. His eloquent and detailed testimony before the Commission was the first time that he had publicly spoken about his experience and in conclusion, he was grateful for that opportunity. He said:

I can sleep today. I am a little relieved. That was the major problem. I wanted many people to come here because many of them call us fugitives or rebels here in town. I am sure they have heard it today with their own ears.¹⁷

35. While the hearings had a therapeutic effect for individuals like Omar Qutara, it was not so for some who testified before the Commission. Even as it conducted its hearings, the Commission sufficiently warned itself of the potential of hearings or truth-telling to re-traumatise victims. Such was the experience of a victim who testified before the Commission in Kapenguria:

When I think about those issues, I feel so bad. I do not see the reason why we should talk over such issues, because it will not help me. I do not have any children; one of my ears cannot hear; I do not have any property; my son, who was a man, died because there was nobody who could take care of him when he was sick. I failed to get another person, a man, who will inherit my wealth. Even if I talk from here, I do not know whether the government can really help somebody. What is the importance of all these discussions as we sit here?¹⁸

36. To mitigate the effects of re-traumatisation, the Commission instituted a number of support mechanisms for victims and other witnesses who testified before it.

Inter-relationships between truth, justice and reconciliation

37. Truth, justice and reconciliation – the three pillars of the Commission – share a complex relationship. Depending on how they are pursued, they can both complement and reinforce each other, or be in tension with and even conflict with each other. Truth is necessary for furthering justice and reconciliation; justice is necessary for reconciliation; and reconciliation may be necessary for truth and for justice.
38. From inception, the Commission proceeded from the premise that the three values of truth, justice and reconciliation are mutually inclusive and that they complement

¹⁷ TJRC/Hansard/Public Hearing/Marsabit/4 May 2011/p. 38.

¹⁸ TJRC/Hansard/Public Hearing/Kapenguria/14 October 2011/p. 17.

each other. None of the values should be seen or pursued in isolation. This is an approach that has been recently advocated by the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence. In his first report to the UN Human Rights Council, in which he made a case for a comprehensive approach to the constituent elements of his mandate he noted:

The Special Rapporteur takes the four components of the mandate, truth, justice, reparations and guarantees of non-recurrence as a set of measures that are related to, and can reinforce, one another, when implemented to redress the legacies of massive human rights violations and abuses. Redressing the legacies of abuse means primarily giving force to those human rights norms that were systematically or grossly violated [...] While arguably, they all serve the ultimate end of pursuing justice, a less abstract functional analysis that distinguishes between the immediate, mediate and final ends of the measures would say that the four measures can be conceptualized as assisting in the pursuit of two mediate goals, i.e., providing recognition to victims and fostering trust, and two final goals, i.e. contributing to reconciliation and strengthening the rule of law.¹⁹

39. In the paragraphs that follow, the Commission explains how it conceptualised the linkages and inter-relationships between truth, justice and reconciliation.

Truth and justice

40. Former UN Special Rapporteur Louis Joinet refers to the 'inalienable right to truth', which he defines as a 'collective right, drawing upon history, to prevent violations from recurring'.²⁰ Justice thus looks to the past to facilitate a better future by holding individuals to account for the wrongs they committed; by providing reparations to those who suffered violations; and, through an acknowledgment of such violations and an understanding of their causes, providing guidance to the present generation to prevent the commission of such violations upon future generations.
41. In essence, truth telling is necessary for justice. By identifying those individuals and institutions responsible for historical violations, truth telling contributes to holding those responsible to account through public naming and shaming and provides evidence to support the Commission's obligation to recommend to the government those individuals who should be investigated and, if sufficient evidence exists, prosecuted. Such truth telling also provides a basis for other recommendations, including those relating to individuals or institutions that should contribute to reparation initiatives and those individuals who should be barred from public office or other positions of responsibility and trust.

¹⁹ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, Human Rights Council, 9 Aug 2012, A/HRC/21/46.

²⁰ *Question of the Impunity of Perpetrators of Human Rights Violations*, UN Sub-Commission on the Protection and Promotion of Human Rights, June 1997.

Truth and reconciliation

42. The relationship between truth and reconciliation is twofold. First, public truth-telling offers a forum for the victims to recount publicly their experiences and to have such experiences acknowledged. Such acknowledgement can contribute to individual healing and thus strengthen the courage of victims and perpetrators to work in furtherance of reconciliation and national unity. As expressed by the Sierra Leone Truth and Reconciliation Commission, reconciliation must be based on an understanding of the past 'which allows both victims and perpetrators to find the space to live side by side in a spirit of tolerance and respect'.²¹ This concept is also expressed in the mandate of the Truth and Reconciliation Commission of Canada, '[t]he truth of our common experiences will help set our spirits free and pave the way to reconciliation'.²²
43. Second, truth-telling offers an opportunity to uncover historical truths and interrogate the past. Periods of transition offer a unique opportunity to redraft social understandings of a country's history and rectify past narratives imposed by the state in furtherance of the interests of a powerful few or an intolerant majority. A member of the Chile Truth and Reconciliation Commission expressed the relationship between truth telling and reconciliation thus:

Society cannot simply block out a chapter of its history; it cannot deny the facts of its past, however differently these may be interpreted. Inevitably the void would be filled with lies or with conflicting, confusing versions of the past. A nation's unity depends on a shared identity, which in turn depends largely on a shared memory.²³
44. This is not to say that all Kenyans need to agree on a new historical account; rather, the Commission aims to generate constructive debate and discussion by bringing to light information and facts that were previously unknown or little known to Kenyans. Reconciliation, like history, is the result of a process of engagement with the past by the present in order to secure a more just and peaceful future.

Justice and reconciliation

45. There can be little doubt that effective and prompt justice will promote meaningful reconciliation. Justice initiatives have the potential to foster reconciliation. In particular, the following could promote reconciliation: providing adequate reparations to victims, whether individual or communal; acknowledging those who suffered wrongs and those individuals and institutions responsible; investigating and, where appropriate,

²¹ *Report of the Truth and Reconciliation Commission for Sierra Leone, volume one* (2004) 85.

²² Schedule N of the Indian Residential Schools Settlement Agreement, preamble.

²³ J Zalaquett 'Balancing Ethical Imperatives and Political constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43 *Hastings Law Journal* 1425, 1433.



prosecuting those responsible; reforming institutions to prevent future violations and to provide equal opportunity and support to all Kenyans, including those from historically marginalized communities.

46. The justice furthered by the Commission is restorative in focus and thus joins easily with efforts to further reconciliation. While restorative justice does not preclude retributive justice, it would be a mistake to focus on the retributive contributions or omissions of the Commission and its work in evaluating its contribution to reconciliation. For, while retributive justice can and has contributed to reconciliation, it may also undercut reconciliation.
47. In developing its recommendations for further investigations, prosecutions and other forms of retributive justice, the Commission was sensitive to the needs of reconciliation and national unity. There is no doubt that some will question the choices made by the Commission in this regard, arguing that some who have been recommended for prosecution should not have been so recommended, or that others should be enjoined together with those who have been recommended for prosecution. This does not mean however that there can be no meaningful reconciliation at the individual, community and national levels. There is much that can be done to foster reconciliation between individuals and groups. These important tasks should not simply be left in the hands of investigators, lawyers, prosecutors and technocrats. It is the responsibility of all Kenyans to pursue reconciliation.

Objectives and Functions of the Commission

48. The objectives and functions of the Commission were respectively spelt out in sections 5 and 6 of the TJR Act. Although these objectives and functions were outlined in two separate sections of the Act, the Commission proceeded with its work with the understanding that both sections essentially related to its mandate and there were no strict distinctions between its objectives, on the one hand and its functions, on the other.
49. Section 5 of the TJR Act provides that ‘the objectives of the Commission shall be to promote peace, justice, national unity, healing and reconciliation among the people of Kenya’. These objectives must be understood from a historical perspective, and particularly, in relation to both historical and immediate reasons leading to the formation of the Commission. Chapter one of this Report recounted that history, but it must be emphasised here that central to establishing the Commission was the stark and painful realisation that Kenya’s past and history could no longer be ignored or ‘swept under the carpet’. The past had to be confronted.
50. Thus, when the Truth, Justice and Reconciliation Bill, 2008 (TJR Bill) was introduced in Parliament for debate, the Minister for Justice stated in her ‘Memorandum of Objects and Reasons’ that:

[...] The Bill is borne of the realisation that lasting peace and co-existence cannot prevail in Kenya unless historical injustices and violation and abuse of human rights have been addressed.
51. The Minister further explained that:

The Bill emanates from the deliberations of the National Dialogue and Reconciliation Committee which was formed after a political crisis ensued following a dispute on the outcome of the Presidential Election held on 27th December, 2007. The political crisis brought to the surface deep-seated and long-standing divisions within the Kenyan society and to heal those divisions, a raft of constitutional, legal and political measures to defuse the crisis were proposed, among them being the formation of a Commission to deal with historical injustices and violation of human rights. The establishment of the Commission was conceived with a view to addressing historical problems and injustices which, if left unaddressed, threatened the very existence of Kenya as a modern society.
52. The fact that the past had to be confronted was eminently clear to the National Assembly when it sat to debate the TJR Bill. In seconding that the Bill be read a second time, a member of the KNDR team indicated that:

[...] the events of the last General Election taught this country a lot of painful lessons. It has given us a chance to reflect on our past. It has become absolutely necessary to bring our past to some closure so that we can move ahead as a country. The Truth, Justice and Reconciliation Commission is the avenue through which Kenyans from all walks of life, and with truth, justice and reconciliation being their mission, come together to express themselves in this exercise so that they can bring their past to a closure and open a new chapter for us to move ahead as a country. It became clear that among the things that informed the near destruction of our country in the last General Election were issues that have been pending for a long time. There were historical injustices and prejudices that were informed by past events, deeds and actions by individuals, organisations and governments. It is necessary for us to bring that to a closure so that Kenya can exit from these prejudices and perceived or real injustices that were meted to the people of Kenya, thereby causing the mistrust that exists between our citizenry. The Bible says 'if you know the truth, the truth will set you free'. It is important for us to get to know the truth so that, as a country, we become free. It is important for the things that have been said about people and communities be known. The truth about government bodies, individuals and public officers must be known. The truth must be known so that we can set our country free. It is said that injustice anywhere is a threat to justice everywhere. It is, therefore, important for us, as a country, to deal with injustices that have been meted upon citizens of our country, whether they are perceived or real so that again we can live in a just society.²⁴

53. In addition to stating the objectives of the Commission, section 5 also indicated 10 ways by which those objectives should be achieved. When these modes of achieving its objectives were read together with section 6 of the Act, the Commission found it necessary to conceptually cluster its functions into four broad categories, that is, functions relating to: creating a historical record; victims, perpetrators; and the report.

On a historical record

54. Although the TJR Act does not create a hierarchy in relation to the functions of the Commission, it is noteworthy that the first two ways in which it envisaged that the Commission would execute its objectives is through the compiling of a historical record. In this regard, section 5(a) mandated the Commission to establish an accurate, complete and historical record of gross violations of human rights committed in Kenya by various state actors between 12 December 1963 and 28 February 2008. Section 5(b) mandated the Commission to establish as complete a picture as possible of the causes, nature and extent of violations of human rights. In this regard, the catalogue of specific violations that the Commission investigated is provided and discussed in detail further below.

²⁴ Kenya National Assembly, Official Report, 24 July 2008, p. 2217.

On victims

55. Victims are at the heart of a truth-telling process and the operations of a truth commission. The process ought to give agency and recognition to victims. Ultimately, it should provide redress to victims. The process itself should be sensitive and humane.
56. According to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims, 'victims should be treated with humanity and respect for their dignity and human rights and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families'.²⁵ In this light and in keeping with international standards, sections 5 and 6 of the TJR Act mandated the Commission to carry out the following functions with respect to victims:
 - Identify and specify victims of violations;²⁶
 - Determine ways and means of redressing the suffering of victims;²⁷
 - Provide victims with a platform for non-retributive truth telling;²⁸
 - Provide victims with a forum to be heard and restore their dignity;²⁹



²⁵ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims, para 10.

²⁶ TJR Act, sec 6(c).

²⁷ TJR Act, sec 5(e).

²⁸ TJR Act, sec 5(g).

²⁹ TJR Act, sec 5(h).

- Investigate into the whereabouts of victims and restore their dignity;³⁰ and
- Recommend reparation measures in respect of victims.³¹

57. The Commissions faithfully performed these functions. On identifying and specifying victims of violations, the Commission has compiled and published in this Report a list of victims of various violations committed during its mandate period. The list contains the names of victims who submitted their cases to the Commission and as such, it is not a complete list of all people who suffered violations during the mandate period. In relation to determining ways and means of redressing the suffering of victims, this report contains a catalogue of recommendations aimed at repairing the harm suffered by victims. The Commission's measures intended to ensure that victims have a platform for non-retributive truth-telling are discussed in detail in the next chapter.
58. In a nutshell, the Commission held various forms of hearings which provided victims with the opportunity to narrate their stories and in the process restore their dignity and commence a healing process.

On perpetrators

59. While victims are at the heart of a truth-telling process, the involvement of alleged or actual perpetrators is equally important for optimum success of the process. Firstly, for a complete and accurate story of violations, the perspectives of both victims and perpetrators are a requisite. For this reason, section 5(a) of the TJR Act required the Commission to record the 'motives and perspectives of the persons responsible for commission of the violations'. Secondly, inter-personal reconciliation between a victim and a perpetrator is by necessity dependent on the participation of both parties. Of course, a victim may reconcile with his situation and even forgive the perpetrator without the two ever meeting, but the benefits of a healing and reconciliation process are maximised when both parties have a joint forum for constructive engagement.
60. For these reasons, the TJR Act mandated the Commission to provide perpetrators with a platform for non-retributive truth telling and a forum to confess their actions as a way of bringing reconciliation.³² However, knowing that a careful balance must be struck between reconciliation and justice, the drafters of the TJR Act also recommended that the Commission should determine perpetrators of violations and where appropriate recommend their prosecution.³³ The Act also mandated the

³⁰ TJR Act, sec 6(t).

³¹ TJR Act, sec 6(k) & 42.

³² TJR Act, sec 5(g) & (i).

³³ TJR Act, sec 5(c) & (d); sec 6(f) & k(ii).

Commission to facilitate the granting of conditional amnesty to perpetrators who make full disclosure of their involvement in violations. The Commission's approach in relation to this specific mandate relating to amnesty is discussed in detail later in this chapter.

61. In respect to determining perpetrators of violations, the Commission has published in this report names of individuals who were alleged to have committed gross violations of human rights during its mandate period. The Commission received allegations against 54,000 individuals. However, the list of alleged perpetrators contained in this report is only limited to those who were afforded an opportunity to respond to allegations levelled against them. Due to limited resources and time constraints, the Commission could not notify all alleged perpetrators of the nature of allegations raised against them. As such, the Commission had to prioritise its work in relation to sending out notifications to alleged perpetrators. The criteria used included looking at the gravity of the violations and the frequency of an individual's appearance in the Commission's database as a perpetrator.

the Commission held various forms of hearings which provided victims with the opportunity to narrate their stories and in the process restore their dignity and commence a healing process.

On the report

62. The functions of the Commission in relation to preparing this Report were outlined under sections 5(j) and 48(2) of the TJR Act. In essence, the law expressly required the Commission to do two main things in this report: document its findings and make recommendations flowing from those findings. The Act stipulated that the recommendations of the Commission should include the following:
- Recommendations for prosecution
 - Recommendations for reparation for victims
 - Recommendations on specific actions to be taken in furtherance of the Commission's findings
 - Recommendations on legal and administrative measures to be taken to address specific concerns identified by the Commission
 - Recommendations relating to the mechanism and framework for the implementation of its recommendations and an institutional arrangement.
63. Due to the numerous yet interrelated issues that it was called upon to document, the Commission grappled with how best to structure this Report. Several options were scrutinized and after lengthy discussions, the current structure was adopted.

Temporal Mandate

64. The Commission's temporal mandate was one of the least understood aspects of its mandate despite efforts by the Commission to educate the public on this subject. This situation arose because up until its formation, disagreements were still rife as to which period the Commission should cover in its inquiry. Before the Task Force on the Establishment of a TJRC, a considerable number of people were of the opinion that a Kenyan truth commission should have a temporal mandate dating back to 1895 when the boundaries of what is now Kenya were demarcated. In essence, there are those who wanted the envisaged commission to address violations and atrocities committed during the colonial period. The Task Force, while agreeing that the colonial period was marked by unspeakable atrocities, rejected the idea that a truth commission should inquire into issues dating as far back as 1895. The Task Force explained its position thus:

First, that period (1895-1963) is too remote in time, and the questions that it raises are too complex for a transitional justice instrument like a truth commission. Evidence would be scant; many of the perpetrators are long dead or are in the United Kingdom. Secondly, the answerable power is not Kenya, but the United Kingdom, and truth commissions are not generally established to investigate a remote, departed power. Finally, extending the truth commission to the colonial period would be an impossibly expensive, laboriously prohibitive, and practically unmanageable exercise. For these reasons, the Task Force rejects 1895 as an impracticable time-line, and instead recommends that the Kenya government sets up a less ambitious vehicle, such as a committee of eminent Kenyans to examine a limited set of issues relating to the colonial period.³⁴

65. For the colonial period, the Task Force recommended that 'a less ambitious vehicle, such as a committee of eminent Kenyans' be constituted for purposes of examining 'a limited set of issues relating to the colonial period'. For the truth commission, the Task Force recommended that its temporal mandate be limited to the independence period. It offered four reasons for this position:

The Task Force therefore is of the view that a truth commission ought to cover the period from 1963 to 2002, the post-colonial era and the period KANU ruled the country [...] the reasons for this choice, which the Task Force endorses, are rational, compelling, and unassailable. First, the period combines the first and the second regimes under KANU, and as such cannot be said to be selective or directed at any particular community. This is important because a truth commission cannot be legitimate if it appears to be an instrument to settle scores against a particular former regime, community or individuals. Secondly, the post-colonial period is very present, and not remote. Many of those who

³⁴ Government of Kenya *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission* (2003) 37 [Hereinafter Makau Mutua Report].

served in the independence government are still alive. Thirdly, it stands to reason that Kenyans ought to rightly audit their own state, not the colonial British state. Fourth, the human rights violations and gross economic crimes that the majority of Kenyans want investigated were committed over the last forty years. Lastly, the investigation span of the last forty years is financially feasible and defensible, practical, and could be carried out within a two-year period. It is for these reasons that the Task Force recommends that a truth commission cover the period from December 12, 1963 to December 31, 2002.³⁵

66. As described in the previous Chapter, the recommendations of the Task Force were never followed through. However, when the question of establishing a truth commission returned to the table under the KNDR process, the issue on the temporal mandate of the commission returned with it too. Perhaps, acknowledging that there were still some agitating for the colonial period to be the subject of inquiry, parties to the TJRC Agreement decided to limit the commission's mandate to the independence period but they also agreed to give it room to look into events prior to this period. According to the Agreement:

The Commission will inquire into such events which took place between December 12, 1963 and February 28, 2008. However, it will as necessary look at antecedents to this date in order to understand the nature, root causes, or context that led to such violations, violence or crimes.

67. In terms of the TJRC Agreement, the TJR Bill delineated the Commission temporal mandate to focus on the post-independence period, from 12 December 1963 when Kenya got its independence to 28 February 2008 when the National Accord was signed. But it also clearly indicated that the Commission would be empowered to look into the colonial period in as far as this period was relevant for understanding 'antecedents, circumstances and context' of violations committed after independence. When the Bill was introduced in Parliament, the Minister for Justice explained the proposed temporal mandate of the Commission in the following words:

Clause 5 gives the objectives of the Commission as to promote peace, justice and national unity, healing and reconciliation among the people of Kenya. The Commission will, therefore, be establishing an accurate, complete and historical record of violation and abuses of human rights and economic rights inflicted on Kenyans by the state, public institutions and holders of public office, both serving and retired, between 12th December, 1963 and 28th February, 2008.

These two dates are significant. 12th December 1963 is when we attained Independence while 28th February 2008 is the date when the National Accord was signed. So, we want to examine how we have dealt with each other as an independent state. However, Clause 5A (i) recognises that we may need to go beyond 12th December 1963 to the

³⁵ Makau Mutua Report (n 33 above) 37.

antecedents, circumstances and factors so as to contextualize such violations. If we need to go beyond 12th December 1963 to discover the genesis of the problem, the proposed Clause 5B does indicate that we can go as far back as possible in order to establish a complete picture of the causes, nature and extent of the gross violation of human and economic rights committed between the period I have stated and including antecedents and circumstances.³⁶

68. Despite the above clear explanation, some members of Parliament still proceeded to lament that the proposed temporal mandate was too limiting to the extent that the colonial period was not covered. The words of Njeru Githae, then an Assistant Minister of Local government, are instructive in this regard:

It is unfortunate that we have come up with the date of 12th December 1963 when Kenya attained Independence. If I would have been asked, I would have said we need to go backwards to when Kenya as a nation we know today, first existed. I would have gone back to 1895. This is the time that some of the so-called historical injustices started. I have talked of the year 1895 because before then, Kenya, whether a colony or a protectorate did not exist. This then would have given Kenyans an opportunity to go as far back as memory can remember. This would give the basis for the so-called historical injustices. Some of the so-called historical injustices are actually a result of colonialism.³⁷

69. After clarifications, those who harboured fears such as is quoted above came to understand that the envisaged commission could inquire into the colonial period. No changes were, therefore, made to the clauses in the TJR Bill relating to the temporal mandate of the Commission. Thus, in the TJR Act, the first part of the relevant sections mandates the Commission to investigate violations of human rights that occurred in Kenya between 12 December 1963 and 28 February 2008.³⁸ The second part mandates it to look into 'antecedents, circumstances, factors and context'.³⁹
70. Notwithstanding the clear authority, even obligation, in the Act to examine the pre-independence period for the root causes of the violations committed since independence, many Kenyans remained under the impression that the temporal mandate of the Commission strictly covered the period between 12 December 1963 and 28 February 2008. For instance, in a letter to the Chairman of the Parliamentary Committee on Administration of Justice and Legal Affairs, the Release Political Prisoners Trust sought the review of the TJR Act because they claimed, amongst other reasons, that:

³⁶ Kenya National Assembly, Official Report, 24 July 2008, p. 2111-2112.

³⁷ Kenya National Assembly, Official Report, 24 July 2008, p. 2119.

³⁸ TJR Act, sec 5(a) & (b).

³⁹ TJR Act, sec 5(a) (i) & (b) (i).

It ignores a crucial and critical part of the Kenyan history. It starts from 1963, yet some of the root causes of the issues that date back to the colonial era are not covered in the Act. Kenyans need to know why the period before independence is being left out of the TJRC and why some Kenyans have been left out of the process, yet they have the living testimonies and memories of the history and real life experiences; not allegations. To us, the scope on the search for justice through TJRC should cover the history of our country as a whole.

71. The Kenya National Liberation War Veterans Association expressed similar sentiments. In a submission to the Commission, the association lamented that:

The TJRC Act of 2008 excludes the colonial period. Hence our members ranging from 3,500 are being left out in the truth-telling process of our country; being left out of this process leads to suffocation of Kenyan history and what haunt[s] us as a nation up to date.

72. Indeed, similar concerns became one of the grounds of a suit seeking the dissolution of the Commission. As discussed in detail in Chapter Four of this Volume, the applicants in the case of *Augustine Njeru Kathangu & 9 Others v TJRC and Bethuel Kiplagat*⁴⁰ challenged the statutory mandate of the Commission, arguing that the TJR Act was defective and unconstitutional to the extent that it excluded the periods before 12 December 1963 and after 28 February 2008 from the Commission's temporal mandate. The court dismissed the contention on a technical ground, though in doing so it incorrectly accepted the underlying assertion that the Commission was precluded from looking at events before or after the prescribed temporal mandate:

We note that the *ex parte* applicants are concerned with human rights violations which occurred prior to 12th December 1963 and after 28th February 2008, which are not covered under the TJRC Act. It is arguable as to whether the legislature was right in excluding those violations. This issue and other equally pertinent issues which have been raised can only be determined in a properly pleaded case, preferably in a constitutional reference.

73. In addition to raising concerns about the perceived legal inability for the Commission to inquire into events that occurred during the colonial period, some people went further to assert that the Commission's mandate should have been extrapolated to cover the period after 28 February 2008. For instance, in its letter already alluded to above, the Release Political Prisoners Trust argued that:

The [TJR] Act also ignores the period after February 2008, when other human rights violations took place, especially the killing of human rights defenders GPO and Oscar

⁴⁰ High Court (Nairobi) Misc App. 470 of 2009 (unreported).

King'ara of Oscar Foundation on March 5 2009 and the recent Mathira killings among other happenings that leave questionable marks on their intentions and purposes, alienating sections of Kenyans who keep on crying for justice.

74. This was an erroneous assumption. But first, it must be emphasised that being a temporary body, a truth commission must have a time-bound mandate. Its focus should be on past violations, as has been the case with all truth commissions across the world. The role of investigating 'new' and 'current' violations traditionally rests with permanent bodies such as the police department or national human rights institutions. Occasionally, commissions of inquiry are constituted to investigate particular current events or violations.
75. With these caveats in mind, the Commission nevertheless proceeded with its work with the understanding that it could, in certain circumstances, inquire into events that occurred after 28 February 2008. Firstly, borrowing *mutatis mutandis* from the 'continuing violations' doctrine developed by human rights treaty bodies, the Commission could extrapolate its mandate beyond 28 February 2008 if a violation under its inquiry was a continuing violation. That is, the violation commenced during the mandate period but continued after that period. For example, some of the people displaced during the 2007-2008 Post-Election Violence remain in camps and have not been compensated for their losses. As such, the Commission required all individuals filling out a Statement Form to indicate whether the violation they were recording was a continuing violation.⁴¹
76. Secondly, the Commission was expressly mandated to 'investigate any other matter that it considers requires investigations in order to promote and achieve national reconciliation'.⁴² Therefore, notwithstanding that a violation or event occurred after its formal mandate, the Commission could investigate it, provided that such an investigation was necessary for the promotion and achievement of national reconciliation. Moreover, from a pragmatic point of view, it was important for the Commission to constantly take into account current developments which could impact on its work.
77. Despite the many concerns raised about its temporal mandate, when the Commission undertook its civic education campaigns and explained its mandate, many came to understand that the temporal mandate of the Commission was flexible and that its inquiry was a contextual one that required all events to be taken into account including those that had occurred prior to and after its formal mandate period.

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of violations
committed
after
independence.*

⁴¹ See Appendix 4 for the Statement Form.

⁴² TJR Act, sec 6(j).

Subject Matter Mandate

78. Unlike most previous truth commissions, whose mandate focused on human rights violations during a particular event (such as an armed conflict), the Commission's mandate covered a 45-year period of relative peace, albeit with occasional eruptions of violence that were often limited to specific geographical areas or to political transitions. In other words, the country as a whole has never experienced an intense and long period of violence. However, the entire mandate period was characterized by various forms of state violence and episodes of systematic and widespread violations of human rights. The mandate period was also characterised by state plunder, corruption and impunity.
79. Against this background, it was important that the subject matter mandate of the Commission be clearly spelt out. The question of what this Commission would investigate was first dealt with by the Makau Mutua Task Force. According to the Task Force, unlike the question relating to the temporal mandate, there was substantively huge consensus among Kenyans on what violations and issues should be the subject of a truth commission's inquiry:

One of the least contested questions in the quest for a truth commission for Kenya relates to its terms of reference or the matters that it must address, that is, the types of violations that it must investigate. Although different communities, groups, and individuals around the country expressed particular preferences to the Task Force, there is no doubt about the functions that Kenyans want a truth commission to perform. Kenyans want a truth commission to perform four inter-related functions. These are establishing the truth about past atrocities by identifying the perpetrators and the reasons behind their actions; recognising victims and providing justice or some form of redress for the harm and suffering inflicted on them by the previous governments; auditing the state and suggesting corrective measures to avoid a recurrence of abuses; and creating an enabling environment for national reconciliation and healing.⁴³

80. The Task Force proceeded to observe that:

But Kenyans are clear that these functions cannot be successfully performed unless established categories of human rights violations and economic crimes are fully investigated and addressed. While it is true that many horrible and unimaginable violations have been perpetrated by the state over the last forty years, the Task Force believes that a truth commission cannot investigate every human rights violation. The Task Force therefore recommends that a truth commission address certain categories of violations. The violations that ought to form the terms of reference of a truth commission must be those that indicate a systemic pattern or state policies, actions that

⁴³ Makau Mutua Report (n 33 above) 29-30.

were carried out as policies of the state to abrogate the rights of Kenyans. Thus a truth commission must have the discretion to decide which violations qualify for scrutiny. In any case, it is practically impossible for a truth commission to address more than several thousand cases. That is why the Task Force has identified individual cases and groups of violations that it believes ought to be the subject of inquiry. The Task Force has made this choice consistent with the views of Kenyans and with due regard to the purposes of an effective, timely, and the least burdensome truth commission. The Task Force recommends that a truth commission investigates six categories of human rights violations and economic crimes.

81. For these reasons the Task Force recommended that a Kenyan truth commission should limit its focus on the following six violations and/or issues:⁴⁴

- Political assassinations and killings
- Massacres and possible genocides
- Political violence and killings of democracy advocates
- Torture, detention, exile, disappearances, rape, and persecution of opponents
- Politically instigated ethnic clashes
- Violations of economic, social and cultural rights

82. During the KNDR negotiations, this list was expanded to include numerous other issues and particularly, a category of issues falling under the rubric of historical injustices. In this regard, the TJRC Agreement states:

The Commission will inquire into human rights violations, including those committed by the state, groups, or individuals. This includes but is not limited to politically motivated violence, assassinations, community displacements, settlements and evictions. The Commission will also inquire into major economic crimes, in particular grand corruption, historical land injustices, and the illegal and irregular acquisition of land, especially as these relate to conflict or violence. Other historical injustices shall be investigated.

83. The TJR Act was enacted with the recommendations of the Makau Mutua Task Force and the provisions of the TJRC Agreement in mind. However, sections 5 and 6 of the Act, under which the mandate of the Commission is spelt out, is at best ambiguous and confusing. For instance, it makes several incongruent references to the nature of rights to be investigated: 'violations and abuses of human rights and economic rights'; 'gross violations of human rights and economic rights'; and 'gross human rights violations and violations of international human rights law and abuses'. In essence, it is not clear whether the drafters intended that the Commission focus on

⁴⁴ Makau Mutua Report (n 33 above) 30-33.

'ordinary' violations of human rights or on gross violations of human rights. Similarly, multiple sections of the Act offer different prescriptions on the same topics. For instance, on the subject of sexual violations, section 5(c) refers to 'sexual violations' but section 6(h) refers to 'crime of a sexual nature against female victims'. Moreover, while some key terms within the Commission's mandate are defined, some are not (such as 'economic crime'). In addition, some definitions offered in the Act create uncertainty and ambiguity concerning the intention of the drafters.

84. Faced with these uncertainties and mindful of the high expectations many placed on the Commission's work, the Commission adopted a liberal approach to interpreting its mandate. After a careful analysis of the provisions of the TJR Act, it categorised its subject matter mandate into three broad areas: gross violations of human rights; historical injustices; and other mandate areas.
85. Before these mandate areas are discussed in detail, it is important to dispense with two preliminary issues. Firstly, the TJR Act appears to create a distinction between 'human rights violations' (presumably under national law) and 'violations of international human rights law'. The Commission considered this distinction to be inconsequential. It is assumed and rightly so, that in referring to both 'human rights violations' and 'violations of international human rights law', the lawmaker wanted to be exhaustive and not to miss anything. However, the lawmaker was clearly mistaken as to the possible difference in violations of human rights under national and international law. What differs – and this was irrelevant to the work of the Commission – is the forum at which victims may seek recourse. Sometimes the remedies available and the protections afforded may be more extensive under international law than at national law.
86. Given that Kenya was already a party to the main international human rights instruments for a good number of years during the mandate period,⁴⁵ the Commission looked seamlessly at both national law (Constitution and Statute) and relevant international law in determining which rights were violated during the mandate period. In any case, the Act sourced definitions of various concepts from international law.
87. Secondly, the Act appears to make a distinction between civil and political rights, on the one hand and socio-economic rights, on the other. This is apparent from section 5(a) and (b) which refer to 'violations and abuses of human rights and economic rights' and 'gross violations of human rights and economic rights'

⁴⁵ International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (CESCR); African Charter on Human and Peoples' Rights; etc.

respectively. The use of the disjunctive 'and' may appear to suggest that there is a difference between 'human rights', on the one hand, and 'economic rights', on the other. Again, this distinction is inconsequential. It is now established in human rights law and practice that all human rights are indivisible, interdependent and interrelated.⁴⁶ As such, the traditional dichotomy drawn between civil and political rights and socio-economic rights has since been rejected.⁴⁷

88. Apart from the conceptual linkages between civil and political rights and socio-economic rights, historical patterns of human rights violations in Kenya shows that violations of these two categories of rights work hand in hand. This was a point that the Makau Mutua Task Force considered when it recommended that a Kenyan truth commission should inquire into violations of both civil and political rights and socio-economic rights. According to the Task Force:

It is a well-established fact in human rights law that all human rights – including economic, social and cultural rights – are indivisible, inter-dependent, and inter-related. Thus human rights law does not only refer to civil and political rights. The Republic of Kenya has an internationally binding obligation to protect all human rights, that is, civil and political rights, and economic, social and cultural rights, because it is a signatory to both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. That is why a truth commission should investigate the violations of civil and political rights as well as those of economic, social and cultural rights.⁴⁸

89. Indeed, several chapters of this Report demonstrate the inherent linkages between civil and political rights and socio-economic rights.
90. The sub-sections that follow now focus on the three broad areas of the Commission's subject matter mandate.

Gross violations of human rights

91. Although, as indicated above, it is not evidently clear whether the intention of Parliament was for the Commission to focus on 'ordinary violations' or 'gross violations of human rights', the Commission made a decision to focus on the latter. After a careful scrutiny of the TJR Act, the Commission concluded that there was a strong textual indication all over the Act to suggest that Parliament intended gross violations of human rights should be the focus of the Commission's inquiry. In

⁴⁶ Vienna Declaration and Programme of Action, para 5.

⁴⁷ See J Biegon 'The inclusion of socio-economic rights in the 2010 Constitution of Kenya' in J Biegon & G Musila (eds) *Judicial enforcement of socio-economic rights under the new Constitution: Challenges and opportunities for Kenya* (2011) 13.

⁴⁸ Makau Mutua Report (n 33 above) 33.

section 5 and 6, the Act refers to ‘gross violations of human rights’ or ‘gross human rights violations’ seven times.

92. There are at least two additional reasons why the Commission believes its focus on gross violations of human rights is accurate and valid. First, comparative experience shows that gross violations of human rights have been the focus of inquiries by truth commissions elsewhere.⁴⁹ Despite contextual differences between Kenya’s and other countries, there was no need for the Commission to reinvent the wheel on this specific issue. The second reason was a matter of policy and practical considerations. The Commission could not, even if it chose to do so, inquire into all human rights violations, however petty, within a 45-year period. It was not practical, in view of time and resource constraints.
93. Having made the decision that it would focus on gross violations of human rights, the Commission had to then define what this entailed. Of course, the starting point was the TJR Act which defines ‘gross human rights violations’ to include the following:
 - (a) violations of fundamental human rights, including but not limited to acts of torture, killing, abduction and severe ill-treatment of any person;
 - (b) imprisonment or other severe deprivation of physical property;
 - (c) rape or any other form of sexual violence;
 - (d) enforced disappearance of persons;
 - (e) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender or other grounds universally recognised as impermissible under international law;
 - (f) any attempt, conspiracy, incitement, instigation, command, procurement to commit an act referred to in paragraph (a) and (c), which was committed during the period between 12 December 1963 and 28 February 2008 and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive; or
 - (g) crimes against humanity.
94. In terms of this definition, the Commission prioritised the following categories of violations in its work and has dedicated a chapter to each in this report:

⁴⁹ See for instance South African TRC; Sierra Leone TRC; and Liberian TRC.

- Unlawful killings and enforced disappearances (including political assassinations, extra-judicial killings and massacres);
 - Unlawful detention, torture and ill-treatment; and
 - Sexual violence.
95. Further, owing to its wide temporal mandate and for pragmatic reasons, the Commission had to be selective of the events it would concentrate on in terms of research and investigations. In this regard, the Commission prioritised violations committed in the following contexts:
- Shifta War (1965-1967);
 - Security operations in North Eastern, Upper Eastern and North Rift (1963-2008);
 - Attempted coup (1982);
 - Crackdown on multi-party and pro-democracy activists (1986-1991);
 - Ethnic and politically instigated clashes (1991/1992 and 1997);
 - Activities of and crackdown on militia groups (2006-2007); and
 - Post-election violence (2007-2008).
96. While in its research and investigations the Commission prioritised violations committed in the above contexts, it has captured and narrated in this Report many more violations that were committed in contexts beyond those listed above.
97. The three categories of violations listed above relate to violations of bodily integrity or more generally of civil and political rights. In addition to these and in accordance with the TJR Act, the Commission also focused on violations of socio-economic rights. This report has considered the subject in three different ways.
98. Firstly, the Commission considered the socio-economic impact of violations that targeted individual's bodily integrity or their civil and political rights. As indicated earlier, violations of civil and political rights always go hand in hand with violations of socio-economic rights.
99. One of the findings of the Commission in this regard, for instance, is that most security operations in the country in which killings, torture and sexual crimes were committed, were also characterized by the burning of houses, theft or killing of cattle, looting of property and destruction of crops. The impact of these violations was particularly borne by the most vulnerable in society such as women, children, persons with disabilities and the elderly.

100. Secondly, the Commission considered socio-economic rights within its mandate to inquire into and establish the reality or otherwise of perceived economic marginalisation of communities. In this respect, the Commission considered violations of socio-economic rights as independent violations.
101. Finally, the Commission considered socio-economic violations within its mandate to investigate economic crimes and grand corruption. As the Makau Mutua Task Force report noted, 'economic crimes lead to the violations of the entire gamut of human rights and in particular of economic, social and cultural rights.'⁵⁰

Historical injustices

102. Although the term 'historical injustices' is not used in the TJR Act, the notion of 'historical injustices' pervades the debate on transitional justice in Kenya and has since become a rallying cry for those seeking justice for past violations. There is nevertheless ample proof that it was intended that the Commission would inquire into what are regarded as 'historical injustices'.
103. This was clearly spelt out in the TJRC Agreement and the Memorandum of Objects and Reasons attached to the TJR Bill. As already quoted above, the latter document stated that:

The establishment of the Commission was conceived with a view to addressing historical problems and injustices which, if left unaddressed, threatened the very existence of Kenya as a modern society.
104. However, 'historical injustices' is not a term of art. It entered Kenyan lexicon in the context of activism and agitation for constitutional reform and establishment of transitional justice mechanisms aimed at addressing past human rights violations. In public discourse, the term refers to at least two things: Firstly, it refers to exclusion and marginalisation (in terms of economic development) of certain groups or regions and a range of violations supportive of this phenomenon.
105. Secondly, it refers to dispossession and inequalities in the allocation of land in a variety of ways by successive governments (or those associated with them) in pre-independence and post-independence Kenya. For instance, during the parliamentary debate that preceded the enactment of the TJR Act, a member of Parliament observed that:

⁵⁰ Makau Mutua Report (n 33 above) 33.

One of the functions of this Commission is to find the so-called historical injustices. I am one of the people who have been unable to understand what this so-called historical injustice is. I am saying this because it is more related to land, and more particularly, land in the Rift Valley.⁵¹

106. In other words, the term historical injustice has been used to describe issues of marginalisation and dispossession that resulted in disparities of income, wealth and opportunity that lie at the heart of many of the current conflicts in Kenya. In its report, the Commission of Inquiry into Post Election Violence, for instance, makes reference to 'historical marginalisation, arising from perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services' as one of the main causes of inter-ethnic tensions and conflict.⁵²
107. Thus, although the TJR Act does not expressly refer to historical injustices, it mandates the Commission to inquire into issues that fall under this term. First, section 6(p) mandates the Commission to 'inquire into and establish the reality or otherwise of perceived economic marginalisation of communities and make recommendations on how to address the marginalisation'. Second, section 6(o) mandates the Commission to 'inquire into the irregular and illegal acquisition of public land and make recommendations on the repossession of such land or the determination of cases relating thereto'.

Other mandate areas

108. In addition to gross violations of human rights and historical injustices, the Commission was mandated to investigate and/or carry out the following three functions:
 - consider the reports of the relevant commissions of inquiry and make recommendations on the implementation of such reports;
 - inquire into the misuse of public institutions for political objectives; and
 - inquire into the causes of ethnic tensions and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities.

⁵¹ Kenya National Assembly, Official Report, 24 July 2008, p. 2120.

⁵² Government of Kenya *Report of the Commission of Inquiry into Post Election Violence* (2008) 23.

Breadth and Complexity of Mandate

109. As can be gleaned from the foregoing discussion, the Commission's mandate was both materially vast and complex. Truth commissions are ordinarily mandated to focus only on gross violations of human rights. In addition to being mandated to investigate gross violations of human rights, the Commission was also mandated to investigate historical injustices and other issues that are rarely the focus of a truth commission. The enormity of the task handed to the Commission is well illustrated by the testimony of a witness who, speaking of only a single event, the Wagalla Massacre, observed that:

If all the water is turned into ink with which to write, all the trees are turned into pens with which to write, and all the land is turned into paper on which to write, the history of Wagalla cannot be covered.⁵³

110. The breadth and complexity of its mandate, as measured against its resources and life span, imposed on the Commission intense pressure. It also partly contributed to the Commission's inability to present its Report as it had been initially scheduled.

Responsibility for Violations and Injustices

111. The question of responsibility for violations and injustices committed during the Commission's mandate period was dealt with under section 5(a) and 6(b) of the TJR Act. Section 5(a) restricted responsibility to the state, its organs and agents or former agents. It required the Commission to establish a record of violations committed by 'the state, public institutions and holders of public office, both serving and retired'. Thus, in ascribing responsibility to the state, the Commission adopted an approach that was informed by the express language of the TJR Act and by international legal principles concerning state responsibility. In particular, the Commission considered that an act or omission of the following entities was attributable to the state:

- state organs;
- a person or entity who acts under the legal authority of the state to perform governmental functions (and it does not matter whether the organ or entity exercising governmental authority exceeds its authority or contravenes instructions);
- a person or group of persons acting on the instructions of, or under the direction or control of, the state in carrying out the conduct; and

⁵³ TJRC/Hansard/Public hearing/Wajir/18 April 2011/ p. 20.

- private entities, the activity of which is acknowledged and adopted as its own by the state.⁵⁴

112. Section 6(b), on the other hand, expanded the list of those who could be held responsible for violations and injustices beyond the state. In addition to public institutions, public office holders, the state, state actors and persons purporting to have acted on behalf of a public body, it also lists the following: individuals, bodies and organisations. The Commission interpreted the reference to individuals, bodies and organisations to include persons other than state agents or persons purporting to act under the authority of the state.
113. As such, while the Commission primarily focused on violations perpetrated by the state and its agents, in certain respects it considered the actions of non-state actors, especially militia groups such as Mungiki, Chinkororo and the Sabaot Land Defence Force (SLDF). The Commission's inclusion of non-state actors in its definition of perpetrators was fortified by the fact that this inclusion was necessary for the establishment of an accurate, complete and historical record of historical injustices and gross violations of human rights.

Amnesty

114. One of the most controversial provisions in the TJR Act concerns the Commission's powers with respect to amnesty. Amnesties have been a much used, if controversial, mechanism in most transitions. While historically amnesties have been used and upheld even when they have applied to international crimes and other gross violations of human rights, there is now an established principle that amnesties for international crimes are prohibited under international law.
115. The TJR Bill included provisions granting the Commission power to recommend amnesty for a broad range of violations. Those powers were changed, in part, because of the successful lobbying of both domestic and international human rights organisations, who argued that international law prohibits the granting of amnesty for international crimes.
116. Thus, the first version of the TJR Act significantly restricted the range of violations for which amnesty could be granted. In particular, it provided that amnesty could not be granted for 'gross violation[s] of human rights or an act, omission or offence

⁵⁴ Articles on State Responsibility adopted by the International Law Commission in 2001, arts 4-12. For reference, see Yearbook of the International Law Commission, 2001, vol. II, Part Two.

constituting a gross violation of human right[s] including extra-judicial execution, enforced disappearance, sexual assault, rape and torture'. It also clearly indicated that the Commission had powers to recommend but not to grant amnesty. However, the Act still had several shortcomings in respect of the Commission's amnesty powers.

117. For example, the explanatory note in the margins of Part III of the Act relating to amnesty stated 'No amnesty for crimes against humanity'. This suggested that amnesty could be granted for other international crimes, such as war crimes, genocide, or torture. It also stated that the Commission could recommend amnesty for a violation of 'any international treaty to which Kenya is a party'.
118. As such, there were some who feared that the specific reference to crimes against humanity but not to genocide or war crimes might have suggested that the Commission could recommend amnesty for genocide or war crimes.⁵⁵ While the Commission concedes that the language as originally drafted was somewhat confusing with respect to its powers to recommend amnesty for genocide and war crimes, the clear provision prohibiting it from recommending amnesty for gross violations of human rights would clearly have prevented the Commission from recommending amnesty for most acts that would qualify as either genocide or a war crime.⁵⁶
119. In 2009, the TJR Act was amended to, amongst other reasons, make its amnesty provisions conform to internationally accepted norms. The marginal note that had read 'No amnesty for crimes against humanity' was amended to read 'No amnesty for international law crimes'. Moreover, the reference in section 34(2) recommending amnesty for an act that violates 'any international treaty to which Kenya is a party' was removed. Finally, the Act was amended to make it clear that amnesty could not be granted for crimes against humanity or genocide.
120. While the amendments made it clear that genocide, crimes against humanity and most likely other international law crimes could not be the subject of an amnesty recommendation, the Commission was still left to determine the acts, if any, for which it had the power to recommend amnesty. The Act made it clear that the Commission could not recommend amnesty for gross violations of human rights.

⁵⁵ This fear was buttressed by the fact that the reference to no amnesty for crimes against humanity was only found in a marginal note, and was not (until the 2009 Amendments) provided for in the text of the Act itself.

⁵⁶ It is possible to argue that some minor acts that do not include violence against persons but might still qualify as genocide or a war crime would not constitute a gross violation of human rights of the nature provided in the Act (which lists violations of bodily integrity rights such as extrajudicial execution, enforced disappearance, sexual assault, rape, or torture). Thus some might argue that cruel inhuman or degrading treatment that does not rise to the level of torture but is part of an armed conflict or committed as part of a broader campaign of genocide might not fit within the prohibited acts for which the Commission could not recommend amnesty. Given the 2009 amendments to the Act, the Commission did not have to address whether such acts would or would not qualify as a gross violation of human rights.

121. While the amnesty provisions only made reference to acts of violence (extra-judicial execution, enforced disappearance, sexual assault, rape and torture), the Act defined gross human rights violations more broadly than this to include 'violations of fundamental human rights'.⁵⁷
122. Given these restrictions on its powers, the Commission undertook a number of consultations with various stakeholders to better understand the limitations on its amnesty powers and to discuss the opportunities, if any, its amnesty powers provided with respect to furthering its mandate with respect to truth, justice and reconciliation.
123. After internal deliberation and consultations with stakeholders, the Commission decided to forego exercising the powers granted to it to recommend amnesty. There are several reasons for this. First, given the broad definition of gross violations of human rights in the Act, the type of acts for which the Commission could recommend amnesty is very limited. The Commission generally adopted an expansive view of what qualified as a gross violation of human rights in order to provide a forum to as many witnesses as possible.
124. Second, given the limited acts for which amnesty could be recommended and the fact that it could only recommend and not grant amnesty, the Commission did not anticipate that much additional truth would come out of the amnesty process. The amnesty administered by the South African Truth and Reconciliation Commission (which was clearly the primary model for the amnesty provisions provided in the Act), was able to grant amnesty itself and was not clearly prohibited from considering amnesty for gross violations of human rights and even international crimes. The South African Commission did grant amnesty for, among other things, acts of torture, enforced disappearances, extra-judicial killings and other acts that are clearly outside of this Commission's power to recommend amnesty. While some have criticised the South African amnesty for foregoing justice for such crimes, others argue that new information was revealed about some of the worst violations committed during the apartheid years.
125. Regardless of whether one views the South African amnesty as having been a success in contributing to the truth of apartheid-era violations, there is no question that the limited amnesty powers provided in the TJR Act would not have provided a similar opportunity to the Commission.

⁵⁷ TJRC Act, sec 2. While the definitions section refers to 'gross human rights violations' and the amnesty section to 'gross violation of human rights' we do not think that the drafters intended to be referring to two different concepts, but instead use the two phrases interchangeably to refer to the same violations.

Other Relevant Aspects of the Commission's Mandate

Application of the Indemnity Act

126. In 1972 the Kenyan Parliament passed the Indemnity Act,⁵⁸ which restricts the ability of individuals to make claims arising from acts committed by the Kenya armed forces and others acting on behalf of the government for any act they committed during the so-called Shifta War (25 December 1963 – 1 December 1967). The restriction on, among other things, any proceeding or claim to compensation is itself restricted to acts committed only in a part of Kenya: the former North Eastern Province and Lamu, Tana River, Marsabit and Isiolo districts.
127. The Indemnity Act thus purports to institutionalise impunity for human rights violations committed by those acting on behalf of the government during a prescribed time and in a prescribed area. In other words, it attempts to create a separate legal regime with respect to accountability for the Shifta War.
128. To qualify for legal protection under the Indemnity Act, an individual's action must have been done in good faith and 'done or purported to be done in the execution of duty in the interests of public safety or the maintenance of public order, otherwise in the public interest'.⁵⁹
129. Since the passage of the Indemnity Act many have argued for its repeal, including and not surprisingly, residents of the affected areas. Parliament voted to repeal the Indemnity Act in 2010. The President however refused to assent to the repeal and thus the Indemnity Act continues to be part of the laws of Kenya.
130. From its inception, concerns were raised about the impact of the Indemnity Act on the Commission's work. Some were concerned that the Indemnity Act prevented the Commission from investigating, researching, discussing, or commenting on violations that occurred in the areas and during the times covered by the Act. Others argued that the Commission should devote some of its operational resources to pushing for repeal of the Indemnity Act. Still others refused to engage with the Commission unless and until the Act was repealed.
131. Speaking of the Indemnity Act before the Commission, a witness lamented:

What a gross violation of human rights and absolute abuse of democracy that has been legitimized under the law! It was this period between 25th December 1963 to 1st December 1967 that gross human rights violations and atrocities were meted out on the residents of Northern Kenya. It is something so strange that section 3(b) says 'if it is done

⁵⁸ Chapter 44, Laws of Kenya.

⁵⁹ Indemnity Act, sec 3(1) (a)-(b).

in good faith'. I wonder whether the killing of our people, raping of our wives, killing our animals were done in good faith.⁶⁰

132. Another witness expressed similar sentiments:

I do not want to go into the details of the Act, but it puzzles me ... I am yet to understand whether human rights can be grossly and systematically violated and abused in good faith and whether such violations and abuses further any known public interest.⁶¹

133. In interpreting the scope of its mandate, the Commission obviously had to address the applicability and effect of the Indemnity Act on its activities. After thoroughly considering the issue, the Commission concluded that the Indemnity Act did not apply to the work of the Commission and thus could not restrict in any way the work of the Commission. There are two arguments that support the Commission's conclusion.

134. First, the Indemnity Act makes it clear that its restrictions with respect to accountability do not apply to 'the institution or prosecution of proceedings on behalf of the government'.⁶² This section makes clear that the focus of the legislation is on restricting the right of private individuals to bring a claim for compensation or other form of accountability.

135. The Commission is an independent government commission that was created by and works on behalf of the government. As such the Commission clearly is engaged in 'proceedings on behalf of the government' and thus its operations are excluded from the provisions of the Indemnity Act.

136. Second, even if one were to argue that the Indemnity Act by its terms applies to and thus restricts the powers of the Commission, the passage of the TRJ Act, which, under this argument, conflicts with the provisions of the Indemnity Act, would prevail as it was passed after the Indemnity Act. It is a fundamental principle of the rule of law that if two pieces of legislation conflict, the one passed later in time applies unless the later legislation makes clear that it is subject to the previous legislation.

137. In this case, Parliament passed the TJR Act in 2008 and decided not to make the Commission subject to the Indemnity Act. This argument is strengthened by the fact that Parliament did expressly indicate that the Commission is subject to other pieces of legislation that conflict with the TJR Act, such as the Protected Areas Act.⁶³

⁶⁰ TJRC/Hansard//Public Hearing/ Marsabit/4 May 2011/ p.

⁶¹ TJRC/Hansard/Public Hearing/Marsabit/4 May 2011/p. 8.

⁶² Indemnity Act, sec 4(a).

⁶³ The Protected Areas Act, which governs access to certain sensitive government buildings and facilities, conflicts with the general power granted to the Commission to 'visit any establishment or place without giving prior notice'. TJR Act sec 7(2) (b). Parliament made clear that notwithstanding the power to visit any establishment without prior notice, the Commission was still bound by the provisions of the Protected Areas Act. TJR Act sec 7(4).

Choice of terminologies

138. Truth Commissions have grappled with how best to refer to individuals who were affected by or are responsible for gross violations of human rights. The Commission, like other truth commissions around the world, had a strong victim focus. The TJR Act directed the Commission to elicit the views and perspectives of victims, restore their dignity and determine ways and means of providing them with redress. The term 'victim' is also defined in the Act essentially as any person or group who has suffered any harm, loss or damage as a result of a human rights violation.⁶⁴
139. However, while the TJR Act refers to perpetrators, it does not define the term. It is clear, however, that the term perpetrator refers to an individual who bears some responsibility for a gross violation of human rights or other violation within the mandate of the Commission. Both terms (victim and perpetrator) thus presuppose a determination that, in the case of victims, an individual has suffered harm, loss or damage as a result of a violation, or in the case of perpetrators, are responsible for a violation. In other words, both require that a determination be made with respect to the existence of a violation and either harm or responsibility arising from that violation.
140. So as not to prejudge the existence of a violation, harm, or responsibility and to better fulfil its obligations to provide 'victims, perpetrators and the general public with a platform for non-retributive truth-telling',⁶⁵ to promote reconciliation and national unity and to respect the dignity and value of all Kenyans, the Commission decided to refer to all individuals who engaged with the Commission as witnesses, rather than as victims or perpetrators. With respect to those who others named as being perpetrators of a particular violation, the Commission adopted the term 'adversely mentioned person' again so as not to prejudge whether an individual indeed qualified as a perpetrator with respect to a specific violation.
141. Depending on the evidence collected by the Commission with respect to a particular violation, an adversely mentioned person may be identified in this report as being responsible for a particular violation (and thus correctly identified as a perpetrator of that violation), or as an individual who some have accused, but for whom there is insufficient evidence for the Commission to assert with confidence their responsibility, or as an individual for whom the evidence suggests has no responsibility for a particular violation.

⁶⁴ TJR Act, sec 2.

⁶⁵ TJR Act, sec 5(g).

142. In addition, many individuals qualify as both victims and perpetrators. In fact for some perpetrators it is their experience as victims which push them to become perpetrators, sometimes in the name of vindicating either real or perceived violations suffered by themselves, their families, or their community. Much of the violations involving ethnic tension and ethnic violence may be better understood by acknowledging the dual experiences of individuals and communities as having attributes of both victims and perpetrators. As such, The Commission deemed it inappropriate to refer to a person as a victim or perpetrator as such a designation only reflects one part of that individual's experience.

143. The manner in which individuals engaged with the Commission underscored the problematic nature of referring to individuals as victims or perpetrators. While the Commission referred to individuals who engaged with the Commission as witnesses, individuals self-identified themselves and others using terms like victims, survivors and perpetrators. Some who qualified as victims under the Act referred to themselves as survivors, choosing to adopt a term that emphasized their present and future survival rather than their past victimization. For instance, David Onyango Oloo expressed the views of many who suffered from violations of the past:

What a waste of time the Moi KANU regime went through, plucking university students from their classrooms and homes and dumping them in filthy dungeons. It did not stop anything. Did it? We are still here. Are we not? We survived. Did we not? Yes, we are survivors and not victims. We are victorious overcomers and not carcasses of state oppression. They tried to bury us alive but we defiantly emerged from the graves called maximum security penitentiaries. We are still here standing up and fighting for peace, justice and democracy. You can lock people up but no oppressor has yet found a way of imprisoning patriotic, democratic and revolutionary ideas.⁶⁶

144. Another witness, Wahinya Bore, echoed this position:

We are not victims but people who are simply victorious. We are not carcasses of state oppression or repression. We are people who are strong. Let it not be seen as if victims are begging for mercy or to be heard. No! We want the world to know that something happened somewhere in Kenya. The issue here is that there is a constituency of some people in this particular country who fought for the liberation of this particular country, but they have never been recognised.⁶⁷

145. Regardless of how they chose to describe themselves, this Report is a tribute to the thousands of individuals who suffered the various forms of violations and injustices recorded here and in the Commission's database.

⁶⁶ TJRC/Hansard/Thematic Hearing on Torture/Nairobi/28 Feb 2012/p. 47.

⁶⁷ TJRC/Thematic Hearing on Torture/Nairobi/28 Feb 2012/p. 53.



Methodology and Process

Introduction

1. The Commission adopted procedures and policies which conformed to internationally accepted standards for truth commissions and truth seeking initiatives. The Commission's reference materials in this regard included the General Principles and Parameters for the Truth, Justice and Reconciliation (TJRC Agreement), Truth Justice and Reconciliation Act (TJR Act) and the United Nations Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.
2. The TJRC Agreement provided that:

The Commission shall receive statements from victims, witnesses, communities, interest groups, persons directly involved in events, or any other group or individual; undertake investigations and research, hold hearings; and engage in activities as it determines to advance national or community reconciliation. The Commission may offer confidentiality to persons upon request in order to protect individual privacy or security, or for other reasons. The Commission shall solely determine whether its hearings shall be held in public or in camera.
3. The TJR Act also gave the Commission 'all powers necessary for the execution of its functions'.¹ These included the power to: gather information by any means it

¹ TJR Act, sec 7.

deemed appropriate; visit establishments or places for the purpose of obtaining information; interview individuals; call upon individuals to attend its hearings; require statements to be given under oath; request and/or compel the production of information; and issue summons as it deemed necessary.

4. The Commission structured its operational work under four mutual and overlapping phases:
 - statement-taking;
 - research and investigations;
 - hearings; and
 - report writing.
5. The public was educated about these processes through the Commission's civic education and outreach programmes and activities. Where appropriate, the Commission opened up its procedures to external review and used the reports and recommendations of such reviews to strengthen its processes.



Civic Education and Outreach

Starting out

6. The Commission's functions, as spelt out in its founding legal instrument included 'educating and engaging the public and giving sufficient publicity to its work so as to encourage the public to contribute positively to the achievement of the objectives of the Commission' and 'informing the public of its existence and the purpose of its work'.² To fulfil on this requirement, the Commission carried out civic education and outreach activities to allow full and active public participation in its work and processes. These civic education and outreach activities were also a means of building ownership of both the Commission's processes and its final report among Kenyans.
7. Civic education and outreach activities were initially delayed by lack of funds which made it impossible for the Commission to educate and engage with the public as mandated. This was only possible from August 2010 - a year after Commissioners were sworn in. The controversy over the suitability and credibility of the Chairperson derailed several planned activities including civic education and outreach. It also crippled efforts to engage with civil society and development partners for assistance and support.
8. The Commission received funds in July 2010 and immediately proceeded to establish its Civic Education and Outreach Department with responsibility for coordinating all the Commission's civic education and outreach activities. The Department started by developing a Strategy and Work Plan before rolling out key activities in November 2010. The roll-out followed soon after the Chairperson took the decision to step aside and allow inquiry into his suitability to hold office.
9. Recognising the financial and time constraints faced by the Commission,³ the Department established partnerships with organisations including Kituo cha Sheria, African Centre for the Constructive Resolution of Disputes (ACCORD), International Organization for Migration (IOM), Action Aid, and others to facilitate some of its operations and activities. Kituo cha Sheria disseminated information about the Commission's mandate and work in its outreach programmes in the provinces of Nairobi, Nyanza and Rift Valley. The IOM incorporated aspects of the Commission's mandate and processes in its inter community dialogue and peace meetings among pastoralists communities in Northern Kenya, particularly in

² TJR Act, sec 20(5)(a).

³ See Chapter Four in this Volume.

Kakuma, Pokot, Kapenguria, Dadaab and Garissa. The structured assistance of civil society partners enabled the Civic Education and Outreach Department to expand its reach and work.

Specific activities

10. The Civic Education and Outreach Department conducted a number of activities including training of stakeholders, hosting workshops and meetings, and participation in *barazas* and Agricultural Society of Kenya (ASK) shows in an effort to reach as many people as possible from all sectors of society.
11. The Department's major activity involved conducting pre-hearing civic education drives around the country. These drives served a three-fold objective: informing the public about the Commission's work and processes; managing public expectations; and creating a receptive environment for the hearings that were to follow. The drives used interactive and participatory approaches that allowed participants to seek clarification and engage in discussions. Most of these drives were held in town halls but in some areas they took the form of open-air gatherings or *barazas*. Participation was open to the general public, different groups of victims, community leaders (including representatives of councils of elders and political leaders), as well as members of professional organisations and the business community.
12. To ensure inclusiveness in its civic education and outreach activities, the Commission organised special workshops and meetings that created space and a conducive atmosphere for expression and discussion of the various experiences of specific vulnerable groups. Such forums were organised for women, youth, children, persons with disabilities, internally displaced persons, slum dwellers, squatters, evictees and survivors of particular episodes of human rights violations.
13. The Commission designed and produced information, education and communication (IEC) materials that were distributed to individuals through various outlets, including public events and functions of the Commission. IEC materials included brochures summarising the Commission's processes, posters with pictures promoting peace and dialogue, fliers with specific information and messages on public hearings and Commission branded products such as T-shirts, scarves and khangas.

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Statement-Taking

14. Statement-taking is not only one of the primary sources of information for truth commissions but it is also a major avenue through which individuals interact with a truth commission. The number of statements collected provides an indication of the interest of individuals in a truth telling process. The Commission collected a total of 42,465 statements. This high level of participation confirmed the findings of the Makau Mutua Task Force that there was overwhelming desire for a truth-seeking process in Kenya.
15. The process sought statements from victims and witnesses of various forms of human rights violations. It provided victims, their families and witnesses the opportunity to tell their stories. The process gave voice to a multitude of stories and perspectives about violations that had occurred in Kenya's history.
16. The Commission was fully aware that the process of sharing experiences of gross human rights violations could be traumatic for victims. As such, Statement Takers were trained on how to assist victims deal with trauma. Moreover, aware of the importance of the need for inclusion and participation in a truth seeking process, the Commission ensured that the statement taking process was inclusive, accessible and safe. In particular:
 - the Commission recruited Statement Takers from all regions of the country to ensure broad geographical reach for the statement-taking process;
 - individuals were free to give statements in the language of their choice, although the statement taking forms were filled out in English;
 - individuals could request a different statement taker to record their statement if they were uncomfortable giving their statement to the person before them (for example, an elderly person could choose not to give a statement to someone much younger than them);
 - the Commission learned from the experience of other truth commissions that women were less likely to give their statements to male Statement Takers. For this reason, as far as it was possible, statements from women were taken by female Statement Takers; and
 - the Commission made special provisions to reach out to those who could not normally access a statement taker. For example, the Commission deployed 16 Statement Takers to prisons across the country.

Statement Form

17. The Commission designed a Statement Form to capture information from witnesses.⁴ The Statement Form was designed to ensure the gathering of as much information as possible about gross violations of human rights. The Form was designed to capture this information from both victims and perpetrators, but no single perpetrator volunteered information through this avenue. This was so despite the fact that individuals who were adversely mentioned in Statement Forms or during the hearings were so notified and requested by the Commission to file a statement.
18. Human Rights Information and Documentation Systems (HURIDOCs), an internationally recognised organisation in human rights data gathering and analysis, reviewed the Statement Form and found it met internationally accepted standards for tools designed to gather information about human rights violations. HURIDOCs described the Commission's statement taking form as 'one of the most sophisticated we have seen from a truth commission'.

Initial Statement-Taking Exercise

19. The Commission undertook an initial statement taking exercise in Mt Elgon in May and June 2010. This was, in effect, a pilot project conducted for two reasons. Firstly, the Commission used the exercise to get feedback from victims and other witnesses about the statement-taking methodology, including the Statement Form. Secondly, the exercise enabled the Commission to begin its main operational activities immediately, despite the fact that resources to hire staff were yet to be received. This inadequacy of financial and human resources through the first year of the Commission's establishment hindered the start of a nation-wide exercise until July 2010. Rather than wait for the availability of adequate resources, the Commission took the opportunity of the initial exercise to strengthen the tools it would work with and learn from the mistakes of other truth commissions that had not field-tested their statement-taking form and methodology.
20. The Commission found the initial statement-taking exercise extremely valuable because:
 - it allowed the Commission to interact on a one-on-one basis with victims and witnesses and to gain valuable insights into how to elicit the range of violations and experiences of statement givers;

⁴ See Appendix 4 for the Statement Form.

- it permitted Commissioners to participate first hand in the day to day activities of statement-taking, an experience that would enrich their ability to guide the national statement-taking process and to understand and process the information more thoroughly in connection with public hearings;
- the exercise elicited information that allowed the Commission to refine its statement-taking form and statement-taking methodology; and
- the statement-taking exercise provided an opportunity for the Commission to engage with its core mandate functions despite the challenges that up until that point had primarily limited the Commission's activities to Nairobi.

Training of Statement Takers

21. The Commission recruited 304 Statement Takers - 113 male and 191 female. They were trained between 23 August 2010 and 9 September 2010 to prepare them for their task. The Commission developed a curriculum with four major areas of focus: transitional justice, human rights, and the mandate of the Commission; gender perspectives in statement taking; trauma management and the statement taking-form and process. Training workshops were held in each of the eight provincial headquarters and were conducted by staff of the Commission with the assistance of consultants.

Statement-Taking

22. The nation-wide statement taking exercise was officially launched on 9 September 2010 and lasted five months. It was anticipated that some individuals would be unwilling or unable to record statements during the formal statement taking exercise and so the Commission, continued to record and receive statements and memoranda at its offices and during individual and thematic hearings.
23. The Commission travelled around the country conducting civic education and individual hearings which increased its visibility significantly and resulted in many more people coming forward to record statements. The Commission re-engaged a limited number of Statement Takers during the pre-hearing stage to record statements for a period of two weeks in each specific area.
24. The Commission cultivated a number of important partnerships with civil society organisations around the statement-taking exercise. The main partners in this regard were Action-Aid and Kituo cha Sheria. Action-Aid partnered with the Commission in statement-taking in Mt. Elgon and the Coast region while Kituo cha Sheria focused entirely on the Coast region. Both organisations recruited

Statement Takers who received training based on the curriculum developed by the Commission before being deployed in the field. They would then forward the statements to the Commission.

25. Despite the huge number of statements recorded the Commission continued to receive complaints that individuals had not been able to record their statements. This continuous expression of interest in recording statements underscored the depth of interest in a truth telling process as well as the increased credibility of the Commission as it embarked upon activities relating to its core functions.

Review of Statement-Taking

26. In November 2010, the Commission reviewed the statement-taking process in consultative meetings with CSOs based in all eight provinces. The review had a three-fold objective: to identify gaps and critical issues emanating from the statement taking process; to assess the quality of information received through the statement taking process; to assess the level of participation of vulnerable groups (such as women, persons with disabilities, etc) in the process.
27. Through these review meetings, the Commission established working arrangements with local organisations some of which later supported the statement-taking process through civic education and mobilisation of their respective constituents. At the end of the statement-taking session, debriefing sessions for Statement Takers were held in each province and included psychosocial support to help them cope with the stress of having to hear traumatic accounts from victims.

Statements by Children

28. As is the case with other vulnerable groups, the TJR Act allowed the Commission to put in place special arrangements and adopt specific mechanisms and procedures to address the experiences of children. Consistent with the Kenyan law and international practice, the Commission defined a child as any human being under the age of 18 years.
29. A Stakeholders' Workshop on the Participation of Children in the Commission's Process was held on 7 October 2011 in Nairobi. The purpose of the meeting was to consult child protection agencies and other stakeholders on best practices in taking statements and organising hearings involving children.
30. Taking statements from children requires special skills and considerations. A distinct training programme was therefore designed for statement takers who would engage

Statements Distribution by region and gender

Region	Male	Female	Unknown	Total
Central	1778	1574	6	3358
Coast	2455	1079	13	3547
Eastern	3467	1775	7	5249
Nairobi	832	947	2	1781
North Eastern	2883	1307	2	4192
Nyanza	2602	1828	7	4437
Rift Valley	7211	4698	23	11932
Western	3934	2890	8	6832
Not Given	649	405	83	1137
Grand Total	25811	16503	151	42465

with children and record their statements. The scope of the training included aspects relating to: the different evolving capacities of children and processes suited to those capacities; the need to ensure children's free participation without interfering with their other entitlements such as education or play; the need to avoid stigmatisation or discrimination; and the need to obtain consent from the parents, caregivers or guardians of a child. A total of 40 statement takers - drawn from the Commission, child protection agencies and individual professional counselling organisations – were trained under programme.

31. A special Children's Statement-Taking Form was also prepared in consultation with child protection agencies and was pre-tested in October 2011 to assess its suitability and effectiveness in taking statements from children. The draft was subsequently revised to incorporate insights from the pre-testing exercise.⁵
32. The 40 statement takers were then guided on the use of the Children's Statement Form before they were deployed to take statements from children for a period of one month. A total of 996 statements were collected from children: 500 from boys and 496 from girls.
33. On the basis of these statements, the Commission subsequently organised a thematic hearing for children in December 2011, details of which are discussed later in this Chapter.

⁵ See Appendix 5 for the Children's Statement Form.



Memoranda

34. Statements recorded by individual victims or witnesses provided the bulk of raw information for the Commission. In addition, memoranda were also collected by the Commission. Generally, memoranda were submitted by representatives of affected communities or groups, but in some instances also by individuals. Memoranda provided information beyond the limits of the Statement Form. Groups and individuals could include longer narrations of the history, context and causes of violations.
35. The Commission developed and distributed guidelines to ensure that the memoranda incorporated pertinent information such as the names of individuals involved and a comprehensive description of where, when, why and how the alleged violations occurred. Similar to the Statement Form, the guidelines relating to the memoranda also requested a brief outline of the expectations and recommendations of the affected groups or individuals.
36. A memorandum was also a means by which a group of people or community developed, through a consultative and participatory manner, an agreed narrative of what they had experienced. In the process, harmony was fostered within the community. For instance, in Marsabit, the Commission received a memorandum prepared by Marsabit Inter-Ethnic Consultative Group which described itself as 'a non-registered entity which was purposely formed to consult on the historical injustices that were faced by the people in this county with a view to comprehensively presenting them before the Commission'.⁶ A representative of

⁶ TJRC/Hansard/Public Hearing/Marsabit/4 May 2011/p. 19.

the Group explained to the Commission the reason behind its formation and the impact of developing a joint memorandum:

When we drafted this memorandum, we appreciated the fact that the Commission is not just a Truth and Justice Commission, but a Truth, Justice and Reconciliation Commission. We valued the inherent good in doing a collective memo because we cannot cheat ourselves. If every community were to stand here and present its separate memorandum, especially on issues relating to ethnic conflict, there would be accusations and counter accusations which may give us the truth and justice, but defeat the object of reconciliation. By coming together, we have diffused that tension and we believe that our efforts will crystallize towards [reconciliation].

37. The Commission continued receiving memoranda beyond the statement taking exercise and throughout the hearings phase. In total, the Commission received 1529 memoranda from individuals, groups, associations and communities.

Regional distribution of memos.

Province	Count
Central	162
Coast	255
Eastern	168
Nairobi	55
NG	202
North Eastern	24
Nyanza	122
Rift Valley	626
Western	214
Total	1828

Information and Data Management

Records Management

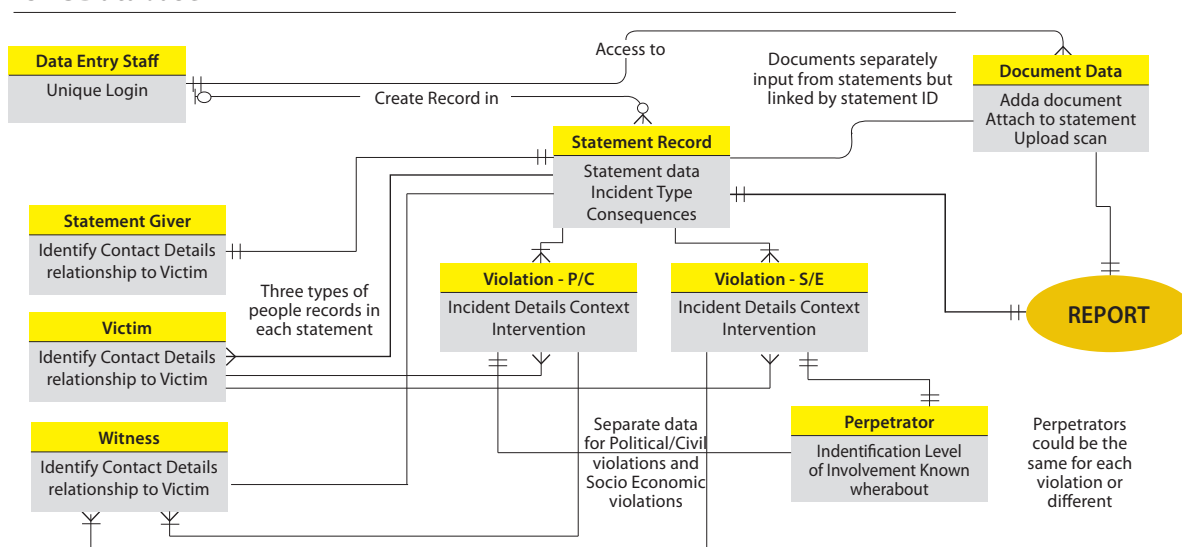
38. The ICT and Documentation Department was responsible for the organization and management of the Commission's print and electronic records. The Department developed an organization-wide file plan based on an internally developed taxonomy to guide the naming and filing of official records. The development of the file plan was informed by the functions and nature of records created and used by the various departments of the Commission. The operational records were classified by function while the substantive records by subject.

39. The Commission had in its custody records of a sensitive nature such as the statements collected from the public, proceedings of both public and in-camera hearings, evidence materials and investigation reports. These records had to be protected to ensure they were available when needed and that their integrity was maintained (that they were not altered).
40. The degree of sensitivity or confidentiality of a record was based on the gravity of damage which its unauthorized disclosure could likely cause any individual or group. Protection against unauthorized access to records or access by unauthorized persons required sound procedures for handling access protocols. As such, access to records was based on the following classification:
 - **Open records:** for unclassified records whose access was limited to the Commission's staff;
 - **Confidential records:** for records that required written authority to access from the originating department;
 - **Strictly confidential:** for records that required direct written authorization for access from the CEO.
41. The security classification of records determined how records were stored; the confidential and strictly confidential records were secured in disaster proof safes in the office and in a vault at a local commercial bank respectively. These security measures also applied to electronic records which were stored mainly in shared electronic drives with a requirement for access passwords. Moreover, all confidential and strictly confidential electronic files were protected by various encryption levels.

Electronic Database

42. In order to organise, manage and statistically analyse the information received through statements and memoranda, the Commission created an electronic database that facilitated the input, storage, retrieval and analysis of data. A team brought together by HURIDOCs provided technical support in the creation of the database while the United Nations Office of the High Commission for Human Rights (OHCHR) offered financial support.
43. Ideally the design of a database is undertaken either before or simultaneously with the design of the Statement-Taking Form and procedures. However, given the financial and other constraints that have been mentioned, the Commission was unable to prepare the general Statement-Taking Form at the same time as the Children's Statement-Taking Form. The latter was developed near the end of the national statement-taking process.

TJRC Database



■ Designing the database

44. The development of the database began with a needs assessment to ensure that it was designed to meet the specific needs of the Commission. This was undertaken by a project team comprised of three experts from HURIDOCs, Stataid and BoldEverything (the 'Data Team'). The Data Team spent a week in Nairobi, from 31 January to 4 February 2011, during which it met with Commissioners and staff members (mainly the management team, researchers, IT technicians, and the statement manager).
45. On 1 February 2011, the Data Team reviewed the Statement Form together with the Commission's Researchers. The review discussed the best way to represent in the database, the information presented in the Statement Form. The Statement Form was reviewed line by line. For each question, the group discussed whether the data should be maintained in the database and, if so, what was the best format for the data (qualitative, quantitative, or both). The discussion lasted many hours and covered the entire database.
46. In the end the following tasks related to the design of the database were completed: determination of database specifications and requirements; collection of variables and initial quality analysis for statements emanating from North Eastern Province; a preliminary determination of the human resources required for coding and data entry; and determination of ICT assurance and data security protocols.

■ *Tracking Log for Statements*

47. Each Statement Form had an identification number, ranging from 00001 to 50000. This allowed each statement to be individually tracked. With the initial assistance of the Data Team, the Commission prepared an Excel Spreadsheet tracking log with a row for each statement using their respective identification numbers. The log was used for multiple purposes:

- ***Determining the statement status:*** Statements could either be blank, filled out, incomplete, cancelled, damaged, destroyed, or missing. Knowing a Statement's status was helpful for determining how many statements had been used at any particular time and whether each statement had been coded and entered into the electronic database.
- ***Maintaining a record of the physical location of the statement:*** Because almost all statements contained confidential information, it was imperative that all statements be returned from the field and then carefully tracked if they were not in storage. The tracking log therefore contained a variable that indicated the physical location of a statement at any particular time. This ensured a greater degree of data security.
- ***Organising coding and data entry steps:*** The tracking log was used to assign particular statements to particular coders or data entry staff on particular days. It was also used to maintain a record of which statements had been coded and which still needed to be coded. It was also used to randomize the order in which statements were coded and entered into the database, to allow the database at any particular time of its development to represent the full set of statements in an unbiased way. Thus as the coding and data entry process continued, statistics could be generated and the emerging patterns in the data could be ascertained.

■ *Data Coding and Entry*

48. Feeding information into the Database was a two-track process. First, the information contained in the Statement Forms was transferred into a coding sheet. The coding sheet served as a uniform template for feeding data into the database. In the second instance, the coded information was entered into the electronic database.
49. The coding process was guided by a Coding Manual. Its main purpose was to stipulate fixed data coding, entry, and management practices and protocols, to ensure that the Database is based on consistent and reliable standards and that it

is independent from external influences or other unforeseen factors. The Coding Manual also established principles of confidentiality and addressed matters of protection of confidential information handled by the coders. Thus, the Manual was designed as a reference by which staff could ensure that high-quality data storage practices and the appropriate handling of data were maintained at all times.

50. In August 2011, the Commission recruited a total of 30 Statement Coders who were trained to convert the qualitative narratives contained in statements and memoranda into quantitative parameters that could generate statistical analyses. Together with the Database Manager, the Coders and Data Entry Clerks signed a Statement of Confidentiality.
51. The Database Manager oversaw the coding process and the overall functioning of the database. She was responsible for ensuring that the procedures outlined in the Manual were followed with great care. Any questions, uncertainty, or ambiguities that Coders or Data Entry Clerks encountered during their work were to be directed to the Database Manager. Caution was crucial for data coding or data entry personnel and in a situation of uncertainty were to approach the Database Manager to ensure accuracy of the coding and data entry processes.
52. The coding process took five months from August to December 2011.

■ ***Evaluating the database***

53. Throughout the data entry and coding process, the Database Manager periodically reviewed and compared the inputted data with the content of the Coding Sheet. She conducted the review at least every two weeks as a matter of course although the frequency of reviews depended on her analysis of the work of each individual coder. For purposes of quality control, the Database Manager was responsible for arranging periodic dual data entry for a random subset of statements. She also implemented other methods for testing data quality as she deemed necessary.
54. In December 2011, following the conclusion of the coding process, the Commission embarked on the evaluation of the entire database. A two track approach was adopted. Firstly, an internal data entry quality analysis was undertaken to check for duplication and other errors in the database. In particular, entries were cross-verified and appropriate action taken where it was found that individuals had recorded multiple statements. The evaluation also ensured that all statements and memoranda had been fed into the database. This was done by cross-checking the entries in the database against a manual statement/memoranda log.

55. Secondly, the Database was evaluated by an external independent consultant. The evaluation, which was financially supported by ICTJ, assessed the reliability of the database through identification of any factors that could affect analysis of the collected data. From 12 to 16 December 2011, the independent reviewer undertook a data assessment mission to the Commission. He held a series of meetings with both the Commissioners and with the technical team in charge of the database. In particular, between 13 and 15 December 2011, he worked closely with the Commission's Directors for Research and for ICT and Documentation, and the Database Manager to evaluate the data collection and management processes and to identify any challenges that could affect the data analysis phase. As the Independent Consultant observed, the Commission's technical personnel were, in many instances, well aware of the potential challenges, and using his expert knowledge and comparative experience from the Peruvian Commission, the independent consultant provided mainly technical guidance on possible solutions to address identified challenges.
56. At the end of the exercise, the independent consultant recommended ways to address identified challenges and the Commission acted on these recommendations.

Research and Investigations

57. The Commission used both primary and secondary materials in its research into the various mandate areas. Primary materials comprised of statements, memorandum and exhibits received from victims and witnesses. The Commission also sourced materials from the National Archives and from government registries. Secondary materials included the works of academics and reports of relevant organizations and institutions. The Research Department also organized thematic workshops with relevant experts and stakeholders during which various research themes were explored. The investigative functions of the Commission were outlined under section 6 of the TJR Act. In September 2010, the Commission established an Investigation Department with the hiring of two senior investigators. The Commission was unable to hire the head of the department until April 2011. The Commission had resolved, early in its life, that the head of investigations would be a non-Kenyan. However, the ability to attract an international candidate with the requisite skills and experience was dependent on raising funds from donors. For reasons discussed in the next Chapter, this was not possible until April 2011 during which month four additional investigators were also recruited.
58. The primary role of the Investigations Department was to identify and interview witnesses whose individual stories would contribute to the historical narrative

of gross violations of human rights in the country. The role of the Department also extended to the collection and analysis of relevant documentary and other forms of evidence. The strategy for conducting such investigations was robust yet flexible enough to adapt to the changing operational environment. For purposes of selecting window cases to be heard during the individual hearings (see below), the Investigation Department interviewed a total of 919 people across the country as shown in the table below.

Phases of investigations

59. Investigations were conducted in three main phases: before, during and after the hearings.

- **Pre-hearing investigations:** Pre-hearing investigations were conducted ahead of the hearings in each of the eight provinces of the country. A senior investigator appointed as the Investigations Manager for each region was responsible for developing a Regional Investigation Plan. The Plan consisted of an overview of the major human rights violations reported in the region. It also included a list of potential witnesses and AMPs distilled from Statement Forms and from other sources of information available to the Commission. A *Regional Report* was then produced identifying crucial cases to be investigated in a specific region and a timeline for conducting the investigations.

An investigation team was then deployed to the regions and with the help of the Regional Office, located witnesses and obtained detailed statements from them, which were then verified and corroborated by other evidence. Visible evidence of injuries sustained by witnesses was documented through photography. Where possible and in appropriate cases, the investigation team visited the sites of violations and took photographs to document the scene. They also searched for and collected documents and secured relevant physical evidence.

The Investigation Manager for each region produced a daily report which included summaries of the interviews conducted, documentary evidence collected, signed copies of the formal statements and details of any other investigative activity. These daily reports were the foundation of the final Regional Investigation Reports that were developed at the conclusion of each regional pre-hearing investigation.

- **Investigations during hearings:** Investigations during hearings were conducted by an investigator who was present at a hearing session. This investigator assessed, with the help of the Regional Coordinator, new witnesses and took further detailed statements when appropriate. He also

conducted immediate investigative follow-up of issues emanating from the hearings.

- **Post-hearing investigations:** Although each regional hearing was conducted and concluded in a short span of time ranging from two to six weeks, Regional Coordinators continued their field inquiries and were approached by witnesses wishing to provide information. This led to identification of further issues for investigation and investigators accordingly returned to some areas to conduct further inquiries even after the conclusion of hearings. These additional field trips were considered on a case by case basis. The new information collected was integrated into the regional investigation reports.

60. The Investigations Department also continued to work in support of the Nairobi-based thematic hearings. Additionally, investigators played a significant role in the identification and collection of information in relation to adversely mentioned persons.

Hearings

61. Section 5(a) and (b) of the TJR Act required the Commission to establish an accurate, complete and historical record of gross human rights violations and to gather as much information as possible about the causes, nature and extent of these violations. Together with research, investigations and other sources of information, hearings enabled the Commission to fulfil a major part of this duty.
62. The Commission started its hearings in mid-April 2011 in Garissa and concluded at the beginning of April 2012 in Nairobi. The Commission conducted three kinds of hearings: individual hearings, women's hearings and thematic hearings.

Individual Hearings

63. Individual hearings focused on the experience of individuals in relation to gross violation of human rights. Testimony was heard from individuals whose rights had been violated, as well as from those who either had knowledge of or allegedly participated in acts that resulted in the violations. The individual hearings were designed to achieve three goals, namely:
 - To provide victims, adversely mentioned persons and the general public with a platform for non-retributive truth telling;
 - To provide victims with a forum to be heard and restore their dignity; and



- To provide repentant adversely mentioned persons with a forum to confess their actions as a way of bringing reconciliation.
64. To a large extent the first two objectives, specifically as they related to victims, were achieved. As is described elsewhere in this Report, many of the victims who narrated their experiences at the Commission's hearings did so for the very first time. For them, the forum and platform provided by the Commission had a healing or therapeutic effect; and the simple act of speaking out was a big stride towards emotional recovery and restoration of human dignity.
 65. However, only limited success was recorded in respect to the third objective. A number of adversely mentioned persons who appeared before the Commission claimed that they had forgotten details of the events under scrutiny or simply took a defensive position. They were not forthright with details. Some were unapologetic about their role regarding specific events especially security operations that culminated in the massacre of innocent individuals. Others offered apologies, but such apologies were usually not combined with any acknowledgement of responsibility.
 66. Individual hearings were designed on the basis of a few cases ('window cases') that were selected for purposes of painting the broader patterns and trends of gross violations of human rights in a particular region or area.

Selection of Window Cases

67. Due to the large number of statements and memoranda received by the Commission, it was impossible to provide a public platform for all individuals who wished to testify. Only a small percentage of victims were given the opportunity to testify. The statement by Commissioner Margaret Shava in response to a witness who sought to know the relevance of his testimony summarises the rationale of using window cases:⁷

We have gone out and asked people who feel that they would like to make a statement to the Commission to make a statement. We have collected over 40,000 statements but we cannot hear 40,000 people because of the time that we have been given to do our work. So we have selected some cases that we feel bring out the nature and the patterns of violations which have taken place in this country. We feel that your stories demonstrate a very important aspect and that is why we have asked you to come [...] We hope that by the time we have heard your story, we will gain an understanding that we did not have about how these violations have been perpetrated. That understanding is going to inform our findings and recommendations in our report.

68. Or as Commissioner Tecla Namachanja explained in Mandera in April 2011:

Let me also take this opportunity to thank those who recorded statements with the Commission. In total, the Commission received over 30,000 statements and 300 memoranda. Because of time limitation and the nature of Truth Commissions, we shall not be able to conduct hearings for all the statements recorded. The Commission has, therefore, selected a few statements to conduct the hearings on what would give a global picture of the violations suffered by people from this region. In the next three days, for example, we shall hear testimonies on the history of events and violations in Mandera; violations suffered by women, testimonies on torture, marginalization, massacres, extrajudicial killings, detentions, loss of property, serious injuries suffered during postelection violence and police brutality. Although a few people will be giving testimonies concerning violations suffered in Mandera, most of you will relate with the testimonies shared because most of you have suffered similar violations. However, I want to assure you that every statement recorded will be part of the report when the Commission finishes its work.⁸

69. To ensure that a representative sample of cases was selected in each region, the selection process considered the following factors:

- regional trends and patterns of gross violation of human rights;
- issues and injustices specific to the region;
- issues and injustices specific to vulnerable and minority groups resident in the region;

⁷ TJRC/Hansard/In-Camera Hearing/Nairobi/22 February 2012/p. 20.

⁸ TJRC/Hansard/Public Hearing/Mandera/25 April 2011/p. 1-2.

- significant events that occurred in the region during the mandate period, such as security operations
70. Three departments – Legal, Investigations and Research – were involved in the selection of cases. The Research Department prepared, for each region, a general background report describing the regional trends and patterns of human rights violations. The Investigations Department searched through statements and memoranda in the regional reports for potential window cases. This was followed by the interviewing of potential witnesses and narrowing down their number and findings submitted to the legal department. The Legal Department assessed the cases further and depending on the suitability of a case prepared a final list of window cases.
 71. Regional Coordinators and Statement Takers were also invaluable actors in the process because of their knowledge of their respective regions and the issues most important to the local community. The Commission also profiled events and violations thought to have particular relevance to the national narrative about gross violations of human rights.

Preparation of Witnesses

72. The Special Support Services Department was responsible for preparing witnesses for hearings. This involved counselling witnesses and managing their expectations. In partnership with a number of organisations including Kenya Red Cross Society, Kenyatta National Hospital and the Gender Violence Recovery Centre, counselling services were provided. The Kenya Counselling Association and the Kenya Institute of Professional Counsellors assisted the Commission to identify locally based counsellors who would continue offering counselling services to witnesses and victims long after the Commission had concluded its hearings in a specific area or region.
73. All witnesses were encouraged to come to the hearings with a relative, friend or a person they trusted and who could provide emotional support as they gave their testimony. All witnesses who had to travel a long distance to the hearing venue had their travel expenses met, and were provided with a modest stipend to cover their living expenses while participating in the hearings. The Commission also ensured that female witnesses with infants were able to attend the hearings and travelled with someone to look after their infants at the expense of the Commission.
74. At least a day before the hearing, witnesses were shown the hearing venue to give them a chance to familiarise themselves with the hearing setting and ask any questions they had about the process. On the day of the hearing, the

Commission explained to witnesses the hearing procedures and the role of the various actors.

Conducting Individual Hearings

75. The conduct of the hearings was governed by the Hearing Procedure Rules which were published in the Kenya Gazette on 8 April 2011.⁹ These rules were produced after extensive consultations with law-oriented stakeholders, including the Law Society of Kenya, International Federation of Women Lawyers (FIDA-Kenya) and the Kenya Section of the International Commission of Jurists (ICJ-Kenya).
76. Often, public hearings began with the testimonies of community leaders who did not necessarily testify about specific violations but rather about the general issues affecting their particular community, area or region and the broader context of violations within that particular area or region.
77. The Commission was established as a quasi-judicial body and its ultimate goal was to find the truth and foster reconciliation. As such, its hearings were non-adversarial in nature. Under the guidance of a Leader of Evidence, witnesses were allowed to tell their stories in their own words and style and with minimum interruption. Only at the end of a testimony would the Leader of Evidence and the Commissioners pose questions to a witness in order to clarify or seek views on specific aspects covered in the testimony.
78. The Commission ensured that witnesses restricted their testimony to what they had recorded in their written statements, especially those aspects relating to adversely mentioned persons. The witnesses were instructed not to adversely mention individuals whom they had not already recorded in their statements. This allowed the Commission the opportunity in accordance with the rules of natural justice to notify individuals in advance if they were to be adversely mentioned.
79. All adversely mentioned persons were invited before the Commission and were informed of their statutory right to be represented by legal counsel. However, in accordance with the gazetted Hearing Rules, neither they nor their legal representatives were permitted to cross-examine witnesses. They were invited to listen to the testimony of witnesses and later given an opportunity to tell their version of the story. The idea was to ensure that the Commission's proceedings were not transformed into a rigid, adversarial court-like scenario in which witnesses could not express themselves fully and freely.

⁹ See Appendix 6 for the Hearing Procedure Rules.



TJRC public hearings at Bungoma County Hall.

80. In evaluating the testimony and evidence presented at such hearings where adverse testimony was given against individuals or institutions, the Commission took into account the fact that these individuals and their counsel were prevented from cross-examining witnesses. In this regard Commission hearings borrowed from the traditions of civil law legal systems where the decision-maker plays a more active role in examining and cross-examining witnesses than is the case in common law legal systems.
81. The hearings were conducted by a panel of at least three or more Commissioners, one of whom had to be an international Commissioner, and one of whom had to be of the opposite gender from the other two. As a general policy, the Commission endeavoured to make sure that that at least one international Commissioner was present at all formal proceedings of the Commission. The involvement of foreign Commissioners expanded the pool of expertise. It was also the Commission's experience that victims in some parts of the country were more receptive to foreign Commissioners than to their Kenyan counterparts. For instance, when asked of his expectations of the Commission, a witness in Mandera responded:

Initially, I did not have any expectation. There was rape and killing. This was normal. I now see that there is a Commission which has the intention of doing justice. Now there is a ray of hope in my heart. I expect justice. When I see international faces amongst you people, I get a glimpse of hope that we may find justice for the rape and the killings that took place. I pray that justice prevails and the criminals be brought to book.¹⁰

82. The Commission selected venues for the hearings taking into account the following considerations:
 - capacity of the venue ;
 - accessibility of the venue to witnesses and the general public including by persons with disabilities;
 - neutrality of the venue, especially in regions or areas where two or more groups or communities with a history of conflict or tension reside;
 - availability of sanitary services and other social amenities; and
 - security.
83. The Commission held hearings in several locations in each region in an effort to facilitate public access and participation and to ensure that diverse voices were heard. Simultaneous translation of the proceedings was provided at all public hearings including into sign language.
84. The majority of witnesses who testified before the Commission did so in public. However, where the safety of a witness or the nature of his/her testimony so demanded, the hearing was held in private.

Table 1: Areas where the Commission held its hearings

	Region	Hearing locations
1	Central	Nyeri, Muranga, Kiambu and Nyandarua
2	Coast	Lamu, Hola, Kilifi, Mombasa, Kwale, and Wundanyi
3	Eastern	Meru, Embu, Machakos, Makindu, Kitui, Marsabit and Isiolo
4	Nairobi	Nairobi
5	North Eastern	Garissa, Wajir, Mandera, and Moyale
6	Nyanza	Kisumu, Kisii and Kuria
7	Rift Valley	Kericho, Nakuru, Naivasha, Narok, Kajiado, Rumuruti, Eldoret, Lodwar, Kapenguria, Kitale, and Baringo
8	Western	Mt. Elgon, Kakamega, Busia, and Bungoma
9	Uganda	Kiryandongo

10 TJRC/Hansard/Public Hearing/Mandera/26 April 2011/p. 36.

Women's Hearings

85. The participation of women and members of other vulnerable groups is a central pillar of any comprehensive and inclusive truth-seeking process. Experience has shown that due to gender stereotypes and cultural norms, women are unlikely to participate in public processes unless proactive measures are taken to encourage and facilitate such participation. In the absence of such measures in the past, Kenyan women had traditionally been left out of public processes that had shaped and defined the country's socio-political and economic policies including those policies that directly impacted their day to day lives.
86. Not surprisingly, the participation of women in public hearings conducted by the Makau Mutua Task Force to gather views as to whether Kenyans desired a truth commission was limited. Therefore, the Task Force made the following observation, suggesting as it did, that a truth commission established in accordance with its recommendations should pay particular attention to the participation of women in its processes:¹¹

The Task Force was deeply concerned by the low numbers of women who turned up at its public hearings to make submissions. Although the Task Force encouraged the few women present to speak up, this problem will have to be addressed once the truth commission is set up so that the issues that are particular to women are adequately dealt with. Kenya, like most countries, has deeply embedded prejudices, policies, and traditions that have historically marginalised women and made them invisible in the public square. Discrimination against women, violence, rape, and patriarchy have consigned women to the margins of society. Human rights violations and the economic crimes committed by the state have a special gendered effect on women. That is why violations against women have disproportionately multiplied adverse effects and are rarely addressed. A truth commission must pay particular attention to the participation of women and the abuses perpetrated against them. Otherwise, a truth commission will have little or no beneficial value in addressing the plight of women.

87. Against this background, the Commission took measures to ensure the participation of women in its processes including in the hearings. Indeed, section 27(1) of the TJR Act permitted the Commission to put in place special arrangements and adopt specific mechanisms and procedures to address the experiences of, amongst others, women.

¹¹ Government of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003) 15.

88. In particular, the Commission conducted, alongside its public hearings, women-specific hearings which were exclusively attended by women. The Commission was conscious of the fact that while some women were courageous enough to testify about traumatic events in front of a general public hearing, restricting women to these general public hearings only would have resulted in many women being reluctant to testify. Moreover, the decision to conduct women-focused hearings was reinforced when a preliminary review at the conclusion of the statement-taking process showed that only one third of the total statements received were from women. In essence, women had not come forward to record statements in numbers proportionate to their representation in the general population.
89. The hearings were framed as ‘conversations with women’. They were designed to and were safe spaces where women could freely talk about violations that were specific to them. The majority of women who attended the hearings felt comfortable sharing their most traumatic memories. The women’s hearings enabled the Commission to fill the gap identified in its data bank as well as to record violations specific to women. The hearings provided insights into women’s perspectives of experiencing injustice and conflict. They also provided the Commission with insights into women’s views as to how they wanted their suffering and pain redressed.
90. The Commission was, however, concerned that while the women’s hearings provided a safe space for women to tell their stories, the stories were therefore not heard by men or the general public. Women hearings were justifiable for the reasons suggested, but an opportunity was lost to reach out and educate men. Some of the men may have been insensitive to or ignorant of the experiences of women, including the impact of historical injustices.
91. But on a balance, the Commission’s choice of holding women-only hearings was clearly the correct choice. Without the hearings the experience of the vast majority of women who engaged with the Commission would not have been captured. It is hoped that the inclusion of a detailed discussion in this Report of what was learned from those hearings will increase the awareness of men about the impact of injustices on women, and thus counter the adverse impacts of the exclusion of men from these hearings.

Schedule of places where the Commission held Women's Hearings

Date	Region	Specific Place	Venue
<i>Wednesday, April 13, 2011</i>	North Eastern	Garissa	Agricultural Training Institute
<i>Tuesday, April 19, 2011</i>	North Eastern	Wajir	Raha Palace Hotel
<i>Wednesday, April 20, 2011</i>	North Eastern	Wajir	Raha Palace Hotel
<i>Tuesday, April 26, 2011</i>	North Eastern	Mandera	Jabane Hall
<i>Sunday, May 01, 2011</i>	Eastern	Moyale	Arid Lands Resource Management Project Guest House.
<i>Thursday, May 05, 2011</i>	Eastern	Marsabit	Nomad's Trail Rest House Conference Hall
<i>Tuesday, May 10, 2011</i>	Eastern	Isiolo	Wabera Primary School Dining Hall
<i>Tuesday, May 24, 2011</i>	Western	Mt. Elgon	Mount Elgon Council Hall
<i>Tuesday, June 28, 2011</i>	Western	Kakamega	Sheywe Conference Hall
<i>Monday, July 04, 2011</i>	Western	Busia	Busia Country Hotel
<i>Saturday, July 09, 2011</i>	Western	Bungoma	Tourist Hotel
<i>Saturday, July 16, 2011</i>	Nyanza	Kisumu	the Aga Khan Hall
<i>Friday, July 22, 2011</i>	Nyanza	Kisii	St. Vincent Catholic church Centre
<i>Tuesday, July 26, 2011</i>	Nyanza	Kuria	St. Matare SDA Church Kegonga
<i>Tuesday, September 20, 2011</i>	Rift Valley	Kericho	Kipsigis County Hall
<i>Saturday, September 24, 2011</i>	Rift Valley	Nakuru	ACK Cathedral
<i>Tuesday, September 27, 2011</i>	Rift Valley	Naivasha	St Francis Xavier Catholic Church
<i>Friday, September 30, 2011</i>	Rift Valley	Narok	African Hope Conference Hall
<i>Tuesday, October 04, 2011</i>	Rift Valley	Eldoret	Teacher's Advisory Centre Hall
<i>Tuesday, October 11, 2011</i>	Rift Valley	Lodwar	St. Teresa Pastoral Centre Hall Lodwar
<i>Saturday, October 15, 2011</i>	Rift Valley	Kapenguria	Pokot county Council Hall
<i>Saturday, October 22, 2011</i>	Rift Valley	Kitale	Kitale county Council Hall
<i>Tuesday, October 25, 2011</i>	Rift Valley	Baringo	Baringo County Council Hall
<i>Tuesday, November 01, 2011</i>	Uganda	Kiryandongo	Youth Centre Kiryandongo
<i>Tuesday, November 08, 2011</i>	Central	Nyeri	YMCA Hall Nyeri
<i>Friday, November 11, 2011</i>	Central	Muranga	Muranga College of Technology
<i>Tuesday, November 15, 2011</i>	Rift Valley	Rumuruti	Town Council of Rumuruti Social Hall
<i>Friday, November 18, 2011</i>	Eastern	Meru	Meru Municipal Council Hall
<i>Tuesday, November 22, 2011</i>	Eastern	Embu	Embu Ack Church
<i>Friday, November 25, 2011</i>	Eastern	Machakos	Our Lady of Lourdes Catholic church Hall
<i>Friday, December 02, 2011</i>	Eastern	Kitui	Parkside Villa Kitui
<i>Friday, December 09, 2011</i>	Rift Valley	Kajiado	Kajiado ACK Church
<i>Tuesday, January 10, 2012</i>	Coast	Lamu	Sunsail Hotel Lamu
<i>Friday, January 13, 2012</i>	Coast	Hola	Hola County Council Hall
<i>Tuesday, January 17, 2012</i>	Coast	Kilifi	Moving the Goal Post Conference Hall Kilifi
<i>Friday, January 20, 2012</i>	Coast	Mombasa	Wesly Methodist Tononoka Hall, Mombasa
<i>Tuesday, January 24, 2012</i>	Coast	Wundanyi	Kenya National Library Hall, Wundanyi
<i>Tuesday, January 24, 2012</i>	Coast	Kwale	Kwale County Council Hall
<i>Tuesday, February 21, 2012</i>	Nairobi	Nairobi	Charter Hall, Nairobi

Conducting Women's Hearings

92. Women's Hearings were presided over by female Commissioners and female staff of the Commission. The proceedings of the hearing were recorded verbatim. Translation services were provided to allow participants to freely communicate in the language of their choice. Prior to the hearings and with the financial support of UN Women, civic education was conducted to create awareness about the hearings amongst women and to encourage their participation. Women were encouraged to attend and participate in the hearings through announcements at local markets, and local radio stations. Leaders of community based organizations encouraged women to attend and to participate.
93. Counsellors using group sessions prepared women to give their testimonies prior to the start of hearings. They were informed of what to expect during the hearing and reassured of the confidentiality of the process. Before the start of the hearings they were invited to perform songs and dances. The Commissioners and staff of the Commission always joined in the singing and dancing, a gesture that fostered confidence and trust among the women and created an atmosphere conducive for the candid and open conversations that ensued.
94. The hearings were conducted in all regions of the country and were attended by more than 1000 women with an average of 60 women in each hearing. The majority of the women expressed appreciation for the opportunity to speak about issues that they had hitherto not spoken about in public and in some cases, had not even spoken about in private.

Box 1

Comments by an independent observer regarding women's hearing held in Garissa

I informally write to commend, congratulate you and encourage you to continue doing a great job as you have been doing at the public hearings and as very well demonstrated this morning with the women's private hearings.

Kindly allow me to briefly share my experience today with you on two particular areas I observed: managing of the day's women's hearing and strong concluding remarks.

You are conducting a laborious task for and on behalf of Kenyans, and we appreciate your tireless efforts and great commitment to deliver on this task under [an] immensely busy schedule.

Today, you two [Commissioner Tecla Namachanja and Secretary Patricia Nyaundi], supported by your team, really managed the hearings well, and demonstrated very high level [of] cultural and emotional intelligence. You connected with the women participants very well in the morning session, and set the mood and atmosphere right for the women to openly share and narrate their experiences,

I wish to commend you, [firstly], on how you managed the hearings. I observed the following positive things]

- i) Letting the women sing and dance to their favourite choice songs at the beginning (and also at the end), let them psychologically relax and start bonding as the women-folk gathered for the same agenda.
- ii) Emphasis on the importance and significance of the hearings for the individual and the group, and that each participant narrating their story should be heard with equal respect and attention and by reprimanding the participants laughing at another's story.
- iii) Your empathy with each of the participants who narrated their story (even when the events narrated were very emotionally difficult or disturbing), and acknowledging and letting them enlighten TJRC on their own cultural practices on how to handle certain experiences.
- iv) giving each one the opportunity to give their own opinion of what is the best recommendation that they would contribute to TJRC.

Secondly, the other notable observations to which I wish to extend my compliments, was in your very strong closing remarks.

- i) Helping the women understand the TJRC process and timeframe so as not to raise high expectations by giving the assurance that the recommendations and actions will not be immediate, but will be included in the TJRC final report, which will also take time and will come at the end of the process of public hearings around the country
- ii) Explaining that healing in the period after the TJRC is equally important and must continue; by inviting the women to continue [the process] amongst themselves [by] telling or narrating their traumatic stories in an environment where they can be comfortably vulnerable enough to allow for the healing process and with the support of CBOs and NGOs, [and to] even write these stories for record.
- iii) [The] gesture of friendship and willingness to continue engaging with public by encouraging those women who did not have a chance to record their statements or have a memorandum written to do so and leaving a token (TJRC 'kikoy') of appreciation for participants for taking time to support TJRC.

I apologize for the long email, but having only previously experienced the mock hearings and then Isiolo hearings, I could not resist applauding you and the entire TJRC team-Commissioners and Staff for working tirelessly to make the hearings a success.

The journey continues, but be encouraged that TJRC will only do it better!

Email from Naomi Maina,
Social Justice, Reconciliation and National Cohesion Project
Senior Officer, GIZ International

Referral Mechanisms

95. There were high expectations among victims in almost all places that the Commission visited that the Commission would at the very least meet their immediate needs both in monetary or material terms. This was outside the direct mandate of the Commission. Furthermore, the Commission did not have resources beyond what was allocated for providing transport and accommodation to victims who testified.
96. As a stopgap measure the Commission established a referral mechanism. Thus, where women raised issues which could be redressed immediately by a specific government department or ministry or organisation, they were referred to these institutions and also advised on how to access them. For example, women with disabilities were referred to the National Council for Persons with Disabilities where they were registered and found information on how to access the National Development Fund for Persons with Disability.
97. Women seeking to access credit were referred to the Women's Enterprise Fund while those with matters relating to child maintenance were referred to the Ministry of Gender, Children and Social Development. Others were referred to civil society organisations for *pro bono* legal services amongst other services.
98. In a few instances, the Commission in collaboration with organisations such as the Jaipur Foot Project provided direct support. This included the provision of wheelchairs and white canes for witnesses with disability. Similarly, women who were found to be suffering from prolonged post traumatic stress disorder were provided with treatment as part of a project funded by AMREF and implemented in conjunction with the Kenyatta National Hospital and local district hospitals.

Monitoring and Evaluation of Hearings

99. The hearings were evaluated by independent monitors who submitted periodic reports to the Commission pointing out both the strengths and weaknesses of the exercise. ICJ Kenya Chapter, Kituo cha Sheria, and KNCHR were among the organisations who formally conducted the exercise. The evaluations of these institutions were based on observations of the Commission's hearings and interviews of relevant stakeholders including Commissioners and staff of the Commission.
100. The Commission received and proceeded to make appropriate changes where it was feasible to do so. ICJ Kenya presented to the Commission what may be regarded as the most comprehensive evaluation of the Commission's hearings.

The evaluation report identified a number of positive aspects about the manner in which the Commission conducted hearings. The report concluded that the hearings complied with international standards for truth seeking bodies and in particular:

- due process protections were afforded to individuals who testified before the Commission;
- persons of interest to the Commission were treated with respect and dignity;
- persons of interest were provided with the opportunity to give a statement to the Commission laying forth their version of the events in question;
- the Commission made attempts to corroborate information implicating individuals before they were publicly named as persons of interest;
- the hearings focused on securing recognition of truths that were formerly denied or hidden, such as the Wagalla Massacre.

101. The evaluation report also raised a number of concerns including that: the hearings were legalistic and court-like; the extent of victim participation in the planning and conduct of the hearings was unclear; information about the Commission's resources and procedures for provision of psychosocial support were not widely and publicly available; and that the Commission's dissemination of information relating to hearings fell below expectation.

102. The Commission did not take these concerns lightly and took appropriate remedial measures. Noting that most of the issues revolved around information sharing, the Commission launched a new website on 26 August 2011. The website offered a fresh look with enhanced user-friendly navigation which in turn facilitated faster access to information. Some of the features that were introduced in the new website included the following:

- **Latest News:** This feature provided highlights of latest news on what is happening at the Commission. This included the Commission's official communication to the public.
- **What's New:** This feature provided an all inclusive list of the latest additions to the website.
- **Events Calendar:** This feature provided details of events such as hearings, workshops, civic education and outreach programs as well as other relevant activities.

- **Hearings Guide:** This was an electronic map indicating all locations where the Commission would hold its hearing or where it had already done so. For each location, the map provided a tool tip summary.
- **Audio/ Visual Gallery:** This feature provided a collection of Commission's videos classified by region.
- **Image Gallery:** This feature provided a collection of captioned images classified by region and event.
- **Resource Centre:** This feature provided a collection of documents, policies, and publications.
- **Newsletter Sign Up and/or Subscription:** This feature allowed persons and organizations that wished to receive regular communication updates from the Commission to sign up for the service.
- **Advanced Search:** In addition to the simple search, this feature allowed users to easily search and find information on the website.
- **Media Centre:** the Media Centre contained news, press releases and information relating to the Commission's coverage in the media.

Post-Hearing Feedback Sessions

103. Due to time constraints, the Commission was unable to hear testimonies of adversely mentioned persons in the specific areas or regions in which they had been adversely mentioned. Although some AMPs were heard in the regions, most hearings for AMPs were held in Nairobi a few weeks after the individual hearings had been concluded in the regions. Therefore, the majority of victims did not have the opportunity to be present at the hearings in which AMPs testified or gave their version of the story.
104. In mitigation against the inability of victims to witness the testimonies of AMPs, the Commission, in partnership with Kenya National Commission on Human Rights (KNCHR) and German Technical Cooperation (GIZ), organised thirteen public feedback meetings in Wajir and Garissa counties in October 2011. The initial plan also included sessions in Mandera County. However, due to security reasons those sessions were cancelled. Subsequent to its hearings in Mandera, which borders Somalia, activities by the Al Shabaab militia group heightened, making the Commission's travel to Mandera impossible for security reasons.

105. The feedback sessions involved showing a video summarising individual and women's hearings in the Northern region of Kenya and another video showing proceedings of the AMP hearings in Nairobi. The sessions began with a moderator explaining the Commission's mandate and process, including what would possibly happen to AMPs (for example, the possibility that they would be named in this Report or recommendation made for their prosecution). After viewing the two videos, a public dialogue designed to get feedback from the audience and to answer questions followed.
106. Attendance at the sessions in Wajir County was high with audiences ranging from 150 to 300 people (Women constituted between 20% and 50% of the audience). In Garissa County, the attendance was much lower, with audiences between 15 and 35 people, with women constituting 20% of the audience.
107. The Commission had intended to organise similar feedback sessions in all regions in the country but this could not be done because of time and financial constraints.

Media Coverage of Public Hearings

108. The success of a truth commission partly depends on a nation's awareness and level of its peoples' participation in its processes. The media plays a central role given its ability and capacity to reach out to the masses. For this reason, and bearing in mind the dynamic and positive contribution the media had made in the success of, for instance, the South African Truth Commission, the Makau Mutua Task Force had envisaged a Kenyan truth commission whose public hearings would be carried live on television and radio.¹² Indeed, there were some at the Task Force who were of the opinion that the public broadcaster, Kenya Broadcasting Television (KBC), would be expressly required to carry the public hearings of the truth commission live on radio and television.¹³
109. However, the experience of the Commission was very different from what had been envisaged and strongly advocated for. The Commission's public hearings were carried live on television on only two occasions. This led to an analyst to lament, justifiably so, that:

As victims and affected communities engage in the public hearings, what seems to be lacking is a national dialogue and engagement in the truth-seeking process. Most

¹² Makau Mutua Report (2003) 35.

¹³ Makau Mutua Report (2003), Annexure 6.

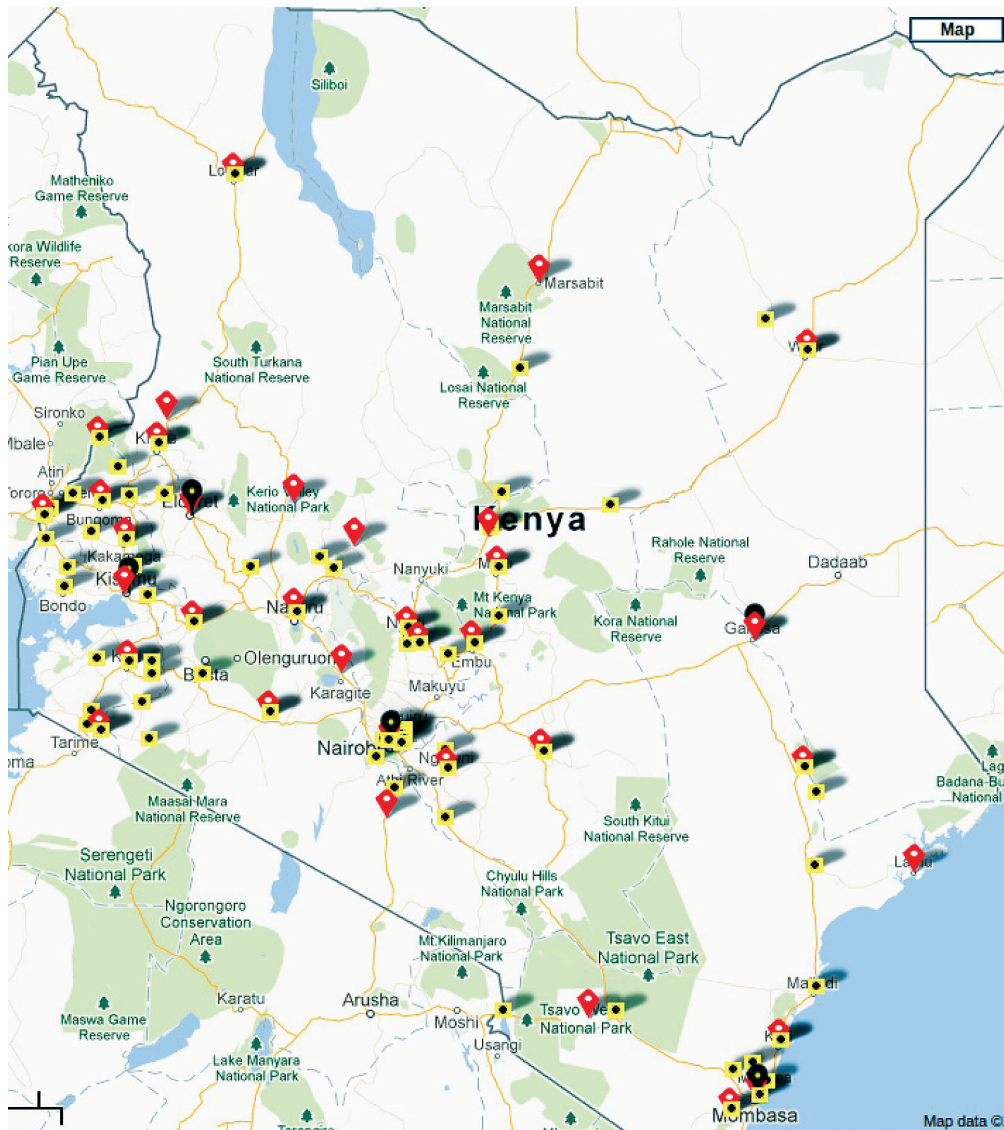
notable in this regard is the low media coverage of the proceedings. This is most aptly demonstrated through a comparison between the media coverage of the public hearings (and the TJRC process in general) and past national truth-recovery processes. For instance, the Goldenberg Inquiry into embezzlement of public funds elicited great public participation and was intensely covered in the media including through daily live broadcasts of the Commission's proceedings in one of the main television stations. Given the gravity of the past atrocities that form the subject of the TJRC hearings, one would imagine that there would be significant public interest in and robust media coverage of the hearings.¹⁴

101. There were several reasons that accounted for this state of affairs. Firstly, throughout the period that the Commission held its public hearings, it constantly competed for news coverage with more dramatic and unfolding events such as those surrounding the International Criminal Court. Secondly, due to its lean budget, the Commission could not afford to pay for live coverage of its hearings. The media houses, on their part, did not appear to consider the Commission's hearings worthy or suitable for unpaid-for coverage in the public interest. In other words, in a commercialized media environment as obtains in Kenya, it is in the nature of media houses to amplify mostly that which in their opinion sells newspapers or draws audiences.
111. Since it could not afford to pay for live coverage of its hearings, the Commission opted to carry weekly roundups of its hearings in a documentary format. Even so, finding a suitable television channel to carry the weekly round-up was not easy. Citizen TV could not slot the Commission's round-up at prime time but offered only to do so on Saturdays and Sundays in the afternoon. This arrangement did not work for long for it was still expensive. The Commission, therefore, moved its round-up to the public broadcaster where the round-ups were transmitted every Wednesday's after the 9 p.m. news at a fee.
112. However, the Commission's experience with the public broadcaster, in one occasion, was reminiscent of the old days during which the public broadcaster was under the control of the state. In particular, KBC failed to air the Commission's round-up on 5 October 2011 without notice. In response to the Commission's demand for an explanation, KBC's Managing Director, Chris Mutungi, wrote that the round-up scheduled for that day 'was found unsuitable for transmission based on KBC's editorial programming policy'. The said policy, however, is neither in the public sphere nor was it expounded upon. It appears that the round-up was censored because a witness appearing in that round-up had mentioned




¹⁴ C Alai 'Truth, justice and reconciliation' in L Mute & L Young (eds) *Transitional justice in Kenya: Looking forward, reflecting on the past* (2011) 111, 125-126.

President Kibaki in a negative light. The Commission finally settled on KTN for media coverage for the remainder of its tenure.

Locations for hearings, focus group discussions and TJRC offices



Legend:

-  TJRC Regional Offices
-  Areas where FGDs were conducted
-  Areas where hearings were conducted

Thematic Hearings

113. In addition to individual hearings, the Commission conducted thematic hearings that focused on specific violations, events, or groups of victims. Thematic hearings were meant to elicit public testimony on specific themes that are of particular importance in Kenya's pursuit for truth, justice and reconciliation.
114. The Commission held a total of 14 thematic hearings focusing on the following subjects:
 - Access to justice;
 - Economic marginalisation and minorities;
 - Land;
 - Armed militia groups;
 - Prisons and detention centres;
 - Torture;
 - Ethnic tensions and violence;
 - The 1982 attempted coup;
 - Security agencies, extra-judicial killings and massacres;
 - Persons with disabilities (PWDs);
 - Women;
 - Children;
 - Internally Displaced Persons (IDPs); and
 - Political assassinations.
105. In selecting the subject of the hearings, weight was given to significant events during the mandate period and to highlighting the experiences of particularly vulnerable groups with respect to historical injustices.
116. Individual experts, associations representing groups of victims, and relevant CSOs and state agencies were invited to testify during these hearings. The Commission held preparatory consultation sessions with relevant stakeholders prior to some of the thematic hearings. In a number of the hearings such as those on children, IDPs and PWDs, individual victims of violations were also invited to testify.

Media Workshop

117. The Commission also held a media workshop on 23 February 2012. This workshop was similar to a thematic hearing. It brought together journalists, media houses and associations representing journalists and media houses. They testified about their experiences relating to state control and repression of the media during the mandate period.

Table 2: Schedule of thematic hearings

	Thematic hearing	Date(s)
1	Children	13 & 14 Dec 2011
2	Ethnic tensions and violence	2 Feb 2012
3	Internally Displaced Persons	3 Feb 2012
4	Women	8 Feb 2012
5	Economic marginalization and minorities	13 Feb 2012
6	Persons with Disabilities	16 Feb 2012
7	Torture	28 Feb & 7 Mar 2012
8	Prisons and detention centres	29 Feb 2012
9	Access to justice	1 & 2 Mar 2012
10	Political assassinations	5 & 6 Mar 2012
11	Security agencies, extra-judicial killings and massacres	9 Mar 2012
12	Armed militia groups	12 Mar 2012
13	1982 Attempted Coup	21 Mar 2012
14	Land: Historical injustices and illegal/irregular allocation of public land	22 Mar 2012

Thematic Hearing on Children

118. The thematic hearing on children was based on statements recorded by children and was designed to ensure that children gave their testimony in an environment in which they felt safe, free and confident to do so. The Commission took several measures towards this end.
119. Although the hearing was open to the public, the identities of children who testified were concealed. Members of the public could follow the hearing by a video link but could not see the particular child testifying before the Commission. Moreover, the children were not identified by their names or in any other identifiable way. Secondly, the hearing venue was set up such that the Commissioners sat at the same level as the children testifying before them. Play and art materials were available in the hearing venue to allow the children to play and/or paint even as

they testified. As was the case with the general individual hearings, children and their care givers visited the hearing venue on the eve of the hearing. Similarly, each child who testified received counselling before and after sessions.

120. Each child testified for an average of 20 minutes, although the time varied depending on the age of the child. A total of 40 children, aged between 6 and 17 years, from across the country, attended the thematic hearing which was held in Nairobi with the Commission paying for the transport of both the children and their parents or caregivers, to and from Nairobi.

Televised Discussions on Thematic Hearings

121. In January 2012, the Commission produced a series of 30 minute discussion programmes based on the subjects covered during the Commission's thematic hearings which were televised on KTN. The programme entitled '*Kenya's Unheard Truth*' was launched on 9 February 2012. It was broadcast at 10 p.m. every Thursday. A total of eight programmes were aired between February and April 2012.

Focus Group Discussions

122. The Commission undertook a special data collection exercise on regional perceptions about the violations of socio-economic rights and economic marginalisation. This special exercise was needed after preliminary analysis of statements and memoranda showed that reporting on the violations of socio-economic rights was very low. Despite the fact that the Statement Form had a dedicated section on socio-economic rights, individuals who recorded statements tended to focus on human rights violations relating to bodily integrity and less on violations of socio-economic rights.
123. Between 25 January 2012 and 8 February 2012, the Commission conducted Focus Group Discussions (FGDs) throughout the country with a view to documenting regional perceptions on violations of socio-economic rights and on economic marginalisation. This was done to supplement data collected through statement taking.
124. For these discussions, the Commission drafted a questionnaire for guidance.¹⁵ The questionnaire was reviewed both internally and externally before it was pre-tested in Kibera, Nairobi, on 14 December 2011 and revised accordingly to incorporate insights gained from the pre-testing exercise.

¹⁵ See Appendix 7 for the FGD Questionnaire.

125. The Commission recruited eight facilitators (one in each province) to conduct the FGDs. The facilitators were trained on the mandate of the Commission and the use of the questionnaire before being deployed to the provinces to facilitate the discussions. Each FGD consisted of about 12 to 15 participants drawn from either urban informal settlements or rural areas, although the number of participants in exceptional circumstances exceeded 15. Participants were carefully chosen to ensure there was diversity in the group in terms of age and gender. Persons with disability and members of other vulnerable groups were particularly targeted for inclusion in the discussion group. A total of 81 FGD sessions were conducted across the country with a total 1192 individuals participating in the FGDs (See table below).

Table 3: Schedule of FGDs on Economic Marginalization and Violations of Socio-Economic Rights

	Province	Areas where FGD were conducted	FGDs	Participants
1	Central	Oi Kalau, Nyahururu, Nyeri, Othaya, Mwea, Kagio, Muranga, Kenol, Kiambu and Lari	10	135
2	Coast	Malindi, Garsen, Kilifi, Mtwapa, Mombasa, Kwale, Kaloleni, Mariakani, Voi and Taveta	10	170
3	Eastern	Machakos, Kitui, Embu, Chuka, Meru, Isiolo, Archers Post, Laisamis and Garbatulla	10	137
4	Nairobi	Kibera, Starehe, Kayole, Korogocho, Githurai, Kasarani, Makadara, Mukuru kwa Njenga and Kawangware	9	145
5	North Eastern	Garissa, Shanta Abak, Wajir, Giriftu, Bura and Masalani	5	86
6	Nyanza	Kisumu, Ahero, Bondo, Siaya, Kisii, Nyamira, Borabu, Migori, Kuria, Homabay and Suba	11	155
7	Rift Valley	Lodwar, Kitale, Turbo, Eldoret, Eldama Ravine, Nakuru, Kericho, Bomet, Kilgoris, Lolgorian, Narok, Isinya and Kiserian	14	246
8	Western	Kakamega, Mumias, Bungoma, Cheskaki, Kapsokwony, Webuye, Amagoro, Chakol, Busia, Funyula, Vihiga and Hamisi	12	118
		Totals	81	1192



Mr. David Chemiati (extreme left) showing TJRC commiccioners a mass grave site in Mt. Elgon.

Site Visits

126. The Commission visited a number of sites of importance to its work in several parts of the country. These visits enabled the Commission to visualize and contextualize violations that had occurred in those sites. Among the sites that the Commission visited include:

- a mass grave in Turbi, Marsabit, where eight adults and 21 children were buried after the Turbi Massacre of 12 July 2005.
- a mass grave in Garbatulla, where individuals killed during the Shifta War were buried.
- a mass grave in Kiambaa KAG Church, Eldoret, where 26 people who were burnt to death at the church during the 2007/2008 Post Election were buried.
- Kiryandongo Refugee Camp in Uganda which hosts Kenyan refugees, primarily from Malaba and surrounding areas, who fled the country during the 2007-2008 Post-Election Violence.
- Wagalla Airstrip, the site of what became the Wagalla Massacre. It is here in February 1984 that men belonging to the Degodia clan were gathered, tortured, and some of them ultimately killed by state security agencies.

127. Other sites or places visited by the Commission include Langata Women's Prison, Nyayo House 'Torture Chambers' in Nairobi, Mandera Prisons, Mandera Law Courts, Mawingu IDP Camp in Naivasha, and Kapkota Military Base in Mt. Elgon.

Reconciliation

128. The Commission's reconciliation activities were spearheaded, at the Commissioners' level, by the Reconciliation Committee established in terms of section 22 of the TJR Act, and at the Secretariat level, by the Department of Civic Education and Outreach.

Reconciliation Policy

129. Reconciliation activities were conducted under the Reconciliation Policy which laid out the Commission's understanding of the notion of reconciliation and its role. In particular, the following policy guidelines guided the Commission's reconciliation work:
- Reconciliation is complex and includes several relationships, levels and actors. The various levels or 'types' of reconciliation include intra-personal, inter-personal, inter-community, and national reconciliation.
 - In a context where inter-ethnic tension is deep, as is the case in Kenya, the mending of social relations is imperative. The role of the Commission in this regard is to facilitate dialogue and other activities that mark the beginning of inter-community reconciliation.
 - Healing is closely linked to reconciliation. The idea of healing invokes the idea of remedy, restoration, repair, or mending. National healing entails attending to and restoring social relations in communities and inter-ethnic relations. At a personal level, healing takes various dimensions, but begins with acknowledgement and restoration of dignity.
 - Reconciliation is both a goal and a process. As a goal, it is a long term goal. The Commission role in this regard is to initiate dialogue and lay the groundwork, together with other relevant bodies, for long term processes of reconciliation. As a process, reconciliation occurs in various sites and activities. It involves numerous actors and the Commission is only one of these.
 - There exists both conceptual and practical links between reconciliation and the notion of justice. Justice includes redistributive, retributive and reparative justice. Reconciliation is fostered when those who have suffered

are restored and repaired, those who were previously excluded are included in meaningful ways, and those in dire want as a result of marginalization are materially enabled to move forward.

- A relationship exists, too, between reconciliation and truth. While closure for victims and the ability to address past violations and prevent repetition begins with knowing the truth about past events, truth-telling may open wounds in ways that slow or impede reconciliation and healing especially at a personal level. The challenge is to engage with both without negating either.
- The notion of truth includes at least three versions or types of truth: Personal or narrative truth (personal versions of truth by witnesses, including victims and perpetrators); factual or forensic truth (the product of investigations, verification and corroboration); social truth (the product of dialogue, interaction, discussion and debate; and healing and restorative truth.
- To achieve reconciliation emphasis should be put on facilitating dialogue and creating space for constructive exchange by and around individuals, communities and institutions.

Reconciliation Activities

130. In preparation for rolling out reconciliation activities and particularly to ensure the participation of relevant stakeholders in such activities, the Commission convened two meetings in March 2011. On 3 March 2011, the Commission held a Consultative Prayer Breakfast with religious leaders in Nairobi. This was followed a week later by a three-day Stakeholders Consultative Workshop in Naivasha.
131. The Commission also initiated working relations with both governmental and non-governmental organisations including with the National Cohesion and Integration Commission (NCIC) and the National Steering Committee on Peace Building and Conflict Management (established within the auspices of the Ministry of State for Provincial Administration and Internal Security). The Commission's working relationship with the NCIC resulted in the formation of a Joint Taskforce on National Healing and Reconciliation composed of Commissioners and staff from the two commissions. Unfortunately, activities which the Joint Taskforce had planned to carry out never took off.
132. Reconciliation is a long term process and given the Commission's resource constraints it embarked on developing a National Reconciliation Agenda to serve

as a blue-print for reconciliation activities after the winding up of the Commission. Two approaches were adopted for this. First, a Reconciliation Consultative Meeting was held on 6 February 2012 bringing together stakeholders involved in reconciliation work from across the country. The outcome was the establishment of a Reconciliation Reference Group that was mandated to work with the Commission to develop the Agenda. The Reference Group held several meetings between February and May 2012.

133. Second, the Commission undertook countrywide forums on the theme of reconciliation. The forums served as avenues to: (a) listen and understand the meaning of reconciliation for communities in different regions of the country; and (b) find out specific issues in each region that bring about tensions, hostility, hatred and conflict. The forums also gave communities the opportunity to suggest specific options and solutions to problems and issues affecting them. They were able to share their dreams about the Kenya they want and to recommend ways of promoting healing and reconciliation in their regions and ultimately in the whole of Kenya.
134. From 9 to 20 March 2012, the Commission held a total of 10 reconciliation forums around the country. The forums were held in Mombasa, Garissa, Isiolo, Machakos, Nyeri, Eldoret, Nakuru, Kakamega, Kisumu and Nairobi. Between December 2012 and March 2013, the Commission organized a series of workshops on trauma healing and strategy formulation. The workshops were held in Cheptais, Eldoret, Mombasa, Kilifi, and Kwale. The objectives of these workshops were to: assess levels of healing and reconciliation in selected communities; identify local actors who could then spearhead trauma healing and reconciliation; and explore local mechanisms for healing and reconciliation.

Report Writing

135. The final product of the Commission is this Report which was compiled in terms of section 5(j) and 48(2) of the TJR Act. These sections essentially tasked the Commission to compile a report providing as comprehensive as possible an account of its activities and findings together with recommendations on measures to prevent the future occurrence of violations.



Challenges in the Execution of Mandate

Introduction

1. The Commission encountered many challenges in the execution of its mandate some of which were expected and understandable while others were completely unanticipated. This Chapter highlights these challenges in an effort to enlighten Kenyans of the environment and conditions under which the Commission operated. The Commission believes that candid reporting of these challenges could help prevent similar situations in future both in Kenya and elsewhere in the world.
2. While there were many impediments to the work of the Commission, only four major challenges are discussed here: the controversy surrounding the credibility and suitability of the Chairperson; financial and other resource constraints; legal challenges; and, the lack of sufficient state and political will to support the work and implementation of the objectives for which the Commission was established.
3. Other challenges generally stemmed from one or more of these four major challenges including the disengagement of key stakeholders (notably CSOs and donors) from the processes of the Commission.

Credibility and Suitability of the Chairperson

4. Almost immediately after the inception of the Commission, CSOs and a range of other actors raised concerns over the suitability and credibility of Ambassador Bethuel Kiplagat to serve as the Commission's Chairperson. In this section, the Commission explains this challenge in detail because of the great impact it had on the operations of the Commission. Indeed, it was the single challenge that threatened the very existence of the Commission.

The allegations

5. Many critics argued, initially, that the fact that Ambassador Kiplagat had served in powerful positions in the government of President Daniel arap Moi disqualified him from serving on the Commission. The Commission viewed this matter differently, pointing out that the mere fact that Ambassador Kiplagat (or any other Commissioner) had served in a previous government did not and should not automatically disqualify him from serving on the Commission. Given the fact that the ultimate purpose of the Commission was to foster national unity and reconciliation, the Commission felt that it was not only acceptable, but even desirable, to have such an individual or individuals on the Commission. The Commission was not a judicial mechanism, or a purely investigative commission of inquiry, where the general conflict of interest that Ambassador Kiplagat presented as a former member of President Moi's government would have been of more serious concern.
6. Some of those raising concerns about Ambassador Kiplagat at this initial stage were more specific, asserting that he presented a direct conflict of interest with respect to three issues in the Commission's mandate: he was a beneficiary of illegal or irregular allocations of land; he was a key witness to the events leading to the murder of the Honourable Dr. Robert Ouko who was at the time of his death Kenya's Minister of Foreign Affairs; and he was involved in one or more meetings in Wajir related to the planning of the security operation that ended in the Wagalla Massacre.
7. These three allegations were of particular concern to the other Commissioners. The Act required that a Commissioner should not have been 'involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated under this Act'.¹ The language of the Act was quite broad, prohibiting not just being implicated in or being legally responsible for a

¹ TJR Act, Section 10(6)(b).

matter within the Commission's mandate, but also being involved, associated, or even linked to such matters.

8. At the beginning these allegations were just that, mere allegations. In the first six months of the Commission's existence (from August 2009 to January 2010) the Commission received no evidence to substantiate the allegations of the three conflicts of interest stated above. Nevertheless significant sections of civil society and other actors continued to call for the resignation of Ambassador Kiplagat or the disbanding of the Commission. Hostile demonstrations greeted the Commission whenever it ventured into the field to perform its core functions. Significant sections of civil society refused to work with the Commission, and donors – with few exceptions – were unwilling to engage with or support the Commission.
9. It was not until January 2010 that the Commission received documents from civil society supporting their allegations against Ambassador Kiplagat. Even then, the documents were not in themselves conclusive with respect to each of the allegations, but were sufficient for the Commission to decide on further investigation to determine the extent, if any, of Kiplagat's conflicts of interest with respect to the mandate of the Commission.

Ambassador's Kiplagat's response

10. In response to the documents submitted to the Commission, Ambassador Kiplagat met with all the Commissioners and admitted to having bought the plots of land that he was alleged to have received illegally or irregularly (including a plot mentioned in the Report of the Commission of Inquiry into Illegal/Irregular Allocation of Land (Ndung'u Report). However, he insisted that he had followed all of the then existing procedures for the acquisition of such land.
11. With respect to the death of Dr. Robert Ouko, Ambassador Kiplagat reiterated that he was not involved in any plan or plot to assassinate the Minister (and that in fact he was personally and professionally shocked and distraught over the assassination). Furthermore, he said he had cooperated with each and every investigation undertaken to solve that murder. The Commission noted that at no time was any allegation made or evidence presented to the Commission alleging that Ambassador Kiplagat was responsible in any way for the murder of the Minister. Rather, the allegation was that Ambassador Kiplagat was in possession of relevant information and that he had been present at certain events that might have been related to the assassination of the Minister. It was also alleged

that he had been found not to have been a cooperative witness during some or all of the investigations into that murder.

12. Over the Wagalla Massacre, Ambassador Kiplagat first stated categorically that he had never been to Wajir in his entire life and thus could not have attended any meeting that may have taken place there related to the Massacre. He noted that at the time of the alleged meetings in Wajir he had just returned from his posting in London as Kenya's High Commissioner to the United Kingdom, and thus could not have travelled to attend such a meeting.
13. A few weeks later, Ambassador Kiplagat told fellow Commissioners and the public that he 'could not remember' if he had ever been to Wajir or not and thus could not recall if he had ever attended a meeting in Wajir. As it later became clear, Ambassador Kiplagat had in fact attended a meeting of the Kenya Intelligence Committee in Wajir on 8 February 1984 less than forty-eight hours before the start of the security operation that resulted in the Wagalla Massacre.
14. The alleged involvement of the Chairperson in these matters and the fact that documentary evidence had been presented to the Commission linking him to three important areas of the Commission's mandate, created a conflict of interest between him and the Commission. He could not investigate and make findings on issues of which he was a suspect without violating the fundamental principle of justice that a person should not be a judge in his own case. There seemed to be no way in which he could participate in the hearings and other public activities in these three areas without creating the appearance, if not the reality, of improperly influencing the work of the Commission in matters in which he had an interest. His involvement in any way in the Commission's activities related to these three areas raised serious concern that such involvement would scare witnesses, including victims, from engaging with the Commission. This would irrevocably diminish the effectiveness, integrity and credibility of the Commission.
15. These conflicts of interest presented by Kiplagat, accompanied by demands for his resignation and the dissolution of the Commission, almost completely eroded the ability of the Commission to garner support from the public, civil society and development partners. Development partners and civil society were extremely reluctant to provide support, including in-kind support, for the Commission's activities because of Kiplagat's conflicts which exacerbated the Commission's financial problems (see below) and hindered the implementation of its ambitious work plan developed in the first few months of its existence.

Finding a solution

16. From January to April 2010 the Commissioners engaged in a series of internal discussions regarding the conflicts of interest presented by Kiplagat. He made it clear that he would not resign as chairperson. The other Commissioners respected his decision. A number of options were discussed, including the creation of an external committee of former Truth Commissioners from around the world who would evaluate the matter and present their recommendation on the way forward. The Commission retained the services of a professional mediator to assist the Commissioners in developing a way forward. The Commission was also assisted by the Parliamentary Committee on Legal and Administrative Affairs in seeking a solution.
17. After about three months of discussion, Ambassador Kiplagat indicated that he preferred to follow the provisions of the Act concerning the removal of a commissioner as set out in Section 17. The Commissioners unanimously agreed with the option chosen by Ambassador Kiplagat. On 12 April 2010, all nine Commissioners, including Ambassador Kiplagat, wrote to the Minister of Justice asking that a formal request be sent to the Chief Justice to establish a tribunal pursuant to Section 17 of the Act to enquire into the conflicts of interest raised by the presence of Ambassador Kiplagat in the Commission.
18. Recognising the detrimental effect this controversy was having on the work of the Commission, and recognising further that a legal process had now been initiated to address the issues raised by his continued participation and presence in the Commission, Ambassador Kiplagat agreed to step aside until the tribunal process reached its conclusion. This promise was included in the letter of 12 April 2010 to the Minister of Justice which was signed by all Commissioners, including Ambassador Kiplagat.
19. However, within 24 hours of having signed the letter indicating he would step aside, Ambassador Kiplagat met Commissioners and stated that he would not in fact step aside. He indicated that he had been advised by the Ministry of Justice that he could not legally step aside and thus he would not honour the pledge he had made in writing the day before. Meanwhile, the Minister of Justice responded to the Commission's letter of 12 April 2010. He advised that given the provisions of the Act, the Commission should write directly to the Chief Justice.
20. Thus, on 15 April 2010, all eight Commissioners, with the express consent and approval of Kiplagat, filed a petition with the Chief Justice requesting a tribunal

under Section 17 to determine whether Ambassador Kiplagat had engaged in ‘misbehaviour or misconduct’ under Section 17(1)(a) of the Act by:

- a) swearing in an affidavit submitted to the Selection Panel that he was not ‘in any way ... involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated under the Act’ as provided in Section 10(6)(b) of the Act;
 - b) privately and publicly asserting during his time as commissioner that he was not in violation of Section 10(6)(b) of the Act; and
 - c) asserting the right to participate in investigations and other related activities with respect to matters in which he has a conflict of interest.
21. After almost a month without a response from the Chief Justice, the Commission wrote to him on 14 May 2010 inquiring as to the status of the petition.
 22. On 9 September 2010, in the absence of any decision on the part of the Chief Justice to accept or reject the Commission’s petition, a coalition of civil society organizations (CSOs) filed a separate petition to the Chief Justice also requesting that a tribunal be established under Section 17 of the Act to determine whether Ambassador Kiplagat had engaged in misbehaviour and misconduct and whether his presence in the Commission violated the newly ratified Constitution of Kenya.
 23. There then followed a curious set of letters between the Chief Justice and members of civil society concerning their petition and the petition of the Commission. On 16 September 2010 the Chief Justice responded to the CSOs concerning their petition, and copied the letter to the Commission. The letter from the Chief Justice informed the CSOs that a response concerning the petition against Ambassador Kiplagat had already been made to the Commission.
 24. The copy of the letter to the Commission included two additional letters that the Commission later learned were not included in the original letter sent to the CSOs. First there was a letter dated 7 September 2010 to the Secretary of the Commission in which the Chief Justice noted he had forwarded a copy of the Commission’s petition to the Attorney General on 3 May 2010. This was curious given the fact that the Act did not indicate any role for the Attorney General with respect to a request for a tribunal under Section 17. This was also the first time the Commission had received such a letter from the Chief Justice.

25. Secondly, also attached was a copy of a letter sent from the Chief Justice to the Attorney General dated 3 May 2010 requesting that the Attorney General, 'in his role as the Principal Legal Advisor to the Government of Kenya', advise the Chief Justice if the grounds listed in the Commission's petition 'satisfy the requirements of the law precedent to setting up a tribunal as set out in S. 17(1) of the said Act'.
26. By the end of September 2010 the Commission had been waiting for over five months for a response to its petition before the Chief Justice.
27. In October 2010, Ambassador Kiplagat gave a nationally televised interview concerning the Wagalla Massacre in which for the first time he publicly admitted that he had been present in Wajir for a meeting of the Kenya Intelligence Committee on 8 February 1984, because another participant at that meeting had confirmed to him that they both had been present. When he was reminded of his presence at the Wajir meeting Ambassador Kiplagat declared with certainty that the Kenya Intelligence Committee meeting did not discuss a security operation. He later asserted that the sole purpose of the visit of the Kenya Intelligence Committee to Wajir and to other parts of the then North Eastern Province was for development purposes and not security.
28. In addition, in that same nationally televised interview he stated, in response to a question about government responsibility for the Wagalla Massacre, the following:

I doubt, I find it extremely difficult, no government worth its salt plans to massacre its people.
29. Lessons of history show that far too often governments unfortunately do massacre their own people. By stating a conclusion concerning government responsibility for the Wagalla Massacre Ambassador Kiplagat was engaging in just the sort of activity that had led to the original concerns about the conflict of interest his inclusion in the Commission presented. As the official spokesperson of the Commission his statements suggested that the Commission had already prejudged an issue that it was in fact still investigating. Even more, he was making such a statement about an incident in which he himself had been implicated and was under investigation.
30. In the same month of October 2010 the Parliamentary Legal Affairs Committee requested an update from the Commission on how the issues relating to Ambassador Kiplagat were being addressed. The Parliamentary Committee

announced at the end of that meeting that it was giving the Commission 72 hours to find a way forward or the Committee would move to have the Commission disbanded.

31. Thus, on 28 October 2010, the Commission moved to the High Court for a *writ of mandamus* to compel the Chief Justice to set up a Tribunal. Around the same time, Commissioner Ronald Slye announced that he would be resigning on 1 November 2010 because of the impasse the Commission had reached. However, he never did resign because on 29 October the Chief Justice announced that he would be establishing a Tribunal to inquire into the issues raised about Ambassador Kiplagat. On 1 November 2010 the Kenya Gazette published a notice from the Chief Justice dated 21 October 2010 establishing the Tribunal pursuant to Section 17 of the Act. It was not clear why a decision made on 21 October was never formally communicated to the Commission.
32. The terms of reference for the Tribunal established by the Chief Justice were fundamentally different from and far broader than the issues raised by the Commission in its petition. Rather than limiting the jurisdiction of the Tribunal to acts committed by Ambassador Kiplagat in connection with his appointment and after his appointment (the subject of the Commission's petition), the Chief Justice interpreted 'misbehaviour and misconduct' under Section 17(1)(a) of the Act more broadly. The mandate of the Tribunal as set up by the Chief Justice was as follows:

To investigate the conduct of the Chairman of the Truth, Justice and Reconciliation Commission, Ambassador Bethwell [sic] Kiplagat including, but not limited to, the allegations that the said Chairman's past conduct erodes and compromises his legitimacy and credibility to chair the Commission; his past is riddled with unethical practices and absence of integrity; he has been involved in, linked to or associated with incidents considered to be abuse of human rights; is likely to be a witness in the same matters that the Commission is mandated to investigate.²
33. The Tribunal was given six months from the publication of the Gazette Notice to investigate and report back to the Chief Justice.

The Legal proceedings

34. Upon the announcement of the creation of the Tribunal and the publication of its terms of reference, Ambassador Kiplagat issued a signed media statement on 2 November 2010 in which he stated 'I, indeed, very much welcome the decision of the Chief Justice to ascertain the truth concerning the allegations that have been

² Gazette Notice Nos. 13203 and 13204, Kenya Gazette, Special Issue, Vol. CXII – No. 111 (1 November 2010).

made against me [by establishing the Tribunal],’ and that he saw ‘the Tribunal as an opportunity to finally put any doubts about my credibility to rest once and for all’.

35. Ambassador Kiplagat also announced that he was ‘stepping aside’ from his duties as Chairperson and Commissioner ‘in order to allow the Tribunal to carry out its mandate’.
36. Before the Tribunal could commence its operations, one of its members declined to take up the appointment and the Chief Justice had to appoint a replacement which he did in the *Gazette* Notice dated 9 November 2009.³ However, the individual so appointed was not qualified to serve in the Tribunal as he was neither a sitting nor a former judge. Thus in December 2009 the Chief Justice published another *Gazette* Notice dated 1 November 2009 correcting that error and appointing an individual qualified under the terms of Section 17 of the Act.
37. In essence, the Tribunal was not properly constituted until mid-December 2010. In the meantime, the six months time in which it was to do its work was running out.
38. The Tribunal’s establishment was announced at the end of October 2009, but it only began its formal examination of Ambassador Kiplagat’s case in March 2010, four months later. The Tribunal spent much of its initial time setting up offices, drafting rules of procedure and lobbying for money from the Government.
39. Despite his openly declared promise to cooperate with the Tribunal, Ambassador Kiplagat filed an application before the same Tribunal challenging its jurisdiction as soon as it rolled out its proceedings. He argued that the Tribunal could not investigate his conduct prior to his appointment as the Commission’s Chairperson. He added that the only conduct that the Tribunal could investigate, if at all, was his conduct while in office (which was coincidentally consistent with the original petition filed by the Commissioners).
40. The Tribunal delivered its ruling on Kiplagat’s application on 12 April 2010 and held that it had jurisdiction to investigate his past conduct. It ruled that the scope of investigations as stipulated in the appointing instrument (*Gazette* Notice No. 15894) extended to ‘the conduct of the subject (Chairperson) during the period pre-dating the subject’s appointment as a Commissioner and the Chairman of TJRC’. The Tribunal also noted that the fact that ‘the subject was interviewed or vetted by other organs did not mean that such organs could not have over-looked some aspects of the subject’s conduct prior to his appointment to the Commission’.

³ *Gazette* Notice No. 13881, *The Kenya Gazette*, Vol. CXII- No. 120 (19 November 2010).

41. A week later, Ambassador Kiplagat moved to the High Court for an *ex parte* application requesting a stay of the proceedings of the Tribunal while he sought legal review of the rejection by the Tribunal of his motion challenging its jurisdiction. The High Court granted the stay of the Tribunal's proceedings on 27 April 2010. In doing so, the High Court made an important point that initially informed the Commission's decision to petition for the formation of the Tribunal. It stated:

The issue is not whether the allegations being levelled against him [Ambassador Kiplagat] are true. What is material is that the Commission will want to investigate the circumstances surrounding the death of Robert Ouko, the Wagalla Massacre and the Ndung'u Report on Illegal/Irregular Allocation of Public Land and in each case he is being adversely mentioned. He cannot sit in judgment when the issues are being discussed. Justice will cry if he were allowed to sit in judgment, be a witness and an accused, all at the same time. My advise (sic) is that he should do the honourable thing.

42. While Kiplagat's challenge to the jurisdiction of the Tribunal proceeded in the High Court, the six months given to it to complete its work ran out. The Tribunal requested an extension of its life but the newly appointed Chief Justice, Dr. Willy Mutunga, refused because, in his opinion, 'such action would have resulted in a wastage of national resources'. Thus, the Tribunal never completed its work and could not advise the President, through the Chief Justice, if Ambassador Kiplagat should continue as Chairperson and as a member of the Commission.
43. When the High Court was to hear arguments in the case challenging the jurisdiction of the now-defunct Tribunal in December 2011, Ambassador Kiplagat voluntarily withdrew his challenge. The Commission did not oppose this withdrawal as it removed the stay against the Tribunal's work. This would have allowed the Chief Justice to revive the old Tribunal or create a new Tribunal to address the claims made in the Commission's April 2010 petition. The withdrawal of the case in effect denied the High Court the opportunity to pronounce on whether the Chief Justice acted properly in establishing the Tribunal.
44. After more than a year of legal activity, beginning with the creation of the Tribunal in October 2010 to the withdrawal of Kiplagat's lawsuit in December 2011, and more than eighteen months after the filing, with Kiplagat's express consent, of the original petition requesting a tribunal, no tribunal or court had ruled on the merits of the petition concerning the conflicts of interest and alleged misbehaviour and misconduct of Kiplagat.
45. An issue that had been raised from the first day the Commission was created and on which the Commission's credibility hinged, was still unresolved two years later.

The return of Ambassador Kiplagat

46. On 4 January 2012, Ambassador Kiplagat returned to the Commission offices unannounced and proceeded to occupy the office of the Acting Chairperson without requesting her permission to do so. When contacted that same day by the media, he reportedly replied, 'I resumed office in the morning and I am back with a bang'.
47. He was in the office for three days in a row, from 4 to 6 January 2012 at a time when many of the other Commissioners were in the Coast region preparing for public hearings there. He demanded access to documents related to the Report, including documents to do with some of the areas in which he had a conflict of interest. He indicated that he had returned 'to shape the final report'. The staff to their credit resisted these demands, correctly noting that the Commission had put in place a formal procedure that all individuals, including Commissioners, had to follow in order to access such documents. Informed that he could not have the documents he was demanding, he reportedly declared that the staff answered directly to him as Chairperson and to no one else. If they refused to accede to his demands he would have them arrested. Again to their credit the staff resisted such demands and upheld the internal policies of the Commission that were designed to protect its sensitive information.
48. Alarmed at the turn of events, and particularly at the reports of Ambassador Kiplagat's attempts to threaten the staff to reveal sensitive information, the Commission wrote to the Chief Justice on 6 January 2012 requesting that he either reconstitute the old tribunal or constitute a new one to address the allegations contained in their petition of April 2010. In that letter the Commissioners informed the Chief Justice of the urgency of the matter, particularly given the reported actions of Ambassador Kiplagat described above.
49. On the same day, 6 January, the Commissioners wrote to Ambassador Kiplagat expressing concern at his reported conduct upon returning to the office, especially his demands to access documents related to the Report. The Commissioners pointed out that this was in direct contravention of the Commission's existing policy.
50. Ambassador Kiplagat did not respond to that letter but instead issued a statement to the entire Commission declaring, among other things, that he was now the centre of power of the Commission. He declared that any Commissioner or staff member who was unhappy with this turn of events 'should raise the matter with

the appointing authority or the courts’, and that ‘[a]nything short of this will be treated as insubordination, to be dealt with in accordance with the relevant legal and disciplinary procedures’. He further stated:

The Commission and its staff are legally incapable of formulating any “existing policy” to withhold the Commission’s documents from the Chairman. Any such “policy,” assuming one was put up in the absence of the Chairman, is *ultra vires* the TJRC Act and hence null and void. Accordingly, the Chairman expects every Commissioner and staff member to avail to him all such of the Commission’s documents as the Chairman may from time to time require in the execution and functions of his office. Any Commissioner or staff member who defies any such request shall be deemed to be engaging in insubordination, to be dealt with in accordance with the relevant legal and disciplinary procedures. (emphasis in original)

51. Ambassador Kiplagat’s statement to the entire Commission is attached to this Report as Appendix 7 not only for reference but also because, in his opinion, it reflects the true account of how events unfolded. Faced with Ambassador Kiplagat’s aggressive assertion of authority, the Commission was concerned about his clear intention to ignore any and all Commission procedures to preserve the integrity and confidentiality of the information entrusted to it. The Commission was particularly concerned about the confidence and security of the over 40,000 Kenyans who had trusted and engaged with it, and so it went to the High Court on 10 January 2012 requesting an order to prohibit Ambassador Kiplagat from returning to the Commission unless and until a competent tribunal had addressed the allegations in the original petition and also requesting an order requiring the Chief Justice to constitute such a tribunal.⁴
52. On 24 February 2012, Justice Mohamed Warsame issued his ruling in the case. The judge noted that ‘there could be flaws and lacuna in the way [Kiplagat] is going back after he agreed to step aside for allegations against him to be investigated and determined’, and that ‘none of the allegations [against Ambassador Kiplagat] have been considered, investigated and determined’, but he nevertheless dismissed the application.
53. The learned Judge in his ruling stated that suits such as the one brought by the Commission should be required to go through the Attorney General. Although he noted that such a requirement was not in the TJRC Act, he concluded that ‘the applicant could and should have sought the opinion and advice of [the] honourable Attorney General by listing of all relevant issues and seeking a cogent and clear request, reconsideration of their mandate in view of the return of their Chairman [sic]’. As to whether there is merit

⁴ *Truth, Justice and Reconciliation Commission v The Chief Justice of the Republic of Kenya & Bethuel Kiplagat, Judicial Review Case No. 7 of 2012*

in enacting legislation requiring that cases instituted by independent commissions be screened in advance by the Attorney General, as suggested by the learned Judge, is outside the purview of the present discussion. It is nevertheless necessary to note here that the TJR Act contemplated no role for the Attorney General in cases instituted by it, and that a requirement that the Commission should have consulted with the Attorney General or any other outside body when acting in furtherance of its mandate would have compromised its independence.

54. While the matter before the Judge was very narrow, that is, whether or not Ambassador Kiplagat should be barred from the Commission until allegations raised against him are determined in a proper forum, the Learned Judge proceeded to interpret section 17 of the TJR Act which deals with the removal of a Commissioner. He held that section 17 prohibited a tribunal from looking at the past conduct of Ambassador Kiplagat – an interpretation that directly contradicted that of the Chief Justice who established just such a Tribunal. The Judge’s interpretation of section 17, nevertheless, was consistent with the position taken in the Commission’s original petition to the Chief Justice.
55. The learned Judge also admonished the Commission to understand that the ‘controversy once settled by the authoritative decision of the High Court should not be re-opened unless there are extraordinary reasons for doing so’. This was a particularly curious statement as the case brought by Ambassador Kiplagat challenging the establishment of the Tribunal was withdrawn before the court could rule on its merits. It is thus reasonably presumed that the learned Judge was referring to a separate case, *Augustine Njeru Kathangu & 9 Others v TJRC and Bethuel Kiplagat*. This was the case brought against the entire Commission and challenged the constitutionality of the Commission and the validity of Kiplagat’s appointment because of an alleged faulty oath. But as will be discussed below, the issues in that case were quite distinct from the issues raised in the Commission’s petition of April 2010 and all of the subsequent related litigation.⁵
56. Finally, the learned Judge in his ruling ordered that the costs of Ambassador Kiplagat related to this litigation be paid not by the Commission itself but by the Commissioners in their individual capacity. The learned Judge did not explain why he took the unprecedented step of imposing such costs on individuals who were not party to the suit. In other words, the suit had been filed by the Commission in its own name and which was by law a body corporate capable of suing and being sued.

⁵ See the discussion below of *Augustine Njeru Kathangu & 9 Others v TJRC and Bethuel Kiplagat* [High Court Misc App No. 470 of 2009 – unreported]

57. The learned judge read out his entire ruling on Friday 24 February 2012 at mid day in open court in front of the media and the Commission's legal representatives. However, the Commission's lawyers were informed that the written ruling was not ready as certain typos and other minor edits needed to be made. The Commissioners visited the Judge's chambers that afternoon to receive the ruling, only to be told it would not be ready until Monday.
58. On Monday 27 February 2013, the Commission's representatives returned to the Judge's chambers again only to be informed the ruling would be ready that afternoon. In the afternoon, they were told it would be ready on Tuesday 28 February 2013. Meanwhile, the Commission learned that Ambassador Kiplagat had received a final and signed copy of the ruling from the Court early on the morning of Monday 27 February 2013. After the Commission pointed out this anomaly to the Court, and after several phone calls, the Commission was finally able to receive a copy of the ruling on the evening of Monday 27 February 2013.
59. The Commission does not wish to speculate about what may have led to the delay in the issuing of the ruling, or of the issuance of the ruling to one party and not to the other. It is nevertheless important to point out that such anomalies undermines individuals' and institutions' access to justice as guaranteed under the Constitution of Kenya and relevant human rights treaties to which Kenya is a party.
60. In March 2012, the Commission filed its appeal against the ruling of Judge Warsame and asked for an emergency injunction to keep Ambassador Kiplagat out of the Commission's offices until the legal issues raised by the case had been decided. That appeal, including the request for an emergency injunction, is still pending as of April 2013.

Mobilising sectarian support

61. It is noteworthy that as part of his efforts to push for his return to the Commission, Ambassador Kiplagat resorted to mobilising sectarian support. On 3 April 2012, he attended a meeting convened by KAMATUSA, an association of Kalenjin, Maasai, Turkana and Samburu ethnic communities. Under the banner of 'Rift Valley leaders', the meeting demanded the unconditional return of Kiplagat. They asserted that:

As the Rift Valley we are very concerned about the ongoing process at TJRC because of lack of representation of the interests of Rift Valley region and the community at large. Both the Constitution of Kenya and the TJRC Act emphasises the need for regional balance in the composition of the Commission. We are perturbed by the manner in which the TJRC Commissioners have orchestrated the exclusion of Ambassador

Bethuel Kiplagat from the process and the report writing thus denying the people of Rift Valley a voice and representation in the commission. Indeed, by posing as though they are the appointing authority, the commission and commissioners have abrogated themselves powers only preserved for Parliament and the Executive, and even in disregard of court's unequivocal observations.

Going by the manner in which Amb Kiplagat is treated, the Rift Valley has been placed in a situation of justified fear that the commission does not mean well for its people. Many of the persons summoned are from the Kalenjin community yet adequate time was not allocated to hearing their complaints.

We in Rift Valley maintain a demand that Amb Kiplagat be reinstated unconditionally to any outstanding proceedings and be involved in the process of writing the Commission's report.

62. This disappointing and unfortunate statement was clearly based on the erroneous reading of the law coupled with a lack of proper understanding of the workings of the Commission. The claim that the exclusion of Ambassador Kiplagat had the effect of 'denying the people of Rift Valley a voice and representation in the commission' had no basis both in law and fact. Neither Ambassador Kiplagat nor any other commissioner was appointed to the Commission to safeguard the interests of any specific ethnic community or region. While the TJR Act required the composition of the Commission to reflect regional balance,⁶ it was never the intention of Parliament that the Commissioners would represent the interests of their ethnic communities in the work of the Commission. If this were the case, the Commission would need more than 40 commissioners, each representing the interests of his or her ethnic community!

63. But more importantly, the TJR Act in itself made it clear that once elected, Commissioners were enjoined to act independently and to serve in their personal capacity. In particular, section 10(7) provided that:

A commissioner once appointed shall cease active participation in the affairs of any political party or other organisation, whether registered or unregistered, propagating partisan views with respect to the work of the Commission.

64. Further, section 21(2) of the TJR Act provided that:

Each commissioner and member of staff of the Commission shall serve in his individual capacity, independent of any political party, Government or other organisational interests, and shall avoid taking any action, which could create an appearance of partiality or otherwise harm the credibility or integrity of the Commission.

⁶ TJR Act, sec 10(4).

65. In essence, by attending a meeting whose main agenda was to foster sectarian interests, Ambassador Kiplagat acted in contravention of the TJR Act. In addition, by failing to distance himself from the statement issued by the Rift Valley leaders, he acquiesced to the erroneous notion that he was appointed to the Commission to give 'the people of Rift Valley a voice and representation in the commission'.
66. The claim that the majority of persons summoned before the Commission were from the Kalenjin community had no basis in fact and was simply inflammatory. According to its methodology described in detail in the previous Chapter, the Commission summoned individuals pursuant to a set of objective criteria; it summoned individuals against whom allegations had been leveled and after conducting its own investigations including the gathering of evidence. Factors such as race, sex, and ethnic or social status were never and could not be considerations in deciding whom to summon before the Commission.

'Reconciling' with Ambassador Kiplagat

67. Given the High Court decision against restricting Ambassador Kiplagat from returning to the Commission, the Commissioners established modalities for his participation during the remainder of the Commission's life. The Ministry of Justice (and in particular the Minister for Justice, the Honorable Eugene Wamalwa) and the Commission on Administrative Justice (CAJ) assisted the Commission in establishing the terms of reference for the participation of Ambassador Kiplagat in the remaining work of the commission.
68. Up until the interventions of the Ministry of Justice and CAJ, the other Commissioners had publicly stated that they would honour the High Court judgement and not bar Ambassador Kiplagat from entering the Commission's offices. However, they would not work directly with him unless and until the issues raised by his conflicts of interest had been properly investigated and adjudicated by an independent process. This position was reflected in their press statement of 27 February 2012, which also noted that Ambassador Kiplagat had been named adversely by dozens of witnesses before the Commission and that he had already appeared as an adversely mentioned person before the Commission with respect to the Wagalla Massacre. The Commission also planned to call him again as an adversely mentioned person with respect to irregular land acquisition and the assassination of the Honourable Dr. Robert Ouko.
69. This public stand by Commissioners with respect to Ambassador Kiplagat was criticised by some as defiance of the court order. Other critics raised the concern that a Commission tasked with promoting reconciliation in the country did

not appear to be able to reconcile within itself. This criticism was based on the erroneous assumption that there was a personal dispute between Ambassador Kiplagat and the rest of the Commissioners and hence the need for reconciliation amongst them. However, the real issue was one of principle and the correct interpretation of the law and the effect of the legal proceedings involving Ambassador Kiplagat and the Commission. It was never at any point about the personal relations between Kiplagat and the rest of the Commissioners. In any event, while the situation between Kiplagat and the other Commissioners illustrated conflict, the disagreement between the parties was pursued through existing legal and other legitimate processes. Ambassador Kiplagat was given an office, allowed to move freely to and from his office, and the other Commissioners met with him a number of times to discuss in a civil manner ways to resolve the conflicts created by his presence.

70. After a series of meetings with the Minister of Justice, Ambassador Kiplagat and the other Commissioners, an agreement was reached in principle to involve Ambassador Kiplagat in the remaining work of the Commission in a way that preserved the integrity of the process. In particular it was agreed that:
 - a) Kiplagat would not be involved in the writing of the final report (in part because he had been absent during the period when the vast majority of the work of the Commission was done);
 - b) he would be allowed to review the final report at the same time and in the same manner as the other Commissioners, except that Kiplagat would not be allowed to review those sections of the report in which he had a conflict of interest.
71. At a meeting held at the offices of the Ministry of Justice on 12 April 2012 and attended by all Commissioners, Ambassador Kiplagat agreed in principle not to be involved in the parts of the Report in which he had a conflict of interest. But he raised concerns about the definitions of conflict of interest involving him. He asked, for example, whether he would be kept out of all sections of the Report dealing with land or just those sections dealing with the specific land that is claimed he irregularly or illegally acquired. Ambassador Kiplagat and the other Commissioners agreed to work out these details among themselves. As a result of this agreement, the Minister of Justice immediately announced that Ambassador Kiplagat and the other Commissioners had reconciled.
72. On the same day that the agreement was reached between the Commissioners and Ambassador Kiplagat, CAJ issued an advisory opinion on the dispute

between the Commissioners and Ambassador Kiplagat. The Advisory Opinion correctly set out the history of the various legal processes initiated by and against Ambassador Kiplagat and the Commission and concluded, among other things, that:

- a) Ambassador Kiplagat should be allowed to return and sit in his office in accordance with the High Court decision; and
 - b) Ambassador Kiplagat 'should not participate or interfere with the preparation of the TJRC Report since such participation may have a negative effect to the acceptance of the Report', but that he should 'be given an opportunity to review the Report within a short time and to script an addendum to the Report wherein he may agree or give his dissenting opinion'.
73. The Advisory Opinion also made reference to the 'sectarian support' which Ambassador Kiplagat had mobilised to push for his return. The Office of the Ombudsman noted that such support 'ultimately undermines Kiplagat's authority' and noted that attempts by Ambassador Kiplagat or other Commissioners to seek such sectarian support 'will only seek to erode the integrity of the Report'. A full copy of the Advisory Opinion is attached to this Report.⁷
74. Following up on the agreement between Ambassador Kiplagat and the other Commissioners facilitated by the Minister of Justice, the Commissioners drafted an Aide Memoire that set out the history of the events surrounding Ambassador Kiplagat's conflicts of interest and the many different attempts to address those conflicts.⁸ The Aide Memoire proposed a set of modalities that would govern his participation in the work of the Commission during the remainder of its life. The proposed modalities were drafted based upon the meetings facilitated by the Minister of Justice, the Advisory Opinion issued by the Office of the Ombudsman, and consultations with experts in the area of conflicts of interest. The resulting modalities were four:
- a) Ambassador Kiplagat will review drafts of the Report in the same manner and at the same time as other Commissioners.
 - b) Ambassador Kiplagat will not be allowed to review those sections of the Report that concern areas in which he has a conflict of interest, including those parts of the Report concerning massacres, political assassinations, and

⁷ See Appendix 8 for the Advisory Opinion.

⁸ See Appendix 9 for the Aide Memoire.

land. Ambassador Kiplagat will be given the same rights and opportunities as any other adversely mentioned person. Thus if the Report includes an adverse finding concerning Ambassador Kiplagat, he will be given the same opportunity as other adversely mentioned individuals to respond to that finding and to have his response taken into account in the final drafting of that finding.

- c) Since Ambassador Kiplagat has refused to honor a summons to testify before the Commission, the Commission reserves the right to pursue legal enforcement of its summons as provided for under Section 7(6) of the Act.
- d) Ambassador Kiplagat must agree to comply with the decision-making processes of the Commission set forth in the Act and as established by resolutions of the Commission.

75. Ambassador Kiplagat was given a copy of this Aide Memoire in early April 2012 and requested to either agree to its contents or submit a counter-proposal to the other Commissioners in writing. He never responded to the contents of the Aide Memoire, and as such, the other Commissioners and the Commission staff operated pursuant to the four modalities set forth in that document. In a Commission meeting in March 2013, almost a year after the Aide Memoire was given to him, Ambassador Kiplagat claimed that he did not understand that there was any agreement between himself and the other Commissioners as set forth in the Aide Memoire, and that he wanted access and the ability to comment on drafts of the three chapters in which he has a conflict of interest. The other Commissioners refused to renegotiate the agreement at this late date. As such, the Commission can categorically state that the final drafts of the chapters of the Report dealing with land, political assassinations, and massacres were drafted without any input or influence by Kiplagat. As a Commissioner, Ambassador Kiplagat was allowed to read these three chapters after they were finalized so that he could decide whether or not to write a response or dissenting opinion to the Report setting out any differences he may have with the content of those three chapters.

Impact of controversy

76. The controversy about Kiplagat's suitability as a Chairperson of the Commission and the legal suits that ensued adversely affected the operations of the Commission throughout its life. The controversy diverted and distracted the attention and energy of the Commission from executing its core mandate. His initial refusal to step aside led to the resignation of Kaari Betty Murungi as the Vice-Chairperson and

later as a Commissioner. This was a great loss to the Commission, as Murungi has extensive experience in transitional justice, human rights law, gender and historical injustices in Kenya. As Vice-Chairperson she provided crucial leadership to the Commission as it grappled with the controversies surrounding the Chairperson. Unfortunately, and contrary to the express provisions of the TJR Act, Murungi was never replaced.

77. Most importantly, the Chairperson's refusal to step aside led to the loss of important stakeholders to the work of the Commission. Social media outlets were awash with calls for the disbanding of the Commission. Donor organisations equally refused to fund the Commission, and those that had initially committed to fund the Commission withdrew their offers. The general public, CSOs, FBOs, CBOs, the media and other relevant stakeholders adopted a policy of 'non-cooperation' with the Commission. Some of these organisations took robust steps to paralyse the work of the Commission. They called on funders not to support the Commission. Some, mainly under the banner of Kenya Transitional Justice Network and Kenyans Against Impunity, planned to engage the Commission 'in as many legal battles as possible' and 'decimate or exhaust' its capacities to move on with its activities.
78. The Commission does not question the good faith of many CSOs which acted against it, perhaps premised on the idea of seeking a credible truth-seeking, justice and reconciliation process. The Commission, however, notes that their strategy inadvertently fitted well into the wishes of actors, both political and otherwise, who saw the Commission and its work as a threat to the *status quo* and their vested interests. By disengaging from the Commission and taking steps to paralyse its work, these CSOs consciously or unconsciously advanced the interests of non-reformists.
79. Many victims, their families, and witnesses similarly refused to participate in the activities of the Commission or to be associated with it in any way. When the Commission set out to execute its mandate, it was met with hostility and confrontation. In January 2010, for example, the Commission undertook an initial civic education tour of the Coast Province. It held public information sessions in Voi, Mombasa, Kwale, Malindi, and Lamu. While the public sessions achieved some level of success, the Commission was plagued with demonstrations and other expressions of protest at the presence of Kiplagat. At the Mombasa session, dozens of people publicly protested and walked out of the session. In Lamu, the Commissioners had to be confined to their hotel rooms while sympathetic representatives of CSOs engaged with local community leaders to ensure the

Commissioners' safety at that session. Following this experience, the Commission abandoned similar outreach and civic education visits that had been planned.

80. The stepping aside of the Chairperson in November 2010 dramatically changed the situation for the Commission. The general public and a significant number of CSOs, FBOs and other stakeholders put an end to their policy of non-cooperation and rallied behind the Commission. Buoyed by this massive support, the Commission worked with renewed vigour under the leadership of its Acting Chairperson, Tecla Namachanja Wanjala, to redeem lost time. In addition to rolling out a renewed civic education programme all over the country, the Commission launched public hearings in April 2011. The reception at these hearings was exceptionally positive, and when the Commission requested an extension of time to complete its hearings, the National Assembly unanimously supported the request.
81. Kiplagat's return in January 2012 threatened to erase all the gains that the Commission had made during his absence. Stakeholders who had re-engaged with the Commission left in droves. CSOs threatened to hold protests and demonstrations to bar the Chairperson from attending the Commission's public hearings that were due to be held in Coast Province. In Nairobi, survivors and families of the Wagalla Massacre held public demonstrations in front of the Commission's offices protesting the return of Kiplagat. Donors who had expressed a willingness to support the process now withdrew their commitments of support. It was, for all intents and purposes, a return to square one.

Other conflicts of interest

82. Conflict of interest issues were not just confined to Ambassador Kiplagat alone. There were also allegations that Commissioner Major General (Retired) Ahmed Farah had been involved in the security operation that became the Wagalla Massacre. These allegations, just like those raised against Kiplagat, were supported by similar credible but not conclusive evidence (in this case a sworn affidavit). The Commission immediately instituted procedures to keep away any information or discussions related to the Wagalla Massacre from Commissioner Farah in accordance with the Commission's code of conduct. Commissioner Farah agreed to these procedures and willingly complied.
83. The Commission also immediately undertook investigations into these allegations and established that:
 - a) the Navy, of which General Farah was a part, was not in fact involved in any way with the Wagalla Massacre, and

- b) that General Farah was in fact out of the country before, during, and after the Wagalla Massacre.
- 84. Nevertheless, the Commission decided to hold a public hearing concerning the allegations against Commissioner Farah because of the importance of engaging in a public and transparent process addressing such allegations given their potential to affect the credibility, integrity, and legitimacy of the Commission.
- 85. At the public hearing, the individual who had alleged that Commissioner Farah was involved in the Wagalla Massacre publicly repudiated his earlier statement and swore, under oath, that he had no knowledge linking Commissioner Farah to the Wagalla Massacre.⁹

Financial and Resource Challenges

- 86. The second great challenge that the Commission faced from inception was the lack of sufficient funds and resources to efficiently and effectively conduct its operations. Although Parties to KNDR encouraged 'strong financial support to the Commission',¹⁰ the Commission operated on a paltry budget throughout its life. The financial situation was so dire that at times it had to seek loans from Commissioners.¹¹ The preliminary cost of fulfilling the Commission's mandate effectively and efficiently was estimated to be approximately Ksh 2.2 billion for the two-year operational period. This amount is comparable, when adjusted for inflation, to the amount expended on the Peruvian Truth and Reconciliation Commission and significantly less than that spent on the South African Truth and Reconciliation Commission.

The first fiscal year (2009-2010)

- 87. During the Commission's first fiscal year, its finances were entirely controlled and administered by the Ministry of Justice. This situation obtained because of government regulations that prohibited the Commission from controlling its finances until the Secretary to the Commission, who was also the accounting authority and chief executive, had been hired. However, even when the Secretary was hired in February 2010, the Commission was not allowed to take control of

⁹ TJRC/Hansard/Public Hearing/Nairobi/

¹⁰ TJRC Agreement.

¹¹ Ironically, as noted before, those same Commissioners who so generously reached into their own pockets to ensure the Commission could continue with its work were later falsely accused in the media of stealing such money from the Commission.

its finances until the start of the next fiscal year, more than five months later in July 2010. The Commission lacked financial independence during this period and experienced the following challenges as a result:

- a) it had to seek the express approval of the Ministry for any expenditure, a process which delayed activities;
- b) individual Commissioners had to rely on their personal resources when the Commission's requests were delayed or denied;
- c) it had no authority to approve or disapprove any expenditures made on the Commission's behalf by the Ministry;
- d) it had no knowledge of many expenditures made by the Ministry on its behalf; and
- e) despite numerous requests, the Commission was never given a complete account of the money spent on its behalf by the Ministry during that first year.

88. The Commission's lack of control over its finances during the first year of operations was not made public until April 2010 just after the Commission announced it would be petitioning the Chief Justice to establish a tribunal with respect to the issues raised by Kiplagat. Around that same time the then Minister of Justice, the Honorable Mutula Kilonzo, indicated in a number of public statements that the Commission may have engaged in inappropriate and perhaps even illegal financial activities. As a result of these allegations, the Parliamentary Public Accounts Committee and the Parliamentary Committee on the Administration of Justice and Legal Affairs undertook an investigation of the matter. In response, the Commission submitted detailed financial documents to the respective Committees and noted that because it had no control over its own finances any questions concerning the finances of the Commission (including questions the Commission itself had raised concerning some of the documents it had provided) should be directed to the Ministry of Justice.
89. For the 2009-2010 fiscal year, the Commission submitted to the Treasury a budget of Ksh 1.2 bn but was only allocated Ksh 190 million, or just under 16% of its proposed budget. As with most such allocations, the Ksh 190 million was transferred to the Commission's account with the Ministry of Justice in three quarterly instalments, each of which was insufficient to service the Commission's growing portfolio of debts and pay staff salaries, much less finance mandate-related operations. As a consequence, the Commission deferred the hiring of staff until August 2010 and froze all but the most essential mandate-related operations.

The second fiscal year (2010-2011)

90. By the end of October 2010, the Commission had no funds at all to sustain its operations and had to seek monthly advances amounting to Ksh 44.2 million from the Treasury for the months of November and December to pay staff salaries and continue statement taking. Similarly, in order to run its operations, the Commission sought and received an advance of Ksh 80 million from the Ministry of Justice. These advances kept the Commission going but they were temporary solutions to a chronic financial problem. They were uncertain and *ad hoc* and so the Commission could not plan its activities properly resulting in, among other things, inadequate civic education and preparation for the Commission's statement taking and public hearings.
91. In December 2010 the Commission submitted a request to the Treasury for supplementary funding. Without the supplementary funding the Commission was unable to launch its public hearings in February 2011 as was initially planned. The Commission received Ksh 460 million in April 2011 in response to its request. The Commission was thus able to launch and conduct hearings at the beginning of April 2011 in North Eastern, Upper Eastern and Mt. Elgon.
92. In the fiscal year 2010-2011, the Commission was eventually allocated a total of Ksh 650 million against a proposed budget of Ksh 1.2 billion. The inadequate funding in the first fiscal year, and the late allocation in its second fiscal year, placed great strains on the Commission's operations. In particular:
 - The Commission was unable to start its operations after the statutorily stipulated three month establishment phase. For the first six months of its existence, with no control over its limited funding, the Commission operated with neither a Secretary nor a functional Secretariat. The Commissioners performed most of the administrative and organisational work with the assistance of a 17 member support staff deployed to the Commission by the Ministry of Justice.
 - Although the Commission finally hired its Secretary in February 2010, it was unable to undertake any substantial hiring of staff until the 2010-2011 fiscal year. The operational units of the Commission thus became functional only in September 2010 after directors and staff of the various units were hired and inducted. But these units remained under-funded and under-staffed, a fact that undermined their capacity to function effectively.
 - The Commission did not have adequate and appropriate office space until January 2011, more than sixteen months after its establishment. The Commission delayed the hiring of needed staff until towards the end of 2010 for lack of office space. As a result some individuals who had applied for jobs with the Commission took up other job offers.

- The Commission had recurrent delays in paying bills and salaries. Indeed, the Commissioners had to loan the Commission money to enable it to commence the statement taking process.
 - The Commission had to cut short its provincial outreach and familiarisation meetings after conducting such meetings in only two provinces.
 - The Commission was unable to conduct intensive training sessions for Statement Takers, especially in relation to trauma management and identification. Many Statement Takers were subject to trauma but the Commission could only organise two debriefing sessions for them. These were during the review meetings and at the end of the official statement taking period. The statement taking process identified many victims and witnesses who needed counseling but given the Commission's limited financial and other resources, limited counseling services were provided.
 - The Commission's launch of public hearings was delayed, first for one year, then for an additional two months. According to the work plan, the Commission had intended to hold hearings beginning in April 2010 but this was revised when it became clear that the Commission would be unable to hire staff until after July 2010, and that no money would be available other than for minimal operational activities until that time. The revised Work Plan set a hearing period of 7 months from February 2011 to August 2011. Due to lack of funds, the launch of the hearings was delayed again until April 2011 when the Commission received an advance of Ksh 80 million from the Ministry of Justice. This delay in commencing public hearings adversely affected the Commission's schedule which had to be compressed.
 - The delay in commencing hearings in turn had an adverse 'ripple effect' on the general Work Plan of the Commission. The most far-reaching impact was that the Commission was unable to hold public hearings in some parts of the country and on the entire breadth of issues within its mandate. These delays contributed significantly to the Commission's requests for extension of its lifetime discussed earlier in Chapter One of this Volume of the Report.
93. The Commission's paltry budget was, towards the end of its term, supplemented by external donors, most of whom provided aid in the form of technical support. Initially, however, donors had generally refused to fund the Commission in any way. At the beginning of the Commission's life potential donors conditioned their support on the establishment of a Special Tribunal for Kenya as recommended by the Commission of Inquiry into the Post-Election Violence (CIPEV), a matter over which the Commission had no control. Most importantly, the overwhelming number of donors declined to

support the Commission in view of the controversy that surrounded the suitability of the Chairperson. In addition, donors expressed misgivings at providing funding to a process that was meant to be national but which was so underfunded by the Government. As one donor expressed to the Commission, it would have been inappropriate for the process to be a donor-driven project.

Legal Challenges

94. The Commission was a corporate body with perpetual succession and a common seal and was capable of suing and being sued in its own name.¹² Soon after its establishment, two legal actions were lodged in the High Court, both of which sought the dissolution of the Commission. The substance, outcomes and impact of the two cases are discussed in this sub-section.
- ***Augustine Njeru Kathangu & 9 Others v TJRC and Bethuel Kiplagat [High Court Misc App No. 470 of 2009]***
95. The Applicants in this case were members of a lobby group, *Kenyans Against Impunity*, which was formed in the aftermath of the 2007/08 PEV. They were also victims of violations that fell under the Commission's scope of inquiry. They raised a constitutional challenge on the composition and statutory mandate of the Commission.
 96. They challenged the process of nominating the Commissioners arguing that, contrary to the provisions of the TJR Act, the Selection Panel that was responsible for their nomination was not properly constituted. In particular, they argued that representatives of the Episcopal Conference of Kenya, the National Council of Christian Churches of Kenya and the Federation of Kenya Women Lawyers had not participated in the selection process. The Court found this contention lacked merit in part because some of these organisations were in fact represented in the selection process and the absence of specific religious organisations did not invalidate the process. Those organisations participated in a process by which the two religious organisations among them were represented on the panel.
 97. They also challenged Ambassador Kiplagat's suitability to serve as the Commission's Chairperson for reasons already discussed earlier. They asked the Court to quash his oath of office and prohibit him from running the affairs of the Commission. They argued that the Chairperson's oath of office (and by extension of all the other Commissioners) was null and void because it was administered on 3 August 2009 yet the *Gazette* Notice appointing them was published much later on 14 August 2009.

¹² TJR Act, sec 2.

In essence they argued that the President had put the cart before the horse. The Court found this contention to be without merit. It ruled that what was relevant was not the date on which the *Gazette* Notice was published but the date on which the President signed it, and that was 22 July 2009. As such, the Court concluded that ‘the issue of putting the cart before the horse as contended by the *ex parte* applicants has absolutely no basis’.

98. On the Applicants’ prayer to prohibit Ambassador Kiplagat from running the affairs of the Commission, the Court based its ruling on a technicality, arguing that the Applicant’s request for an order of *prohibition* was inappropriate given that they were not challenging the manner in which Ambassador Kiplagat was running the Commission but the authority to appoint him as Chairman of the Commission. The Court also noted that such an order of prohibition would only address claims raised about the process of Ambassador’s Kiplagat’s appointment and not the merits of his appointment, which consequently were not addressed by the Court. As such, the Court concluded that:

The *ex parte* applicants are not challenging the decision making process in the appointment of 2nd respondent [Kiplagat]. They are challenging the merit of the 2nd respondent’s selection and nomination, being of the view that the 2nd respondent was not a suitable person for nomination. As we have pointed out the remedy of prohibition does not deal with the merit of the decision but with the process. For this and other reasons already stated the remedy of prohibition as sought by the *ex parte* applicants is therefore not available to them.

99. In relation to the statutory mandate of the Commission, the Applicants averred that the TJR Act was unconstitutional to the extent that it excluded the periods before 12 December 1963 and after 28 February 2008 from its temporal mandate. The Court did not delve into the merits of this contention. Instead, it ruled that while the Applicants raised important issues, they could not challenge the legality of the TJR Act in the manner in which they did, that is, through a judicial review process rather than through a constitutional reference.
100. Ambassador Kiplagat and the Commission argued before the Court that the only proper procedure for the removal of a Commissioner, which was in part what the Applicant’s were seeking, was through the creation of a Tribunal pursuant to Section 17 of the Act. The Court did not comment on this argument, other than to note that it had been made.
101. The ruling of the Court in this case was particularly important in view of the different interpretations accorded it by interested parties. As noted above, Ambassador Kiplagat returned to the Commission’s offices in January 2012 in part arguing that the dismissal of this case meant that he had been ‘cleared’ of all allegations

raised against him. It is also possible, as noted above, that the ruling of the High Court in *TJRC v Bethuel Kiplagat & Chief Justice* denying the Commission the right to bar Kiplagat from its offices may also have depended upon this ruling. The media accepted this interpretation, and with few exceptions, reported that Kiplagat had been 'cleared' by the courts.

102. On the contrary, the Commission held the considered view that the case had neither cleared the Chairperson of allegations levelled against him nor did it pronounce on the substance of those allegations. In other words, the High Court never dealt with the question of whether the allegations levelled against Ambassador Kiplagat were true or false. Instead, it ruled that it (the Court) was not the proper forum to address those issues and that they had not been properly presented by the Applicants in that case. The Court also noted that the Commission and Ambassador Kiplagat had argued that the only proper forum for addressing such issues was a Tribunal set up under section 17 of the Act. As noted above, notwithstanding this earlier argument supported by Kiplagat, when such a tribunal was later established it was challenged by Kiplagat.

- ***Moraa Gesicho v Attorney General and TJRC [High Court (Kisii) Petition No. 1 of 2010]***

103. The petitioner in this case described herself as a victim of the 2007/08 PEV. She sought a declaration from the High Court that the Commission had no basis upon which to pursue justice for victims of the PEV. She therefore prayed for the dissolution of the Commission. Her argument was based on a perceived failure by the Commission of Inquiry into the Post-Election Violence (CIPEV) to make specific recommendations to the Truth Justice and Reconciliation Commission as expressly required by its terms of reference. The legal instrument that created CIPEV (*Gazette Notice No. 4473*) mandated it to 'make such recommendations to the Truth, Justice and Reconciliation Commission as the Commission [CIPEV] may deem appropriate'.
104. The Commission opposed her petition on simple reasoning. The purported failure of CIPEV to make any specific recommendation to the Commission did not bar the latter from pursuing justice for victims of PEV. The 2007/08 PEV squarely fell both within the temporal and material mandate of the Commission. Indeed, hundreds of victims of PEV participated in the Commission's processes; they recorded statements and testified before the Commission. Their statements, testimonies and views were taken into account in drawing up the findings and recommendations and compiling of this Report.
105. The case had not been finalized by the time of submitting this Report.

Lack of Political Will

106. The two major challenges discussed above – the response to the controversy around the Chairperson and the financial and resource constraints that the Commission faced – were products of and symptomatic of a bigger challenge: the lack of sufficient political will on the part of the state to give the Commission the support it needed and to commit to pursue the objectives for which the Commission was established.
107. The state's lack of political will to support the work of the Commission was manifested in many diverse ways. Firstly, in spite of the express and mandatory provisions of the TJR Act, the President failed to fill the position of Commissioner Kaari Betty Murungi when it fell vacant in April 2010. This forced the Commission to operate with eight Commissioners, and later when Ambassador Kiplagat stepped aside, with only seven commissioners. Secondly, despite multiple requests, the state refused to hand over to the Commission relevant documents pertaining to its mandate, including the reports of previous commissions of inquiry that the Commission was obligated to review and evaluate.¹³ Because of this consistent lack of cooperation, the Commission was forced to acquire many relevant documents, including the reports of previous commissions of inquiry, through unofficial and informal means.
108. Thirdly, the state's failed to support adequately the Commission's reconciliation work. The Commission's mandate of promoting national unity and reconciliation demanded strong political support. By their stature and position in society, political leaders, especially the President and the Prime Minister, had key roles to play in steering the nation towards national unity and reconciliation. However, their support for this particular work was *ad hoc* and inconsistent. Only a few political leaders publicly spoke of national unity and reconciliation within the framework of the TJR Act. Political leaders, more often than not, took steps that undermined national unity and reconciliation. Many other political leaders through their inaction and lack of support contributed to this atmosphere and thus lessened the ability of the Commission to perform its functions. Some made inflammatory statements that spurred ethnic tension.
109. Not surprisingly in January 2012, the KNDR Monitoring Project warned that:

The Truth, Justice and Reconciliation Commission (TJRC) and the National Cohesion and Integration Commission (NCIC) have continued their efforts to inquire into human rights violations and prevent future violence, respectively. *However, without political support for the work of these commissions, their impact on ethnic relations and deterrence capacity for future dissonance remains uncertain.*

¹³ TJR Act, sec 6(m).

110. It is significant that until the handing over of this Report, the Commission was unable to secure an appointment to meet with the President. From the earliest days of the establishment of the Commission in August 2009 the Commission sought an audience with the President but the efforts were in vain. The Commission also had difficulty meeting the Prime Minister. It pursued an appointment with the Prime Minister both with or without the President but it was virtually more than half way through its work when the Commission was able to pay a courtesy call on the Prime Minister. This lack of access to the two Principals was one of the many indicators of the lack of interest or indifference to the Commission from the political elite.
111. This lack of political will on the part of the political elite may partly have stemmed from the absence of a clean break with the past. It could also be attributed to the fact that many state and public officials who served under previous repressive and corrupt regimes were also serving in the Coalition Government. They had either participated in or oversaw acts of repression and corruption during periods that were squarely within the mandate of the Commission. Many of these individuals had an interest in maintaining the *status quo* and a complete break with the past could potentially or actually injure their vested interests.
112. In August 2009, Professor Yash Pal Ghai, a leading constitutional law scholar, had already foreseen that anti-reformists would sabotage the country's reform and transitional justice agenda. Writing on the challenges of establishing a constitutional order in Kenya, he observed that he had already:
- said enough to indicate how vested interests, among politicians, businesspeople, and the bureaucracy will sabotage reforms (as they have done ever since Kenya's independence). Despite the ravages wreaked upon the state, it still remains the primary means to accumulate wealth and power—and those who are in control of it will fight to maintain their control, regardless of the rules of the constitution. *It is hard to provide the answer to this dilemma, that the very sponsors of reform are its principal saboteurs.* What we know is that constitutionalism cannot be willed; it must be established by deep commitment and sustained activity.¹⁴
113. Not surprisingly, despite the numerous institutional and legislative reforms (including the enactment of a new constitution and the reform of the judiciary) which followed the signing of the National Accord, the government continued to exhibit and resort to past practices and tendencies. In a sense, systematic violations of human rights and disregard for the rule of law continued way into an era which was supposed to be marked by a clean break with the past. It mattered little that by signing the National Accord and engaging in the KNDR process, the country's

¹⁴ Y Ghai 'Decreeing and establishing a constitutional order: Challenges facing Kenya', Oxford Transitional Justice Research Working Paper Series, 10 August 2009.

political leadership had formally committed itself to recreating the Kenyan State through a more transparent and accountable form of governance. The renewed optimism after the signing of the National Accord was even shorter-lived than that which accompanied the entry of the NARC government in 2002.

114. Examples abound of how, soon after signing of the National Accord, state agencies once again started sliding back to past practices. In 2008, for instance, in a security operation dubbed *Operation Okoa Maisha*, the army tortured and maimed suspected members of the Sabaot Land Defence Force (SLDF) in the Mount Elgon region. Reports of economic crimes and grand corruption involving top government officials continued to hit the headlines. Between July 2008 and January 2009, KNDR Monitoring Project listed at least six cases of corruption in which government officials were allegedly or reportedly involved:¹⁵

- In July 2008, the Minister for Immigration was accused of giving work permits to foreigners against advice from senior Ministry officials. The Kenya Anti-Corruption Commission detectives revealed an elaborate cartel of brokers who were making billions of Kenya shillings at the Ministry;
- In July 2008, the Minister for Finance was accused of flouting public procurement rules and irregularly selling the Grand Regency Hotel;
- In October 2008, a saga surrounding the destination of a Ukrainian vessel that was hijacked by Somali pirates off the Kenyan coast with 33 T-72 Russian made tanks, 23 aircraft guns and ammunition was reported. While the Kenya Government insisted that the weapons were for its military, there were allegations that the arms were imported on behalf of the Government of Southern Sudan;
- In September 2008, Finance Minister Amos Kimunya denied allegations that a currency-printing contract was irregularly awarded to De la Rue. The government was said to have lost billions of shillings in the deal;
- In October 2008, the National Social Security Fund was said to have lost Ksh3 billion in pensioners' funds through dubious investments, including the sinking of about Ksh1.5 billion in the stock brokerage firm, Discount Securities Limited, which has since been placed under statutory management;
- In January 2009, the Kenya Pipeline Company and Triton Petroleum Company Limited were at the centre of a scandal in which financiers risked losing up to Ksh7.6 billion;

¹⁵ KNDR Monitoring Project *Review Report: Agenda Item IV, Long Standing Issues and Solutions* (2009); See also 'Land of scandals' Daily Nation, 15 Jan 2009.

- In January 2009, there were allegations that the Kenya Tourism Board Managing Director irregularly allocated Ksh 43 million to two private companies;
- In January 2009, it was reported that maize meant to cushion Kenyans against rising food prices and looming starvation had been allocated to briefcase millers and companies that were colluding with senior government officials. This maize was allegedly sold to Southern Sudan at a higher price. Thus over Ksh 800 million was reported to have been lost in the fraud.

115. The fact that the state continued to behave in much the same way as it did in the past, coupled with the fact that the structures of governance were dominated by holdovers from the previous regimes, had a negative impact both on the operations of the Commission and the public perception of its work. Many people were often doubtful whether the recommendations of the Commission would be implemented. They repeatedly expressed their concern that little had changed despite the signing of the National Accord and the legislative reforms that followed. In an apt metaphor, a witness summarised the concern thus:

There is a parable which says that a goat was eaten by a hyena and then the goats went and said to other hyenas, 'We were eaten by a hyena. Can you help us?' The hyena went to other hyenas and said: 'If you ate some goats, why did you not eat all of them, so that we could not hear any complaints?' By this I mean that unless there will be another government, but the one I know, the people I hear, are the same ones who caused us the pain.¹⁶

Conclusion

116. The Commission, like many that have gone before it both in Kenya and abroad, faced many challenges. Some of these challenges, as described in this Chapter, at times threatened the very existence of the organization and took a physical and emotional toll on the Commissioners and the staff of the Commission. The Commission faced these challenges with courage, conviction, and commitment. How well it succeeded in the end is not for it to say. Instead, the Commission hopes that its work, as documented in this Report, will in the end contribute to truth, justice, national unity and reconciliation in Kenya.

¹⁶ TJRC/Hansard/Public Hearing/Wajir/18 April 2011/p. 66.

Appendices

Appendix 1A

Personal Profiles of the Commissioners

Ambassador Bethuel A. Kiplagat - Chairperson, Kenya

Amb. Bethuel Kiplagat is a diplomat with vast experience having served as ambassador to France and Later to United Kingdom. He is also an experienced peace builder having served as Deputy Secretary-General of National Council of Churches and secretary to church and society committee which dealt with political, social and economic issues including community relations and reconciliation. Having served as Permanent Secretary Ministry of Foreign Affairs for close to nine years, Amb. Kiplagat initiated peace processes for Somalia, Kenya, Uganda, Tanzania, Sudan, Ethiopia and the Great Lakes, work which culminated to signing of the peace agreements for Somalia and Kenya.

Amb. Kiplagat has also served as Kenya's Special Envoy for Somalia National Reconciliation Conference from February 2003 until after formation of Somalia Transitional Federal Government, Chairman of Eminent Person



of Africa Peer Review Mechanism (APRM) - a body which evaluates governance with strong emphasis on democratic value and human rights where he was lead panelist for Nigeria, Egypt, Mozambique to mention a few.

On 24th February 2006, he was appointed as Chairman Committee of Eminent Persons on Constitution Review Process, a committee whose recommendations were used by the team of experts to implement the writing of the new constitution.

Amb. Kiplagat is also the Chancellor Egerton University, the Chairman of the first Micro Credit Finance Bank in Africa (K-Rep) focusing on alleviation of poverty, the Chief Executive Africa Peace Forum, an Ambassador for peace of the African Union for the year of Peace and Security Campaign and a COMESA Elder.

Tecla Namachanja Wanjala - Vice Chairperson, Kenya

Tecla Namachanja is a peace builder and community social worker experienced in conflict management, transformation and peace building across the region. Commissioner Wanjala is one of the three women recognized as Pillars of Peace for intervening in the Kenya's 1991-92 and 1997 ethnic clashes and is globally recognized as one of the 1,000 women nominees for the 2005 Nobel Peace Prize.

She has an MA in Conflict Transformation from Eastern Mennonite University (EMU) in Harrisonburg Virginia, USA and is currently a PhD candidate at Masinde Muliro University of Science and Technology, studying peace and conflict. During her thirteen years peace-building career she has engaged in conflict resolution processes nationally as well as in Sudan, Rwanda and Ethiopia and has conducted numerous regional training workshops. Until joining TJRC, Commissioner Wanjala headed the Regional Party for Peace in East and Central



Africa (PEACE 11) Program that aims to enhance African leadership in conflict management in the Horn of Africa.

Commissioner Wanjala also helped the Nairobi Peace Initiative train over 500 workers in basic skills in conflict transformation in 1997 and 1999. In addition to this, she also consulted on peace building and post-conflict reconstruction in Eastern and Southern Africa for Japan International Cooperation Agency (JICA) 2005-2008 and coordinated the Peace and Development Network (PEACENET) efforts in organizing coalition and advocacy meetings on conflict and peace.

During the infamous Kenya ethnic clashes of 1993 to 1995, Commissioner Wanjala journeyed with internally displaced persons for their humanitarian assistance and co-ordinated for relief and rehabilitation for over 40,000 survivors of ethnic clashes.

Major General (Rtd) Ahmed Sheikh Farah - Commissioner, Kenya

Widely travelled in the world and with a very clear picture of the regional and international security environment, Major General Farah this important perspective to his role as Commissioner. Throughout his successful military career in the Kenya Armed Forces he has worked diligently, rising to the highest rank in the military command structure. His academic and professional qualifications span across international training attained from England, Australia, America and Israel and he has served in numerous positions in the armed forces in his capacity as commander. He is well versed in conflict prevention, management and resolutions at the regional level as well



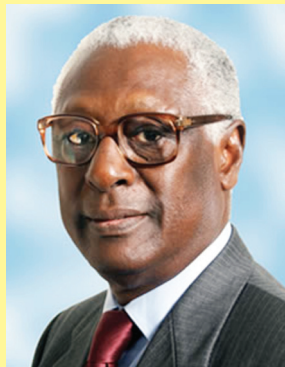
as UN peace support operations in the international arena.

At his last appointment at Kenya's National Defence College, he was part of the directorate and responsible for overseeing strict adherence to the curriculum by university lecturers in addition to formulating lecture guides. His emphasis was on domestic and foreign policy studies. He has a track record as a resourceful, reliable and capable manager, whether at corporate level in the private sector or at strategic and policy level in government.

After retiring from the Department of Defence, he went into business and security consultancy in Mombasa.

Ambassador Berhanu Dinka, Commissioner, Ethiopia

Ambassador Berhanu Dinka is a diplomat with 27 years in the Ethiopian Foreign Service and an illustrious career in the United Nations and international peace-keeping. Commissioner Dinka continues to take on special assignments though now retired. Thus, he assisted in the Abuja talks on the conflict in Darfur when requested by the African Union, chairing the Power-Sharing Commission until the Darfur Peace Agreement (DPA) was concluded in Abuja in March 2006.



Earlier he served in Ethiopian embassies in Monrovia, Cairo and Washington, D.C., becoming an ambassador in 1975 and heading the Department of Africa and Middle East Affairs in the Ministry of Foreign Affairs. He was the first Ethiopian ambassador to

the Republic of Djibouti (1980-84) and then Permanent Representative to the UN in New York with concurrent accreditation to Canada. In 1992 he moved to the UN and served in Cambodia, South Africa and Somalia. He was the Secretary-General's Special Envoy to Sierra Leone 1995-1997; Special Representative of the Secretary-General (SRSG) for the Great Lakes Region of Central Africa 1997-2002 and SRSG for Burundi 2002-2004.

Having attained the rank of Under Secretary-General in the UN, Commissioner

Dinka represented the Secretary General in the Arusha negotiations on Burundi and the Lusaka negotiations to resolve the conflict in DR Congo.

Judge Gertrude Chawatama - Commissioner, Zambia

Commissioner Gertrude Chawatama is a Judge with the High Court of Zambia with over 19 years of professional judicial experience. Trained in Canada as a judicial educator, mediator and trainer of mediators, Judge Chawatama, holds a Bachelor of Law degree from the University of London. Until her appointment to the Commission and in her capacity as a Judge of the High Court of Zambia, Judge Chawatama's duties included unlimited and original jurisdiction to hear and determine any civil and criminal proceedings under any law, supervision of any civil or criminal



proceedings before any subordinate court or any court martial and making orders, issuing such writs and giving appropriate direction for the purpose of ensuring that justice is duly administered.

She was a Board member of the Commonwealth Judicial Education Institute based in Canada and a council member of the Commonwealth Magistrates and Judges Association for the East, Central and Southern African region. Judge Chawatama was also the Chairperson of the Juvenile Justice Forum in Zambia.

Margaret Shava - Commissioner, Kenya

A committed and accomplished professional, Commissioner Shava was educated in law and democracy in UK and has over 17 years experience working in law, management and peacebuilding. An advocate of the High Court of Kenya, she has also practiced conveyancing and commercial law with a leading Nairobi law firm and excels in modern corporate and human resources management. With her experience in the economic sectors as well as the UN and national & international NGOs specializing in human rights, governance and international refugee law, she brings a very special set of skills to her task as Commissioner.



Regional Senior Programme Officer; 1998 – 2003 she served with UNHCR in Kenya, the Eastern Horn and Great Lakes Region; Geneva and Sudan, driving UNHCR's core mandate of Protection, with regard to asylum seekers

and refugees from the E. Horn and Central Africa. From 2002 she managed the Refugee Status Determination (RSD) exercise for Eritrean refugees in Gedaref, North Eastern Sudan. Working with various human rights NGOs has honed her skills – she has facilitated civic education workshops, developed concept papers and been an observer in the 1997 Kenya General Elections. The Institute for Education in Democracy, FIDA-Kenya, a women's NGO with UN observer status, and the Education Centre for Women in Democracy are among the NGOs she has consulted

with. Also, while chairing Young Career Women (Kenya), affiliated to the International Federation of Business and Professional Women, Commissioner Shava spearheaded strategic planning of the organisation's programmes, expanding their existing programme of educating girls from poor families.

Professor Ronald Slye - Commissioner, USA

Professor of Law in Seattle since 1997 with an honorary professorship at the University of the Witwatersrand, Commissioner Slye teaches, writes and consults on public international law and international human rights law. International criminal law is his special area of expertise, including legal responses to genocide and other mass atrocities especially tribunals and truth and reconciliation commissions.



Author of dozens of articles and book chapters on international law, human rights, environmental and poverty law and co-author of two books on international criminal law including the

major textbook in the US, he previously served as a legal consultant to the South African Truth and Reconciliation Commission 1996-2000. He is currently writing a book on that commission and its amnesty process.

Having studied and evaluated the response to mass atrocities in South Africa and Cambodia, Commissioner Slye has advised the main repository of documents on the Khmer Rouge era, the Documentation Center of Cambodia, which was instrumental in creating the current tribunal that is prosecuting former members of that regime.

Professor Tom Ojienda - Commissioner, Kenya

Commissioner Prof Tom Ojienda is a past President of the East African Law Society, past Chair of the Law Society of Kenya and Financial Secretary and Vice President of the Pan-African Lawyers Union (PALU). A Chevening Scholar, Ojienda obtained his LLB from the University of Nairobi, an LLM Degree from Kings College, and an LLD Degree from the University of South Africa. A seasoned lawyer and land expert, Ojienda was a consultant for both the Njonjo and Ndungu Land Commissions, and served as a member of the Legal and Technical Working Group in the National Land Policy formulation process.



Over the years, he has been involved in the civil society and advocacy networks of Zimbabwe, Rwanda, Burundi and Mozambique and was part of a team of five emi-

nent lawyers appointed by the International Bar Association on a mission to the DRC. Commissioner Ojienda chairs the Land Acquisition Compensation Tribunal, sits on the Council of Legal Education, the Board of the American Biographical Institute, the International Bar Association, the Kenya Industrial Property Institute and has previously chaired Legal Clinics at the School of Law, Moi University.

He has written two books on land law, one on the Law of the Sea and another on corruption. He has also edited two books on democracy and constitutional change. He has consulted for the World Bank, USAID, ACCORD and EAC and continues to consult in the area of land reform, human rights, gender and legal practice.

Appendix 1B

Management Team



Patricia Nyaundi
CEO, February 2011– August 2012



Tom Aziz Chavangi
Director Legal Affairs, July 2010 – August 2012/CEO, September 2012 – August 2013



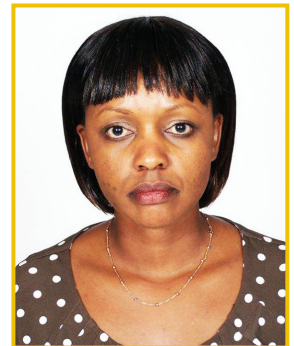
Japhet Biegon
Director Research, April 2011– August 2013



Juliana Mutisya
Director Finance and Administration, July 2010 – October 2013



George Balozi
Director Finance and Administration, October 2012 – August 2013



Stellamaris Muthoka
Director ICT and Documentation, June 2011 – August 2013



Godfrey Musila
Director Research, July – December 2010



Nancy Kanyago
Director Special Support Services, September – July 2012



Elijah Letangule
Director Civic Education and Outreach, July 2010 - August 2013



Kathleen Openda
Director Communications, June 2011 - August 2013

Appendix 2

List of Regular Staff

NAME	Department	Position Title
Abdirashid Abdinoor	Finance/Administration	Bodyguard
Abdulaziz Ali Farah	Civic Education and Outreach	Civic Education and Outreach Officer
Abel Wara Ochieng	Finance/Administration	Administration Officer
Alex Gitonga	Finance/Administration	Security Officer
Alfred Muthama Mutisya	Investigations	Investigator
Amanda Majisu	Research	Senior Researcher
Amina Adan Mohamud	Investigations	Investigator
Anthony Otiende	Legal	Legal Officer
Anthony Pendo Juma	Finance/Administration	Assistant Director, Administration
Aska Kemunto Birundu	Finance/Administration	Administration Assistant
Bellinda Akello	Legal	Legal Officer
Benard Kiplangat Koech	Research	Assistant, Research
Benjamin Wamalwa	Finance/Administration	Driver
Bernard Nyandoro	Finance/Administration	Bodyguard
Bernard Wachira Waheire	Legal	Human Rights Officer
Caroline Wambui	Research	Assistant, Research
Catherine Nambisia	Finance/Administration	Senior Personal Secretary, Chair
Charles Babu Karan	Finance/Administration	Regional Coordinator, Western and Nyanza
Cletus Muniafu	Finance/Administration	Driver
Dahir Abdi Adan	Finance/Administration	Security Officer
David G Mugo	Investigations	Investigator
David Olubonjo Ambuka	Documentation and ICT	ICT expert
Dennis Kiwanza	Finance/Administration	Bodyguard
Dorcas Njeri Kariuki	Finance/Administration	Receptionist
Elijah L. Letangule	Civic Education and Outreach	Director
Emily Wambui Kimani	Legal	Legal Officer
Eric Kiplangat Changwony	Finance/Administration	Driver
Esther Kiseu	Finance/Administration	Personal Secretary, Commissioners
Eunia Obonyo	Finance/Administration	Senior Personal Secretary, Directors
Evans Getenga	Finance/Administration	Security Officer
Evans Okeyo	Investigations	Investigator
Faith Ngugi Gitobu	Finance/Administration	Assistant , HR

NAME	Department	Position Title
Felister Wairimu Mutitu	Finance/Administration	Accountant
Gladys Jeptoo Sitienei	Finance/Administration	Assistant, Accounts
Gladys Wairimu Mwariri	Research	Senior Researcher
Godfrey Musila	Research	Director
Godfrey Muyaya	Finance/Administration	Bodyguard
Hanney Yusuf	Documentation and ICT	Senior Clerical Officer, ICT
Immaculate Mulaku	Finance/Administration	Procurement Officer
Isaac Owuor Ochieng	Finance/Administration	Bodyguard
Jacqueline Chepkoech	Investigations	Investigator
James Ndaraiya Magenda	Finance/Administration	Assistant, Procurement
Jane Wekesa	Finance/Administration	Senior Personal Secretary, CEO
Japhet Biegon	Research	Director
Jennifer Kinuthia	Documentation and ICT	Records Management Assistant
John Kilonzo Mutuku	Finance/Administration	Senior Clerical Officer, Procurement
John Kiptoo Korir	Finance/Administration	Bodyguard
John Nguata Wairimu	Finance/Administration	Administration Assistant
Joseph Ikiroi Mugo	Finance/Administration	Driver
Joyce Bulimu	Investigations	Investigator
Judy Kirubi	Finance/Administration	Security Officer
Juliana N. Mutisya	Finance/Administration	Director
Julius Chepkwony	Finance/Administration	Security Officer
Justus Kasoa	Finance/Administration	Driver
Justus Ong'ondi	Finance/Administration	Driver
Kathleen Openda	Communications	Director
Kennedy O Ageji	Finance/Administration	Bodyguard
Kennedy O Ochieng	Finance/Administration	Driver
Kule Wario	Finance/Administration	Assistant Regional Coordinator, North and Upper Eastern
Lameck Omondi	Finance/Administration	Driver
Lucy Njoki Waigwa	Special Support	Special Support Officer, Victims and Witnesses
Lucy W Karanja	Finance/Administration	Personal Secretary, Commissioners
Lydia Mugure Mbaria	Special Support	Special Support Officer, Gender and Minorities
Macdonald Wandabwa	Documentation and ICT	Assistant Librarian
Martinella Leparmarai	Finance/Administration	Security Officer
Medline Murumba	Finance/Administration	Assistant Regional Coordinator, Nairobi, Central and Lower Eastern
Meshack Ambuso	Finance/Administration	Administration Assistant

NAME	Department	Position Title
Michael J Onjiri	Finance/Administration	Driver
Mohamed Farah	Finance/Administration	Bodyguard
Mohammed Abdinoor	Finance/Administration	Regional Coordinator, North and Upper Eastern
Mohammed Babaa	Finance/Administration	Assistant Regional Coordinator, Coast
Mohammed Hussein Hassan	Finance/Administration	Driver
Muthoni Alice King'ang'i	Documentation and ICT	Hansard & Reports
Nancy J. Komen	Finance/Administration	Receptionist
Nancy Kanyago	Special Support	Director
Nelly Gacheri Kamunde	Research	Senior Researcher
Nicholas Sarisar	Finance/Administration	Assistant Regional Coordinator, Rift Valley
Nkule Laibuta	Finance/Administration	Regional Coordinator, Nairobi, Central and Upper Eastern
Patricia Nyaundi		CEO
Patrick Njue Muriithi	Legal	Legal Officer
Paul Riyes Tobiko	Research	Senior Researcher
Paul Rotich	Finance/Administration	Security Officer
Pauline Wanjiru Nyingi	Internal Audit	Internal Auditor
Peter Kimani Karanja	Finance/Administration	Driver
Phylis Nyaboke	Finance/Administration	Assistant, HR
Rahab Robi Chacha	Finance/Administration	Assistant Regional Coordinator, Western and Nyanza
Raphael Alango Nyina	Finance/Administration	Bodyguard
Rebecca Mutende Mutuku	Special Support	Special Support Officer, Victims and Witnesses
Reuben Kyalo	Research	Assistant, Research
Richard Chepsergon	Finance/Administration	Security Officer
Robert Grinstead	Investigations	Director
Robert Wafula Buke	Civic Education and Outreach	Civic Education and Outreach Officer
Rosalind Kimani	Finance/Administration	Chief Procurement Officer
Rosemary Nchinyei Paring'iro	Communications	Senior Public Communications Expert
Samuel Mulumbi	Finance/Administration	Chief of Security and Logistics
Samuel Owour Ogola	Special Support	Special Support Officer, Gender and Minorities
Shedho Liban	Finance/Administration	Accounts Assistant
Simon Njenga	Legal	Clerical Officer, Legal
Solomon Mbuthia	Legal	Legal
Sophia Mogire	Finance/Administration	Driver
Stella Muthoka	Documentation and ICT	Director

NAME	Department	Position Title
Stephen Maroa	Finance/Administration	Driver
Sujata Sanjay Rane	Documentation and ICT	Data base manager
Susan Atieno Bala	Finance/Administration	Senior Clerical Officer, Kisumu Office
Sylvia Chidodo	Finance/Administration	Regional Coordinator, Coast
Symphorosa Oundo	Research	Assistant, Research
Teresia Mumbi	Documentation and ICT	Hansard
Timothy Njaaga	Documentation and ICT	Senior ICT Officer
Tom Aziz Chavangi	Legal	Commission Secreatry/CEO
Vincent Mutiso	Finance/Administration	Security Officer
Zaituni Abdi	Finance/Administration	Senior Clerical Officer, HR
Keli Kilungu Wambua	Documentation and ICT	Records management officer
Osore Anziya	Documentation and ICT	Librarian
Rita Mukami Kirimi	Documentation and ICT	Assistant Records Management officer
Sharon Jepkemboi Kamar	Documentation and ICT	Handard
Florence Okore	Administration	Office Assistant
Elijah N yairo bosire	Documentation and ICT	Hansard Editor
Goerge Balozi	Finance/Administration	Director
George Kayesi	Administration	Accounts Assistant
Dr Godfrey Musila	Research UNIT	Director Research
Davies Kelmen	Investigations	Investigator
Cledious Mikoma	Administration	Driver
Anna Kiprotich	Administration	Regional Coordinator Rift Valley
Diana Gombe	Administration	Assistant Director Human Resource
Julius Opala	Administration	Assistant Director, Finance
Suleiman Orang'o	Administration	Driver
Burje Juma Burje	Administration	Bodyguard
Michael Okuma	Administration	Driver
Carolene Kituku	Research	Assistant Researcher
Eric Ouma Adur	Administration	Support Staff
Jacinta K. Ruth	Civic Education and Outreach	Assistant Researcher
Alex Omondi	Finance/Administration	Driver
Rose Sabatia	Finance/Administration	Admin
Marvin Mutuku	Finance/Administration	Driver
Paul kaloki	Finance/Administration	Driver
Clara Rotich	Research	Investigator
Mildred Ngesa	Communications	Communications
Benson oketch	Finance/Administration	Driver

List of Interns and Data Entry Coders

NAME	Department	Position Title
Tabitha Njoka	Communications	Communication intern
Abdinassir Ogle Ahmed	Legal	Intern, Legal
Abdiwahab Abdirahman	Documentation and ICT	Coder
Alice Nyanganyi Nyaribo	Documentation and ICT	Records Management Intern
Amina Werar	Documentation and ICT	Data entry clerk
Angela Ayieko	Documentation and ICT	Data entry clerk
Boyani Abisage	Documentation and ICT	Data entry clerk
Christine Mwaniki	Documentation and ICT	Data entry clerk
Claire Anderson	Research	Intern
Claudia Hargaten	Research	Intern
Darleen Seda	Research	Intern
Diana Nalake	Documentation and ICT	Coder
Dinah Nkatha	Documentation and ICT	Hansard & Reports Intern
Elias Maroa	Documentation and ICT	Coder
Fatuma Ibrahim	Legal	Intern
Francis Kiilu Musyoka	Documentation and ICT	Coder
George Nsorani	Documentation and ICT	Coder
Gladys Mwaniki	Documentation and ICT	Coder
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Jesse Masai	Communications	Communications Intern
Jilo Dika	Documentation and ICT	Coder
Kepha Owena	Documentation and ICT	Data entry clerk
Khoboso Dokhe	Civic Education and Outreach	Intern, Civic Education and Outreach
Leah Nyambeki	Legal	Intern, Legal
Leslie Hylton	Research	Intern
Marc Borg	Research	Intern
Martin Wanyonyi	Legal	Intern
Mayesha Alam	Research	Intern
Mercy Apiyo Were	Communications	Communications Intern
Muinde Kimuyu	Documentation and ICT	Data entry clerk
Pius Kamtia	Documentation and ICT	Coder
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Shallyne Mwikali	Documentation and ICT	Data entry clerk
Steve Ogony	Documentation and ICT	Data entry clerk
Vanessa Mueni Mutunga	Documentation and ICT	Data entry clerk
Winfred Masinde	Documentation and ICT	Coder
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Grace Wanja Karanja	Documentation and ICT	Data Clerk
Kelly Wekesa Watulo	Documentation and ICT	Data Clerk

NAME	Department	Position Title
Leticia Njeri Wanyagi	Documentation and ICT	Data Clerk
Rose Omuga	Documentation and ICT	Data Clerk
Marigi Racheal Nduta	Documentation and ICT	Data Clerk
Andrew Kyalo Kasemba	Documentation and ICT	Records management intern
Susan Mweyeria Mwangi	Documentation and ICT	Records management intern
Abraham Pkoror	Documentation and ICT	Data Clerk
David Okute	Documentation and ICT	Data Clerk
Edwin siocha	Documentation and ICT	Data Clerk
Mohammed Dow	Legal	Intern, Legal
Patrick Kiptoo	Documentation and ICT	Data Clerk
Rachel Muya	Documentation and ICT	Data Clerk
Titus Toroitich	Documentation and ICT	Data Clerk
Lucy Nkatha	Legal	Intern
Damaris Wambui	Documentation and ICT	Intern
Desmond Otwal	Documentation and ICT	Data Clerk
Edger Omondi	Documentation and ICT	Hansard Intern
Pascal Mwithaga	Documentation and ICT	Data entry clerk
Elizabeth K. Kioko	Administration	Intern Human Resource
Maureen Chebet Saina	Research	Intern
Enoch Otiria Obuolo	Research	Intern
Patricia K. Kinoti	Special Support	Intern
Johnstone Cheruiyot	Research	Intern
Abdullahi Abdinoor	Research	Intern
Georgina wabwire	Research	Intern

List of Consultants and Resource Persons

- | | |
|--|--------------------------------|
| 1. Abraham Waithima | 16. Joseph Kioi |
| 2. Amriptal Kalsi | 17. Korir Sing'Oei |
| 3. Center for Minority Rights Development (CEMIRIDE) | 18. Lenny Otieno |
| 4. Chacha Berata | 19. Lilian Bogonko |
| 5. Connie Mumma | 20. Mercy Kaburu |
| 6. Emmanuel Sayiorri | 21. Morris Mbondenyei |
| 7. Evelyne Asaala | 22. Onesmus Masinde |
| 8. George Mukundi | 23. Patrick Musembi |
| 9. Godfrey Musila | 24. Peter Mageto |
| 10. Grace Katasi | 25. Rasna Warah |
| 11. Horace Awuori | 26. Rose Lukalo |
| 12. Jane Dwasi | 27. Rosemary Orlale |
| 13. Jane Kiragu | 28. Sarah Kinyanjui |
| 14. Jarso Forole | 29. Syagga & Associates Ltd |
| 15. John Ambani | 30. The Consulting House (TCH) |
| | 31. Walter Oyugi |

Appendix 3

Audited Statement of Financial Position for the Years 2010-2011 and 2011-2012

ASSETS	2011-2012	2010-2011 (Restated)	2010-2011
Non-Current Assets			
Plant and Equipment	22,158,067.19	22,572,106.31	15,922,556
Current Assets			
Inventories	2,728,918.95	9,454,103.93	9,454,104
Accounts receivable	2,008,191.75	23,887,719.14	23,887,719
Prepayments	333,772.80	253,483.00	253,483
Cash and Cash Equivalents	109,127,713.87	208,155,155.12	208,155,155
Total Assets	136,356,664.56	264,322,567.50	257,673,017
FUND BALANCE AND LIABILITIES			
Deferred Income		-	4,954,318
Net Income	136,356,662.39	255,755,444.85	244,151,577
Total Funds	136,356,662.39	255,755,444.85	249,105,895
Non-Current Liabilities			
Current Liabilities			
Accounts Payable	-	8,567,122.17	8,567,122
Total Liabilities	-	8,567,122.17	8,567,122
Total Fund Balance and liabilities	136,356,662.39	264,322,567.02	257,673,017

Audited Statement of Comprehensive Income for the Years 2010-2011 and 2011-2012

	KSHS	KSHS	KSHS
REVENUE	2011-2012	2010-2011 (Restated)	2010-2011
Exchequer Contribution	527,000,000.00	650,000,000.00	650,000,000.00
Other Income	8,711,447.25	674,000.00	674,000.00
Total Income/Revenue	535,711,447.25	650,674,000.00	650,674,000.00
Operating Expenses			
Wages, salaries and employee Benefits	168,616,761.69	174,813,632.77	174,813,632.77
Depreciation Equipment	7,672,184.12	7,736,996.04	7,007,048.82
Communication, Supplies & serv	10,280,590.50	8,471,191.88	8,471,191.88
Domestic travel & other trans	72,728,787.81	25,334,527.79	25,334,527.79
Foreign Travel & subsistence	7,883,758.25	2,006,771.01	2,006,771.01
Printing, Information Supplies	56,463,557.99	38,981,899.33	38,981,899.33
Rentals of produced Assets	90,397,468.51	58,560,656.20	58,560,656.20
Training expenses and capacity building	-	2,313,040.00	2,313,040.00
Hospitality supplies & service	36,519,835.19	18,909,132.20	18,909,132.20
Insurance cost	19,203,276.75	15,615,631.97	15,615,631.97
Specialised materials and Supp	4,004,369.00	8,738,259.00	8,738,259.00
Office & Gen Supplies	10,511,229.04	1,366,734.50	3,931,194.85
Fuel, Oil & Lubricants	16,434,087.38	8,478,296.28	8,478,296.28
Other operating expenses	78,358,230.17	30,261,743.20	30,261,743.20
Maintenance exp- motor vehicles	2,389,701.94	2,215,540.00	2,215,540.00
Routine maintenance-others	6,199,036.27	883,858.00	883,858.00
Government Pensions and Benefits	67,447,355.10	0	
Total expenses	655,110,229.71	404,687,910.17	406,522,423.30
Surplus from operating activities	(119,398,782.46)	245,986,089.83	244,151,576.70

Cash Flow Statement

For the Years 2010-2011 and 2011-2012

	KSHS	KSHS	KSHS
REVENUE	2011-2012	2010-2011 (Restated)	2010-2011
Exchequer Contribution	527,000,000.00	650,000,000.00	650,000,000.00
Other Income	8,711,447.25	674,000.00	674,000.00
Total Income/Revenue	535,711,447.25	650,674,000.00	650,674,000.00
Operating Expenses			
Wages, salaries and employee Benefits	168,616,761.69	174,813,632.77	174,813,632.77
Depreciation Equipment	7,672,184.12	7,736,996.04	7,007,048.82
Communication, Supplies & serv	10,280,590.50	8,471,191.88	8,471,191.88
Domestic travel & other trans	72,728,787.81	25,334,527.79	25,334,527.79
Foreign Travel & subsistence	7,883,758.25	2,006,771.01	2,006,771.01
Printing, Information Supplies	56,463,557.99	38,981,899.33	38,981,899.33
Rentals of produced Assets	90,397,468.51	58,560,656.20	58,560,656.20
Training expenses and capacity building	-	2,313,040.00	2,313,040.00
Hospitality supplies & service	36,519,835.19	18,909,132.20	18,909,132.20
Insurance cost	19,203,276.75	15,615,631.97	15,615,631.97
Specialised materials and Supp	4,004,369.00	8,738,259.00	8,738,259.00
Office & Gen Supplies	10,511,229.04	1,366,734.50	3,931,194.85
Fuel, Oil & Lubricants	16,434,087.38	8,478,296.28	8,478,296.28
Other operating expenses	78,358,230.17	30,261,743.20	30,261,743.20
Maintenance exp- motor vehicles	2,389,701.94	2,215,540.00	2,215,540.00
Routine maintenance-others	6,199,036.27	883,858.00	883,858.00
Government Pensions and Benefits	67,447,355.10	0	
Total expenses	655,110,229.71	404,687,910.17	406,522,423.30
Surplus from operating activities	(119,398,782.46)	245,986,089.83	244,151,576.70

Appendix 4



STATEMENT FORM

STATEMENT

concerning

GROSS VIOLATIONS OF HUMAN RIGHTS

The aim of this **STATEMENT FORM** is to gather as much information as possible about the gross violations of human rights (GVHR) suffered by individuals in various contexts in Kenya between 12 December 1963 and 28 February 2008. In terms of section 6 of the Truth, Justice and Reconciliation Commission Act (2008), gross human rights violations are:

1. Violations of fundamental human rights, *including* acts of torture, extra judicial killings, abduction and severe ill-treatment (cruel treatment) of any person; imprisonment or other severe deprivation of physical liberty (prolonged imprisonment);
2. Rape or any other form of sexual violence, including defilement, sodomy.
3. Enforced disappearance of persons, including arrest, detention or abduction of persons by state agents, or with the authorization, support of the State;
4. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender
5. Economic Crimes, including fraudulent or unlawful acquisition, disposal, mortgaging, charging or damage of public property; tax evasion; offences related to tenders and improper procurement;
6. illegal and irregular acquisition of public land; exploitation of natural or public resources
7. Economic crimes especially grand corruption, including bribery; fraud; embezzlement or misappropriation of public funds; abuse of office; breach of trust
8. Economic marginalisation of communities; Multiple and *systematic* violations of the right to education, health, property (land)
9. Crimes against humanity
10. Any attempt, conspiracy, incitement, instigation, command, procurement to commit an act referred to in (1) and (3) above, and was advised, planned, directed, commanded or ordered, by any person acting with a *political motive*.

If you have experienced or have knowledge of *Gross Violations of Human Rights* committed between 12 December 1963 and 28 February 2008, please complete this statement. Thank you for sharing your painful experience with the TJRC. Your contribution will help our country come to terms with the past.

OBJECTIVES OF THE TJRC:

The objectives of the Truth, Justice and Reconciliation Commission are:

- Establish a complete historical record of gross human rights violations and past injustices, including causes, nature and extent
- to restore the dignity of victims/survivors by providing a forum to tell their stories and recommending ways and means of redress for them
- provide a forum for perpetrators to tell their stories and to create possibilities for national reconciliation
- Recommend prosecutions of perpetrators as well as amnesty in appropriate cases

IMPORTANT THINGS TO NOTE:

- You are entitled to legal representation at your own cost, both while completing this statement and/or when testifying in a possible public hearing. If you require legal aid contact the secretariat for information on organisations that offer legal aid.
- If you make a false statement willingly and knowingly you could be prosecuted.
- If you complete this statement by yourself, please post (or hand deliver) to the TJRC Offices in Nairobi:
- Please attach copies of additional documents (for example, copy of ID, newspaper clippings, doctor's reports, etc.). Do not surrender original documents except at the request of the Commission.
- Please put your initials (sign) at the bottom of every page of your statement.
- By submitting this statement to the TJRC, your name may appear in the final report of the Commission; perpetrators may be informed of any allegations you make; and your medical, legal and other records may be made available to the Commission.
- Experience shows that some people, especially women, testify about violations of human rights that happened to family members or friends, but they are less willing to speak of their own suffering. Please don't forget to tell us what happened to you yourself if you were the victim of a gross human rights abuse.
- The Commission is concerned and is committed to the security of all persons that give statements. Kindly communicate to the commission your concerns on security at the earliest possible opportunity.

Declaration

I, solemnly declare that the information I am about to give the Truth, Justice and Reconciliation Commission, is true and correct to the best of my knowledge, information and belief.

Signature / Finger Print / Mark

Date

Witness signature (can be Statement Taker, or any other person)

Would you be prepared to testify during one of the Commission's hearings? **YES** / **NO** [*circle*]

If yes, would you prefer to appear in a public or private (in camera) hearing? **PUBLIC** / **PRIVATE** [*circle*]

Do you feel you would be endangered by giving testimony at a hearing? **YES** / **NO** [*circle*]

Do you have any disability? **YES** / **NO**

If yes, describe?

Which language would you prefer to use at the hearing?

Details of the person *HELPING* to fill in the statement

Please fill in this section if somebody is helping you to make the statement.

Full name of person helping:

Relationship to Statement Giver (*eg neighbour, friend, relative, Statement Taker*):

.....

Address:

.....

Signature of helper: Date:

1. DETAILS OF STATEMENT GIVER

Surname: **Title:**
(*for example, Mr., Ms., Mrs., Dr., Prof.*)

First Names:

Other names:
(*for example, clan names, code names, pseudonyms, nicknames, aliases*)

Identification: *National ID, Passport or Driving Licence, Refugee ID Number:*

Date of birth: (age).....**Sex:** **Male / Female** [circle]

Citizenship:

Contact Address:

Postal Address: (P.O Box and Postal Code).....

Physical address [Estate/Village]

Province:

Location:

District:

Sub-Location:

Mobile or Telephone No:

Email:

What is the best and easiest way the TJRC can contact you in future?

(Could be the same address as above or could be a friend or relative with whom there is regular contact)

Name of Contact person: (if relevant)

Contact address:

Contact telephone (include code if landline):

2. WHOSE STORY ARE YOU GOING TO TELL THE COMMISSION?

Are you going to tell the Commission about what happened to **you**? **YES / NO** [circle]. If NO, indicate your relationship with the victim(s).

.....

Give reason(s) why victim cannot record his/her own statement (*eg she is dead; very old; displaced; sick etc*)

.....

3. DETAILS OF VICTIM(S) *(If statement giver is the Victim, there is no need to repeat details here)*

If statement is on behalf of a family or group, provide details of the head of family/group then list the rest in the space provided.

Surname: **Title:**

(for example, Mr., Ms., Mrs., Dr., Prof.)

First Name(s):

Identification: *National ID, Passport or Driving Licence:*

Date of birth: (age).....**Sex:** Male Female *[Circle]*

Relationship to maker of statement: (eg son, mother, aunt, mother)

Occupation at time of violation:

Contact Address:

Postal Address: (P.O Box and Postal Code)

.....

Physical address [Estate/Village]

Province:

Location:

District:

Sub-Location:

Mobile or Telephone No (of victim):

Email:

LIST more victims if any:

4. PLEASE PROVIDE SPECIFIC DETAIL ON VIOLATIONS

In this section, provide all the relevant information needed by the TJRC concerning the specific gross human rights violations. The Commission may use information to make findings, so provide as much verifiable detail as possible when responding to questions

Please mark the boxes below relating to which violation(s) were suffered, and then turn to the sections that follow and answer the questions with as much detail as you can.

The table below provides a list and brief description of the different types of gross human rights violations as defined by the Act. You are requested to:

- indicate which categories are relevant to your experience by marking a cross (X) in the appropriate box. If you have experienced more than one type or category of violation please indicate this by putting a cross (X) in the appropriate boxes.
- If your experience does not fit exactly into any one of the types/categories of violations listed below, please use the ADDITIONAL PAGES at the end of this form to write down your story.

5.1 GROSS VIOLATIONS (Mark with an X)**LIST OF CIVIL AND POLITICAL RIGHTS:**

Extra Judicial Killing/Murder The person died as a result of a violation(s) (for example, shot by police at a political funeral, died as a result of torture in detention).	
Serious Injury or Severe Ill-Treatment Does not result in death. Examples include bombings, shootings, stabbings, burnings, sexual abuse, attempted killings. These may have occurred in demonstrations, political conflict between groups, armed combat, castration etc.	
Torture Systematic and intentional abuse with a particular purpose, for example, to get information, intimidation, or punishment. This happens in captivity or custody by the state or other groups. The person, however, survived the ordeal.	
Abduction or Disappearance by state agents There is evidence that someone was taken away forcibly and illegally, or the person vanished mysteriously and was never seen again.	
Prolonged detention/severe deprivation of liberty This relates to unlawful detentions: detention without trial, deprivation of liberty beyond legal sanction	
Rape and other sexual violence, including defilement and sodomy	
Violations related to Administration of Justice Including discrimination, denial of access, prolonged legal process, lost files	
Persecution/ Discriminatory denial of basic rights Against any group or collectivity on political, racial, national, ethnic, cultural, religious or gender	
LIST OF SOCIO-ECONOMIC RIGHTS	
Economic Crimes Including fraudulent or unlawful acquisition, disposal, mortgaging, charging or damage of public property (including money); tax evasion; serious offences related to tenders and improper procurement	
Grand corruption Including bribery; fraud; embezzlement or misappropriation of public funds; abuse of office; breach of trust; offences related to procurement and tendering	
Multiple and systematic violations of the right to property (land) Including forced removal (evictions), title violations, non-compensation, illegal and irregular acquisition/allocation of land	
Multiple and systematic violations of the right to education Including systematic discrimination as well as legal, policy and administrative obstacles	
Multiple and systematic violations of the right to health Including failure to access emergency services; allocation of resources and distribution of centres	

Employment

Systematic discrimination in access to employment, discriminatory use of minimum requirement in recruitment

5.2 EVENT(S)/INCIDENT(S) (VIOLATIONS OF CIVIL AND POLITICAL RIGHTS)

In this part, the Commission would like to obtain the following information with respect to specific violations and incidents related to Civil and Political Rights:

What happened? Who was affected and How? When did it happen? Where did it happen? Who did it? Why did it happen, how did it happen? Were there any witnesses? Do you have any documentation?

To whom did it happen?

Name of Victim(s):

.....

VIOLATION 1 (from the list of CPRs above):

.....

When did it happen? Date and time of violation:

.....

Where did it happen? Place/location of violation (*give as much detail as possible including town, area, building as is relevant*):

.....

.....

Please describe how violation occurred (*e.g. how the person was killed or tortured. Include details of what weapon or implements used*).

.....

.....

.....

.....

Reason for violation?

..... Was there any investigation, inquiry, post-mortem or inquest, court case, intervention by elders? Etc If yes, what was the

outcome? (for example, did a doctor examine the victim or, body? Did you find out how the person was killed, tortured etc? Did you go to court to find out what happened? Was anybody found responsible for the death?)

.....

.....

Did this violation affect other people you know? Members of the community? If yes, please provide list here.

.....

.....

CONTEXT, CAUSES AND CIRCUMSTANCES

Describe briefly the situation at the time of each incident (of alleged violations).

(for example, Shifta War (Wagalla massacre); Burnt Forest violence (1993); Mt Elgon violence (police operation, SLDF attack etc); there was a demonstration, political rally during, police disarmament, floods, strike or stay-away; Kikambala evictions (1997), elections (1992); voting day; natural disaster, stay-away; boycott; march; political rally; existing laws etc.)

.....

.....

.....

.....

If violations arose out of a an inter-ethnic conflict, what were the causes?

.....

.....

PERPETRATOR(S)

Is the perpetrator(s) known? **Known** / **Unknown** [Circle]

Can you identify the perpetrator(s) in any way? Give names, rank and title, and physical description:
(for example; Mr. Mrefu, OCS Milimani; four masked men; a big man with a scar called Jichopevu; Mr Soja, a warden at Shimo La Tewa prison etc)

.....

.....

.....

Do you think they were state agents/officials or private citizens? **State agent** / **private citizen** [circle]

.....

How do you know who he was/who they were? *(for example. I saw them; my neighbour told me; there was a court case; they drove a government car, I know the registration number; I saw him wearing the same shirt two days later; he threatened me or bragged about his actions a week after the event)*

.....

.....

Can you specify who did what? Who was in charge? Who gave orders, if any? Who was with him/her/them? *(for example, Mr. Mwenyenguvu commanded the torturers, Mrefu tied my hands, Mlawatu operated the power switch)*

.....

.....

.....

.....

Where and when did you last see the perpetrator(s)?

.....

.....

Do you know where the perpetrator(s) live or operates from?

.....

Would you like to meet the perpetrator(s)?

WITNESSES

Is there anyone else who knows what happened to you or the alleged victim either **before**, **during** or **after** the violation?

If yes; please answer the following questions as fully as possible.

Name.....

Contact Address and Telephone Number:

What did each of the witnesses see, hear or do? (*e.g. he/she was at the scene, she heard screams from the adjoining room, Mwendapole witnessed the event, Daktari treated me when I went to hospital; Nguvuyetu rescued me from etc*)

.....

.....

.....

.....

VIOLATION 2 (from the list of CPRs above):

.....

When did it happen? Date and time of violation:

.....

Where did it happen? Place/location of violation (give as much detail as possible including town, area, building as is relevant):

.....

.....

.....

.....

Please describe how violation occurred (*e.g. how the person was killed or tortured. Include details of what weapon or implements used*).

.....

.....

.....

.....

Reason for violation

.....

.....

Was there any investigation, inquiry, post-mortem or inquest, court case, intervention by elders? Etc If yes, what was the outcome? *(for example, did a doctor examine the victim or, body? Did you find out how the person was killed, tortured etc? Did you go to court to find out what happened? Was anybody found responsible for the death?)*

.....

.....

Did this violation affect other people you know? Members of the community? If yes, please provide list here.

.....

.....

.....

.....

CONTEXT, CAUSES AND CIRCUMSTANCES

Describe briefly the situation at the time of each incident (of alleged violations).

.....

(for example, Shifta War (Wagalla massacre); Burnt Forest violence (1993); Mt Elgon violence (police operation, SLDF attack etc); there was a demonstration, political rally during , police disarmament, floods, strike or stay-away; Kikambala evictions (1997), elections (1992); voting day; natural disaster; stay-away; boycott; march; political rally; existing laws etc.)

If violations arose out of a an inter-ethnic conflict, what were the causes?

.....

.....

PERPETRATOR(S)

Is the perpetrator(s) known? **Known / Unknown** [Circle]

Can you identify the perpetrator(s) in any way? Give names, rank and title, and physical description: *(for example; Mr. Mrefu, OCS Milimani; four masked men; a big man with a scar called Jichopevu; Mr Soja, a warden at Shimo La Tewa prison etc)*

.....

.....

.....

Do you think they were state agents/officials or private citizens? **State agent** / **private citizen** [circle]

.....

How do you know who he was/who they were? *(for example. I saw them; my neighbour told me; there was a court case; they drove a government ca, I know the registration number; I saw him wearing the same shirt two days later; he threatened me or bragged about his actions a week after the event)*

.....

.....

Can you specify who did what? Who was in charge? Who gave orders, if any? Who was with him/her/them? *(for example, Mr. Mwenyenguvu commanded the torturers, Mrefu tied my hands, Mlawatu operated the power switch)*

.....

.....

.....

.....

Where and when did you last see the perpetrator(s)?

.....

Do you know where the perpetrator(s) live or operates from?

.....

Would you like to meet the perpetrator(s)?

WITNESSES

Is there anyone else who knows what happened to you or the alleged victim either **before**, **during** or **after** the violation?

If yes; please answer the following questions as fully as possible.

Name.....

Contact Address and Telephone Number:

What did each of the witnesses see, hear or do? *(e.g. he/she was at the scene, she heard screams from the adjoining room, Mwendapole witnessed the event, Daktari treated me when I went to hospital; Nguvuyetu rescued me from etc)*

.....

.....

.....

.....

5.3 VIOLATIONS OF SOCIO-ECONOMIC RIGHTS

In this part, the Commission would like to obtain the following information with respect to specific violations and incidents related to Socio-Economic Rights: (Land; grand corruption; economic crimes; education; health; access to employment):

VIOLATION 1 (from list of SERs above)

.....

Name of Victim:

When did it happen? Date and time of violation?

.....

Where did the violation happen? Place/location of violation (give as much detail as possible including village, Estate, town, area, building):

.....

.....

.....

.....

Please describe how violation occurred (*eg were forcibly evicted/removed by armed youth; Mr Mkonomrefu, the CDF manager used CDF money allocated for clinic to build his own house; children constantly fall ill in the filthy and congested camps and were denied treatment because we don't have money*)

.....

.....

.....

.....

Reason for violation? (*eg Mpenda Vitu said the land was his; they said we don't belong there; Mkubwa wanted to employ his own people; we had no ability of questioning the use of LATF or CDF money*)

.....

.....

.Is it a continuing violation? (Eg you are still a squatter, an IDP, yet to get justice; the stolen money is yet to be recovered; still cannot access health facilities for emergency treatment):

.....

.....

.....

.....

Was there any investigation, inquiry, court case, intervention by elders? ETC If yes, what was the outcome? (for example, was the matter reported to Anti Corruption Commission, Department of Lands, police? Did you go to court over ownership of the land? Was the alleged discrimination reported to the Education Officer (Division, District or Provincial?) Was anyone ever arrested, prosecuted, convicted?)

.....

.....

.....

.....

Did this violation affect other people you know? Members of the community? (*note that violations relating to land, education, health, grand corruption, systematic discrimination tend to affect communities and groups of people rather than individuals strictly*) If YES, please provide list of other victims you know indicating relationship with you.

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CONTEXT, CAUSES AND CIRCUMSTANCES

Describe briefly the situation at the time of each incident (of alleged violations)
(for example, Shifta War; Company XY acquiring land; XX Settlement Scheme; I went to the public office to process XX document for my daughter; Structural Adjustment Program; Airport/Airtrip expansion; Burnt Forest violence (1993); Mt Elgon violence (police operation, SLDF attack etc); floods; Kikambala evictions (1997), elections (1992); natural disaster)

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PERPETRATOR(S)

Is the perpetrator(s) known? **Known** / **Unknown** [Circle]

Can you identify the perpetrator(s) in any way? Give names, rank and title, and physical description (for example, Mr. Mrefu, a well known businessman in YY; Mlawatu, Treasurer, CDF Committee;

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How do you know he was/who they were? (for example. I saw them; my neighbour told me; there was a court case in which he was named)

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Do you think they were state agents/officials or private citizens? **State Agents** / **Private Citizens** [circle]

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Can you specify who did what? Who was in charge? Who gave orders, if any? Who was with him/her/them? (for example, Mr. Mwenyenguvu led the eviction exercise; a band of youths burnt our houses and destroyed our crops; Mrs Mlakit, Chief or Kata Ndogo was present)

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Where and when did you last see the perpetrator(s)?

Do you know where the perpetrator(s) live or operate from?

.....

Would you like to meet the perpetrator(s)?

WITNESSES

Is there anyone else who knows what happened to you or the alleged victim either **before, during** or **after** the violation?

If yes; please answer the following questions as fully as possible.

Name.....

Contact Address and Telephone Number:

.....

What did each of the witness see, hear or do?.....

.....

.....

VIOLATION 2 (from list of SERs above)

.....

Name of Victim:.....

When did it happen? Date and time of violation?

.....

Where did the violation happen? Place/location of violation (give as much detail as possible including village, Estate, town, area, building):

.....

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.....

.....

Please describe how violation occurred (*eg were forcibly evicted/removed by armed youth; Mr Mkonomrefu, the CDF manager used CDF money allocated for clinic to build his own house; children constantly fall ill in the filthy and congested camps and were denied treatment because we don't have money*)

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Reason for violation? (eg *Mpenda Vitu said the land was his; they said we don't belong there; Mkubwa wanted to employ his own people; we had no ability of questioning the use of LATF or CDF money*)

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Is it a continuing violation? (Eg you are still a squatter, an IDP, yet to get justice; the stolen money is yet to be recovered; still cannot access health facilities for emergency treatment):

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Was there any investigation, inquiry, court case, intervention by elders? ETC If yes, what was the outcome? (for example, was the matter reported to Anti Corruption Commission, Department of Lands, police? Did you go to court over ownership of the land? Was the alleged discrimination reported to the Education Officer (Division, District or Provincial?) Was anyone ever arrested, prosecuted, convicted?)

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Did this violation affect other people you know? Members of the community? (**note** that violations relating to land, education, health, grand corruption, systematic discrimination tend to affect communities and groups of people rather than individuals strictly) If YES, please provide list of other victims you know indicating relationship with you.

.....

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CONTEXT, CAUSES AND CIRCUMSTANCES

Describe briefly the situation at the time of each incident (of alleged violations)

(for example, *Shifita War; Company XY acquiring land; XX Settlement Scheme; I went to the public office to process XX document for my daughter; Structural Adjustment Program; Airport/Airtrip expansion; Burnt Forest violence (1993); Mt Elgon violence (police operation, SLDF attack etc); floods; Kikambala evictions (1997), elections (1992); natural disaster*)

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PERPETRATOR(S)

Is the perpetrator(s) known? **Known / Unknown** [Circle]

Can you identify the perpetrator(s) in any way? Give names, rank and title, and physical description(*for example, Mr. Mrefu, a well known businessman in YY; Mlawatu, Treasurer; CDF Committee;*

.....

.....

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How do you know he was/who they were? (*for example. I saw them; my neighbour told me; there was a court case in which he was named*)

.....

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Do you think they were state agents/officials or private citizens? **State Agents / Private Citizens** [circle]

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Can you specify who did what? Who was in charge? Who gave orders, if any? Who was with him/her/them? (*for example, Mr. Mwenyenguvu led the eviction exercise; a band of youths burnt our houses and destroyed our crops; Mrs Mlakit, Chief or Kata Ndogo was present*)

.....

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Where and when did you last see the perpetrator(s)?

Do you know where the perpetrator(s) live or operate from?

.....

.....

Would you like to meet the perpetrator(s)?

WITNESSES

Is there anyone else who knows what happened to you or the alleged victim either **before, during** or **after** the violation?

If yes; please answer the following questions as fully as possible.

Name.....

Contact Address and Telephone Number:

.....

.....

.....

What did each of the witness see, hear or do?.....

.....

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6. CONSEQUENCES OF THE EXPERIENCES

The following questions are specific to the victim who experienced the violation.

6.1 What was the harm suffered? (E.g. *if the violation(s) caused permanent physical injury, please describe the injury, details of loss; we lost a bread winner; there is high mortality rate; majority of youth are uneducated and unemployed, we have no clinics, no roads*)

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6.2 Were any steps taken to address the harm suffered (*e.g.what treatment did the victim get for the injury?*)
If you suffered physical injury, do you still require medical treatment?

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6.3 Any other harm suffered e.g. psychological, emotional, change of behaviour etc (eg *I am constantly depressed; I need constant counselling; he is depressed all the time; she feels like dying; I am always angry; I hate going near that place; etc.*)

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6.4 Describe any other effects of the violation(s) (e.g. *displacement; we depend on aid from well wishers; I lost a limb and now depend on my son; I cannot have children*)

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6.5 Please explain how the victim coped with the suffering/these effects: (for example, *did somebody help you deal with the pain of the event? Did you see a therapist or your priest, or a traditional healer? community justice and conflict resolution?*)

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6.6 Did the violation affect relationships with friends, family, partner or children? (for example, *we are no longer on talking terms with our neighbours; we don't mix with outsiders anymore; I have lost contact with them; my marriage broke down; my son is in jail, we are squatters, business collapse; farming etc.*)

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6.7 How did the violation affect the health, education, accommodation, finances of the victim's family and what is the current status?

6.9.1 Health (for example, *since the death of my daughter, we have been suffering from depression; I was sick but after treatment, I recovered fully.*)

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6.9.2 Education *(for example, since my husband died, my son had to leave school to earn money; our school was burnt but we are reconstructing it; the displaced teachers refused to return nothing has changed.)*

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6.9.3 Accommodation *(for example, since my son died, we are living in this shack; we are still squatters; some have been resettled)*

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6.9.4 Finances

(for example, before I was imprisoned/tortured/lost my land, I was able to work and take care of my family, now I can't; I lost my farm; my business premises burnt down; I am now disabled and cannot be engaged in gainful employment)

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7. EXPECTATIONS

An important part of the TJRC's proposals to the government will be about reparations including symbolic acts (targeting individuals and communities) which will help us remember the past, honour the dead, acknowledge the victims and their families and further the cause of reconciliation.

Please give us your opinion on what should be done:

7.1 For individuals: *(for example compensation; prosecution identification of perpetrators; exhumation and burial; apology; medals; certificates; street names; memorials; grave stones; counseling etc.)*

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7.2 For the Community: *(for example, a peace park; build a school; exhumation and proper burial of the dead; special ceremony; annual religious service; recovery of stolen funds; affirmative action etc.)*

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7.3 For the Nation: *(for example, monuments; recovery of stolen funds; prosecution; apology; legal and institutional reforms; national day of remembrance, etc.)*

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8. PREVIOUS INTERVENTIONS

Have you already made one or more statements about this incident? **YES NO** *[circle]*

If yes, please specify:

To WHOM statement was made? <i>(for example, police, NGO, church, elders)</i>	WHEN? <i>(for example 1993)</i>	CONTACT details / person <i>(for example, the Chief, DO, Mrs Haki tel.....)</i>	Action taken <i>(for example court case filed)</i>

What legal action did you, the victim or representatives take? Please give dates and the name of the lawyers, court case details etc *(for example, did you report to the authorities? was there a court case about the violation? Did you sue the perpetrators for damages? Did you lay charges against the perpetrators?)*

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What was the result?

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If no action was taken, why? (eg *I did not have money to file a case; the Chief refused to act; Mwenyenguvu threatened me if I did anything*)

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9. DOCUMENTS

Do you have any documents that will help the Commission understand the situation and experience you have described? **YES NO** [Circle]

(for example, Doctor's Certificate, Membership card, Diary, Newspaper clippings, Legal Documents, Post-Mortem report, Hospital records, Police records, Court records, Title Deeds, Allotment Letters, Receipts etc).

Type of Document	Doc. No/ Title No/ Serial No/Ref No.	Attached YES/NO	Where is this document at the moment? If not attached	other comments
(for example) Land Title deed/ Allotment Letter		No	At home	can be availed on request

CHECK LIST FOR STATEMENT TAKER

This page is to help check that the statement has been completed as fully as possible.

	YES/NO	OTHER COMMENTS
Were all the questions either asked or considered?		
Is the DECLARATION signed?		
Is the RELEASE FORM signed?		
Are all the relevant pages (including the additional pages used) initialled?		
Are relevant DOCUMENTS (at section 9) attached?		

FOR OFFICIAL USE ONLY

To be completed by ALL Statement Takers

Full Name of Statement Taker:.....

Signature of Statement Taker:

Date of Interview:/...../..... (day / month / year)

Name of Victim:

Place and Town of Interview:

Language of Interview:

ADDITIONAL COMMENTS/OBSERVATIONS BY STATEMENT TAKER:

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.....

.....



RELEASE FORM:

Records and Documentation

I, *(name of person giving permission*

hereby grant permission for the Investigation Unit of the Truth, Justice and Reconciliation Commission to obtain copies of all documents, including medico-legal records related to my case/the case of.....*(name of victim)* who is

....., *(relationship to victim, for example, myself, my son, my daughter)* for the purposes of ongoing investigation being conducted by the Truth, Justice and Reconciliation Commission.

Yours faithfully,

Signature:(Date:

Appendix 5

Children Statement

Truth, Justice and Reconciliation Commission (TJRC)

Statement Form for Children



	<u>S/No</u>
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STATEMENT FORM FOR CHILDREN

STATEMENT

The aim of this Statement Form is to gather information about the children's experiences relating to the gross human rights violations that the Truth, Justice and Reconciliation Commission (TJRC) is mandated to investigate.

The objectives of the TJRC are:

- Establish a complete historical record of gross-human rights violations and past injustices, including causes, nature and extent
- To restore the dignity of victims/survivors by providing a forum to tell their stories and recommending ways and means of redress for them
- Provide a forum for perpetrators to tell their stories and to create possibilities for national reconciliation
- Recommend prosecution of perpetrators as well as amnesty in appropriate cases

Declaration of consent:

I, _____ confirm my consent that my child/
children or the child _____ of whom I am a parent/guardian
may fill out this statement form to give their testimony to the TJRC.

Contacts: _____

Signature: _____

Truth, Justice and Reconciliation Commission (TJRC)

Statement Form for Children

**Details of Statement Giver:**

Surname: _____

First Names: _____

Other Names: _____

Date of Birth: _____ Sex: Male ☐ Female ☐

Do you know if you were born at home or at hospital? _____

Place of birth (district): _____

Place of living (district and location): _____

Who do you trust or who would you like to be present as you give your statement? _____

Name the person and their relationship with you: _____

Best way for TJRC to contact you: ☐ Phone ☐ E-mail ☐ Postal address ☐ Contact person

Details: _____

2. Current Statusa. You live with your: Father ☐ Mother ☐ Both ☐ Other _____

If you do not, live with your parents, why? _____

b. Do you have siblings (brothers, sisters) Yes ☐ No ☐Do you all live together? Yes ☐ No ☐

c. There are lots of ways that people are different from each other. Some can't hear, some find it difficult to learn at school, do you experience similar incidents like this, for example like physical restrictions that you feel like make you different from others? Yes ☐ No ☐

If yes, describe _____

d. Are you in school? Yes ☐ No ☐

If yes, name school and class: _____

If no, state why: _____

e. Are there days during the week, other than weekends, when you don't go to school?

Yes ☐ No ☐

If so, why? _____

f. If not in school, what do you do? _____

Truth, Justice and Reconciliation Commission (TJRC)

Statement Form for Children

**4. Type of Violation**

a. Do you have water in your home? Yes [] No [] In your school? Yes [] No []

b. If yes, how frequent, is the water clean?

If not, where do you get water from? _____

c. Do you fetch the water? Yes [] No [] Other _____

If you fetch the water, at what time do you do so: mornings []; afternoon []; evenings []

d. Do you have to go far to fetch water?

Explain _____

5. Capability & Type of Violation

a. Have you ever heard about the Truth Commission? Yes [] No []

b. Can you tell us, what you know about the Truth Commission? _____

c. What do you think the Commission does? _____

d. Is there anything that happened to you that that would you like to tell us in regard to the work of the Commission? _____

e. When did this happen? _____

f. Where did it happen? _____

g. Would you like to illustrate this with the help of a drawing? Yes [] No []

h. How do you feel when you think about it (angry, sad, afraid etc.)? _____

i. Can you describe the person who did this? _____

j. Has something like this happened to you before? Yes [] No []

k. Did you or others tell anyone about it? Yes [] No []

What, if anything, was done after you reported? _____

Truth, Justice and Reconciliation Commission (TJRC)

Statement Form for Children



l. Were there other people affected/violated? If yes please explain :

m. Did you notice any changes in your life, after this happened (health, school, home, family or friends)?

n. Are you in a position to tell others (maybe the Commissioners) what happened to you? Yes [☐] No [☐]

o. Has something like this happened to any other child that you know? Yes [☐] No [☐]

p. Who else may have seen what happened to you?

8. Expectations

a) W

What do you think should/could the Commission do for you in respect to the violation?

b) I

Is there anything else you would like to share with us?

STATEMENT TAKER

What was your impression of the child?

Is the child traumatized? Yes [☐] No [☐]

Does the child have any visible injuries? Yes [☐] No [☐]

If yes, explain

Name:

ID:

Date and Signature:

Telephone number:

Appendix 6

Gazette Notice

8th April, 2011

GAZETTE NOTICE 3930 OF 2011

THE TRUTH, JUSTICE AND RECONCILIATION ACT

(No. 6 of 2008)

THE TRUTH JUSTICE AND RECONCILIATION (HEARING PROCEDURE) RULES

PURSUANT to section 29 of the Truth, Justice and Reconciliation Act, 2008, the Truth Justice and Reconciliation Commission makes the following Rules to govern the procedure at its hearings:

1. These Rules may be cited as the Truth, Justice and Reconciliation (Hearing Procedure) Rules.

2. These Rules shall come into force on the date of publication in the Gazette.

3. In the Rules, unless the Context otherwise requires—

“Act” means the Truth, Justice and Reconciliation Act, 2008;

“Commission counsel” means counsel appointed by the Commissioners to assist the Commissioners;

“Commission offices” means the headquarters of the Commission located in Nairobi and any other office that the Commission may designate as its office either generally or for a particular purpose;

“Commission staff” means staff hired by the Commission or with the authority of the Commission are performing functions of the Commission;

“document” means any record made or stored in physical or electronic form and include written, electronic, audiotape, videotape, digital reproductions, photography, maps, graphs, microfiche or any other data and information recorded or shared by means of any device;

“interested person” includes participant, party or witness

“participant” means any person or organization who is given the right by the Commission to participate in hearings held by the Commission;

“person” means a natural person;

“witness” means all persons and organizations giving evidence or testifying before the TJRC, including survivors, victims, experts and perpetrators;

“organization” means any group, institution, government or agency or other representative entity that is not a natural person;

“party” means a person granted full or partial standing as a party by the Commissioners.

4. The Commission shall conduct the following types of hearings—

- (a) individual hearings, which shall focus on individual cases, and the experience of individuals relating to violations being investigated by the Commission.
- (b) institutional hearings, which shall focus on the role played by an institution or institutions relating to violations being investigated by the Commission.
- (c) thematic hearings, which shall focus on types of violations and other broad themes relating to the mandate of the Commission.

5. (1) Subject to the Act, the conduct of and the procedure to be followed during the hearings shall be under the control and discretion of the Commission.

(2) The Commission shall sit on such days, at such times and venue, as it may determine and shall conduct its hearings in accordance with these rules.

6. (1) The languages of the Commission shall be Kiswahili or English.

(2) The Commission shall, taking into account all the circumstances, provide competent interpreters for spoken or sign language, as the case may be, for parties or witnesses appearing before it.

7. (1) Any person or organization wishing to participate in the hearings shall make an application in the prescribed form to the Commission at least fourteen days before the date of the hearing they wish to participate in:

Provided that the Commission may where the circumstances of any particular case demand, allow an application to be made within a shorter time limit.

(2) The Commission may upon scrutiny of statements and questionnaires completed by the public, invite persons or organizations to participate in its hearings.

(3) The Commission may summon any person, including a serving or retired officer, whether adversely mentioned or not, to appear in person and testify, produce any document, thing or information relevant to the Commission's mandate.

(4) The Commission shall determine any special conditions under which a person or organization may participate in its hearings and the parts of the hearings that a person or organization may participate in.

(5) The Commission shall set the priority for participation based on—

- (a) whether the person or organization is directly and substantially affected by the matters covered by the Commission's mandate; or
- (b) the relevance of the testimony in relation to the mandate of the Commission.

(6) The Commission may in the interests of justice revoke the right of a person or organization to participate in its hearings.

8. (1) A witness shall give his evidence or testimony under oath or upon affirmation unless otherwise directed by the Commission.

9. (1) The Commission shall ensure that it preserves the integrity of witnesses at its hearings and maintains its standing as a nonjudicial, non-retributive and non-adversarial form to foster truth, justice, healing and national reconciliation.

(2) The witnesses who are to testify before the Commission may be accompanied by a friend or family member of

their choice during the proceedings, subject to reasonable limitations imposed by the Commission.

(3) The Commission may request witnesses and other participants to advise the Commission on the names and particulars of any other persons whom they believe have relevant information relating to the mandate of the Commission.

10. (1) The hearings of the Commission shall be conducted by a hearing panel and the Chairperson and Vice-Chairperson shall determine the composition of each hearing panel.

(2) A hearing panel shall consist of not less than three Commissioners, of whom one shall be an international Commissioner, and not less than one third of the composition of each panel shall be of either gender:

Provided that the Chairperson and Vice-Chairperson, may constitute a hearing panel whose composition differs from that specified herein as long as the other Commissioners and all witnesses appearing before the panel are informed in writing of the reason for such deviation.

11. (1) Any interested person may, at least seven days prior to a hearing, request a member of the hearing panel to disqualify himself from the hearing and set forth the reasons for the request, and provide supporting documents, where applicable.

(2) Upon receipt of a request for disqualification, the Chairman shall establish a panel of three Commissioners to consider the request, but the panel shall not include the Commissioner who is the subject of the request, and shall include at least one international Commissioner and a Commissioner of the other gender.

(3) In the case of a request for disqualification of the Chairman, the Vice-Chairperson shall constitute the panel to determine such a request.

(4) When determining whether to grant a request for disqualification, the panel constituted under paragraph (3) shall consider the interests and comfort of witnesses appearing before the Commission, and actual and perceived conflicts of interest, and shall be guided by a commitment to fairness and impartiality.

(5) The decision of the panel determining requests for disqualifications shall be final.

12. (1) The Commission may examine and consider any source or type of information it considers relevant to its inquiries.

(2) The Commission may make site visits to any location to ascertain and clarify any fact, issue or other matter arising out of its processes.

(3) The Commission shall have access to any site of relevance to its work, and collect information from such sites, subject to the negotiation for permission under the Protected Areas Act.

(4) The Commission may request the assistance of the police and other Government officials to facilitate its work and enforce its powers under this provision.

13. (1) The Commission shall arrange with the relevant Government agencies for protection for persons placed in danger by reason of their testimony (whether already given or not), or other interaction with the Commission.

(2) Any individual or representative of an individual or organization may make an application in writing to the Commission for protection.

(3) A person who requires protection may present himself to the Commission offices and make a request for protection, setting forth the reasons for such request, to an officer of the Commission.

(4) The Commission shall make arrangements to address any concerns of witnesses arising out of their testimony, including the need to receive counselling before or after their testimony, or both before or after giving their testimony.

14. (1) Upon application, and in accordance with section 25(2) of the Act, the Commission may order that no person shall publish the identity for any witness.

(2) For the purposes of the hearing, an order under paragraph (1) may include the right of any person to have his identity disclosed only by way of non-identifying initials, and, if the Commission so orders, the right to testify before the Commission in camera, together with any other privacy measures which the Commission may grant.

(3) In making such a determination under paragraph (2), the Commission shall consider the reasonable privacy and security concerns of such a person, as well as the need for the Commission's proceedings to be public and transparent.

(4) The media shall ensure that any reports relating to a person granted personal confidentiality or allowed to testify anonymously, avoid references that might reveal the identity of the person.

(5) No photographic or other reproduction of a person granted the right to testify anonymously shall be made by any person or organization other than the Commission, except with the express written permission of such person.

(6) The Commissioners and staff shall not disclose the identity of protected witnesses or information included in a personal confidentiality order, and any disclosure shall cause disciplinary or termination proceedings against that Commissioner or staff member.

(7) Proceedings under paragraph (6) shall not be a bar to criminal or civil proceedings against the offending Commissioner or staff member.

(8) Any person who testifies anonymously shall take an oath or make affirmation to tell the truth using the non-identifying initials given for the purpose of their testimony and such an oath shall be regarded as equivalent to an oath given using that person's full and proper name.

(9) Any participant or witness may apply to the Commission to have financial or personal information which is not relevant to the subject matter of the hearing removed from documents proposed to be introduced into evidence.

(10) When determining whether to remove such information, the Commission shall balance the legitimate privacy and personal interests of the applicant against the general principle that Commission proceedings shall be public and transparent.

15. (1) A person may apply to the Commission to be considered for amnesty in accordance with Part III of the Act.

(2) An application for amnesty shall—

- (a) be in writing;
- (b) state the violation for which the amnesty is sought;
- (c) state the reasons why the applicant believes he or she should be considered for amnesty; and
- (d) state any other relevant information that the applicant may wish to bring to the attention of the Commission regarding the application for amnesty.

(3) The Commission may request an applicant to provide additional information where it considers it necessary.

16. (1) A person may apply to the Commission to be considered for reparation in accordance with Part IV of the Act on such terms as prescribed by the Commission.

(2) An application for reparation shall—

- (a) be in writing; and
- (b) state the violation for which the reparation is sought.

17. (1) The Commission may convene public and private consultations to hear submissions relating to any matter raised at any phase of the public or in camera hearings.

(2) The participants in the consultations under paragraph (1) shall include any persons whom the Commission considers may contribute to the process.

(3) The Commission may invite or grant leave to a person, organization or state agency to submit, in writing or orally, any observations on any issue it considers desirable for the proper understanding or a particular issue the discovery of truth, the fulfillment of justice, or in the furtherance of national unity or reconciliation.

18. (1) The hearings of the Commission shall be open for media coverage, including live television coverage, except in respect of hearings the Commission decides to hold in camera.

(2) The media may contact the Commission to make prior arrangements for coverage.

(3) The Commission may bar the media from the testimony of a witness granted confidentiality status, taking into account the reasonable interests of the witness, the public and the general principle that the Commission's proceedings shall be public and transparent.

(4) Whenever the Commission decides to proceed in camera, or issue an order forbidding publication, disclosure or broadcasting of its proceedings, it shall issue an order in writing to all media outlets which have been permitted to cover proceedings under this Rule.

(5) Media representatives shall abide by these Rules relating to confidentiality.

(6) The Commission shall deal with a breach of the rules relating to confidentiality as it sees fit, which may include exclusion from part of or an entire hearing, or exclusion from some or all future hearings.

19. (1) The Commission shall not be bound by the provisions of the Evidence Act but shall be guided by the ordinary rules of evidence and procedure, including the rules of natural justice.

(2) The Commission may recommend the prosecution of any person in any matter which in its view should be handled by the courts, and in so doing shall be guided by existing statutes and support the recommendation with evidence showing that there are reasonable grounds to believe that a crime was committed by that person.

20. (1) The Commission shall call and examine witnesses during a hearing.

(2) When examining the witnesses, the Commission shall—

(a) consider the need to preserve the integrity of the witnesses and their testimony;

(b) be sensitive to the concerns of the victims; and

(c) maintain the non judicial, non adversarial, and national reconciliatory nature of the process of the Commission.

(3) Subject to compliance with rule 7(1), interested parties, including adversely mentioned persons or their representatives, shall at the individual, thematic and institutional hearings have a right of reply.

(4) Cross examination of the victims or witnesses for the victim shall be limited to hearings relating to applications for amnesty or requests for reparation.

(5) The cross examination under paragraph (4) shall, in any case, be limited to the actual interest of the person or organization requesting for amnesty or being requested for reparations.

(6) The Commission shall not allow the cross examination of witnesses in circumstances other than those set out in paragraph (4).

(7) Notwithstanding paragraph (4), the Commission may, suspend or limit the cross examination during a hearing, if it has reasons to believe that—

(a) a person is conducting the cross examination in bad faith;

(b) the witness being cross examined is being unduly stressed or otherwise suffering harm as a result of the cross examination; or

(c) it is prudent and in the interest of truth, justice and reconciliation to limit or suspend the cross examination.

21. (1) A participant or witness shall provide the Commission with any documents which he intends to submit as an exhibit or otherwise refer to during the hearings not less than seven days before the hearing.

(2) The Commission may make copies of any relevant documents produced by a witness.

(3) The Commission shall inform any person adversely mentioned in a document submitted as evidence to the Commission for the purpose of a hearing and allow the person reasonable time to study and respond on the document before the hearing.

22. A member of staff of the Commission may interview any person who has information or documentary evidence relating to the subject matter of a hearing, and may recommend to the Commission that such person be given the right to participate or testify at a hearing.

23. (1) All participants and their representatives shall abide by these Rules.

(2) The Commission shall deal with a breach of these Rules as it considers fit, including, but not limited to, revoking the right of participation, and imposing restrictions on the further participation in or attendance at (including exclusion from) the hearing by any participant, representative, individual, organization or members of the media.

(3) The Commission may cite for contempt any person or organization refusing to fully comply with a summons to appear, or to produce information, or otherwise obstructs the work of the Commission in any manner.

(4) The Commission may request the assistance of the police and other Government agencies and officials, including the judiciary, in enforcing relevant sanctions against any persons conducting themselves contrary to the provisions of these Rules.

24. The Truth Justice and Reconciliation (Hearing Procedure) Rules published on the 20th August, 2010 are revoked.

Made on the 6th April, 2011.

T. N. WANJALA,
Acting Chairperson,
Truth, Justice and Reconciliation Commission

Appendix 7

Ambassador Kiplagat's Statement on Resumption of Office

All Commissioners and Staff

RE: CHAIRMAN'S RESUMPTION OF OFFICE

Greetings from the Chairman of the Commission.

As you may all be aware, the Chairman voluntarily stepped aside (by keeping off the Commission's affairs) pending the determination of certain legal issues that had arisen regarding his appointment. In particular, the Chairman stepped aside to facilitate the easy and expeditious determination of –

- (a) an inquiry by a Tribunal that had been appointed by the Chief Justice of the Republic of Kenya to inquire into the Chairman's conduct, and whether the Chairman ought to be removed from office; and
- (b) legal proceedings (*High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 470 of 2009*) filed by a group of NGOs and human rights activists who claimed that the Chairman was neither fit to hold office nor validly appointed.

The Gazette Notice that appointed the Tribunal purported to allow it to inquire into the Chairman's "past conduct" rather than his "conduct in office." Since the Gazette Notice was inconsistent with a plain reading of section 17 of the TJRC Act, the Chairman was impelled to challenge it in the courts, through *High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 95 of 2011*. In granting the Chairman's application for leave to challenge the mandate of the Tribunal, the High Court ruled that the issue raised by the Chairman, namely whether a tribunal could be formed to inquire into "past" conduct, was valid.

Having been satisfied that the issue raised by the Chairman was valid and legitimate, the High Court suspended the operations of the Tribunal pending the determination of the dispute. The case came up for hearing several times. The court record indicates that the Tribunal's lawyers either sought an adjournment or took a position necessitating an adjournment almost every time the case came for hearing. Eventually, without the case going for hearing, on 14th October 2011, the Tribunal's lawyers informed the court that the term of the Tribunal had expired. The Tribunal's lawyers requested the court to excuse them from any further court attendances, saying they no longer had any client to represent in the case. Faced with a case challenging the mandate of a non-existent Tribunal, the Court (on 4th November 2011) directed that the Attorney General, as the custodian of the public interest, be served with court papers so that he could express any concerns or issues that might arise with regard to the Chairman's resumption of office. On 1st December 2011, the Attorney General informed the Court that he had no concerns or interest in the case. This left the Court and the

Chairman with a case without a defendant, and in which the government had no interest. The Tribunals term having expired, and there being nobody to proceed against, the Chairman was impelled to withdraw the case. The Commission was represented in the proceedings by a very eminent firm of lawyers, and expressed no objection to the withdrawal of the case.

The court case filed by human rights activist, on the other hand, went to full hearing and determination. The case revolved around the very same issues that had led to the formation of the Tribunal, namely (i) the Wagalla Massacre; (ii) the Ouko murder; and (iii) irregular land allocations. A three-judge bench of the High Court meticulously reviewed the evidence, issues and arguments raised by the parties and upheld the Chairman's appointment through a judgment issued on 28th November 2011. The Commission was also represented in this case, by a very eminent firm of lawyers. Notably, throughout the case, the Commission consistently took the positions that –

- (a) the Chairman had been validly appointed;
- (b) the Chairman was a proper and fit person to hold office;
- (c) there was no merit in the issues raised about the Chairman's appointment. Put differently, the Commission consistently took the position that there was no merit in the allegations that the Chairman had been involved or implicated in (i) the Wagalla Massacre; (ii) the Ouko murder; and (iii) irregular land allocations).

The above positions as taken by the Commission in the court case can be confirmed from the court judgment, which is freely available from the website of the National Council for Law Reporting (<http://www.kenyalaw.org>).

With the two court cases determined, there was no longer any or any legal impediment to the Chairman's resumption of office. Accordingly, the Chairman resumed and assumed his office in accordance with the original appointment. The rationale for the Chairman's course of action was twofold:

- (a) the Chairman has never resigned from or otherwise relinquished his office; and
- (b) the Chairman's original appointment has never been annulled, rescinded or otherwise lawfully vacated by the courts or any other authority. The appointment, therefore, remains valid and subsisting.

The Chairman is in receipt of a letter dated 6th January 2012 signed by two Commissioners, apparently signed on behalf of the Acting Chair. The letter seems to question the Chairman's resumption of office, allegedly because –

(a) *“no determination has been made on the issues presented before the Tribunal”*; and

(b) the Chairman has returned to office *“without consultation, and without authority.”*

The letter also claims that the Chairman has demanded that documents related to the Final Report be released to him *“in direct contravention of existing policy established by the Commission,”* and that the Chairman has announced to the staff that he has returned *“to shape the Final Report.”* Lastly, the letter purports to direct the Chairman to *“cease coming to the Commission’s offices unless expressly invited to do so by the Commission,”* and to *“refrain from attempting to influence the Commission’s work in any way.”*

The Chairman wishes to clarify, and hereby directs, every Commissioner and staff member to note the following:

- (a) there cannot be two centres of power, namely a Chair and an Acting Chair, in the leadership of the Commission. Under the TJRC Act, an acting Chair only performs the duties of the Chair during the absence or incapacity of the Chair. Accordingly, any powers or authority previously exercised by or on behalf of the Acting Chair lapsed by operation of law upon the Chairman’s resumption of Authority;
- (b) as conceded by the Tribunal’s lawyers in Court, the term of the Tribunal formed to inquire into the Chairman’s conduct expired in June 2011. Prior to that, the Tribunal had formally requested its appointing authority and other relevant government offices for the extension of its term. The appointing authority turned down the Tribunal’s request for an extension of its term, presumably in view of the High Court’s finding that the challenge lodged by the Chairman against the mandate of the Tribunal was valid. In view of the foregoing, there was no Tribunal in existence as at the date of the Chairman’s resumption of office. Accordingly, the contention that the Chairman has returned to office in defiance of the Tribunal has no factual or legal merit;
- (c) the Chairman does not need any *“consultation”* or *“authority”* of any Commissioner or staff member to resume office. Any Commissioner or staff member who is unhappy with the Chairman’s return to office should raise the matter with the appointing authority or the courts. Anything short of this will be treated as insubordination, to be dealt with in accordance with the relevant legal and disciplinary procedures;
- (d) the Commission and its staff are legally incapable of formulating any *“existing policy”* to withhold the Commission’s documents from the Chairman. Any such *“policy,”* assuming one was put up in the absence of the Chairman, is *ultra vires* the TJRC Act and hence null and void. Accordingly, the Chairman expects every Commissioner and staff member to

avail to him all such of the Commission's documents as the Chairman may from time to time require in the execution of the functions of his office. Any Commissioner or staff member who defies any such request shall be deemed to be engaging in insubordination, to be dealt with in accordance with the relevant legal and disciplinary procedures;

- (e) the Chairman has not returned to office "*to shape the Final Report.*" Equally, the Chairman has not returned to office to "*influence the Commission's work.*" Instead, the Chairman has returned to lead the Commission and discharge his functions as set out in the TJRC Act, his oath of office and letter of appointment. Again, any Commissioner or staff member who is unhappy with the Chairman's return is free to raise the matter with the appointing authority or the courts;
- (f) the Commission and its staff are legally incapable of ordering or requesting the Chairman to "*cease coming to the Commission's offices.*" Any such request shall henceforth be deemed an act of disrespect and insubordination, to be dealt with in accordance with the relevant legal and disciplinary procedures; and
- (g) the Chairman does not need the Commission's or its staff's invitation, express or otherwise, to come to the Commission's offices. The Chairman comes to the Commission's offices by virtue of his having been validly appointed to his position, which appointment has since been confirmed by the courts.

All Commissioners and staff are hereby directed to note the above clarifications, and accord the Chair all the due cooperation in the discharge of his official duties. Again, any Commissioner or staff member who is unhappy with the directive is at liberty to raise the matter with the appointing authorities or the courts.

Yours faithfully,



BETHUEL KIPLAGAT

Chairman, Truth Justice and Reconciliation Commission

CC Chief Justice of the Republic of Kenya
 Secretary to the Cabinet & Head of the Civil Service
 Permanent Secretary, Ministry of Justice National Cohesion & Constitutional Affairs

Appendix 8

Guide for Focused Group Discussions on the Nature and Extent of Violations of Socio-Economic Rights and on Perception of Economic Marginalisation

November 2011

[Target Groups: inhabitants of regions; members of ethnic minority group/indigenous group (mixed men +women or separately); women; the poor (urban and rural)]

A: Introduction

The Truth Justice and Reconciliation Commission (TJRC) is mandated to inquire into economic marginalisation. In particular, it is required to inquire into perceptions of economic marginalisation by different sectors of society — regions, ethnic minorities, women, the poor (urban and rural) and youth — and to make appropriate recommendations for this to be addressed.

Aim of the FGDs

The Commission is organising countrywide Focused Group Discussions (FGDs) targeting the listed groups in various regions in order to elicit views and therefore enhance the Commission's understanding relating to: 1) whether the groups perceive themselves to be economically marginalised and if yes, how; 2) any facts/evidence they may have that supports their perceived marginalisation; 3) what recommendations the Commission should make in relation to any perceived economic marginalisation.

Economic Marginalisation

Marginalization is the social process of becoming or being made marginal (especially as a group within the larger society). Those who are marginalised exist on the periphery of society often not just in terms of distance from the centre (of economic and political power in Nairobi) but they also lag behind an expected level of performance in economic, political and social well being compared with average condition in the society as a whole.

Economic marginalization is produced by the process through which groups are *discriminated* directly or indirectly, in the distribution of social goods and services such as healthcare, education, social security, water and food, housing, land and physical infrastructure (roads, schools, health facilities): in general, expenditure on development. While in the economic sphere individuals and groups could be pushed to the margins by the operation of market forces and this is found perfectly legal, it is the intervention of the state and its agents in a variety of ways to tip the balance unfairly in favour of particular regions or groups — or its failure to intervene in favour of the vulnerable that is blameworthy and therefore subject of this inquiry.

For our purposes, discrimination is understood as 'any distinction, exclusion, restriction or preference based on any ground such as race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of rights or social goods and services.

While economic marginalisation is a distinct concept, it is linked with social and political marginalisation. Economically marginalized groups tend to be socially marginalized as well: they are disadvantaged with respect to both resources and power.

The Idea of 'Perception'

Perception relates to how one views, interprets or 'perceives' a particular situation, for our purposes, whether one is economically

included or marginalised. From an individual perspective, how one views or understands a situation is a form of *personal truth*. From a group/society's perspective, this would amount to *societal truth*. Because of the subjectivity involved (in personal and societal truth), a perception is in essence a *belief*, rather than tested reality, which is factually proved/provable and is related to or amounts to *forensic/factual truth*. While perceptions about something or a situation (by an individual or group) could be unfounded, it is not always the case because perception could in fact reflect (provable) reality which is established when that belief/feeling is investigated.

The purpose of this study (FGDs) is not necessarily to tease out the *reality* (factual) about economic marginalisation. Rather, it aims to elicit views held by the designated groups *from their perspective* whether they believe/feel they have been economically marginalised. These are *personal* or *societal truths* that the TJRC needs to acknowledge and validate while of course presenting another (factual) narrative (to the extent that it exists and is at variance with perceptions held) about economic marginalisation.

B: General Instructions for the FGD Facilitator

- Introduce yourself and the note-taker in the language that the members are conversant with.
- Explain the importance of the TJRC's work in particular that relating to economic marginalisation and the importance of the FGD.
- Inform participants that the information they will provide is particularly useful to the Commission: it will form part of the Final Report (the main product of the Commission's work) and; it will assist the commission in formulating recommendations to address economic marginalisation.
- Answer all questions the participants have to ask before you start the session
- Let them know about how long the session will last
- Tell them that all answers are correct. There are no wrong answers
- Remind them that participation is voluntary. They can withdraw from the process if they like.
- Remind participants that the information collected from them shall be treated with utmost confidentiality and shall not be used for any other purpose other than the Commission's purposes research

C: Classifying Information

1. Brief description of FGD participants: (eg women, rural poor, inhabitants of Coast etc)...
2. Attach list of FGD participants: _____
3. Province/Region: _____
4. County: _____
5. Name of ethnic community: _____
6. Date of FGD: _____
7. Name of Facilitator: _____

D. FGD Question Items (Disaggregated)

I. GENERAL QUESTIONS RELATED TO ECONOMIC MARGINALISATION (FGDs for regions)

1. There is often the belief that some regions or groups in Kenya have been marginalised, especially economically. What is your understanding of (economic) marginalisation?
 - Probe (use probing or substantiating questions) to establish participants' understanding of related concepts such as political marginalisation and social (exclusion) marginalisation.
 - Once views are expressed on this issue, validate key views from participants and share the TJRC's vision/understanding of economic marginalisation.
2. Do you believe that as a region you have been marginalised economically?

- *Probe to establish in relation to what issues they feel marginalised:*
 - *Is it the distribution of physical infrastructure such as roads, schools, hospitals etc?*
 - *Distribution of social goods and services such as health facilities and healthcare; housing; education (schools); social security; water and food?*
 - *Representation in public employment (public/civil service)?*
 - *Probe further to establish whether it relates to distribution of land (or other injustices around land), a primary means of production?*
 - *Other things done/not done?*
 - *If the language of 'historical injustice' is used, probe to establish what participants think it means and whether they think it was intended or has had the effect of marginalising them economically*
3. Who do you blame/who do you believe is responsible for your marginalisation?
 - *Probe to establish whether they have any specific actors in mind (this can be the government; specific ethnic group; rich neighbours; local MP; colonial government; NGOs; Local leaders etc)*
 - *Probe to establish who in their view they think is the most responsible for their economic marginalisation.*
 - *Clarify that government refers to the three arms of government as well as other state institutions (like parastatals). Clarify further that government relates not only to central government in Nairobi but also local government (local authorities).*
 4. Why do you think that you are marginalised?
 - *Because we want to get some specifics on why they feel marginalised (which is general), probe to obtain some facts on things that make them reach the conclusion that they are marginalised economically.*
 - *Ask them to describe/ provide any information they may have on the status of Socio-Economic Rights.*
 5. What do you think are the reasons (political, economic or cultural) for your economic marginalisation?
 - *Let discussion flow freely but probe appropriately to establish whether it is their culture? Lifestyle? Unsustainable economic activity? Examples can be: reliance on rain-fed agriculture; pastoralism (other than being unsustainable economically, it interferes with children's education etc)? Is it customs that bar members of their community from owning land or engaging economically?*
 - *Is it their politics (remember Moi's 'siasa mbaya, maisha mbaya' meaning don't support me and you will suffer)?*
 - *What about poor leadership, including among local leaders?*
 6. How have you (as a group) coped with economic marginalisation?
 - *Probe to establish how their marginalisation made them feel. Did they feel unwanted, as foreigners?*
 - *Probe to establish how their marginalisation affected their view of things, how it affected how they viewed and related to others (members of other communities?)*
 7. What do you think should be done to address the legacy of economic marginalisation?
 - *Elicit views freely without going into what the new constitution provides unless it comes up early in the discussion.*
 - *Probe to establish how they think the new constitution has changed their situation.*
 - *Probe further to establish specific things about the new constitution that should be emphasized. These can relate to: the Bill of Rights; Devolution; Equalisation fund; land reforms etc*
 8. What do they see as their role in addressing economic marginalisation?

II. QUESTIONS RELATED TO ECONOMIC MARGINALISATION OF ETHNIC MINORITIES

1. There is often the belief/perception that ethnic minorities in Kenya have suffered marginalisation, especially economic marginalisation. What is your understanding of (economic) marginalisation?
 - *Probe (use probing or substantiating questions) to establish participants' understanding of related concepts such as political marginalisation and social (exclusion) marginalisation.*
 - *Once views are expressed on this issue, validate key views from participants and share the TJRC's vision/understanding of economic marginalisation.*
2. Do you believe that as an ethnic minority/indigenous group you have been marginalised economically?
 - *Probe to establish in relation to what issues they feel/have felt marginalised:*
 - *is it with respect to citizenship and legal recognition;*
 - *the distribution of physical infrastructure such as roads, hospitals, schools and health facilities? The distribution of social goods and services such as health facilities and healthcare; housing; education (schools); social security; water and food?*
 - *Representation in public employment (public/civil service)?*
 - *Probe further to establish whether it relates to distribution of land (or other injustices around land), a primary means of production and survival for certain ethnic minorities and indigenous people?*
 - *Other things done/not done?*
 - *If the language of 'historical injustice' is used, probe to establish what participants think it means and whether they think it was intended or has had the effect of marginalising them economically*
3. Who do you blame/who do you believe is responsible for your marginalisation?
 - *Probe to establish whether they have any specific actors in mind (this can be the government; specific ethnic group; rich neighbours; local MP; colonial government; NGOs; Local leaders etc)*
 - *Probe to establish who in their view they think is the most responsible for their economic marginalisation considering different periods in history.*
 - *Clarify that government refers to the three arms of government as well as other state institutions (like parastatals). Clarify further that government relates not only to central government in Nairobi but also local government (local authorities).*
4. Why do you believe that you have been marginalised?
 - *Because we want to get some specifics on why they feel marginalised (which is general), probe to obtain some facts on things that make them reach the conclusion that they are marginalised economically*
 - *Ask them to describe/ provide any information they may have on the status of Socio-Economic Rights.*
5. What do you think are the reasons (political, economic or cultural) for your economic marginalisation?
 - *Let discussion flow freely but probe appropriately to establish whether it is their culture? Lifestyle? Unsustainable economic activity? Examples can be: reliance on rain-fed agriculture; pastoralism (other than being unsustainable economically, it interferes with children's education etc)? Is it customs that bar members of their community from owning land or engaging economically?*
 - *Is it their politics (remember Moi's 'siasa mbaya, maisha mbaya' meaning don't support me and you will suffer)?*
 - *What about poor leadership, including among local leaders?*

- *Do you think lack of adequate political representation contributed to your economic marginalisation? How?*
6. How have you (as a group) coped with economic marginalisation?
- *Probe to establish how their marginalisation made them feel. Did they feel unwanted, as foreigners?*
 - *Has this changed?*
 - *Probe to establish how their marginalisation affected their view of things, how it affected how they viewed and related to others (members of other communities?)*
7. What do you think should be done to address the legacy of economic marginalisation of ethnic minorities and indigenous people?
- *Elicit views freely without going into what the new constitution provides unless it comes up early in the discussion.*
 - *Probe to establish how they think the new constitution has changed their situation.*
 - *Probe further to establish specific things about the new constitution that should be emphasized. These can relate to: the Bill of Rights; Devolution; Equalisation fund; land reforms etc*
8. What do they see as their role in addressing their (previous) economic marginalisation?

III. QUESTIONS RELATED TO THE ECONOMIC MARGINALISATION OF WOMEN

1. There is often the belief/perception that women in Kenya have suffered marginalisation, especially economic marginalisation. What is your understanding of (economic) marginalisation?
 - *Probe (use probing or substantiating questions) to establish participants' understanding of related concepts like political marginalisation and social (exclusion) marginalisation.*
 - *Once views are expressed on this issue, validate key views from participants and share the TJRC's vision/understanding of economic marginalisation.*
2. Do you believe that women have been marginalised economically?
 - *Probe to establish in relation to what issues they feel/have felt marginalised:*
 - *is it with respect to citizenship and legal recognition;*
 - *the distribution of social goods and services such as health facilities and healthcare; housing; education (schools); social security; water and food?*
 - *Representation in public employment (public/civil service)?*
 - *Probe further to establish whether it relates to discriminatory land ownership laws (or other injustices around land)?*
 - *Other things done/not done?*
 - *If the language of 'historical injustice' is used, probe to establish what participants think it means and whether they think it was intended or has had the effect of marginalising them economically*
3. Who do you blame/who do you believe is responsible for your marginalisation?
 - *Probe to establish whether they have any specific actors in mind (this can be the government; specific ethnic group; rich neighbours; local MP; colonial government; NGOs; Local leaders etc)*
 - *Probe to establish who in their view they think is the most responsible for their economic marginalisation.*
 - *Clarify that government refers to the three arms of government as well as other state institutions (like parastatals). Clarify further that government relates not only to central government in Nairobi but also local government (local authorities).*

4. Why do you believe that you have been marginalised?
 - *Because we want to get some specifics on why they feel marginalised (which is general), probe to obtain some facts on things that make them reach the conclusion that they are marginalised economically*
 - *Ask them to describe/ provide any information they may have on the status of Socio-Economic Rights.*
5. What do you think are the reasons (political, economic or cultural) for your economic marginalisation?
 - *Let discussion flow freely but probe appropriately to establish whether it is their culture? Lifestyle? Unsustainable economic activity? Examples can be: reliance on rain-fed agriculture; pastoralism (other than being unsustainable economically, it interferes with children's education etc)? Is it customs that bar members of their community from owning land or engaging economically?*
 - *Is it their politics (remember Moi's 'siasa mbaya, maisha mbaya' meaning don't support me and you will suffer)?*
 - *What about poor leadership, including among local leaders?*
 - *Do you think lack of adequate political representation contributed to your economic marginalisation? How?*
6. How have you (as a group) coped with economic marginalisation?
 - *Probe to establish how their marginalisation made them feel. Did they feel unwanted, as foreigners?*
 - *Has this changed?*
 - *Probe to establish how their marginalisation affected their view of things, how it affected how they viewed and related to others (members of other communities?)*
7. What do you think should be done to address the legacy of economic marginalisation of ethnic minorities and indigenous people?
 - *Elicit views freely without going into what the new constitution provides unless it comes up early in the discussion.*
 - *Probe to establish how they think the new constitution has changed their situation.*
 - *Probe further to establish specific things about the new constitution that should be emphasized. These can relate to: the Bill of Rights; Devolution; Equalisation fund; land reforms etc*
8. What do they see as their role in addressing their (previous) economic marginalisation?

IV. QUESTIONS RELATED TO THE ECONOMIC MARGINALISATION OF THE POOR (RURAL AND URBAN)

1. There is often the belief/perception that the poor in Kenya have suffered marginalisation, especially economic marginalisation irrespective of ethnicity or origin. What is your understanding of (economic) marginalisation?
 - *Probe (use probing or substantiating questions) to establish participants' understanding of related concepts like political marginalisation and social (exclusion) marginalisation.*
 - *Once views are expressed on this issue, validate key views from participants and share the TJRC's vision/understanding of economic marginalisation.*
2. Do you believe that the poor have been marginalised economically? How?
 - *Probe to establish in relation to what issues they feel/have felt marginalised:*
 - *is it with respect to citizenship and legal recognition;*

- *the distribution of social goods and services such as health facilities and healthcare; housing; education (schools); social security; water and food?*
 - *Representation in public employment (public/civil service)?*
 - *Probe further to establish whether it access to land, a major means of production?*
 - *Taxation and labour laws?*
 - *Other things done/not done?*
- *Probe to establish whether factors such as poor education/illiteracy; discrimination (re labour market); location (remoteness); lack of (adequate) social spending on poverty etc have contributed to their situation.*
3. Who do you blame/who do you believe is responsible for your marginalisation?
- *Clarify that government refers to the three arms of government as well as other state institutions (like parastatals). Clarify further that government relates not only to central government in Nairobi but also local government (local authorities).*
 - *Probe to establish whether it has been the same or have they been better or worse under:*
 - *a) the Kenyatta Government;*
 - *b) Moi government and*
 - *c) Kibaki government*
 - *With respect to each of these governments, are there periods when you felt not economically marginalised? Or when things were better?*
4. How to rate government interventions, if any? These include labour laws, minimum wage; education, public spending and poverty eradication programs?
5. Other than the government, are there any other entities that you blame for your economic marginalisation?
- *Probe to establish what specific roles they assign to any of the entities named in their marginalisation? These entities could be colonial government; foreign governments; society (your own); Politicians/leaders (including church religious leaders); NGOs?*
 - *Do you think lack of adequate political representation contributed to your economic marginalisation? How?*
6. What do you think has been the impact of the economic marginalisation of the poor on the poor, society?
7. What do you think should be done to address the legacy of economic marginalisation of the poor?
- *Elicit views freely without going into what the new constitution provides unless it comes up early in the discussion.*
 - *Probe to establish how they think the new constitution has changed their situation.*
 - *Probe further to establish specific things about the new constitution that should be emphasized. These can relate to: the Bill of Rights; Devolution; Affirmative action; Equalisation fund; land reforms etc*
8. One of the main challenges experienced by the poor attempting to fight for their rights is access to justice, both in terms of cost and distance.
- Probe** *to establish what interventions by government can be made in this regard? Probe to establish what interventions can be made by civil society to enhance access to justice for the poor. What is the role of informal justice systems?*
9. What do they see as their role in addressing their (previous) economic marginalisation?

Appendix 9

THE COMMISSION ON ADMINISTRATIVE JUSTICE

ADVISORY OPINION ON THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59 (4) and Chapter 15 of the Constitution of Kenya, as read with The Commission on Administrative Justice Act, 2011. Under Article 252(1) (b) of the Constitution, the Commission has the powers necessary for conciliation, mediation and negotiation. Further, Article 59 (h) and (i) of the Constitution which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration.

Under Section 26(c), the Commission is empowered to adjudicate on matters relating to administrative justice. Section 29(c) grants the Commission power to investigate any matter arising from the carrying out of an administrative action, upon a complaint to the Commission, or on its own initiative. Under section 2 (1), the Commission is empowered to deal with a decision made or an Act carried out in public service, or a failure to act in discharge of a public duty required of an officer in public service.

In light of the above Constitutional and Statutory mandate, the Commission, of its own motion invited the TJRC Chair Amb. Bethuel Kiplagat and the TJRC Commissioners, for a mediation process. Owing to reluctance by some of the parties, the mediation process did not achieve fruition, and the Commission therefore elected to consider the matters and render an Advisory Opinion.

At the outset, we wish to state that we have duly warned ourselves that certain aspects of this matter have been the subject of judicial proceedings, and have taken due regard of such pronouncements. It is important to note that this opinion is not a result of investigations conducted by the Commission. In any event the matters that were before the Courts have been concluded and the issues that fell for determination have been determined. This Opinion is therefore picking up from the resultant effect of the judicial decisions in so far as it relates to Administrative Justice and Public Administration and to offer possible avenues for completion of the TJRC tasks without interferences with the Courts' Orders.

The TJRC is a Statutory Commission established by the Truth Justice and Reconciliation Act, Act No. 6 of 2008 (The TJRC Act). The TJRC Act was enacted after considering the fact that there have been gross violations of human rights, abuse of power and misuse of public office, and that there was need to give the people of Kenya a fresh start where justice is accorded to the victims of injustice and past transgressions. The framers of the TJRC Act were conscious of the fact that some of the transgressions against the Kenyan people could not be properly addressed by our judicial institutions due to procedural and legal hindrances. The Commissioners of the TJRC were duly appointed in accordance with the relevant provisions of the TJRC Act and no issues arose as to the suitability of any of the Commissioners at the time. Thereafter, an issue arose as to the suitability and/or credibility of the Chairperson of the TJRC continuing to serve as such. The dispute ended up in Court through Misc. App No. 470 of 2009 Republic vs. Truth, Justice and Reconciliation Commission and another Ex-parte Njeru Kathangu and 9 Others. In this suit the ex-parte Applicants alleged that:

- a) Amb. Bethuel Kiplagat was unfit to be appointed as a Commissioner and Chairman of the TJRC on account of his past record as he was alleged to have been involved in defending torture, abuse of judicial process and policies of dictatorship in Kenya during the period he served as a diplomat and as the Permanent Secretary in the Ministry of Foreign Affairs.
- b) the TJRC Act specifically excluded holders of public office, both serving and retired, from membership of the TJRC because the actions of public officers are the subject of the investigations being undertaken by the TJRC and therefore the forwarding of the TJRC chair's name for appointment to the TJRC was therefore against the spirit and letter of the TJRC Act.
- c) the Oath of Office taken by the TJRC Chair was null and void as it was taken before publication of the notice of his appointment in the Kenya Gazette .

In short, the Applicants were questioning the recommendation by the Selection Panel and nomination of Amb. Bethuel Kiplagat for appointment as Commissioner and Chairman of the TJRC. These allegations were also supported by a section of members of the public including a section of the civil society who questioned the suitability of the TJRC Chair to continue as such.

The Applicants sought an order of Certiorari, to quash the "Oath of Office" of Amb. Bethuel Kiplagat on account that it was irregularly administered and that the Selection Panel that proposed his name for appointment was not properly constituted. The Applicants contended that the Chief Justice had administered to the Chairman of the TJRC the oath of office on 3rd August 2009 before the appointment or publication on the 14th August 2009 which was done vide Gazette Notice Number 8737, and therefore it was irregular and called for questioning.

The Court found that according to the Gazette Notice, the appointment was made on the 22nd July 2009 before the oath of office was administered and it was only the publication that was done on the 14th August 2009 and therefore declined to grant the order of Certiorari by holding that "there was nothing wrong with the publication of the notice of appointment after administering the oath". It was also found that the selection panel was properly constituted.

The second prayer sought was that of prohibition, to prohibit Amb. Bethuel Kiplagat from running the offices of the TJRC as Chairman or participation in any way in the affairs of the TJRC. The Court looked at the jurisprudence that informs the issuance of such an order of prohibition, and found that the remedy of prohibition as sought by the Applicants was not available to them. The Application was dismissed with costs on the 28th November 2011.

As this matter was pending litigation, Amb. Kiplagat had joined the other Commissioners and signed a letter requesting the establishment of a tribunal to investigate the allegations against him. This was done on the 12th of April 2010 through a unanimous decision by TJRC. On 10th December 2010, the Chief Justice appointed a tribunal under Gazette Notice Number 15894 to investigate the conduct of the TJRC Chairperson, including, but not limited to, the allegations that his past conduct eroded and compromised his legitimacy and credibility to chair the TJRC.

Amb. Kiplagat had, on 2nd November 2010 released a signed media statement welcoming the decision of the Chief Justice to appoint a tribunal. After the appointment of the tribunal, Amb. Kiplagat filed an application before the tribunal challenging its jurisdiction to investigate his past conduct. The motion was however found by the tribunal to be fatally defective and incompetent and was struck out. The tribunal also found that it had jurisdiction to inquire into the past conduct of Amb. Kiplagat. He then moved to the High Court and filed HC Misc. Civil Application NO. 95 of 2011 Bethuel Kiplagat Vs. The Chief Justice and Others and sought to challenge the proceedings of the tribunal by way of Judicial Review. The matter

came before His Lordship Justice Muchelule to determine whether to grant Leave, and whether the Leave granted to institute the proceedings should operate as a Stay of the proceedings before the tribunal. The Judge held that the Leave should operate as a stay after taking into account the matters that the tribunal was going to investigate. Nonetheless, the Judge did make some observations obiter, which we shall make reference to later in this Opinion.

This matter was however withdrawn by Amb. Kiplagat on the 1st day of December 2011. In the meantime, the tribunal's timeline had expired before it had released its report which prompted the TJRC to institute JR Case No. 7 of 2012 *The Truth, Justice and Reconciliation Commission Vs. The Chief Justice of the Republic of Kenya and Bethwel Kiplagat*. The Applicant sought an Order of Mandamus compelling the Chief Justice to appoint a tribunal pursuant to Section 17 (2) of the TJRC Act. In the alternative, they sought an Order of Mandamus compelling the Chief Justice to reconstitute the tribunal appointed on 2nd December 2010 and an Order of Prohibition to prohibit/restrain Amb. Kiplagat from acting and or resuming office as Chairman and Commissioner of TJRC and/or entering the offices of TJRC. It is important to note that at this point Amb. Kiplagat had since "stepped aside".

In a lengthy and reasoned ruling delivered on 24th December 2012, His Lordship Justice Warsame determined that the TJRC had no legal capacity or authority to bring the present application against Amb. Kiplagat. The judge also held that much as a member of the TJRC may be removed from office for misbehavior or misconduct, the misbehaviour or misconduct must have arisen at the time the Commissioner or Chairman was in office. On the pertinent question before the court, the judge held that there is no statutory power imposed upon the Chief Justice of the Republic of Kenya to appoint a tribunal to investigate and inquire into the past conduct of the TJRC Chair or any other Commissioner. He also held that the former Chief Justice had no powers, authority and/or jurisdiction to appoint a tribunal to inquire into the past conduct of the Chair of TJRC. He went ahead to dismiss the Application with costs against TJRC, which costs were to be borne by the Commissioners personally.

It is clear from this rather sad and unfortunate history of the TJRC that the allegations levelled against Amb. Kiplagat were never determined upon their merits. Indeed Justice Warsame after castigating TJRC Commissioners for filing the Application which he considered frivolous nonetheless observed at Page 32 of his ruling that "none of the allegations have been considered, investigated and determined". But it is equally clear that those allegations, insofar as they relate to alleged conduct before appointment, cannot be legally used to bar Amb. Kiplagat from occupying the office of chair to the Commission.

After the aforementioned Ruling, Amb. Kiplagat returned to office to conduct his duties as the Chair of TJRC. He did not get a warm and generous reception from the rest of the Commissioners resulting in a standoff between the two. The other Commissioners were of the view that since the matters against Amb. Kiplagat had never been determined upon their merits, he could not sit and participate in the preparation and pronouncement of the TJRC Report.

Following this stalemate, the Commission, wearing its conciliation hat, sought to provide a forum for mediation between the two parties. Amb. Kiplagat attended to the Commission's offices on the 5th March 2012 and in a lengthy discussion lasting almost three hours gave his points of view of the whole matter. He agreed in the said meeting, to a reconciliation and mediation process to be steered by the Commission.

The other Commissioners of TJRC were also invited to a meeting with the Commission on the 6th March 2012. They elected to send the Chief Executive Officer, Mrs. Patricia Nyaundi who, after explaining that the Commissioners sent apologies as they were having formal hearings, also gave an account of the position as Viewed by the TJRC Commissioners. What followed were formal letters from the Commission dated 6th March 2012 addressed to Amb. Kiplagat and the Chief Executive Officer of TJRC, seeking formal concurrence of both Amb. Kiplagat and the other Commissioners to a mediation process. On the 14th March 2012,

the Commission received a letter dated 12th March 2012 from the Chief Executive Officer of TJRC Mrs. Patricia Nyaundi informing the CAJ that the other Commissioners were consulting on the contents of the Commission's letter of 6th March 2012 and would as soon as possible revert to the Commission. The Commission has since not received further communication from her. On his part, Amb. Kiplagat called the Commission's offices on the 9th March 2012 and politely declined engaging in any further processes concerning the matter since, he noted, he was now settled in the TJRC offices and therefore saw no need of engaging in the mediation intended by the Commission.

In light of the commission's powers and functions as already highlighted, and in view of the clear reluctance to engage in mediation by the parties, the Commission elected to switch from its mediative role under Section 8(f), 26 (c) and 29(2) to its Advisory role under section 8 (h) of the Commission on Administrative Justice Act 2011. Thus, to the extent that Amb. Kiplagat moved to resume office on the one hand, while the rest of Commissioners are determined to thwart his move on the other hand, these constitute "action" and "omission" respectively as defined in Section 2 (1) (a) and (b) of the Act. In the interests of the country, the Commission thus proceeds to render this Advisory Opinion as mandated by law.

The Commission has with abundant caution and care, considered the facts relating to this matter and the effect that the continuing stalemate would have on the integrity of the TJRC report due to be released. We have also carefully analyzed the judicial pronouncements that have been made concerning some aspects of this matter. Nonetheless, whilst the Commission respects the decision of the Courts and concurs with the basis of the decision therein, the same do not preclude the Commission from making its Recommendations from the perspective of public administration.

It is our view that the cumulative Court interventions have blurred the determination of a very important question, namely, whether Amb. Kiplagat, in light of the allegations levelled against him concerning his past conduct, is suitable to hold office as Commissioner and Chair of TJRC. The judicial pronouncements while sound in law, have effectively stopped inquiry and determination of the said question. Indeed, the law is clear and the Court is right on the question of which period the tribunal may investigate the conduct of the Chairperson. It cannot be the period prior to the enactment of the TJRC Act and before his appointment. However, the Integrity of the outcome of the TJRC's report must be protected and guarded in view of the enormous task that has been granted to the TJRC.

In our view, the contest is one between Legality and Integrity. While the legality favours the return of the Amb. Kiplagat to TJRC, it is up to the Commission itself to protect the integrity of the process. The question as to whether Amb. Kiplagat should participate in the remaining process of TJRC is a question not of legality but of integrity. What effect would he have on the integrity of the report if he substantively participated in its preparation?

The question is not about who is right in law but what effect his participation is going to have on the strength of the report? We reiterate and agree with the observations that had been made much earlier by Justice Muchelule in HC Misc. No.95 of 2011 which we quote below in extenso;

"For me, the applicant is faced with a serious moral issue. His appointment was on the basis that his conduct, character and integrity were beyond reproach, and that he was going to be an impartial arbiter in whatever proceedings that were going to be conducted by him. It was expected that he was not involved, implicated, linked or associated with human rights violations of any kind or in any matter which the Commission is supposed to investigate. But now, he is faced with a situation where his past has allegedly been dug out and his own Commission may very well be seeking to investigate him. The issue is not whether the allegations being levelled against him are true. What is material is that the Commission will want to investigate the circumstances surrounding the death of Robert Ouko, the Wagalla Massacre and the Ndung'u Report on illegal/irregular allocation of public land and in each case he is being adversely

mentioned. He cannot sit in judgement when the issues are being discussed. Justice will cry if he were allowed to sit in judgment, be a witness and an accused, all that the same time. My advise is that he should do the honourable thing”.

We agree fully that Amb. Kiplagat cannot be a judge in his own cause. We further observe that Amb. Kiplagat falls on the right side of the Law but on the wrong side of Integrity.

We therefore advise as follows:

1. That Amb. Bethuel Kiplagat should be allowed to return and sit in his office in accordance with the Court Orders.
2. That having assessed the time left within which the TJRC is required to prepare and submit its report vis a vis the time it would take for any appeal filed by the TJRC to be determined, it would be ill advised for the TJRC Commissioners to believe that such determination will be made in time before preparation of their Report.
3. That Amb. Bethuel Kiplagat should not participate or interfere with the preparation of the TJRC report since such participation may have a negative effect to the acceptance of the Report. He should however be given an opportunity to review the report within a short time and to script an addendum to the report wherein he may agree or give his dissenting opinion. This is precented. In the Report of the Independent Electoral Review Commission (IREC or Kieggler Commission), two Commissioners duly expressed their dissent, and reasons thereof, which was included as an addendum to the report.
4. That Amb. Kiplagat be paid the entire difference in salary for the period in which he had stepped aside since he was on half salary.
5. Amb. Bethuel Kiplagat should however, in a show of good faith, waive the costs that had been granted to him by the Courts in the judicial processes between him and TJRC. Indeed, Amb. Kiplagat had indicated to the Commission that he was not keen in pursuing the costs granted to him by the Courts and only wanted reconciliation. If, however, he should elect not to do so, it would be worth pursuing an Appeal in light of S.32 of the TJRC Act which grants immunity from personal liability
6. It has also not escaped our attention that the afflictions in TJRC have also been the subject of political interference. A threat by a section of Rift Valley Members of Parliament to reject the report of the TJRC if Amb. Kiplagat is excluded in the remaining process is unfortunate since it demonstrates sectarian support which ultimately undermines Amb. Kiplagat's authority. Seeking sectarian support by Amb. Kiplagat or any of the Commissioners, will only seek to erode the integrity of the Report.

We do observe that the hardships experienced by the TJRC have struck a sad and solemn note in public administration in Kenya. It is ironical that the very institution established to achieve lasting peace and harmonious co-existence among Kenyans, by providing for them a forum to discuss such matters freely and in a reconciliatory manner, should be the same one engulfed in wrangles. We believe the TJRC Commissioners have the courage, wisdom and ability to pull through this task, and we invite them to do so.

Appendix 10

Aide Memoire

- The Commissioners are concerned about the conflicts of interest presented by Ambassador Kiplagat.
 - Ambassador Kiplagat was present at a meeting of the Kenya Intelligence Committee in Wajir two days before the start of what became known as the Wagalla Massacre;
 - Ambassador Kiplagat was an important witness to events leading up to the assassination of the Honorable Robert Ouko, and was recommended for further investigation and noted as an uncooperative witness by previous inquiries into that assassination;
 - Ambassador Kiplagat has admitted to having been involved in land transactions that were labeled by the Ndung'u Commission of Inquiry as irregular and illegal.
- The Commissioners are also concerned that Ambassador Kiplagat swore under oath before the panel that selected the Commissioners that he “has not in any way been involved, implicated, linked, or associated with human rights violations of any kind or in any matter which is to be investigated” by the Commission. (See Section 10(6)(b) of the Act.)
- The Commission is required by its mandate to investigate all three of the areas listed above in which Ambassador Kiplagat is involved or linked: massacres, political assassinations, and irregular and illegal land transactions.
- All three of the areas listed above have been the subject of numerous statements and memoranda to the Commission, and many of these statements (over three dozen) have specifically mentioned Ambassador Kiplagat as linked to these and other violations within the mandate of the Commission.
- The Commissioners are united in the position that the conflicts of issue raised by Ambassador Kiplagat need to be addressed in a credible and transparent process that is consistent with the rule of law.

History

- The Commissioners, including Ambassador Kiplagat, with the assistance of an external facilitator and mediator, engaged in a series of internal consultations from February to April 2010 to come up with a mechanism to address the conflicts of interest of Ambassador Kiplagat.
- After much discussion and consultation, Ambassador Kiplagat insisted that the only proper mechanism to address the issues raised by his presence was a tribunal established pursuant to Section 17 of the Act. The other Commissioners agreed with this approach, and all nine Commissioners, including Ambassador Kiplagat, agreed in writing that the Commission would request such a tribunal and that Ambassador Kiplagat would step aside until such a tribunal had finished its work.
- The Commissioners filed a petition with the Chief Justice in April 2010 asking that a tribunal be established to determine if Ambassador Kiplagat had engaged in “misbehavior or misconduct” under the Act by signing a false affidavit claiming that he had no involvement with matters to be investigated by the Commission and by continuing to privately and publicly claim that he was not involved with any matter to be investigated by the Commission.
- At the time the Commission submitted its petition Ambassador Kiplagat had already changed his position on the meeting in Wajir, first asserting that he had never been to Wajir in his life, and then claiming that he did not remember if he had attended a meeting in Wajir or not. Since the filing of the petition Ambassador

Kiplagat has been reminded by others that he had in fact been present at a meeting in Wajir two days before the start of the Wagalla Massacre. Having been reminded of his presence, Ambassador Kiplagat now asserts confidently that no security operation was discussed in the meeting he attended over 27 years ago.

- The Chief Justice announced the establishment of a tribunal in October 2010.
- The Chief Justice in exercising his proper legal authority under the Act adopted an interpretation of the phrase “misbehavior or misconduct” that was broader than that asserted by the Commissioners in the petition, and created a tribunal to look into issues of integrity and credibility throughout Ambassador Kiplagat’s life.
- A three judge tribunal began its work in earnest in December 2010 following the “stepping aside” by Amb. Kiplagat.
- While Ambassador Kiplagat first welcomed the creation of the tribunal as a forum before which he could assert his innocence, Amb. Kiplagat filed a challenge before the tribunal questioning its jurisdiction.
- The tribunal rejected Ambassador Kiplagat’s challenge and continued with its work.
- Ambassador Kiplagat then went to the High Court to challenge the jurisdiction of the tribunal. The High Court granted a temporary stay of the proceedings of the tribunal so that Ambassador Kiplagat’s arguments could be heard without prejudice.
- While Ambassador Kiplagat pursued his matter in the High Court, the life of the tribunal expired in April 2011.
- The tribunal never had an opportunity to finish its work, and thus did not rule either in favor or against Ambassador Kiplagat.
- In November 2011 Ambassador Kiplagat withdrew his case before the High Court before the Court could reach a decision.
- The High Court never ruled on Ambassador Kiplagat’s challenge to the legality of the creation of the tribunal.
- A group of former MPs brought a case in the High Court in August 2009 challenging, inter alia, the creation of the TJRC and the selection of all of the Commissioners. Ambassador Kiplagat retained separate counsel in that case, and argued that the only proper procedure for questioning the appointment of a Commissioner was through a tribunal under Section 17 of the Act.
- The High Court dismissed the challenge brought by the former MPs, and in its opinion noted that the proper avenue for challenging the presence of a Commissioner was found in Section 17 of the Act.
- In January 2012 Ambassador Kiplagat returned unannounced to the TJRC offices asserting that he had been “cleared” by the courts.
- The Commission requested that Ambassador Kiplagat honor the pledge he made to the people of Kenya and to the Commission that he would step aside until the tribunal finished its work.
- Ambassador Kiplagat rejected the appeal of his fellow Commissioners and insisted, contrary to the history of the court proceedings, that he had been cleared by the courts.
- The Commissioners went to the High Court to, inter alia, enjoin Ambassador Kiplagat from returning to the TJRC unless and until a tribunal addressed the issues raised in the Commission’s petition.
- Judge Warswame of the High Court in his decision noted that no process had yet been completed concerning the issues raised in the Commission’s petition, yet the learned judge nevertheless ruled against the Commission before providing the Commission an opportunity to argue the merits of the matter.

Current Situation and Way Forward

- The Commission has appealed the decision of Judge Warswame.
- Ambassador Kiplagat has now returned to the TJRC. The CEO vacated her office in order to provide Ambassador Kiplagat with an office.
- The Commissioners met with Ambassador Kiplagat on 30 March 2012. At that meeting the Commissioners reiterated to Ambassador Kiplagat that the differences with him were not of a personal nature, but were differences based on principle. The Commissioners explained that the issues involved the integrity of the TJRC

process, including the final report, and the conflicts of interest presented by Ambassador Kiplagat in three areas within the mandate of the Commission.

- The Commissioners expressed disappointment that the conflicts of interest raised by Ambassador Kiplagat had yet to be addressed, and asked Ambassador Kiplagat to honor the pledge he made to the Commission and the people of Kenya in November 2010 – viz., that he would graciously stand aside while his conflicts of interest were addressed by a tribunal set up under our Act.
- The Commissioners concluded by noting that until a process addressing Ambassador Kiplagat’s conflicts of interest was concluded, the Commissioners would continue to be reluctant to work with him.
- The Commissioners exchanged views with Ag. PS Mr. Kibara on April 3rd 2012 on the possibility of involving Ambassador Kiplagat in the remaining phase of the TJRC work, in particular the review and approval of the Commission’s final report.
- In the meeting with the Ag. PS the Commissioners reiterated that the issues we have with Ambassador Kiplagat are not of a personal nature, but concern issues of principle and the integrity and credibility of the TJRC process.
- The Commissioners noted that allegations linking Commissioner Farah to matters to be investigated by the Commission were raised. The Commission, with the full cooperation of Commissioner Farah, investigated those allegations and found clear and convincing evidence absolving Commissioner Farah of the allegations. Commissioner Farah declined to request a tribunal pursuant to Section 17 of our Act.
- The Commissioners are of the view that the following could be the basis of such involvement:
 - 1) Ambassador Kiplagat will review drafts of the final report in the same manner and at the same time as other Commissioners. The final report is being prepared by a technical team of experts under the supervision of a committee of the Commission. Once a draft of the report is ready, Commissioners will be given an opportunity to review and comment on the draft. The technical team will then redraft the report taking into account the comments of the Commissioners.
 - 2) Ambassador Kiplagat will not be allowed to review those sections of the report that concern areas in which he has a conflict of interest, including those parts of the report concerning massacres, political assassinations, and land. Ambassador Kiplagat will be given the same rights and opportunities as any other adversely mentioned person. Thus if the report includes an adverse finding concerning Ambassador Kiplagat, he will be given the same opportunity as other adversely mentioned individuals to respond to that finding and to have his response taken into account in the final drafting of that finding.
 - 3) Ambassador Kiplagat has refused to honor a summons to testify before the Commission. He is the only person to date who has so refused a summons. Unless Ambassador Kiplagat agrees to testify before the Commission pursuant to this summons, the Commission reserves the right to pursue legal enforcement of its summons as provided for under Section 7(6) of the Act.
 - 4) Ambassador Kiplagat must agree to comply with the decision-making processes of the Commission set forth in the Act and as established by resolutions of the Commission. The Commission has operated successfully for over fifteen months with these procedures, and all of the other Commissioners to date have abided by them.



REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION



Volume III



**REPORT OF THE TRUTH, JUSTICE AND
RECONCILIATION COMMISSION**

Volume III

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**His Excellency
President of the Republic of Kenya**

Nairobi

3 May 2013

LETTER OF TRANSMITTAL

By Gazette Notice No. 8737 of 22 July 2009 and pursuant to section 10 of the Truth, Justice and Reconciliation Act No. 6 of 2008, the undersigned were appointed to be Commissioners of the Truth, Justice and Reconciliation Commission. The Commission was established with the objective of promoting peace, justice, national unity, healing, reconciliation and dignity among the people of Kenya.

Having concluded our operations, and pursuant to section 48 of the Truth, Justice and Reconciliation Act, we have the honour to submit to you the Report of our findings and recommendations.

Please accept, Your Excellency, the assurances of our highest consideration.

Amb. Bethuel Kiplagat
Chairperson

B. A. Kiplagat

Tecla Namachanja Wanjala
(Vice Chairperson)

Tecla Namachanja Wanjala

Judge Gertrude Chawatama

Gertrude Chawatama

Amb. Berhanu Dinka

Berhanu Dinka

Maj. Gen (Rtd) Ahmed Sheikh Farah

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Ronald Slye

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Foreword

This volume builds upon the previous volumes analysis of the past to begin to point the way forward for national unity, healing and reconciliation. One cannot speak of national unity, healing and reconciliation without discussing ethnic tension. The causes of ethnic tension, and the problems raised by ethnic tension, have been discussed in other parts of this Report. In particular the chapter on ethnic tension should be read together with the chapter on Economic Marginalization and Violations of Socio-Economic Rights.

Ethnic tensions, particularly the tendency to view people who are different as ‘the other’ and thus not identify with, and either fear or scapegoat them, is unfortunately as old as human history. Tracing the origins of ethnic tension in Kenya to the beginning of history was beyond the scope of the Commission’s work. To understand the continued presence of ethnic tension today, and its evolution during our mandate period, we started with the colonial period, for it was under the colonial power that the political entity today known as Kenya was formed. In discussing ethnic tension since independence, we look at state and non-state actors, including the role of culture and stereotypes. Any discussion of ethnic tension in present-day Kenya would be incomplete without a discussion of the relationship between ethnicity and politics. It is an unfortunate fact that who joins a political party, and which politicians or parties form alliances, can be more often explained by ethnicity over any other factor. It is this potent, and at times volatile, combination of ethnicity and politics that has unfortunately spiralled into ethnic violence far too many times in our history.

While ethnicity and ethnic tension are discussed throughout the Report, we include here a case study on Mt. Elgon to provide a deeper analysis of the history of ethnicity in Kenya and its relationship to politics, land, and violence. The Mt. Elgon case study is unique because of the peculiar mix of ethnicity in the region, and the fact that ethnic tensions gave rise to a well-organized militia that terrorized the local population, which in turn led the state to engage in a military operation to stop the militia, but which also resulted in additional violations of the local population. Yet, the story of Mt. Elgon is typical in that it combines aspects of historical injustices that the Commission had seen in many other parts of the country. Firstly, the use of ethnicity to divide a local community and the combining of ethnic tension with disputes over land. Secondly, ethnic tension over land and identity spilling over into overt violence. Thirdly, the creation of organized militia groups to harden tensions based upon land and ethnicity. Fourthly, the influence of all of these forces on the political dynamics of the region, underscored by the role that

politicians have and continue to play with respect to ethnic tension, land, militias, and other violence. Finally, the intervention of the state to combat the militia groups and to protect the local population resulting in further violations.

While much of this volume is devoted to understanding the wide variety of historical injustices committed during the mandate period, we combined here a discussion of ethnicity and ethnic tension with national unity and reconciliation as, at the end of the day, they both involve a focus on the individual, the family and the community. It is, in short, a focus on the people of Kenya. And it is the people of Kenya, who have both committed and suffered these violations, who ultimately are the key to national unity and reconciliation.


National unity and reconciliation are properly understood as both a goal and a process. They are ideal states to which we as a nation must strive, and they require constant effort and attention. The same may be said of healing. An individual is never completely healed from a tragedy. If our expectation is complete healing, as though the tragedy had not occurred, then we are setting ourselves up for failure. Similarly, if we set national unity and reconciliation among all peoples as our benchmark of success, then we will never succeed. But if we set our benchmark as working towards and increasing national unity and reconciliation, just as we work to heal an individual who has suffered a tragedy, then we can set clear interim goals, plans, and other strategies by which we can then measure progress.

Efforts at national unity and reconciliation began before the Commission started its work, and will continue after this Report is issued. National unity and reconciliation were furthered by the National Accord that brought an immediate end to the violence arising from the 2007 election. But one can go back to the founding of the nation, in 1963, to find the first efforts to create a nation of people who view themselves first as Kenyan. It is a process that even after half a century is still incomplete. The Commission was under no illusion that it could achieve something that had not yet been achieved after fifty years of nationhood. We hope, however, that we are able to provide a more accurate and current picture of the state of national unity and reconciliation in Kenya today; that the efforts we undertook to further reconciliation in many communities across the nation will bear fruit as those communities continue to work through the legacy of historical injustices; and that the structures that are already in place to further reconciliation will gain strength, and perhaps hope, from the work we have done in furthering national unity and reconciliation.

List of Abbreviations

AFC	Agricultural Finance Corporation	KHRC	Kenya Human Rights Commission
AMPs	Adversely Mentioned Persons	MoSSP	Ministry of State for Special Programmes
CBO	Community Based Organization	NARC	National Rainbow Coalition
CID	Criminal Investigations Department	NCIC	National Cohesion and Integration Commission
CIPEV	Commission of Inquiry into the Post Election Violence	OCHA	United Nations Office for the Coordination of Humanitarian Affairs
DC	District Commissioner	OCS	Officer Commanding Station
DSIC	District Security Intelligence Committee	ODM	Orange Democratic Movement
DO	District Officer	ORN	Operation Rudi Nyumbani
GCG	Grand Coalition Government	PC	Provincial Commissioner
GSU	General Service Unit	PEV	Post-Election Violence
IDPs	Internally Displaced Persons	PNU	Party of National Unity
KADU	Kenya African Democratic Union	RBC	Regional Boundaries Commission
KANU	Kenya African National Union	SLDF	Sabaot Land Defence Force
KAU	Kenya African Union	TJRC	Truth, Justice and Reconciliation Commission
KPU	Kenya Peoples Union	UNDP	United Nations Development Programme
KCPE	Kenya Certificate of Primary School		
KNCHR	Kenya National Commission on Human Rights		





CHAPTER ONE

Ethnic Tension

We must work from the basis that Kenya is a garment of many colours, which is beautiful because each colour is present. We cannot be one colour because we would be dull. Some colours cannot run over others because we would be ugly. We must all stay in place and be bright. That is an ideal situation of where Kenya ought to be.¹

Wambugu Ngujiri, testimony before TJRC

I have only daughters and none of them has a boyfriend who is a Luo. I would want to sleep as a mother knowing that wherever they go, whichever part of this country they will eventually set up homes, they will be treated well.²

Pheobe Asiyo, testimony before TJRC

That we are born of different tribes we cannot change, but I refuse to believe that, because our tribes have different backgrounds and culture and customs we cannot create an African community or a nation.

Tom Mboya, *Freedom and After* (1963) 70

1. TJRC/Hansard/Thematic Hearing on Ethnic Tension and Violence/Nairobi/p. 35
2. TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 37

Introduction

1. A critical challenge that Kenya has faced since attaining independence in 1963 is the integration of its different ethnic groups or communities into a cohesive nation, without compromising the respective distinct identities of these ethnic groups. Over the years, ethnicity has become an instrument of division. Some parts of the country have experienced heightened levels of ethnic tension which have resulted in violence. The 2007/2008 Post-Election Violence (PEV) which prompted the creation of the Commission is perhaps the worst, but not the only, example of violence resulting from, amongst other reasons, long standing ethnic tension between ethnic groups in the country.
2. Although the problem of ethnic tension and violence has long been acknowledged, it was not until the aftermath of the 2007/2008 PEV that robust efforts to address the problem began to take shape. Earlier efforts to address the problem ended neither in fundamental changes in ethnic relations nor prevention of ethnic violence. For instance, in the aftermath of the 1991/1992 ethnic clashes, the National Assembly established a Parliamentary Select Committee to Investigate Ethnic Clashes in Western Kenya and Other Parts of Kenya. It was mandated to investigate the root cause of the clashes, identify persons who might have perpetrated or participated in the clashes and make recommendations that would help to avert such clashes in the future. The 13 member Committee, chaired by the then Changamwe Member of Parliament, Kennedy Kiliku, commenced its work on 14 May 1992 and submitted its report (commonly referred to as Kiliku report) to Parliament in September 1992. The recommendations of the Committee were ignored, and not surprisingly, ethnic clashes were again witnessed in the period running to and during the 1997 General Elections.
3. In response to the 1997 ethnic clashes, the government established the Judicial Commission of Inquiry into Tribal Clashes in Kenya (commonly referred to as Akiwumi Commission).³ It was mandated to investigate the tribal clashes that had occurred in various parts of the country from 1991, with a view of establishing or determining, *inter alia*, 'the origin, the probable, the immediate and the underlying causes of such clashes'. The Akiwumi Commission carried out investigations between 14 July 1998 and 11 June 1999. It submitted its report to the President in August 1999 but the report was not released to the public until towards the end of 2002, when the High Court ordered its release.⁴ Indeed, the government not only delayed the release of the Akiwumi Report for a span of around three years, but it also ignored and contested the findings of the Commission.

³ See Gazette Notice No. 3312 of 1 July 1998.

⁴ See *Roshanali v Republic*

4. Thus, although the government had as early as 1992 acknowledged that ethnic tension was rife in the country it did not take adequate measures to address the issue. The impact of this failure would, coupled with other factors, contribute to the vicious and large scale violence that took place in the country following the disputed presidential election of 27 December 2007. The violence had a distinct ethnic dimension. Therefore, with 1,133 people dead, and more than 350,000 internally displaced during the PEV, the phenomenon of ethnic tension could not be ignored anymore.
5. As such, addressing the question of ethnic tension and violence was top in the agenda of the Kenya National Dialogue and Reconciliation. The NCIC and this Commission were established with complementary roles in dealing with the problem of ethnic tension.
6. For this reason, section 6(s) of the TJR Act mandated the Commission to 'inquire into the causes of ethnic tension and make recommendations on the promotion of healing, reconciliation and coexistence among ethnic communities'.
7. This Chapter documents the main causes and effects of ethnic tension in Kenya. The chapter is based mainly on testimonies that the Commission heard during its hearings across the country. In addition to holding such hearings, the Commission also organized a thematic hearing on ethnic tension and violence on 2 February 2012 in Nairobi. During this thematic hearing the Commission heard presentations by experts and relevant institutions such as: the National Cohesion and Integration Commission (NCIC). The objective of the thematic hearing was well summarized by Commissioner Berhanu Dinka during the opening of the hearing. He said:

In the last ten months, the Commission has travelled the length and breadth of this country. We have listened to testimonies of victims and witnesses of ethnic clashes and political or electoral violence. The stories are sad and revealing. Today, the thematic hearing seeks to further interrogate the issue of ethnicity and its nexus with violence, governance, political transition and distribution of resources.⁵
8. This Chapter should be read together with two other Chapters contained in this Report: The Chapter on 'Economic Marginalisation and Violations of Socio-Economic Rights' which deals in great detail with the nexus between ethnic relations and economic marginalisation; and the Chapter on Land and conflict which deals in great details with the nexus between ethnic relations and land relate grievances. The next Chapter in this Volume focuses on a case study of the intersection between ethnic relations, land and politics.

5. TJRC/Hansard/Public Hearing/Thematic Hearing on Ethnic Tension and Violence/Nairobi/2 February 2012/p. 2

Definitions

9. In this Chapter, ethnic group refers to a group of person defined by reference to colour, race, religion, or ethnic or national origins.⁶ The term 'tribe' is also sometimes used in common parlance, but it is considered derogatory.⁷ The term has a connotation to colonialism and ideas of African traditionalism and backwardness in opposition to white or European civilization. Therefore, the Commission does not use this term, except when quoting witnesses verbatim.
10. Ethnicity may be used as a vehicle for positive group identification, or for negative exclusion including discrimination and, in extreme cases, ethnically-motivated violence. Kenya's history is replete with examples of ethnicity used for both positive and negative purposes. While this chapter focuses on the negative side of ethnicity as required by the Commission's mandate, it is important to acknowledge that ethnic affiliation is not, in and of itself, a bad thing. In fact, ethnicity is often at the core of an individual's sense of identity and belonging. In an environment of tolerance and celebration of diversity, ethnicity can strengthen national identity and purpose.
11. Ethnic tension refers to protracted social and political confrontations between ethnic groups.⁸ Such confrontations may be physical or non-physical in nature. Ethnic tension is also referred to as 'ethnic conflict', and both terms are used interchangeably in this Chapter. Such confrontations may either be physical or non-physical in nature. 'Ethnic violence or clashes', also a commonly used term in Kenya, refers to physical violence that arises from, or is motivated by, ethnic tension.
12. The terms 'ethnic violence', 'ethnic tension', and 'ethnic conflict' are often used interchangeably. This Chapter distinguishes ethnic violence as an aggravated form of ethnic tension or conflict that results in physical violence or even armed conflict. Ordinarily, ethnic tension precedes the occurrence of ethnic violence. Ethnic tension may also continue in the aftermath of ethnic violence.
13. Ethnic tension does not result from the mere co-existence of multi-ethnic groups within a nation.⁹ Rather, ethnic conflict and ethnic violence often arise from socio-economic and political tension between or within the various ethnic communities which are then manipulated by politicians or other leaders to further a selfish political or economic agenda. In Kenya, ethnicity has become an instrument of division. Consequently, parts of the country have experienced heightened levels of

⁶ NCIC Act, sec 2

⁷ Draft Ethnic and Race Relations Policy, NCIC, 2012

⁸ S Kinyanjui & G Maina 'Ethnic conflict in Kenya: An analysis of the politicization of ethnicity and the impact of free markets on ethnic relations' in Kenya Section of the International Commission of Jurists *Ethnicity, Human Rights and Constitutionalism in Africa* (2008) 80.

⁹ O McOnyango 'The Jews, the Gentiles and the Grudge' *UNESCO seminar paper* (1995) 1.

ethnic tension which have resulted in ethnic violence. The 2007/2008 post-election violence that led to the creation of this Commission is perhaps the worst, but not the only, example of ethnic tension erupting into ethnic violence through political manipulation.

Ethnic Composition

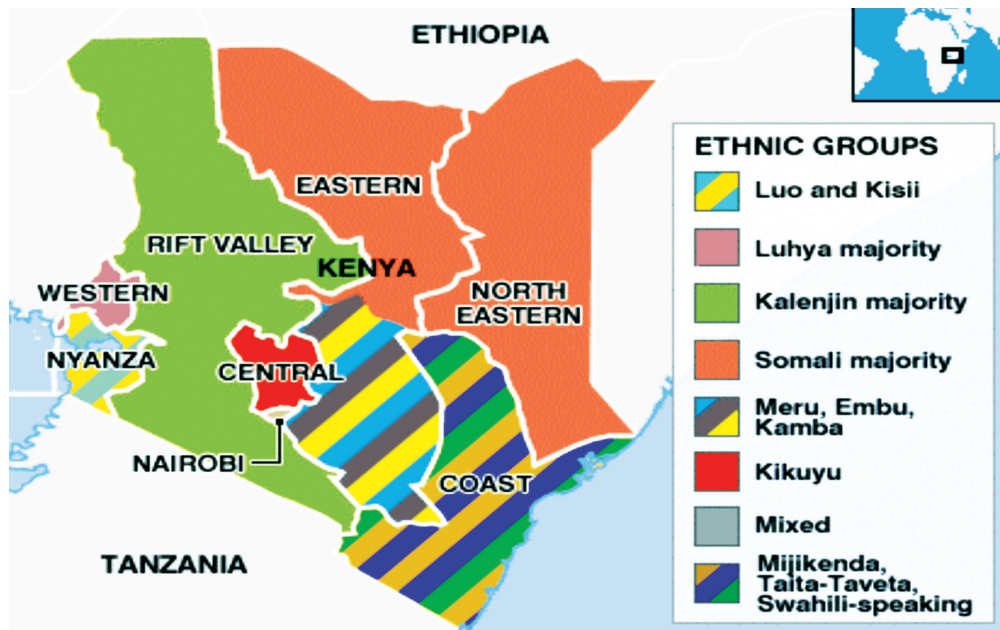
14. Kenya is a multi-ethnic country. Following the adoption of a new Constitution in August 2010, the country has been geographically and administratively divided into 47 counties. Previously the country was divided into eight provinces and 210 districts. With the current population of approximately 41 million people, the country is inhabited by more than 44 ethnic communities from the Bantu, Nilotic and Cushitic peoples. The country's population also comprises people of Arabic, Asian and European origin. The 2010 Population and Housing Census Report include the most recent data on ethnicity, which is set forth in Table 1 and Figure 1.

Table 1: Ethnic composition of Kenya as at 2009¹⁰

Ethnic group	Population
Kikuyu	6,622,576
Luhya	5,338,666
Kalenjin	4,967,328
Luo	4,044,440
Kamba	3,893,157
Kenya Somali	2,385,572
Kisii	2,205,669
Mijikenda	1,960,574
Meru	1,658,108
Turkana	988,592
Maasai	841,622
Teso	338,833
Embu	324,092
Taita	273,519
Kuria	260,401
Samburu	237,179
Tharaka	175,905
Mbeere	168,155
Borana	161,399
Basuba	139,271
Swahili	110,614
Gabra	89,515
Orma	66,275
Rendile	60,437

¹⁰ Government of Kenya 2009 Population and Housing Census Results (2010).

Figure 1: Distribution of Kenya's ethnic communities¹¹



Causes of Ethnic Tension

Colonial origins

15. The origin of Kenya as presently constituted can be traced back to 1895 when the British East Africa Protectorate was established.¹² Prior to that, every community that lived in the territory now called Kenya existed as a discrete unit according to its own respective socio-political arrangements, governing itself by its own customary laws and traditions.¹³ This is true not just of Kenya but of many pre-colonial societies in Africa.
16. Pre-colonial Africa consisted of two categories of societies. The first category had centralised authority, administrative machinery, and standing judicial institutions, while the second had communal and less intrusive governmental paraphernalia. These differences notwithstanding, the majority of pre-colonial African societies

¹¹ As above.

¹² See C Singh 'The republican constitution of Kenya: A historical background and analysis' (1965) 14 *International and Comparative Law Quarterly* 878.

¹³ On such arrangements, see generally A El-Obaid and K Appiagyei-Atua 'Human rights in Africa: A new perspective of linking the past to the present' (1996) 41 *McGill Law Journal* 821.

characteristically displayed ethnic, cultural, and linguistic homogeneity, as well as fundamental cohesion.

17. Foreign intrusion – notably slave trade and colonialism – led to the decline and subsequent demise of many of the social and communal values that had defined African societies. With the introduction of Arab slave traders and European colonialists, African customary practices that essentially promoted homogeneity no longer evolved according to African needs.
18. The weapons of Africans at the time (spears, bows, and arrows) were inadequate against the more destructive weapons of the foreign intruders. Consequently, African societies were easily dominated politically, economically, and socially and their social structures and cultures were either ignored or replaced with foreign ones. For the administrative convenience of the colonial rulers, the disparate traditional communities were forcibly cobbled together to form a single large territorial entity. It was in this fashion that most of the colonial African states, including Kenya, were formed and developed over the years.

Divide and rule policy

19. The colonial government pursued a policy of 'divide and rule' in order to consolidate their hold on the country, and to lessen the possibility that the African population would resist colonial rule. To that end, they magnified the differences between the various communities and regions, and stereotyped each community in a manner that would sow suspicion, hatred and the sense of 'otherness'.
20. In addition, colonial government created ethnically defined administrative boundaries. In determining such boundaries, no serious thought, if at all, was given to historical inter-ethnic interactions and relations. For instance, the people of what was known as Northern Frontier District were divided into two main groups: Somali and Galla with each group accorded its own territory. Sub-groups within these two main groups were further restricted within specific territorial boundaries. The arbitrary manner in which these boundaries were created and the arbitrary nature by which previously independent communities were brought within one administrative unit encouraged competition for resources and ethnic tension.
21. Moreover, the colonial government focused on developing infrastructure and social services in productive areas of the country (the so called 'White Highlands') at the expense of the rest of the country. The resulting inequality remained largely unaddressed in the policies and practices of independent Kenya.¹⁴ Areas were

¹⁴ As above.

defined productive if they contributed to the economic benefit of the colonial power. Thus, fertile agricultural land and areas important for transporting goods were singled out for infrastructure development. The preferential treatment given to some areas of the country because of their clear productivity thus led to differential treatment of ethnic communities that were patterned around the ethnic enclaves created by the colonial government.

22. It is therefore not surprising that underlying regional imbalances and the attendant inter-ethnic inequalities continue to inform the struggle for the Country's resources and access to public services. Competition over public resources often takes on an ethnic dimension and contributes to ethnic tension, conflict and violence.
23. The colonial land policy, particularly in the so-called 'white highlands' contributed enormously to regional and ethnic marginalisation from the economy. Colonial land policies resulted in displacement, the creation of 'native reserves', as well as the movement of masses of population from areas of their habitual residence to completely different regions and settling them on lands that traditionally belonged to other communities. The creation of native reserves ensured that rural areas outside the European domain were demarcated and administered largely as tribal units. The colonial government restricted trade and contact between administrative units
24. By the time Kenya attained independence on 12 December 1963 the colonial power had imposed elements of a modern state structure on communities that historically lacked inter-communal coherence. By forcing ethnic communities that previously lived independent of each other to live together, the British colonisers appeared to be indifferent to the resulting ethnic polarisation. Furthermore, through its policies that favoured the investment of resources only in 'productive areas', colonialism encouraged and created the foundation for discriminatory development in Kenya.¹⁵
25. During the Commission's hearings, a leading political science scholar, Professor Walter Oyugi, succinctly summarised this history:

Before the British settled in this country, [various ethnic] groups existed. They existed as neighbours and they interacted out of need because there were certain resources which were only available in certain areas. They accessed them through the exchange mechanism. There were also conflicting relationships depending on the culture of the neighbouring groups like cattle rustling especially between the Maasai and the Akamba, the Luo and the Nandis and so on. There was interaction and, therefore occasional rivalry over land, particularly over pasture and water, was common. Later on, this extended to agricultural

¹⁵ See African Peer Review Mechanism 'Country review report of the Republic of Kenya' available at <http://www.polity.org.za/article.php?a_id=99422> and <<http://www.nepad.org/aprm>> (last accessed 17 April 2010) 46.

activities. What would happen with the emergence of the colonial situation? Towards the end of 19th Century particularly after the consolidation of British authority around the time of World War I, what the British did which contributed to the emergence of consciousness of various ethnic groups was the idea of containment. Before colonialism, people were moving freely depending on their ability to conquer; but with colonialism, they were now confined to a territory. Administrative units were created and there was an association of people within an area. Over the years, a sense of feeling that “this is our area” or “this is our territory” or “this is our land” developed. Hence, the emergence of Nandi district, Kisii district, Kiambu district and so on. So, you are there because of colonial convenience but over the years, a consciousness of ownership of that particular asset called land began to emerge. Therefore, you begin to see the convergence of territory and ethnic groups. The association of certain ethnic groups emerged. For example, Central province belonged to Kikuyu, Nyanza for the Luos and Kisii, Western for Luhyas, Rift Valley for KAMATUSA; that is, Kalenjin, Maasai, Turkana and Samburu.¹⁶ “

26. As a result of the ethnic biases that coloured development and land policies of the colonial government, Kenya, like many other African countries, entered the era of independence with a heightened sense of ethnicity that continued to divide rather than unite the country. This ethnocentrism had manifold implications. It encouraged the politicisation and manipulation of ethnic identities, resulting in the exclusion of some communities from participating fully in the core social, economic and political activities of the country.¹⁷ Consequently, one of the most acute problems the country faces is the endless struggle to integrate its different communities into a democratic modern nation, without compromising their respective ethnic identities.¹⁸
27. The multiple contradictions left behind by colonial policies on the one hand, and the lack of political will and commitment on the part of the ruling political elite continued to impact negatively on all efforts at creating a truly democratic and prosperous Kenya for all its citizens.

Insider/Outsider dynamics

28. Related to the colonial origins of ethnic tensions discussed above is the phenomenon of ‘insiders’ and ‘outsiders’. Ethnic tension and violence occur when communities assert a superior claim over a territory at the expense of or to the exclusion of others. Such superior claims are based on the assumption that ownership or occupation at some point in the past created an exclusive claim for such ownership or occupation in the present. Often such claims are based on a selective reading of history or oral tradition and myths handed down from generation to generation.

16. TJRC/Hansard/Thematic Hearing on Ethnic Tension and Violence/Nairobi/2 February 2012/p. 5

17 African Peer Review Mechanism (n 8 above) 49.

18 As above.

39. Such exclusive claims to territory inevitably create classes of 'insiders' and 'outsiders'. This perception of people as outsiders as opposed to fellow citizens often lead to increased tension based on ethnicity which, in turn, create the potential for ethnic violence.
31. In the coastal region, members of the Mijikenda community, who regard themselves as indigenes of the coast, view non-Mijikenda individuals such as Kamba, Kikuyu, and Luo who have migrated or settled in the region as 'outsiders'. The 'outsiders' are regarded as 'wabara' and are viewed as a people who have unfairly appropriated to themselves local resources, particularly land.
32. There exist perceptions that while the coastal region as a whole has historically been economically marginalized, specific areas within the region that are predominantly occupied by non-Mijikenda are way better in terms of access to infrastructure and access to public services. The Commission heard such views in relation to Mpeketoni Settlement Scheme which is predominantly occupied by members of the Kikuyu ethnic group. According to a witness:
- You heard about the Bonis. They do not have a road network. If you travel for a distance of less than 100 kilometres you can take 24 hours [...] The most hurting thing is that you go up to Kibaoni on the junction going to Mpeketoni settlement scheme the road is so wide and clean that if you are going to Tana River by road you go through Mpeketoni for the sake of you just knowing the terrain and see it for yourself. The bus was zooming as if it was an aircraft on the runway.¹⁹
33. A perception exists also that public resources allocated for 'insiders' are often diverted to 'outsiders' within the region. For instance, a witness testified that while he had lobbied for an ambulance to be allocated to Lamu District Hospital, the same was diverted to Mpeketoni sub-district hospital:
- I went to the Provincial Director of Medical Health Services. We did everything right. However, when the ambulance came it was taken to Mpeketoni. It was shown as belonging to Lamu District Hospital, but it was sent to Mpeketoni sub-district hospital. I went to the PDA to inquire but I was told it was an order from Nairobi that it be taken to Mpeketoni. There is nothing we could do.²⁰
34. While the Commission could not verify this particular claim, the perception that areas occupied by individuals from outside the region enjoy better services is strongly held amongst coastal locals.

19. TJRC/Hansard/Public Hearing/Lamu/10 January 2012/p. 18

20. TJRC/Hansard/Public Hearing/Lamu/10 January 2012/p. 18

35. In the Rift Valley, members of the Kalenjin assert a superior claim over the region and view non-Kalenjins resident in the region as foreigners. Indeed, the region has been the site of violent ethnic clashes. In particular, during the 1992, 1997 and 2007 general elections, those considered foreigners were forcefully and violently evicted from their farms. This has been particularly the case in settlement schemes that were created in Rift Valley following independence. Non-Kalenjins living in these settlement schemes are regarded as foreigners or *bunot*. As explained by a member of the Kalenjin Council of Elders:

According to the Kalenjin culture, visitors are received in a special way. In the language of the Kalenjin we call those people *Bunot*. *Bunot* is not a derogatory name; it is a name that describes that you do not come from that area. There is a process that the Kalenjin people carry out to assimilate those people into a cohesive life. [...] So, the Kalenjin Community requires nothing but recognition by those who came that they are *Bunot* and the others are the indigenous people. To bring about healing, the Kalenjin Community would like to ask the other communities and particularly the Kikuyu Community because they are predominant, they are our neighbours, they own land and we have intermarried, to recognize that they are *Bunot*.²¹

36. Although it was claimed, as quoted above, that the term 'bunot' is not derogatory, non-Kalenjins in the region perceive this characterization both as derogatory and the source of ethnic tension and the violence and eviction that they have experienced in the past. According to a witness:

The word "bunot" was explained in detail here as a stranger or a person who has stayed in a place for a while. [...] So, the word "bunot" shows that we Kikuyus are still tagged as strangers and we have never been accepted as residents of this place.²²

37. And as described by another witness:

When you stay there for long with people from a certain community, you speak their language fluently, just like them, but the people there, though you have lived with them, know that you are not one of them. They just know you as a foreigner.²³

38. In addition to being referred to as *bunot*, non-Kalenjin communities who have settled in Rift Valley are generally referred to as *madoadoa*.²⁴ In areas predominantly occupied by Maasai, such as Narok and Kajiado, the Kikuyus in particular are referred to as *thabai*. According to a witness, who was brutally attacked and forcefully evicted from his farm in Narok during the 2007 PEV:

They [the Maasai] used to refer to us as spots and thabai, which is a thorny plant. Thabai is a Kikuyu name for that plant.

21. TJRC/Hansard/Public Hearing/Eldoret/3 October 2011/p. 3

22. TJRC/Hansard/Public Hearing/Eldoret/4 October 2011/p. 31

23. TJRC/Hansard/Public Hearing/Naivasha/26 September 2011/p. 30

24. Translates to English as 'spots'.

Of names and their meaning

39. In Coast and Rift Valley alike, a thorny issue that is intricately tied to the notion of insiders and outsiders relates to names of places. In particular, local communities in these two regions are aggrieved that places occupied by those they consider outsiders have been given 'outside names'. In Lamu, a witness lamented before the Commission that a lake that was previously called Mkunguya had its names changed to Kenyatta:

There is a lake there [Mpeketoni] called Lake Kenyatta. How did it get to be called Lake Kenyatta in this area? How did the name Kenyatta find its way in this area? If we go back into our history and our culture, the lake was called the Mkunguya Lake. But now it has become Lake Kenyatta. There are names that have been brought in from central [...] Why is there this plot to even change the names of places that hold our history and our origin in this place?²⁵



2007/8 Kiambaa post election violence victims' graveyard.

²⁵ TJRC/Hansard/Public Hearing/Lamu/10 January 2012/p. 29.

40. The Commission heard a similar issue in Eldoret:

Finally, names have a meaning. When the Kalenjin Community came back to Uasin Gishu, they knew the names of particular areas. However, we have problems with names. When our brothers from Central or when the children of Mumby came to Uasin Gishu, they came with their names. From the Kalenjin perspective, the soil is alive. The soil has its spirit. That is where languages clash. The soil is alive and it knows its owners and its name. However, when somebody else brings a name, there is a clash. The soil says, "What is this name? What is your totem? What is your clan?" I do not blame the Kikuyu Community. However, we would like to tell them that the names they have given the lands they have occupied continue to create conflict in the spiritual realm. For that reason, conflict demonstrates itself practically.²⁶

41. During electoral processes, the foregoing issues are often used to ignite violence against 'outsiders' who are required to vote for ostensibly the preferred political candidate of the local community. Writing in the Oxford Transitional Justice Research Working Paper Series, Dr. Lukoye Atwoli captured this notion succinctly:

A recurring theme in many marketplace and bar-room debates is the need for 'foreigners' who have settled in other people's 'territory' to learn to respect the 'indigenous' people. In this view, the 'foreigners' must not compete for political power with the 'locals', and whenever a national issue requires a vote, they must vote with the 'host' community or face dire consequences.²⁷

42. Thus in Rift Valley, for example, non-Kalenjins are generally expected to vote according to the preferred political candidate amongst the Kalenjin. A member of the Kalenjin Council of Elders testified as much before the Commission:

There is a process that the Kalenjin people carry out to assimilate those people into a cohesive life. In Uasin Gishu County, when the Kikuyu Community or other communities came to settle and live alongside the Kalenjin Community, that kind of process never took place. This, therefore, has left these people living parallel lives all along. They have worked together in business, intermarried and live side by side, but that spirit that brings people together was never developed. This is the root cause of conflict in this region. This is why during elections there is a weak spot in this delicate relationship. *It is primarily because the people from outside this region vote contrary to the voting pattern of the people within the area. So, our people take it that these are not our people and we cannot live with them.*²⁸

²⁶ TJRC/Hansard/Public Hearing/Eldoret/3 October 2011/p. 4.

²⁷ Dr. Lukoye Atwoli, A radical proposal to deal with our prejudices, 21 August 2009, Oxford Transitional Justice Research Working Paper Series

²⁸ TJRC/Hansard/Public Hearing/Eldoret/3 October 2011/p. 19.

Beyond ethnic divides: Stories of heroic roles during the 2007/2008 Post-Election Violence

The Commission also received many testimonies illustrating the often heroic role of some Kenyans who risked their lives to help members of other communities. As one illustrative example, the Commission was told of a Kalenjin who hid two Kikuyu families in his house during the 2007-2008 post-election violence. In another instance, a blind Kikuyu man was rescued by a young Kalenjin while fleeing the violence in Naivasha in 2008:

We met one Kalenjin who was a young man that I had known before who was an ex-chief. He agreed to hold my hand. He said that there were warriors within the bushes and that if they saw him holding my hand they would probably kill him as well. So we went through the bushes [TJRC/Hansard/Public Hearing/Naivasha/26 September 2011]

Another witness told the Commission how the Chief of Lumumba, who is a Nandi, saved the Kikuyu in his community in 2008:

He is called Samatei. He helped the people of Kamukunji. Nobody was killed. He is a man who loves God and people. He should be thanked. The other chiefs went against him. He transferred the APs [administrative police officers] who were Nandi. He said that he did not want them [TJRC/Hansard/In-Camera Hearing/Naivasha/27 September 2011]

Another witness was saved by his neighbour during the 2007-2008 post-election violence in Naivasha:

Now it was approaching 12:00 pm and attacks had started at 9:00 am. My neighbour, a Kikuyu woman, came to the window and told my wife: 'Let me escort you because women are not being attacked. Can I escort you with the children to the police station?' [...] [My wife] requested her to tell the police where we were. The lady came to our house and informed us that the police were outside. So we were rescued by the police [TJRC/Hansard/In-Camera Hearing/Naivasha/27 September 2011]

The Commission wishes to recognize these brave Kenyans and hopes that their examples will be used to foster reconciliation.

State sanctions of outside/insider notions

43. The designation of a community as 'other' or as an outsider has sometimes found support in state policy. In the northern region of the country, particularly in those areas that made up the former North Eastern Province, the Government has institutionalised the disparate treatment of Kenyans based on ethnicity by requiring that Kenyans of Somali origin carry a special pass. While the Government claimed that requiring such passes assisted in distinguishing between Kenyans of Somali origin who are legally present in the region and non-Kenyans of Somali origin, often from Somalia, who may not be legally present, the local Kenyans attribute more sinister motives.
44. This theme is addressed in detail in this Report in Chapter Three of Volume 2C which documents the experiences of ethnic minorities and indigenous people.

Negative perceptions and stereotypes

44. Negative perceptions and stereotypes are a major cause of ethnic tension in the country. Labels have been put on certain communities, portraying them in broad, often negative terms that generalise certain traits and apply them to all individuals belonging to the described community, regardless of how individuals perceive themselves. For example, the Kikuyu are sometimes described as thieves, the Maasai as primitive, the Somali as terrorists, etc. The testimony of Commissioner Halakhe Wago of the National Cohesion and Integration Commission (NCIC) before the Commission during its thematic hearing on ethnic tension and violence is instructive in this regard:

There are negative attitudes towards individuals and social groups. For example, for so long there has been a kind of perception about the pastoralists like the Maasai as always being primitive. The same pastoralists, courtesy of the Somalis and their likes in the north, are seen as being warlike. The Kikuyu are thieves because a few people have picked things here and there or love money because they have been industrious or worked hard. The Luhya and the Kamba are at times referred to as liars and at times as very loyal. The Luos think so much about themselves when there is nothing much about them. We hear so many things about all these communities. The Coastals are deemed lazy people. So, this has really gone into the minds of many Kenyans to the extent that when they see me or you, they will definitely know where to place you as long as your name is clearly understood.²⁹

45. Wambugu Ngunjiri echoed Halake's sentiments and further pointed out that ethnic stereotypes have persisted because of the absence of efforts to debunk such stereotypes:

It is a problem of perceptions, myths and stereotypes about each other. However, nobody has tried to debunk this and so we have people growing in various communities who have been told that other communities behave in a certain way without taking time to find out if it is true. So, we heard conversations that Kikuyus were thieves because a number of members of government were involved in theft. For example, in Teso, even the small Kikuyu population is perceived as thieves even though there were no direct incidents of any of them stealing anything we have reached a point in this country where a lot of our conversations are not based on facts, but perceptions that have developed over years.³⁰

46. Most of the negative perceptions and stereotypes that are present today in Kenya were initially propagated by the colonial government. Besides employing the 'divide and rule' tactic, the colonialist government also perpetuated ethnic stereotyping. Ethnic stereotyping during the colonial period was a silent culture and is therefore not well documented. The writings of Kenyans who lived during this period, as well as the oral testimony of survivors, gave a general sense of the nature and extent of

29. TJRC/Hansard/Thematic Hearing on Ethnic Tension and Violence/2 February 2012/Nairobi/p. 24

30. TJRC/Hansard/Thematic Hearing on Ethnic Tension and Violence/2 February 2012/Nairobi/p. 35

the stereotyping. Generally, the colonialists praised groups out of which they were able to elicit collaborators, such as the Maasai, but denigrated those ethnic groups out of which many 'dissidents' came, such as the Kikuyu.³¹ JM Kariuki, while giving an account of his experiences at the Kowop camp in Samburu District, paints a picture of ethnic stereotyping during the colonial days:

The Turkana said that they had been told by the District Commissioner that we Kikuyu were very disgusting people whose custom it was to eat the breasts of our women and even the embryos of children in the womb. Any Turkana or Samburu who brought him the head of an escaped detainee would be rewarded with *posho* (food), sugar and tea.³²

47. The colonial government succeeded in creating a picture of the Kikuyu as barbaric and savage who should thus not be allowed to interact freely with others in society. In creating negative stereotypes of the Kikuyu and others, the colonial government furthered a policy of economic, social and political marginalisation of other communities.
48. The colonial government's response to the Mau Mau rebellion included perpetuating stereotypes and dividing Kenyans based upon ethnicity. For example, the colonial government hired large numbers of Luo to work on white farms to replace the 'untrustworthy' Kikuyu and included disproportionately large numbers of the Kamba community in the army. The country was thus easily balkanised in the early 1960s when the colonial government declared its intention to grant Kenya independence.

Culture and stereotypes

49. While the colonial government played an important role in cultivating ethnic stereotypes, the Commission also received evidence that some stereotypes are drawn from and driven by traditional cultural beliefs and practices. For instance, the Commission heard that men from communities that do not practice male circumcision have always been stigmatised and regarded as lesser or weaker men, and therefore, incapable of or unsuitable to take political leadership of the country. As one witness testified:

When it comes to issues of leadership, you will not be shocked to find that people who are supposed to be national leaders, saying that the Luo cannot ascend to offices of leadership because they are not circumcised. In the run-up to the 2007 elections, one much respected leader [...] did say publicly that Hon. Raila Odinga cannot be President of this country because he is not circumcised.³³

³¹ As above.

³² JM Kariuki *Mau Mau detainee: The Account by a Kenya African of His Experiences in Detention Camps, 1953-1960* (1973) 74-75.

³³ TJRC/Hansard/Public Hearing/Kisumu/19 July 2011/p. 14

50. Not only has this particular stereotype been used on the political arena to discredit politicians from communities that do not practice male circumcision, but it has also fuelled targeted and barbaric forms of violence against members of such communities. Such violence was meted out particularly against members of the Luo community during the 2007/2008 PEV. The Commission of Inquiry into the Post-Election Violence (CIPEV) recorded forceful circumcision and penile amputation of members of the Luo community, reportedly perpetrated by members of the Mungiki, particularly in Naivasha, Nairobi and Nakuru.³⁴ The Commission received similar evidence during its hearings in Kisumu.
51. Ethnic stereotyping has been extremely damaging to ethnic relations in Kenya. Indeed, some ethnic groups partly attribute their historical economic marginalization to stereotypes that have all along been perpetuated about them. The nexus between ethnic stereotyping and economic marginalization was well drawn by a witness in Kisumu:
- Our people [the Luo], because of persistent and consistent exposure to negativity, have come out to be stigmatized, isolated, uprooted and made hopeless. As a result of this, all the negative adjectives have been used to describe them, and which unfortunately, they have come to believe and even talk about. Among them is that they are lazy. This is diametrically opposed to their virtue of hard work. Two, they are lovers of good life, and thirdly, they are unenterprising. Fourthly, they are too cultural or too traditional. Fifth, they are immoral, proud, antagonistic, empty hero worshippers, backwards and wallowers in political adversity. They are too communal. All these have been summarized that a Luo should not even have a place in this society. They cannot even occupy leadership positions. Psychologically, this is what the people have believed and they live with it. Commissioners, this is closely related to the question of economic emasculation. If you have taken the mind and soul of a person, what remains is a hopeless shell.³⁵
52. A perception study conducted by the Institute of Economic Affairs in 2009 found that respondents had more positive than negative opinions of ethnic groups other than their own. The study also found that many of the negative comments by the respondents on their opinion of other ethnic groups were based on traditional stereotypes about the particular ethnic groups. The study also revealed that 79.1% of the respondents would marry a person from another ethnic group while 86% of them would be a business partner to person of another ethnicity. In essence, the study revealed that members of different ethnic groups do not necessarily have inherent hatred for each other. Rather, they are willing to and often co-exist together. The results of the study are shown in the Tables below.

³⁴ CIPEV Report, 107

³⁵ TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p. 22

Table 2: Perception/comments of members of other ethnic groups

Ethnic group	Positive comments	Negative comments
Luo	54.7%	18.5%
Kikuyu	37.2%	34.5%
Luhya	40.4%	8.1%
Kamba	32.6%	20.3%
Maasai	53%	6.9%
Mijikenda/Taita/Coastal ethnic groups	22.1%	15%
Kalenjin	23.7%	22.9%
Kisii	25.6%	13.5%
Somalis	13.1%	24.8%

Source: IEA perception study (2009)

Question	Yes	No
Would you marry a person from another ethnic group?	79.1%	20.9%
Would you be a business partner to a person of another ethnic group	86%	13.3%
Would you be best friends to a person of another ethnicity?	89.7%	9.2%
Would you share a house with a person of another ethnicity?	75.6%	23.1%

Source: IEA perception study (2009)

Ethnic tension amongst pastoralist communities

53. Ethnic tension and violence in specific parts of the country is influenced by the dynamics of cattle rustling and other resource-based conflicts. While electioneering and insider/outsider dynamics are factors that help to explain ethnic tension and violence among pastoralist communities, resource-based conflicts are equally important. This is not surprising as access to important resources such as grazing land and water has diminished over time with the increase in the pastoralist population and the encroachment into pastoralist areas by sedentary communities.
54. Reuben Kendagor testified before the Commission about cattle rustling between the Tugen Community of Baringo North and the Pokot. His testimony highlights the long history of such clashes, the intersection of ethnicity and resource-based conflicts, the escalation of violence with the introduction of high powered weapons, and the inability or unwillingness of the Government to provide security to these communities:

[W]e are a community that has been offended for a long time. History tells us that the first offence was committed in 1918 when our community was invited for a meeting in a place called Chepkesin in Ng'orora. During this incident, the meeting was expected to be a peace meeting but we are told that everyone in the meeting had a weapon. Our men were told to untie their bows. This is what happened and our people were massively killed. Down the line in 1977 to 1979, our neighbour community invaded our land causing a number of injuries and a large number of livestock were taken away. Most of us moved away. Up to date, I can tell you most of our people are living as far away as Nakuru, Eldoret, Trans Nzoia and so on because of the harsh raids by our neighbour. After 1987, the same problem emerged. That is when the sophisticated weapons were used. The AK47 was used and we began losing lives. This was serious because people were killed even on the wayside. People moved massively. It became more serious when we lost one of our great athletes, a standard six boy, in 2006 in a place called Sitegi in Kaptura Sub-Location, Ng'orora Location. This time round, it made so many families to leave their homes and so many children leave school. During the post-election violence of 2007, this became very serious. We identified one of the raids as a massacre because in a village called Kamwotyo we lost seven people at one time. A lot of animals were taken away. There were gunshots all over. Our people moved towards Kerio Valley. Today, we have people who are settled along River Kerio as IDPs. [...] We lament because ours is a community that will never counter-attack anybody at all. This community has been very bitter. Most of our people call upon the Government to come to their rescue when these incidents happen to them. Unfortunately, the Government has never shown any commitment let alone disarming our dangerous neighbours³⁶

55. The Pokot have had similar encounters with the Turkana. The Commission was informed that since the 1960s, the Pokot and Turkana communities have engaged in endless wars over cattle, pasture and water.³⁷ Pastoralist communities in the north and north eastern regions of the country also have a long history of ethnically-based resource conflicts, including cattle rustling.³⁸ The practice, however, has become more dangerous due to proliferation of firearms and ammunition into the region from neighbouring Ethiopia and Somalia, leading to banditry and general insecurity.³⁹
56. According to the Akiwumi Report, the ethnic tension and violence in Northern Kenya involve "fighting between Somali clans and between Somali clans and the Borana tribe and their cousins such as the Orma, the Burji and the Garre."⁴⁰ In recent years, such clashes involved Borana and Degodia in Isiolo; Degodia and Ajuran in Wajir; Garre and Degodia in Wajir and Mandera; Borana and Degodia in Moyale; Degodia and Orma in Tana River; Ogaden and Munyoyaya, Pokomo and Malokote in Tana River; and Galjael, Orma and Sanye.⁴¹

³⁶ TJRC/Hansard/Public Hearing/Kabarnet/ 24 October 2011/p. 37.

³⁷ TJRC/Hansard/Public Hearing/Kabarnet/25 October 2011/p. 2-6. .

³⁸ Akiwumi Report, p. 279. Kiliku report, p. 63.

³⁹ Akiwumi Report, p. 279.

⁴⁰ As above.

⁴¹ Akiwumi Report, p. 281.

57. Ethnic tension and violence among pastoralist communities are often caused by a number of factors, including:

- Frequent droughts and resultant inadequacy of water and grass. These recurrent droughts cause the drying up of dams, pans, springs and rivers leaving only a few that endure the severity of such vagaries of weather. Depending on the location of the water point or grazing areas, the indigenous communities more often than not, give very difficult conditions, which include cash payments or payments in form of animals for water or grass. This often generates into violent hostilities which can only be dealt with by the survival of the fittest, leading to skirmishes.
- Cattle rustling is one of the major causes of ethnic and clan animosity and violence as the victimized group engages in revenge missions which not only lead to theft of large herds of cattle and other livestock but to loss of human life and multiple injuries to many people.
- The proliferation of firearms from Somalia and Ethiopia has enabled tribes and clans in the region to establish formidable clandestine militia which increases the willingness to use violence to advance interests or solve disputes.
- Diminished access to important resources such as water and grazing land has led ethnic groups to increase their efforts to control resource rich territories, and has also led to election-related violence as ethnic groups and clans compete to increase areas controlled by members of their community.⁴²

58. The political dimension of ethnic tension in the northern region, and the complicated relationship among the factors contributing to such tensions and violence, was touched on by Commissioner Waqo of the NCIC in his testimony before the Commission:

Sometimes you cannot differentiate between peace, natural resource based and political interest based conflicts. For example, what is happening in Moyale today is not so easy for anybody to differentiate. The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) Report showed that it was based on water and pasture problems, whereas many others stood up and said that there is nothing to do with pasture and water. After all, they have received the highest rainfall in the last ten years in that region. So, it is not very easy to tell the differences in some of the instances, but we need a lot of reinforcement of security because of illicit arms. In most of the situations, without any provocation or struggle for resources, availability of firearms has also led to or promoted lawlessness, insecurity and violence [...].⁴³

⁴² As above, 280.

⁴³ TJRC/Hansard/Thematic Hearing on Ethnic Tension/Nairobi/2 February 2012/p. 23.

Ethnicity and politics

59. The first President of independent Kenya, Jomo Kenyatta, did little to counter the ethnic divisions created by the colonial government. During his tenure a small elite group popularly referred to as the “Kiambu Mafia” dominated Kenyan politics, resulting in the emergence of a class of capitalists who were mainly members of the Kikuyu community.⁴⁴ This class enjoyed huge economic prosperity and political influence and repressed any resistance against it. As a result, other ethnic groups as well as many non-conforming Kikuyus were alienated from government affairs.⁴⁵
60. President Kenyatta’s authoritarian style of leadership soon began to attract staunch opposition from some of his previous allies including the then Vice-President, Jaramogi Oginga Odinga, who later broke with KANU to form the Kenya Peoples’ Union (KPU). Although its main aim was to counter KANU’s ethno-politics, it is rather ironic that Odinga’s KPU was far from a model of ethnic diversity as it found support almost exclusively from people of Luo ethnicity.⁴⁶ The formation of KPU therefore enhanced, rather than reduced, the balkanization of the country along ethnic lines. In 1969, following the Kisumu Massacre, KPU was banned. A few months before KPU was banned, Tom Mboya had been assassinated. The assassination of Tom Mboya and subsequent banning of KPU poisoned ethnic relations in the country, especially the relationship between the Kikuyu and the Luo. It was believed that the state, headed by President Kenyatta, had assassinated Tom Mboya. This belief solidly united the Luo against the Kikuyu and vice versa.⁴⁷ The Kikuyu on their part began an oath-taking campaign to ensure that all Kikuyu’s owed allegiance to the President in particular and the ‘House of Mumbi’.⁴⁸ The Commission received evidence about the occurrence of the oath-taking ceremonies and the impact that these ceremonies had on ethnic relations:

I was removed from class in 1969. I was in Standard Four. There was tension but I could not understand whether it was in the whole country. Afterwards, I understood that it affected Central Province. We were taken through the rituals of the Kikuyu. It was called “oathing”. So, I have grown up knowing that Kenya is just for one tribe. I remember that I was in Standard Four. I could not understand, as the women of Central Province, why we were being told that we should not get married to men from other tribes, and especially the Luo community. In that ritual, my agemates did not want to speak about that particular issue. That is what caused confusion among us. We lived in a dilemma as we grew up and brought up our children. We were not free to speak to our children about the source of our differences with other people.⁴⁹

44 A Korwa and I Muniyae ‘Human rights abuses in Kenya under Daniel arap Moi 1978–2001’ (2001) 5/1 *African Studies Quarterly* available at: <http://web.africa.uci.edu/asq/v5/v5i1a1.htm> (accessed on 15 April 2012).

45 As above.

46 R Morrock ‘Heritage of strife: The effects of colonialist “divide and rule” strategy upon the colonized peoples’ (1973) *Science and society* 135 137.

47 J Karimi and P Ochieng, *The Kenyatta Succession*, (1980) 18

48 J Karimi and P Ochieng, *The Kenyatta Succession*, (1980) 18

49 TJRC/Hansard/Women’s Hearing/Nyeri/8 November 2011/p. 15.

61. Another witness told the Commission the following story that confirms that oath-taking ceremonies did take place:

The oath-taking was done to maintain the presidency in the House of Mombi. There were people denying it in Provincial Administration. But I want to tell you one thing: The Provincial Administration then was operating outside the law. It was guided by different rules. So, there were calls in the newspapers that oath-taking was going on and my Provincial Commissioner then, Mr. Koinange, denied that there were such activities going on. As innocent as I was, I thought it was true that the PC did not know. So, there was an inspector of police, an OCS who was working with me when I was a DC. I called him and said: "Do you think this oath-taking is going on because we can see people being transported in buses? Is it true?" Then he told me: "I tell you, the Government is behind it." I told him: "No, you cannot be serious because the PC told me it was not true." I believed PC, DC or DO was speaking on behalf of the Government. So, I said: "This is not true." So, he told me: "If you want to prove let us go to your chief's office tonight." I had a chief in Kiini Location in Kirinyaga District. I think that location is still there, but it has, probably been sub-divided. So, we took off with him and a few askaris and we found the oath-taking going on. When we found the oath-taking going on, we arrested one person and the chief ran away. So, I took the paraphernalia that was being used. When I came back to my house, I told my wife that I think the PC is going to like me because he was saying there was no oath-taking, but I have got this paraphernalia that they were using to administer it. My first car was a Volkswagen 1200. So, I just drove to Nyeri and went and told the PC that, "you were saying there is no oath-taking, but, probably, you do not know; it is going on. I have some things to prove to you that it is going on". Then I went and brought the things to his office. He told me: "Who told you to take the law in your hands and go to that place? Did I order you to do so?" I said: "No, Sir." He told me: "Go back." The same day, I was transferred from Kirinyaga to Murang'a. Before I reached, Mr. Koinange was there with his Mercedes Benz and askaris. He said: "Pack up and go." So, I was startled a little bit. That was when I learnt that in order for you to succeed in the provincial administration, there are only a few words that you should say: "Yes, sir, no sir, thank you, sir." That probably continues up to date. I do not know because I have been out of it for a long time.

62. The effects of these ceremonies continue to be felt today and electoral competitions in Kenya, have always had ethnic undertones.
63. In the period during which KANU enjoyed a political monopoly, ethnicity and sycophancy took a central place in the country's politics. When the President's health began to fail in the 1970s, his close allies and staunch supporters, mainly from the Kikuyu community, began to look for ways of installing a "friendly" president other than President Kenyatta's then Vice-President, Daniel arap Moi, a Kalenjin. The main fear of President Kenyatta's allies was that the presidency would go to someone from another ethnic group, thus depriving them of the trappings

of power. Although the effort to sideline Moi was unsuccessful, it underscored the continued ethnicization of Kenyan politics, and the perception that ethnic representation at the highest levels of government would translate into widespread benefits for members of that community.

64. Daniel arap Moi entered the presidency with the pledge that he would move the country away from the curse and blemish of ethno-politics.⁵⁰ The early years of his presidency showed promise, with his government initially including Kenyans from a wide variety of ethnic communities. Moi's first cabinet, for example, included 11 ethnic groups: eight Kikuyu, three Kalenjin, three Luhya, three Luo, two Kisii, and one Maasai, Taita, Kamba, Embu, Digo and Meru.⁵¹
65. President Moi quickly became preoccupied with suppressing his perceived opponents. This preoccupation with limiting dissent and consolidating power accelerated after the attempted coup in 1982. Campaigns to address corruption, ethnicity and human rights abuses fell aside as President Moi and his government centralized power and tackled dissent.⁵² To consolidate his political power President Moi filled the civil service and state-owned institutions with members of his ethnic group and those from ethnic communities that were viewed as supportive of the regime.⁵³
66. There is evidence that President Moi's administration took a page from the colonial government and used divide and rule tactics to pit ethnic communities against each other.⁵⁴ This policy became particularly evident after the re-introduction of multi-party politics in the country in the early 1990s. The introduction of multiparty politics and elections coincided with a wave of ethnic violence in parts of the country. The NCIC summarizes Moi's tenure as president in the following terms:

Despite the Nyayo philosophy of peace, love and unity, there was insufficient attention to past grievances among Kenyans in the 1980s through to the 1990s. Specifically, there was: (i) lack of decisive land reforms, and land-based conflicts persisted; (ii) little regard to Kenya's diversity in employing or appointing public sector employees; (iii) inequitable distribution of budgetary resources; (iv) mismanagement of public resources; and (v) autocratic governance; among other challenges⁵⁵

50 A Sjögren and P Karlsson 'Kenyan politics 1963–2007: A background to the elections' available at http://www.nai.uu.se/articles/sjogren_and_karlsson/background-1/index (accessed 15 April 2011).

51 *Weekly Review*, Nairobi 30 Nov 1979 as cited in DP Aluhwalia (1996)

52 'Human rights abuses in Kenya under Daniel arap Moi 1978–2001' (2001) 5/1 *African Studies Quarterly* available at: <http://web.africa.ufl.edu/asq/v5/v5i1a1.htm> (accessed on 15 April 2012).

53 Above.

54 DO Oricho 'Advocacy campaign design for interethnic violence reforms in Kenya' (2009) 1/2 *Journal of Law and Conflict Resolution* 50.

55 National Cohesion and Integration Commission (n 100 above) 11.



67. The re-introduction of multi-party politics in the early 1990s, and the demise of KANU's authoritarian rule in 2002 renewed hopes of national healing and reconciliation among the various ethnic communities in the country. There was earnest expectation that the government would create an enabling environment that would ensure equality and non-discrimination for its citizens. Contrary to this popular expectation, most of the 1990s were a continuation of the un-democratic practices birthed at independence. In fact, the re-introduction of multi-party politics in 1991 only increased ethnic identities and divisions as the country's political parties were mainly regional, ethnic-based and poorly institutionalised. The nature and composition of the political parties founded in 1992 and thereafter attest to this fact in that even the self-styled national parties have ethnic or regional undercurrents.
68. It may be argued that Kenya's third multi-party elections, held in December 2002, presented the best opportunity for the development of an ethnically integrated country. This was primarily because of the creation of the National Rainbow Coalition (NARC), and interethnic political party. This opportunity was nonetheless lost as NARC's promise to end ethnicity was not translated into actual policies and programs. In fact President Kibaki's administration has been viewed as no better than its predecessors in relation to instilling a sense of national identity stronger than a sense of ethnic identity.

Land

69. Land is a key factor in understanding ethnic tension and violence in Kenya. When the white settlers came to Kenya, they found some parts of the country unsuitable for their settlement, “either because of the climate or because it was infested by tsetse fly.”⁵⁶ However, the land between the Gikuyu escarpment and Lake Victoria was deemed potentially rich for agro-based development. Owing to its favourable climate and fertile soils and given that the Uganda Railway traversed the region, white settlers were determined to turn it into a “white man’s country.”⁵⁷ Thus, from the early-1900s, there was an influx of settlers from Britain and South Africa.⁵⁸ At the same time the colonial government began to impose restrictions access to land by the existing Kenyan residents. The NCIC recently summarized this restrictive and discriminatory history:

During the colonial era, there was extensive land expropriation and resettlement by the colonialists from the indigenous communities. Land expropriation was extensive, from 2 million hectares in 1914 to 3 million hectares on the eve of independence. The expropriation was achieved through various laws, ordinances and promulgations, including the Native Trust Bill of 1926 which restricted indigenous groups to the Native Reserves. These realities raised the profile of land ownership and required extensive attention into independence to reduce their adverse impact on national cohesion and integration in Kenya. Land-related issues continue to be a lingering source of conflict to date.⁵⁹

70. The European invasion of the White Highlands, as the region later came to be known, became the source of economic marginalization in the country. In the main, European occupation of the region meant displacement of Africans from their traditional homeland.⁶⁰
71. Kenyans displaced from their land by the colonial government were concentrated in reserves, something that considerably restricted their socio-economic life.⁶¹ Those who did not prefer to live in the reserves remained in European farms either as squatters or as labourers, or sought employment in urban areas.⁶²
72. The Mau Mau rebellion to colonial rule had a profound impact on the country since it forced the colonial government to rethink and reformulate its discriminatory

56 R Morrock ‘Heritage of strife: The effects of colonialist ‘divide and rule’ strategy upon the colonized peoples’ *Science and Society* (1973) 135.

57 K Shillington *History of Africa* (1995) 339.

58 As above.

59 National Cohesion and Integration Commission (n 100 above) 9.

60 DA Percox *Britain, Kenya and the cold war: Imperial defence, colonial security and decolonisation* (2004) 15.

61 DA Percox *Britain, Kenya and the cold war: Imperial defence, colonial security and decolonisation* (2004) 15.

62 As above.



A structure housing a family at Pipeline IDP camp in Nakuru

policies.⁶³ Politically, it provoked socio-economic and constitutional reforms “designed to alleviate the grievances of those Africans who had not yet chosen to resort to violence, and to stem support for those who had.”⁶⁴ While these policies were aimed at minimizing rebellion and dissent, they further divided Kenyans along ethnic lines.

73. Central to many of the ethnic tensions in post-independence Kenya is the issue of redistribution of the land formerly occupied by white settlers.⁶⁵ Due to the skewed post-colonial land redistribution policy that was deliberately designed to favour the ruling class and not the landless masses, it is now estimated that more than half of the arable land in the country is in the hands of only 20% of the population.⁶⁶ Politicians in successive governments used land to induce patronage and build political alliances.⁶⁷ Much of the most valuable and productive land has ended up in the hands of the political class, members of their families, and friends (often of the same ethnicity) rather than being returned to the communities from which the colonialists had taken it.⁶⁸

63 K Shillington *History of Africa* (1995) 388.

64 DA Percox *Britain, Kenya and the cold war: Imperial defence, colonial security and decolonisation* (2004) 16.

65 WO Oyugi 'Politicised Ethnic Conflict in Kenya: A Periodic Phenomenon' (2000) 6 available at <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan010963.pdf> (accessed on 15 April 2012).

66 See generally G Njuguna *The lie of the land evictions and Kenya's crisis*, 2 *African Policy Brief* (2008).

67 Kenya National Commission on Human Rights 'Unjust enrichment' (2004) 1.

68. As above.

74. The practice of illegal allocation and distribution of land has led to a general feeling of marginalisation among some communities as well as the ethnicization of the land question. The Commission of Inquiry into the Illegal/Irregular Allocation of Pubic Land (the Ndung'u Commission) noted that throughout the 1980s and 1990s public land was illegally and irregularly allocated "in total disregard of the public interest and in circumstances that fly in the face of the law."⁶⁹ This became the foundation of ethnic tensions, and later violence, particularly in the Rift Valley and Coast Provinces.
75. Further, through its policies that favour the investment of resources in only high potential areas that have ample rainfall and fertile lands, the government has encouraged asymmetrical development in the country that, because of the ethnic dimension of land allocation and ownership, itself has ethnic consequences.⁷⁰ The relationship among land ownership, development, and ethnicity is summarized in a recent report by the NCIC:

The Sessional Paper No. 10 of 1965 on African Socialism and its Application to Development and Planning sought to empower Kenyan citizens of the new nation through the provision of services and expansion of economic opportunities. In doing so, the Government adopted the Africanization Policy to replace the departing European and Asian communities with educated or skilled Africans. Most jobs, firms and businesses were taken over by the African elite but in an ethnically biased manner that also led to the exclusion of Kenyan Asians and Europeans from citizenship and appointments in the civil service. In addition, Sessional Paper No. 10 dismissed the livestock-based pastoralist economy and in the process contributed to unequal development patterns and the marginalization of non-crop-farming communities. There are historical legislative frameworks and policies that facilitate undesirable ethnic and race divisions. Examples of these frameworks and policies are: the Stock and Produce Theft Act which came into operation on 5th May 1933 and is still in force; Sessional Paper No 10 of 1965 that highlighted the areas with potential for growth and relegated other areas to underdevelopment without regard to the people who live there; and The Indemnity Act of 1970 which gives immunity to perpetrators of state violence against its citizens in Northern Kenya. Legislative frameworks that would have enhanced harmonious ethnic and racial coexistence were largely ignored or subverted. In addition, poor and lopsided economic policies and planning have enhanced inequality and ethnic tensions.⁷¹

69 Republic of Kenya 'Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Pubic Land' (hereafter the 'Ndungu Report') (2004) 8.

70 African Peer Review Mechanism 'Country review report of the Republic of Kenya' available at <http://www.polity.org.za/article.php?a_id=99422> and <<http://www.nepad.org/aprm>> (last accessed 17 April 2010).

71 National Cohesion and Integration Commission Commission 'Kenya ethnic and Race Relations Policy' (2011)13.

76. Regional inequalities and imbalance in the country are still evident today (for a discussion of the impact of Sessional Paper No. 10 of 1965, see chapter on Marginalisation). The discrepancies between the various regions of the country are wide, while about 45 percent of the country's modern sector employment⁷² is concentrated in less than 15 towns.⁷³ Thus, the resultant disconnection between the various ethnic communities and regions of the country perpetuated by the colonial administration provided the ethno-regionalised basis for political and economic discrimination of some citizens in post-colonial Kenya. Explaining this phenomenon within the context of the ethnic tensions and violence in the Rift Valley and Central provinces, the KNCHR noted:

The colonial government alienated most of the agriculturally productive land for settler agriculture particularly in Rift Valley and Central. This alienation generated a large number of squatters especially among the Kikuyu. At independence, the Kenyatta government created a land market of 'willing seller willing buyer' with many of the landless being encouraged to join land-buying companies. Rift Valley Province was earmarked for settlement of the landless through this scheme. However, land did not necessarily revert to those who had lost it through colonialism. [...] Over the years, as the population of the Kalenjin who view Rift Valley as their 'ancestral home' increased, the perception also grew that the post-colonial land policies had disadvantaged the community. These grievances featured prominently in the 1990s violence as well as the 2002 elections that saw the election of President Mwai Kibaki and the National Rainbow Coalition (NARC) government.⁷⁴

77. Historical injustices related to land is thus one of the major causes of ethnic tensions and violence in the country. The Ministry of Justice, National Cohesion and Constitutional Affairs underscores this point:

Although there was need for massive land redistribution [at independence], this was not implemented effectively and equitably. Land redistribution initiatives were generally mismanaged and resulted in unequal access to land. The mismanagement heightened conflict between various societal groups, given the importance of land as a source of wealth.⁷⁵

78. Instead of redistributing land to those communities who had been displaced at independence, the government adopted a "willing buyer willing seller" program. Professor Walter Oyugi testified before the Commission about how the willing-buyer-willing-seller redistribution policy was abused, leading to ethnic tensions in the country:

⁷² Modern Sector Employment normally refers to urban, industrial formal sector employment. See UN Habitat, *Supporting the informal sector in low income settlements*, 2006

⁷³ African Peer Review Mechanism (n 8 above) 46.

⁷⁴ Kenya National Commission for Human Rights 'Unjust enrichment' (2004) 17.

⁷⁵ Ministry of Justice, National Cohesion and Constitutional Affairs 'Sessional Paper No. 2 of 2012 on National Cohesion and Integration' (March 2012) 10.

This policy of willing-buyer, willing-seller would benefit mainly people who could access financial resources. Somebody advised the people from Central Province that the best thing to do is to form land buying companies. The land buying companies were formed. They included the Ngwataniro, Nyakinyua and Mabati group. The Mabati Group meant a group of women helping one another to roof their houses and so on, but they also became land buying groups. They were assisted by the state and, therefore, the feeling of preferential access and the resentment that accompanied that. It continued under the leadership of the then Minister for Lands and Settlement, throughout the 1960s into the 1970s. But there would be a change in late 1970s, after Mzee died and Moi came into power. He inherited the Kenyatta infrastructure of governance and promised that he would follow his footsteps. He did by and large, but on the issue of land, which actually took place under his watch as the Vice-President, soon after he came into power, he completely disorganized the land buying companies and disbanded them, but I thought that it was too late at that time.⁷⁶

79. Land, particularly access to rich and productive land, was also a factor in ethnic violence in the Rift Valley during elections. Some scholars have noted:

In 1991, much of the violence was centred around farms which were formerly part of the so-called 'white highlands', land appropriated from those communities who customarily owned and occupied it by the colonial government for white settler farming. Mitetei farm in Tinderet Division, Nandi District, provides an example: purchased by members of the Kikuyu, Kamba, Luhya, Luo and Kisii communities, it is located in traditionally Kalenjin land. Some local Kalenjin argued that they should also receive shares in the farm, leading to a dispute in which the local authorities took the side of the Kalenjin, because of ethnic affiliations and party politics. This farm was the scene of attacks by Kalenjin on the 29th October, 1991, causing all non-Kalenjin occupiers to flee. In or about June, 1992, the farm was surveyed and shared among local Kalenjin people, and titles were issued to them to the exclusion of those who had been forcibly displaced. Those who took over the property refused to reimburse the IDPs for the cost of their shares, arguing that it was 'rent' for land which really belonged to Kalenjin. Owiro farm in Songhor location, Tinderet Division, is another property bought from a European by non-Kalenjin (Luo) individuals using bridging finance from the Agricultural Finance Corporation (AFC). The owners of this farm were also killed or forcibly displaced during the 1991 violence.⁷⁷

80. The finer details of the inter-section between grievances over land and ethnic relations have been dealt with in greater detail in the chapter on land and conflict.

⁷⁶ TJRC/Hansard/Thematic Hearing on Ethnic Tension/2 February 2012/p. 7.

⁷⁷ J Wakhungu, E Nyukuri and C Huggins *Land tenure and violent conflict in Kenya* (2008) 15.

Ethnicity and access to Public Office

81. The perception that ethnic representation in government results in direct economic and other benefits to the represented community is pervasive in Kenya. While the Commission acquired evidence that such benefits do not necessarily accrue to those communities who are represented - even in the highest offices of the land - the perception that they do leads to intense competition for such representation, and thus increases the likelihood of violence during elections. According to Prof. Walter Oyugi:

Ethnicity is an expression of ethnic consciousness in a competitive environment. When people feel that they are being marginalized in the competitive process, their consciousness is heightened. When they think there is exclusion in the structure of access, their consciousness is heightened and mobilization is very easy by the politicians.⁷⁸

82. Throughout Kenya's post-independence history the ethnicity of the president has influenced the composition of the cabinet. According to a study by KIPPRA "The tenure of first government of independent Kenya reflects the disproportionate presence of the president's ethnic Kikuyu group in the cabinet".⁷⁹ This pattern was repeated both in President Moi's and President Kibaki's administration as shown in the table below similarly an analysis of ethnic distribution of permanent secretaries show that the Kikuyus were over subscribed as permanent secretaries in the period 1966 to early 1980s.⁸⁰ From 1978 to 2001 the number of Kalenjin permanent secretaries grew to nearly three times their share of the national population.

Table 1: Ethnic percentage shares of Kenyan cabinet positions

Ethnic Group	Kenyatta (Kikuyu)		Moi (Kalenjin)		Kibaki (Kikuyu)			
	1966	1978	1979	2001	2003	2005	2007	2011
Kikuyu	28.6	28.6	30	4	16	18.1		19.5
Luhya	9.5	4.8	11	14	16	21.2		17.1
Luo	14.3	14.3	11	7	16	3.1		12.2
Kalenjin	4.8	4.8	11	17	7	6.1		9.8
Total	21	21	26	28	25	33		42

Source: Stewart (2008)

78. TJRC/Hansard/Thematic Hearing on Ethnic Tension and Violence/2 February 2012/Nairobi/p. 127.

79. KIPPRA Inequalities and Social Cohesion in Kenya Evidence and Policy Implications (2013).

80. KIPPRA Managing Kenya's Ethnic Diversity (2011) 36-37.

Table 2: Ethnic Distribution of permanent Secretaries, 1966 to 2005

	1966	1970	1978	1979	1982	1985	1988	1994	2008	2001	2003	2004	2005
Kikuyu	30.4	37.5	23.8	29.6	30.0	28.0	21.9	10.7	10.7	8.7	22.0	17.2	18.7
Luhya	13.0	8.0	4.8	11.1	13.3	12.0	6.3	14.3	10.7	13.0	7.0	6.8	9.3
Luo	13.0	12.5	9.5	3.7	6.7	8.0	12.5	3.6	7.1	8.7	15.0	10.3	9.3
Kamba	17.4	8.3	14.3	7.4	10.0	12.0	12.5	21.4	3.6	4.3	15.0	10.3	12.3
Kalenjin	4.3	8.3	4.8	11.1	10.0	20.0	21.9	25.0	28.6	34.8	15.0	10.3	6.2
Maasai, Turkana, Samburu												3.4	6.2
Kisii	4.3	8.3	0.0	7.4	3.3	4.0	3.1	3.6	7.1	4.3	4.0	6.8	9.3
Meru	4.3	8.3	14.3	11.1	10.0	8.0	3.1	3.6	7.1	8.7	15.0	17.2	6.2
Borana & Rendille											4.0	6.8	9.3
Miji Kenda	8.7	4.2	9.5	3.7	6.7	4.0	6.3	10.7	14.3	13.0	4.0	6.8	12.5
Taita													
Pokomo													
Bajun													
Embu													
Arab/Swahili													
European													
Asian													
Others	4.3	4.2	19.0	14.8	10.0	4.0	12.5	7.1	10.7	4.0		3.4	
Total PS	23	24	21	27	30	25	32	28	28	23	27	29	32

Source: Kanyinga (2006)

83. A survey conducted by the NCIC found that 50 percent of Kenya's ethnic groups are only marginally represented in the civil service. The study also found that five communities – Kikuyu, Kalenjin, Luhya, Kamba and Luo occupy nearly 70 percent of civil service employment. Other findings of the study include that the Kikuyu constitute the largest single dominant ethnic group in all ministries and departments, except in the Prisons Department, the Office of the Prime Minister and the Kenya Police and that the Kalenjin are the second largest group in the civil service.⁸¹
84. Another study by NCIC which focused on the ethnic diversity of public universities in Kenya found that these institutions are heavily ethnicised. According to the study:⁸²

81 National Cohesion and Integration Commission 'towards national cohesion and unity in Kenya: Ethnic diversity and audit of the Civil Service' (Volume 1, 2012) 5-7.

82 National Cohesion and Integration Commission *Briefs on ethnic diversity of public universities in Kenya* (2012).

- The percentages of employment in the universities and constituent colleges of the Kikuyu, Luhya, Kalenjin, Luo, Kisii, Embu, Kenyan Europeans, Kenyan Asians, Nubi and Taita communities are higher than their national population ratio (as per the 2009 population census).
- Some of the differences such as that of the Embu community are however negligible (0.13 percent) while others such as that of the Kikuyu community is significant .
- The communities whose representation in the universities' employment is less than their population ratio include the Somali (with the highest underrepresentation, at six percent), the Kamba, Mijikenda, Turkana and Maasai.
- There is a notable lack of some ethnic groups such as the Tharaka, Gabbra, Orma, Burji, Gosha, Dasnach and Njemps, among others.
- In the public universities and constituent colleges, the five largest communities - the Kikuyu, Luhya, Kalenjin, Luo and Kamba who together make up about 66% of the Kenyan population constitute over 81 percent of the total workforce. This severs opportunities to enhance the face of Kenya in these institutions thus excluding the other more than 37 ethnic communities. For example, in the six public universities analysed, the representation of the five big communities is over 86 percent.
- most of the staff in the public universities and constituent colleges come from the communities within which the institutions are located
- The spread of universities in Kenya excludes the northern part of the country with most of them located within Nairobi and its environs.
- Kenyans seem to perceive the university as a job creation enterprise for the community within which the university is located. It may be in this perspective that some regions agitate for the establishment of public universities in their areas.

The perception that ethnic representation in government results in direct economic and other benefits to the represented community is pervasive in Kenya. While the Commission acquired evidence that such benefits do not necessarily accrue to those communities who are represented - even in the highest offices of the land - the perception that they do leads to intense competition for such representation, and thus increases the likelihood of violence during election.

Table 3: Ethnic Composition of Employees in Higher Education in Kenya

Community	Number	Percentages	Population Ratio %
Kikuyu	4133	27.6	17.7
Luhya	2544	17.0	14.2
Kalenjin	2133	14.2	13.3
Luo	2086	13.9	10.8
Kisii	1253	8.4	5.6
Kamba	1041	6.9	10.4
Meru	644	4.3	4.4
Mijikenda	329	2.2	5.2
Taita	196	1.3	0.7
Embu	154	1.0	0.9
Others	87	0.6	-
Teso	60	0.4	0.9
Maasai	57	0.4	2.2
Somali	55	0.4	6.4
Borana	29	0.2	0.4
Mbeere	25	0.2	0.4
Turkana	23	0.2	2.6
Kuria	22	0.2	0.7
Suba	20	0.1	0.4
Other Africans	18	0.1	-
Asian	18	0.1	0.1
Samburu	17	0.1	0.6
Arab	14	0.1	0.1
Swahili	22	0.2	0.3
Nubi	4	0.03	-
Taveta	4	0.03	0.1
European	6	0.04	0.01
American	2	0.01	-
	14996	100	100

Source: NCIC Brief on Ethnic diversity of public universities in Kenya (2012)

Ethnicity and Displacement

85. The history of displacement in Kenya has been recounted elsewhere in this Report.⁸³ In a nutshell, recent years, especially after the advent of multi-party system of governance, has witnessed repeated waves of ethnic violence in Kenya. However, responses to this recurring problem have not been appropriately and effectively handled by the state. Throughout the 1990s IDPs were rarely assisted by the government. Indeed, the national government was in denial of the issues of IDPs. The absence of political and humanitarian responses have been attributed by human right organisation to a lack of an effective policy, legal or administrative framework to effectively deal with the IDPs crisis.⁸⁴
86. Various reports by human rights and humanitarians organisations have highlighted not just the plight of IDPs in camps but the lack of a coherent response from the various governmental agencies responsible for IDPs issues. This give an inclination of a serious absence of political will to effectively resolve the issues of displaced people. A report by the KNCHR/FIDH discusses how the National IDPs Network together with KHRC petitioned the office of the President, the Ministry of Justice and the Ministry of Lands which subsequently made the government to respond to their concerns especially from the security, land and governance perspective.⁸⁵ November 2004 President Kibaki set up a Task Force aiming at collecting data on IDPs, registering them and making recommendations for their assistance.⁸⁶ The registration of IDPs on behalf of the Task Force was meant to be carried out by the DCs and other provincial administrators offices which in actual fact were reluctant to support the process. This did not auger well with the KHRC and the National IDPs Network who deemed the figures and findings from Task Force work inaccurate. By the time the Task Force submitted the report to office of the President in September 2006 the KHRC and the National IDPs Network contested the findings with the view that it would mislead the policy formulation process.⁸⁷ According to KHRC and FIDH this report has not been made public.
87. The violence sparked by the disputed presidential results on 30th December 2007 led to a massive displacement, lose of lives and destruction of livelihoods. Report presented by local and international organisation indicated an estimated 500,000 persons were internally displaced and parties – Orange Democratic Movement (ODM) led by former Prime Minister Raila Odinga and the Party of

83 See Chapter on Gender and Gross Vioaltions of human rights: Focus on Women in Volume 2C of this Report.

84 FIDH & KHRC, *Massive Internal Displacements in Kenya Due to politically Instigated Ethnic Clashes* (2007) , 21

85 FIDH & KHRC, *Massive Internal Displacements in Kenya Due to politically Instigated Ethnic Clashes* (2007) , 22

86 *ibid*

87 *ibid*

National Unity (PNU) of former President Mwai Kibaki signed the National Accord and Reconciliation Agreement (hereafter the National Accord) on 28th February 2008. This led to the formation of a Grand Coalition Government (GCG) through the sharing of power. One of the commitments in the agreement is the restoration of stability and normalcy, including measures to restore fundamental rights and liberties, address the humanitarian crisis and promote healing, reconciliation and reconstruction.

88. One of the key priorities of the National Accord is the resettlement of IDPs languishing in camps and other places. Through the Ministry of State for Special Programmes (MoSSP) a resettlement programme dubbed '*Operation Rudi Nyumbani*' (ORN) was launched on 5th May 2008. However, reports by human rights organisations revealed that the resettlement programmes were not working because they were not well thought out and their implementation was viewed as premature with poor coordination between government ministries, particularly with reporting mechanisms and accountability.⁸⁸ A report by KHRC shows there was evidence that registration of IDPs was haphazard, incoherent and marred with corruption.⁸⁹ This corroborates a testimony given to the Commission in a women's meeting in Agan Khan Hall Kisumu. A representative of a civil society organization told the Commission:

"There is a strong sentiment regularly expressed by some Government officials that IDPs do not exist here. We have heard Government officers constantly under-quotting the number of IDPs in this region. In certain places, they give figures as low as 20. When it is convenient for them, they are considered to be fake. To date, we have never been given a list of IDPs; for example, those who are considered fake and those who are considered genuine.⁹⁰

89. The Commission found out that although the government initiated assistance to provide kick start or stabilisation cash of Ksh 10,000 and another KES 25,000 to those whose houses were burnt, it was outrightly perceived by some as discriminatory. This instead of fostering reconciliation, it continued to inflame inter-community relations.⁹¹ A witness told the Commission in Kisumu,

"We also need to know who has been rehabilitated. We hear stories of people who are getting Kshs3 million but it remains a rumour because where there is no information, there is bound to be speculation and that only helps to fuel ethnic animosity that we are starting to see."⁹²

88 KHRC, Out in the Cold, *The Fate of Internally Displaced Persons in Kenya* (2008-2009), 23

89 KHRC, Out in the Cold, *The Fate of Internally Displaced Persons in Kenya* (2008-2009), 24

90. TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 5

91 United Nations Human Rights Kenya, *Durable Solutions to Internal Displacement, Reconciliation and Restoration of Human Dignity of IDPs in Kenya: A Situation Report* (2011), 9

92. TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 8

90. The perception of bias and discrimination have also emerged in relation to financial assistance and housing. The Commission found a study by UNDP revealing on the unfortunate situation that faced IDPs that noted with alarm;

“Among the returnees to ancestral homes, reconciliation efforts have been compromised by governments’ compensation and resettlement approach. Most of the returnees to the ancestral homes were paid KES 10,000 to restart life. However, other victims of violence who lost property and houses were paid an additional KES 25,000. In Nyanza (Kisumu) where most of the returnees to ancestral homes are currently living, some ‘non-natives’ victims (Kikuyus and Kambas) were paid KES 10,000 and KES 25,000 for loss of property and houses. This has caused a feeling of discrimination against native Luos. There was a feeling among the Luos that the government was discriminating against them and favouring non-Luos particularly, the Kikuyus with regards to compensation. Other government efforts such as the resettlement programme are also perceived to be favouring non-Luos. Reconciliation is further constrained by the fact that the victims who lost their property to neighbours still see their property at their neighbours, yet they find themselves unable to reclaim it. Moreover, reconciliation efforts are rendered elusive owing to the fact that people who were violated continue to wait for justice.”⁹³

91. After displacement cases of discrimination of IDPs was also reported by those who testified before Commission in the public hearing forums. A lady who was in Kachibora IDPs camp around Kitale lamented in pain on how their children were not considered when stipends for bursary were given to children who were enrolling for secondary education after the primary exams. She said,

“Our children are suffering a great deal. For instance, this girl you see here passed her KCPE examinations and qualified to go to secondary school, but her life has been reduced to cooking in hotels. This girl was admitted to secondary school, but she is now in Kitale doing nothing. We do not get bursaries. It is like they belong to specific people.”⁹⁴

92. These sentiments of discrimination in other relief programmes that were carried out by the government were shared by victims of displacement else where in the country who testified before the Commission in Kisumu.

“While other regions are getting fertilizer, seeds, houses, medical aid and regular food supplies, victims in Nyanza, that is, those who were displaced from outside Nyanza and those who come from this area are confined to Kshs10,000 and not everybody got it. The assumption is that the people who came from outside did not own property and were not living any meaningful life but were just labourers and, therefore, all they lost was their wages.”⁹⁵

⁹³ *Ibid*, 17

⁹⁴ TJRC/Hansard/In-Camera Hearing/Men/Kitale/21 October 2011/p. 7-9.

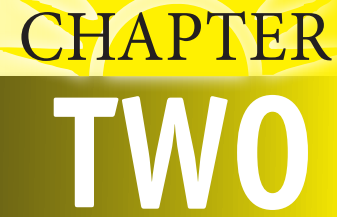
⁹⁵ TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 6.

93. It appears the state has not had a genuine interest in resettling IDPs and the launching of programmes as *Operation Rudi Nyumbani (Return Home)*, *Operation Ujirani Mwema* (Good neighbourliness) and *Operation Tujenge Pamoja* (Let's Build Together) was primarily motivated by the fact that it only wanted to resettle the specific class of IDPs.

Conclusion

Ethnic tension, particularly the tendency to view people who are different as 'the other' and thus not identify with, and either fear or scapegoat them, is unfortunately as old as human history. To understand the continued presence of ethnic tension today, and its evolution during the mandate period, the Commission traced the roots of ethnic tension to the colonial period, for it was under the colonial power that the political entity today known as Kenya was formed. Any discussion of ethnic tension in present-day Kenya would be incomplete without a discussion of the relationship between ethnicity and politics. It is an unfortunate fact that who joins a political party, and which politicians or parties form alliances, can be more often explained by ethnicity over any other factor. It is this potent, and at times volatile, combination of ethnicity and politics that has unfortunately spiralled into ethnic violence far too many times in our history. In the end, it must be appreciated that tackling ethnic tension requires a multifaceted approach aimed at addressing the root causes, including long standing land grievances and economic and political marginalisation.



A yellow sunburst graphic with rays emanating from a central circle, positioned behind the chapter title.

CHAPTER TWO

Ethnic Tension, Land and Politics: A Case Study of the Mount Elgon Conflict

Introduction

1. Elgon is a 4000 metre high mountain that straddles Kenya and Uganda. Between 2006 and 2008, the mountain was wracked by violence that became the focus of much of the Commission's attentions and energies. Estimates place the number of people killed in the Mount Elgon conflict at 600.¹ The victims of sexual violence may run into the hundreds. Up to 45,000 people were displaced. The Commission presents the Mount Elgon conflict as a case study of a conflict that sits at the intersection of three volatile trends that dominated the mandate period. These trends are: ethnic identity and land and electoral politics. Individually these trends are disruptive. Collectively, however, they carry the potential for deep and sustained crisis with serious implications for the protection and violation of human rights. This is then the case study that Mount Elgon presents.

¹ Human Rights Watch, *All the Men Have Gone: War Crimes in Kenya's Mt. Elgon Conflict*, at 27 (July 2008), available at <http://www.hrw.org/sites/default/files/reports/kenya0708webwcover.pdf> [hereinafter *Human Rights Watch Report 2*].

“All these People belong to Mount Elgon”:² Identity on the Mountain

2. Mount Elgon presents a complex ethnic fabric made up of many different ideas and understandings about identity. These form the basis of much recent academic research that the Commission has found useful in its own consideration of ethnicity in Mount Elgon.³ A central identity dominates: the Sabaot. It is from this group that—obviously—the Sabaot Land Defence Force takes its name from. The Sabaot are best understood as a collection made up of four sub-groups known as the Sabiny (or the Sebei in Uganda), the Bongomek, the Kony and the Bok. The name Sabaot has a very specific, recent and traceable history. It emerged in 1949 as name that these four groups assigned to themselves as, it has been argued, to the creation of another supra-ethnic group in the region, the Luhya.⁴ Before that, colonial authorities referred to them simply as ‘Nandi-speakers’. The term ‘Nandi speakers’ was in turn supplanted the term ‘the Kalenjin’ which functioned as another catch-all for a culturally and linguistically connected collective. Each of the Sabaot sub-groups have own readings and understandings of their particular experiences. The Bongomek for instance presented the Commission with a memorandum emphasizing their sense of continued political marginalisation, loss of cultural identity and ethnic victimisation.⁵
3. The story of identity in Mount Elgon is further complicated by the existence of what are most commonly referred to as the Mosop and the Soy clans. Again, the Commission found this to be a somewhat confusing issue whose nuances may be lost on outsiders. The terms Mosop and Soy are above all geographical descriptions. They describe *where* people live and not necessarily *how* they live. The Soy are those from (and of) the lower reaches of the mountain. It includes the Sabaot but—technically—is not limited to them. Mosop refers to those from further up the mountain specifically from Chepkitale; the desolate moorlands that are found at about 3000 meters. The Mosop consists mainly of the Ogiek who are often considered as another Kalenjin sub-group altogether because of their unique cultural traditions.⁶ The Ogiek are primarily hunter-gatherers and cattle herders. An Ogiek elder explained them as:

² TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 14

³ For instance, David M. Anderson and Gabrielle Lynch, ‘The instrumentalization of confusion: the politics of belonging and violence on Mount Elgon, Kenya’, in J. Bertrand and O. Haklai (eds), *Nationalism and Ethnic Conflicts* (University of Pennsylvania Press: Philadelphia, 2011) {In press}

⁴ David M. Anderson and Gabrielle Lynch, ‘The instrumentalization of confusion: the politics of belonging and violence on Mount Elgon, Kenya’, p. 2.

⁵ *Memorandum to the TJRC relating to the plight of Bong’om/Mbong’omek Forced eviction from ancestral territory*, 9th July 2011.

⁶ The Ogiek are also sometimes referred to as the Dorobo or the Ndorobo. Certain misgivings surround this name with some calling for its total rejection because of its association with poverty and backwardness. See TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 2.

The Ndorobo community who live above the forest zone and below Mount Elgon. These people are cattle herders and beekeepers. There is no crop production. Since historical time, they have been feeding on mild, honey and meat and they also used to look for food from distant areas of the Soy community.⁷

4. The Ogiek lack of geographic cohesion as well as their tendency to adopt the language and customs of their neighbours baffled colonial administrators who tried to create specific reserves for them. They have also confounded post-colonial efforts to administer and manage them along conventional lines leading to recurrent concerns about marginalisation and even outright neglect.⁸ The result has been Mosop as a geographical descriptor means that some Sabaot—principally the Kony—also self-identify with this clan. Conversely, the argument has been made that the Ogiek are not a distinct Kalenjin sub-group and are instead Sabaots who happen to live further up the mountain.
5. The fluidity of these identities is reflected in the testimonies heard by the Commission. Some witnesses emphasize the idea of a single people divided only by the arrival of colonialism:

The Europeans, they said “This is Mosop and that is Soy”. It was that boundary that distinguished the Soy. So, the people were unable to distinguish between the Soy and the Mosop. That is why they called the people by the names “Soy” and “Ndorobo”.⁹

6. Other witnesses emphasized the different fractures and cleavages that divided Mount Elgon communities amongst themselves and from each other:

There is no clan called the Soy and there is no clan called the Ndorobo. We have several clans in Mount Elgon. The people from the moorland who are Ndorobo have a number of clans among them and they are not a clan themselves. The Soy have so many clans; almost 100. The word Ndorobo as far I know refers to people who were living in the forest.¹⁰

7. The various Sabaot (and affiliated) communities are the clear majority in Mount Elgon. There are also however two significant non-Sabaot minorities: the Bukusu and (less numerous) the Teso. The Bukusu and Teso presence on the mountain feature prominently in the evolution and unfolding of the SLDF. Their presence also stands at the heart of other episodes of ethnic violence over the past two decades.

⁷ TJRC/Hansard/Public Hearing/Kapsokwony/25th May 2011/p.2.

⁸ Issues surrounding the Ogiek as an ethnic minority are discussed elsewhere in this report.

⁹ TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 11

¹⁰ TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 2

“We are not Sharing Mount Elgon”:¹¹ Land and the Mountain

8. Many of Commission’s witnesses took a very long view and described their presence on the mountain as dating back several hundred years or—at the very least—several generations. All the Mount Elgon communities have their own particular understandings about belonging to the mountain. A representative from the Teso community spoke of pre-millennial migrations down the River Nile with eventual settlement in and around the mountain.¹² The Bukusu narrative is of a mountain that they refer to as Masaba.¹³ Sabaot elders expressed similar notions of longevity. Notwithstanding these very long histories, current settlement patterns in Mount Elgon are actually a very recent, colonial phenomenon.

9. Mount Elgon, like so many other parts of Kenya, was profoundly affected by the colonial administration’s decision to open up parts of the country to European settlement. In 1926, a branch of the railway reached Kitale. The region’s temperate climate and fertile soils proved irresistible and soon afterwards Uasin Gishu and Trans Nzoia were set aside exclusively for European use. Indigenes were evicted further westwards into the Kavirondo Native Reserve which included Mount Elgon. This was how many Sabaots found themselves on the mountain. Trans Nzoia and Uasin Gishu were entirely shut off to them except if they took up employment as labourers on European farms. In 1932, there was another critical development with the Carter Land Commission. The Carter Commission represented a seminal attempt to tackle land needs and tenure in colonial Kenya. In Mount Elgon, Carter made the critical decision to create another Native Reserve in the moorlands. The reserve consisted of 40 000 acres at altitude and above the forest belt in Chepkital. Its occupants consisted of a community that colonialists referred to as the “El Gony” but who are more—as per the discussion above—are more properly described as the Ogiek with (possibly) Bok elements:

The Moorland area of Mount Elgon, comprising some 40,000 acres, should be added to the Kavirondo Native Reserve and set aside for the use of the El Gony, who should also be able to find accommodation in other parts of the Kavirondo Native Reserve, or to the extent that the Uganda Government may be willing to accommodate more El Gony in its territory, they should have an option of going there.¹⁴

¹¹ TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 14.

¹² TJRC/Hansard/Public Hearing/ Kapsokwony/23rd May 2011/p. 41.

¹³ TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/ p. 29.

¹⁴ Claire Medard, “Indigenous” Land Claims in Kenya: A Case Study of Chebyuk, Mount Elgon District’ in Ward Anseeuw and Chris Alden (eds), *The Struggle over Land in Africa: Conflicts, Politics and Change* (Cape Town, 2010), p. 22.

10. The residents of Mount Elgon are incredibly conversant with this history. They speak eloquently about events that took place nearly eight decades ago and add their own personal and pained feelings about the fate that befell them as a result of the Carter Commission:

I can summarize the problems of Mount Elgon in a very short manner. It is based on the arrival of the colonial government. Before that the Sabaot were able to look after themselves successfully. Unfortunately when the Europeans came, they removed them from their ancestral land which is currently known as Trans Nzoia and Bungoma including Mount Elgon itself. The Europeans removed Sabaot because they wanted to use their land to settle their own Europeans. To do that, they physically removed them. They were taken in Uganda as shown in our records. The Sabaots have been living under a lot of humiliation. They have been marginalized and persecuted. They were prosecuted and dispersed.¹⁵

11. The Commission also heard from another extraordinary 91 year old witness who had even more vivid memories about the demarcation of the Chepkitale reserve:

After the white settlers came, they said that we were living with animals. They tried to put the boundaries between the forest and the land. They took the soil to test it and establish where the boundary of the forest was. Those Europeans they put beacons to show the boundaries of the Soy and the Mosop. The name "Soy" shows where the boundary was. They called the other side "Reserve".¹⁶

12. And so Mount Elgon sat for most of the colonial period. The Ogiek were essentially marooned close to the top of the mountain in Chepkitale. The rest of the Mount Elgon populace—the Bukusu, the various other Sabaot sub-groups and the Teso—were scattered throughout the slopes and foothills. A representative of the Bukusu community painted a picture of a peaceful coexistence. As he described it, 'before 1963, we were staying happily with our neighbours.'¹⁷
13. Sabaot elders, however, tell a markedly different tale of increasing unhappiness at the apparent Bukusu dominance of the economic and, in particular, political life of Mount Elgon. It appears that the majority of chiefs during the colonial period were either by accident or design drawn from the Bukusu and larger Luhya community to which they belonged. Their administration was far from popular with the Sabaot who complained bitterly about corruption as well as forced road building and forest clearing campaigns. The powerful chief Murunga was particularly hated. Chaffing under Luhya domination, Sabaot elders and politicians began to champion the administrative separation of Mount Elgon from

15. TJRC Hansard/Kapsokwony/Public Hearing/23rd May 2011/ p. 4 – 5.

16. TJRC/Hansard/Public Hearing/Bungoma/12 July 2011/p. 11

17. TJRC/Hansard/Public Hearing/Kapsokwony/23 May 2011/p. 28.

Bungoma and its unification with “other Kalenjins” in Trans Nzoia. This was the recommendation made to the Regional Boundaries Commission(RBC) in 1962. The RBC was the body charged with laying the groundwork for independence and it travelled throughout the country taking opinions and recommendations on various administrative issues. The RBC eventually turned down Sabaot requests for separation. Elgon remained part of Bungoma.

14. The mountain approached Independence with trepidation. The decision to leave the boundaries unchanged was angrily received. Added to this was a heated political atmosphere occasioned by competition between the two main parties – KANU and KADU – and their ethnically defined constituents. In 1963, violence broke out on the mountain. While the violence went both ways (anti-Bukusu and anti-Sabaot), the Bukusu seemed particularly badly hit. Once again, this is something that current residents continue to remember and speak about with a great deal of pain:

In 1963 when we elected the first MP for Mount Elgon, we had clashes. Houses were burnt and cattle stolen, homes were destroyed...From 1961 to 1974, we had the infamous tribal clashes. Those really affected us very much. People were killed, cattle stolen and homes destroyed. During that period, about 556 Bukususes were killed across Mount Elgon and Trans Nzoia and 50 Bukususes displaced. During that time, land was taken by the Sabaots.¹⁸

15. It was, as the Commission discovered, an ominous start to the post-colonial history of Mount Elgon.

Chebyuk Settlement Scheme: Phases I, II and III

16. Identity and land provided the structural underpinnings to the SLDF. The actual catalyst, however, was the Chebyuk Settlement Scheme. Chebyuk has a long, complicated and ultimately unavoidable history that holds the keys to understanding the emergence of a complicated militia.
17. Technically, the story of Chebyuk begins in the mid-1960s when talk began to emerge a scheme to remove the people of Chepkitale from the moorlands and re-settle them on the lower slopes of the mountain. From the outset, however, there had been concerns about Chepkitale’s suitability for human inhabitation. Those concerns were expressed by some colonial administrators in the 1930s with the initial creation of the moorland reserve in the 1930s but they were either ignored or overruled. It would take another three decades for the broad consensus

¹⁸ The Commission has been unable to verify the accuracy of these numbers. TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/p. 28

to emerge that it was in everybody's interests that the move down-mountain be implemented. The government would then be able to supply security, health, education and roads; the previously unserved Chepkitale people would finally be able to access these services. Other priorities also came to the surface with wildlife officials pressing for the creation of a national park to showcase the mountain's unique wildlife and vegetation.

18. Most Ogiek agree that – attachment to the land aside – life in Chepkitale was difficult. An Ogiek elder sketched out an unhappy picture for the Commission:

These people did not have schools, before and even after Uhuru. When Kenya attained independence, these people were forgotten. They were not offered school education and from 1963, there were no primary schools in Chepkitale. If it was there, it was only one that went up to Standard Three. That was a big problem. There was no hospital, no security personnel and because of this, the animals were stolen by the Sebei of Uganda. These people had great suffering.¹⁹

19. Discussions began in 1965 with Ogiek leaders, local district officials and government authorities coming together to plan for the move. In 1968, a notice was published in Kenya Gazette. Implementation had to follow. A few hold-outs in Chepkitale opposed the relocation and spoke openly about 'not wanting to move' but the terms of the notice were unequivocal: the moors had been closed off.²⁰

Chebyuk Phase I

20. On the face of it, Chebyuk appeared straightforward: the relocation of a relatively small community for sound, legitimate and developmentally-oriented reasons. Indeed, the government had already deeply invested in resettling the landless, the displaced and many thousands of others washed up in the wake of colonialism. The reality of Chebyuk's implementation was, however, very far from straightforward. The whole scheme was ineptly and inexpertly handled from the very beginning. Both the wider research and Commission witnesses make this perfectly clear. Trouble started with a giant sized legal loophole. In 1971, about 460 families (3800 people) were moved from Chepkitale before and without official degazettement of Chebyuk which therefore remained part of the forest and unlicensed. In essence, people were moved into a settlement that did not actually exist.
21. Because degazettement had not taken place, plots could not be demarcated and title deeds could be issued. The result was an unruly free-for-all. People assigned themselves plots with each family apparently claiming 20 acre spreads as per government promises

¹⁹ TJRC/Hansard/Public Hearing/Kapsokwony/25th May 2011/p. 2.

²⁰ TJRC Hansard/Public Hearing/Kapsokwony/25th May 2011/ p. 5.

made when the scheme was first announced. Families with no titles then proceeded to sub-divide and re-sell their self-claimed allocations. The main recipients/beneficiaries of this redistribution were Soy locals and neighbours who had helped in the clearing of forest. Chebyuk also attracted huge numbers of people who had not been included in the original plans. Landless Soy families who had missed out on nearby settlement schemes in Trans Nzoia streamed into Chebyuk hoping to benefit from the lack of legal structure to install themselves on plots of land.

22. A Commission witness summarized the chaos of the entire exercise:

The movement of the Ndorobo to the Chebyuk Settlement Scheme did not take place when it was conceived in 1965 because of logistics. The Ndorobo as they were referred to were moved in 1971 by the then Government. Allow me now to say that the Government did not do its work because it never identified how much land out of the forest was going to be allocated to these Ndorobo. So the excision exercise did not take place. The Government did not appoint a Commission or a Committee which was credible to settle those people. The Government left those people to settle themselves.²¹

23. The witness elaborated on the unauthorized entrenchment of the Soy in Chebyuk:

What happened is that they invited their brothers the Soy to clear the forest because this was forest land. Some of them decided to sell certain pieces of land to facilitate themselves to till the land. The Government did not facilitate them. This is how the Soy came in. However, that is not the only way the Soy entered Mount Elgon. There are those who bought land in the so-called Mount Elgon Chebyuk Settlement Scheme from the Ndorobo. When Chebyuk Settlement Scheme was taking shape, there were pockets of land which were left as islands in the proposed scheme. Some of them are the current Cheptoror. The Soy people grabbed land and settled themselves. The current Cheptoror was then referred to as Shauri Yako. The reason for this was because they had not been allocated the land.²²

24. Degazettement eventually took place in 1974. Six thousand five hundred hectares were officially sliced out of the forest to create Chebyuk Settlement Scheme.

Chebyuk Phase II

25. Chebyuk Phase One and the three year delay involved in its establishment left a lot of unhappy people in its wake. Nobody seemed entirely satisfied with the way that things had turned out. The biggest problem was a large constituency of people believed that they had been unfairly shut out of the scheme. The disgruntled included Soy who claimed that they had either been given or had bought land

²¹ TJRC Hansard/Public Hearing/Bungoma/11th July 2011/p. 3.

²² TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 3.

from the Mosop and had been wrongly overlooked and subsequently evicted by the committee that had decided on final allocations in Phase One. There were also those who had simply allocated themselves large tracts of land in Chebyuk; they had lived there for many years and wanted their squatter and user rights recognized.

26. While they were the primary beneficiaries of the scheme, the Mosop began to take a much harder line on Chebyuk land. The twenty acres per family apparently agreed upon when the scheme was first announced do not seem to have materialized with each household eventually receiving much less land than they had anticipated. Another of their main arguments became that the 6500 hectares that they had been allocated in Chebyuk was inadequate compensation for 35 000 hectares they had lost in Chepkitale. Indeed, some even tried to move back up into the moorlands even though Chepkitale had been turned into a game reserve in 1968 and thus not licensed for human activity and settlement. They were forcefully and violently evicted by administration police. The Mosop also turned their attention to the presence of Soy and other so-called outsiders within Chebyuk itself who had bought or otherwise acquired land in the scheme. They demanded this land back. The Soi (and to a lesser extent Bukusu and Teso) who had bought land from the Mosop counter-demanded their money back and, failing that, simply refused to move. A Commission witness described Mosop unhappiness with the situation that prevailed in the late 1970s and early 1980s:

In 1979, the Government went and chased those who had remained in Chepkitale. During this process some of the animals were shot and killed. In the 1980s when we were in Chebyuk, the rulers who were imposed on us ruled us ruthlessly. They were predominantly from the Soi community. We suffered greatly because we had no chief, no political leader and we were ruled ruthlessly.²³

27. Although the Commission has been unable to establish the specifics, a series of petitions and representations were made concerning the situation in Chebyuk. Eventually in 1979 President Moi set aside yet more land for additional settlement. This is what became known as Chebyuk Phase Two. It came as no surprise to the Commission that many of the same problems that bedevilled Phase One manifested in Phase Two. The legal framework required to anchor the settlement (degazettement) was entirely non-existent. There was also no clear understanding as to how the land would be divided amongst the many different claimants. The perennial issue of squatters and the apparent buyers of Mount Elgon also could not be addressed. As such, the 1980s were tense and difficult years in Chepyuk. Some Commission witnesses have spoken about

²³ TJRC/Hansard/Public Hearing/Kapsokwony/25th May 2011/ pp. 2 – 3.

sporadic outbreaks of violence (burning of huts and assaults) as threats flew back and forth the various communities.

28. In 1988, a delegation of Mosop elders met with President Moi and presented him with a memorandum outlining their many concerns about the land situation in Mount Elgon. They expressed deep anxieties about the adjudication and allocation in Chepyuk Phase Two accusing the local Member of Parliament, Mr. Wilberforce Kisiero and a local chief of corrupting the process for the benefit of their families, friends and associates.²⁴ The President responded by stripping Mr. Kiseiro of his Assistant Ministerial position at the Ministry of Education. He then announced the appointment of a team to re-evaluate and streamline the allocation of land in both Chepyuk Phase One and Phase Two. That team consisted of Mr. Lekoolool (who was at this point the Commissioner of Western Province), Mr. Changole (District Commissioner Bungoma) and a Mr. Muchumbet (a government surveyor). They began work in early 1989.
29. Twenty years on, Mr. Lekoolool is still regarded as a controversial and divisive figure amongst some sections of the Mount Elgon population. He was described by a Commission witness as one of the people responsible for the 'evil' of Chebyuk.²⁵ By most descriptions, anecdotal and academic, Lekoolool's intervention was dramatic. All the Chepyuk allocations and self-allocations were annulled. The entire process would begin all over again. A vetting committee was created and applications invited afresh. Predictably, the number of applicants far exceeded the amount of land available. Perennial claimants to Chebyuk land, the Mosop and the Soy, put in their claims. There was also a rush of interest from people from many other communities; their applications were based on long term settlement by virtue of having worked or having bought the land. With no other way to balance the amount of land available against the number of applicants, Lekoolool's committee introduced balloting which reduced the entire allocation process to a kind of raffle; those whose names and numbers came up counted themselves lucky. The Committee also capped land parcel sizes at 2 hectares as way of admitting larger numbers into the scheme. At the end of the exercise, a group of Mosop was settled mainly in the Cheptoror and Kaimugul areas of the scheme. The Soy received scattered plots throughout Chepyuk. The vast majority, however, could not prove ownership. They were evicted from their land along with those could prove ownership but had no luck in the balloting. Entire families were uprooted. Landless, people drifted to urban centres such as Kapsakwony, Cheptais and – further afield – Bungoma, Kitale and Webuye.

²⁴ Mr. Kiseiro's testimony before the Commission was that he was 'quite happy to be out of Government'. He also accepted that there were many in Mount Elgon who regarded him as contributing to 'delays' in the regularization of the scheme. TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/ p. 9.

²⁵ TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p.12.

30. It was a violent and unsettled time on parts of Mount Elgon. Some residents blamed Mr. Lekoolool personally for both the fact and the manner of their eviction from Chebyuk:

PC Lekoolool chased away those people who had lived in the forest. When this happened, they burnt people's properties and brought people from Mosop and put them in Cheptoror. They closed every path and said it was a forest where trees would be planted. After they planted trees, we went there and cried wondering what had happened yet we happened to have been given the land by the Government.²⁶

31. The former Provincial Commissioner has a very different understanding of the part he played in Chebyuk. His story was of overseeing a relatively smooth, amicable and ultimately successful settlement process. Mr. Lekoolool rejected the claim that he controlled the notorious vetting committees that prepared the lists that in turn, determined eligibility for the ballot:

When I went there, I went for meetings with the committee and asked for the list. We went through the list in big organized barazas. It was not secretly done; it was publicly done. Therefore, to identify them we were using their own people. Of course, a person like me coming from another area would not know who is a Ndorobo and who is a Soy. So we used their own people to identify the genuine Ndorobo. They did exactly that and came up with that list. We then organized them in a way that they balloted in a transparent way. That is how we settled them.²⁷

32. He further rejected the idea of animosity between him and Mount Elgon people. If anything the former Provincial Commissioner spoke of a very friendly relationship rooted in a successful resettlement:

That was a clean job and if you went to the top that mountain, you will find children who have been born and named "Lekoolool". Can you give a child the name of an enemy? He must have been friendly. So, Lekoolool was a very friendly man who settled them properly and they appreciated it and named their children after me.²⁸

33. The only failing that Mr. Lekoolool would admit to was a delay in the issuance of title deeds and various other documents necessary to confirm ownership. Even then he would not accept personal blame for this in that such delays were inherent to government and that Chebyuk's difficult terrain made for difficult delineation:

Documentation is done by balloting and then records are set up for settlement and issuing of title deeds. It takes a bit of time to identify plots for individual settlers. It took a long time because it is a forested place and it was not easy to access the place and

26 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/ p. 12.

27 TJRC/Hansard/Public Hearing/Nairobi/15th September 2011/p. 19.

28 TJRC/Hansard/Public Hearing/Nairobi/15th September 2011/p. 25.

identify beacons. That is why the title deeds delayed because we had to show everybody but the process was on.²⁹

34. Mr. Lekolool left Elgon before the title deeds were issued. Other than this, he was satisfied with the outcome of his intervention in the long-running Chebyuk saga. As far as was concerned, everyone was a 'winner' and he departed certain that the people of the mountain were finally enjoying the 'fruits' of independence.³⁰

Chebyuk Phase III

35. In January 1993 two minibuses full of elders and local notables motored out of Mount Elgon. Their destination and mission were familiar ones: an appointment with President Moi to discuss the perennially thorny issue of Chebyuk settlement scheme. The elders and notables represented an equally familiar group of petitioners. Chebyuk Phase Two had created a bad-tempered cocktail of losers easily recognized by the Commission. One ingredient in this cocktail consisted of the group of people who since the 1970s and the advent of Chebyuk I, had (often illegally) carved out sizeable farms for themselves and their families. Some of these farms were very large indeed (80 hectares); their owners were forced to downsize under Lekolool's arrangement. Another ingredient was the group of people whose numbers did not come up in the balloting at all. They missed out completely on the chance to be settled in Chebyuk. All belonged to the very large group of hopefuls that had grown up around the successive attempts to redistribute and resettle Chebyuk. Once again, their petitions were well received by President Moi. The creation of Chebyuk Phase Three in the locales of Chepkurkur and Korng'otuny was announced.
36. The central problem with Chebyuk Phase Three was that as with Phase Two, the scheme was introduced into an area already characterized by different forms of land occupation. Moreover as soon as Phase Three was announced, it attracted a slew of newcomers intent upon formulating their own claims to the land. Typically, inertia, confusion and delays set in. At some point the District Commissioner, a Christopher Munguti, attempted to jump-start matters by apparently preparing residents for the infamous and much despised process of balloting. Some kind of preliminary survey was conducted. The Commission is unclear about Mr Munguti's actual role. Testimonies heard suggest that it was a high-handed one. One witness claimed that at some point in 1998, Mr. Munguti carried out 'balloting for Chebyuk III at Kapsakwony at the office'

²⁹ TJRC/Hansard/Public Hearing/Nairobi/15th September 2011/p. 22.

³⁰ TJRC/Hansard/Public Hearing/Nairobi/15th September 2011/p. 19.

and that was the means by which 'so many people were issued with balloting papers for Chebyuk III.'³¹ Others described Munguti's actions in even more sinister terms:

Another DC by the name Munguti returned evil again into Chebyuk. They brought the map and asked the people to ballot for their land using the map. The land they were asking people to ballot for was already occupied by other people. Once you had participated in the ballot, the surveyors were instructed to go and remove the person who was already on the farm.³²

37. These attempts at surveying and purported evictions inspired yet another visit to see President Moi in Eldoret. Mr. Munguti's handling of Chepyuk Phase Three was apparently the main topic of discussion:

We met President Moi at Eldoret where we informed him about the problems we were facing. President Moi was so surprised. He said: "I had given you this land, who is this one that is again interfering with the map?" We told him it was DC Munguti. He asked us where DC Munguti came from. We told him we did not know. He said: "I have heard," and we then came back.³³

38. Soon afterwards, District Commissioner Munguti was transferred out of Mount Elgon. Chebyuk residents attributed the transfer to intervention by the President. The process started again with a much clearer focus on the matter and task at hand: 1732 (mainly Soy) families to be settled on 3464 hectares of land.³⁴ This worked out to individual plot sizes of 2 hectares each.

39. In the early 2000s, government machinery finally moved into action. For many of the same reasons already explained, surveying was a slow and difficult process that ran into a number of headwinds including the emergence of a campaign known as *Nyumba kwa Nyumba*. The chief proponent of *Nyumba kwa Nyumba* was the then member of parliament, Mr. John Serut. *Nyumba kwa Nyumba* was a stand borne out the fiercely competitive politics of Mount Elgon which will be discussed shortly. It is best understood as a call for usufructuary rights to be recognised during the survey and allocation. In other words, people would be allocated whatever land they were using and had claimed as their own despite the fact that some of these plots were many times larger than the two hectares that the government intended. Serut is said to have advised people to sit tight and to regard that the survey as a mere formality

³¹ TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 4

³² TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 12.

³³ TJRC/Hansard/Public Hearing/Nairobi/15th September 2011/p.12.

³⁴ Chebyuk Phase Three is most often described as designed with the Soy in mind as they had been somewhat ignored by Chebyuk Phases One and Two. See Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', ISS Pretoria Monograph No. 152, pp. 17 – 19.

that would eventually confirm their ownership of the land. Indeed, many of his constituents voted for him in the 2002 election on the basis that he had promised to 'assist' them to resolve the land issue.³⁵

40. In his depositions on *Nyumba kwa Nyumba* before the Commission, Mr. Serut stepped back from his trenchant stand of a decade ago. *Nyumba kwa Nyumba*, was both misstated and misunderstood and that it was never his intention to suggest that each, any and all residents of Chebyuk would be allocated their particular patch of land. That, he argued would result in very small and unproductive plots: a 'slum' of little agricultural and economic value. Serut's current explanations of *Nyumba kwa Nyumba* maintain that was meant only as a general call for a legitimate survey that respected the rights of 'genuine', long-term squatters:

So, what did I mean? I meant this: proper procedures were to be followed. Identification of the genuine people to be settled and; thereafter, those who were already on the ground, should be settled on the same piece of land, not to be moved. So, after vetting, the list should be re-vetted for the people on the ground. If you are already on the ground, it only made sense that you are returned to the same piece of land. That is what I called "Nyumba kwa Nyumba". Not a man coming to squat on land and within two days and then you are told now you have ownership of land.³⁶

41. Misinterpreted or not, *Nyumba kwa Nyumba* was an immensely popular position that captured many residents' aspirations. In 2005, however, there was a drastic re-drawing of Chebyuk Phase Two and two very important adjustments were made. Both these adjustments, as the Commission was told, would have stunning consequences. The first was that the size of the allocations would be halved from two hectares to just one. The second was that the allocations would be shared evenly between the Soy and the Mosop: 866 plots for the Soy and 866 for the Mosop.
42. The entire character of the settlement scheme changed very quickly. It is not entirely clear to the Commission *why* the changes were so rapidly introduced. The dominant view in Mount Elgon is that this was a purely political decision designed to reward and punish the Mosop and Soy respectively for positions they took during a constitutional referendum in November 2005. The referendum, a national one, had deeply local reverberations in Mount Elgon for reasons that will be discussed shortly. Mr. Serut's evidence threw some

35. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 3

36. TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 21.



Hon. John Serut testifying before the Commission at a Public hearing

light on *how* the changes were brought about. They were apparently the product of discussions and planning between the Provincial Commissioner, Abdul Mwasserah, and various community leaders. Mr. Serut's representation was that initially, the process was a smooth and an inclusive one that produced a list of worthy, deserving and legitimate beneficiaries:

They were very patient. They went through the process peacefully and involved and engaged the community properly. When we identified the land, we agreed that to identify those who should be beneficiaries, we should use the panel of elders. The panel of elders did its work and in a priority manner. The Ndorobo were told to get 50 per cent and the Soy 50 per cent. We also agreed that those who would be identified as beneficiaries, the list to be held for one month for the public to ventilate and find out whether the people who had been undeserving. When this list had been hung for one month, nobody raised a finger against anybody to say that he or she did not deserve.³⁷

43. This list, uncontroversial in Serut's eyes, in effect sounded the clarion call. Long simmering elements finally consolidated into the fighting force that was the SLDF.

³⁷ TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/ p. 7 – 8.

The Politics of the Mountain

44. Land and ethnicity explained the underlying cause and eventual emergence of SLDF. They do not, however, fully explain the timing of the militia or provide a complete answer for why the group activated when it did. For an understanding of timing, the Commission turned to the politics, politicians and political cycles of Mount Elgon. The question of Mount Elgon land was deeply politicized. From the local to the national to the presidential, politicians of all hues were drawn into knotty issue that was Chebyuk settlement scheme. Parliamentary politics though have had the greatest impact.
45. Mount Elgon's politics conform to Kenyan politics in that—as is explained in another section of this report—they are broadly ethnic. Politicians and their parties mobilize primarily along ethnic lines. What this meant was that for many years Mount Elgon constituency has been represented by a member of parliament from the majority Sabaot community. In turn, Mount Elgon representatives have without exception aligned themselves with the larger Kalenjin bloc and whatever political party housed them. Daniel Moss of KANU was the first politician to represent the mountain in Independent Kenya. He was a trenchant supporter of Sabaot land rights and a prime mover behind the establishment of Chebyuk in the mid-1960s. The same can be said of his successor Wilberforce Kisiero who appeared before the Commission to make a lengthy and passionate submission about mistreatment of his people since 'time immemorial'.³⁸
46. Even after Kenya became a multi- party state in 1992, Mount Elgon continued to vote KANU. Again, the rationale was largely ethnic. Mount Elgon voters fed into the larger Kalenjin vote that supported KANU and President Moi. Despite the fact that Mount Elgon was a KANU zone the politics of the region were extremely competitive and were (until 2007) geared towards securing the KANU nomination; the winner of the KANU nomination was essentially guaranteed a trouble free journey to parliament. In 1997, Wilberforce Kisiero was succeeded by Joseph Kimkung. He was another Sabaot but from the less politically prolific Kony sub-group.
47. Without individualizing the Mount Elgon issue, the Commission has attributed much of the animosity, venom and degeneration of the region into a very difficult relationship between two competing politicians who have both represented the constituency in parliament: Fred Kapondi and John Serut.

³⁸ TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/p. 7.

In 2002, John Serut rose to the pinnacle of Mount Elgon politics defeating the incumbent Joseph Kimkung. Mr. Serut came to politics from the Ministry of Lands where he used to work as a registrar. There was of course nothing accidental or coincidental about this. He presented himself to the electorate as someone with a technical understanding of land issues. The importance of land on the mountain means Elgon politicians structure their campaigns around promises to deliver farms into the waiting arms of the landless. One of the messages of his campaign was that allocations at Chepyuk III would finally be settled to the advantage of all concerned especially his supporters: the Sabaot. The *Nyumba kwa Nyumba* campaign was a reflection of this popular and populist stand. As the sitting Member of Parliament, Mr. Serut's sentiments carried great weight and some of the Commission's witnesses described their great pride in a leader who was finally standing up for the poor and landless of Mount Elgon.³⁹

48. Mount Elgon, however did not exist in a vacuum. It lay against the broader tableau of national politics. And in 2005, there was no more important issue in 2005 than the referendum on the adoption of a new constitution. Mr. Serut was awkwardly placed for this historic referendum. In February 2004, he had sensationally defected from KANU to FORD-Kenya, at that point a party of the opposition. At a rally attended by such FORD-Kenya big wigs as Mukhisa Kituyi, Musikari Kombo and Moses Wetangula described KANU as a vehicle that has 'stalled along the way'.⁴⁰ It was an extra-ordinary move given that FORD-Kenya was almost completely dominated by Bukusu politicians who were regarded as the long-term enemies of Sabaot ambitions. Predictably, Mr. Serut's flirtation with FORD-Kenya did not last very long. Within months, he was back in the KANU fold and took the lead in championing the "Yes" campaign for KANU and other government affiliated parties in the 2005 constitutional referendum.
49. Mr. Serut's support for the "Yes" camp (symbolized by a banana, "No" by an orange) was unabashed. He traversed Mount Elgon enthusiastically campaigning for a variety of social and ideological reasons:

I told them to vote for "Yes". The issue of women marrying women and men marrying men; these were allegations and did not exist in that draft. Whether it was called the Wako Draft or whatever draft, it was none of our business! That is what I told my people as a leader. I told them that they did not elect me to Parliament to go eat and forget them. I had to guide them.⁴¹

39 TJRC/Hansard/In-Camera/Bungoma/26th May 2011/p. 3.

40 Serut Ditches Kanu for Ford-Kenya, *Daily Nation*, 16th February 2004.

41 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 21.

50. But Mr. Serut had made a serious political miscalculation and had not read his constituents or the national mood correctly. He found himself on the wrong end of a number of powerful current and former KANU politicians who supported the “No” campaign and subsequently joined the Orange Democratic Movement that was birthed by opposition to this particular effort to revamp Kenya’s constitution. Mount Elgon, despite Mr. Serut’s best efforts, fell firmly in the “No” camp.
51. Mount Elgon’s “No” vote had fall out had lasting consequences for the open running sore that was Chebyuk. Mr. Serut explained his defence of proposed constitution in high-flowing moral and ethical terms such as opposition to same-sex marriage. The Commission, however, heard consistent evidence that in fact, he ran a hard-nosed and nakedly political campaign during which he linked the regularization of Chebyuk land to voting “Yes”. Ominously, he linked voting no with dire and unpleasant consequences. At a rally held in the wake of the referendum and Mount Elgon’s resounding “No” vote, Mr. Serut was heard chastising constituents for refusing to ‘follow bees for honey’ and instead choosing to ‘follow flies and [to] eat human waste.’⁴² On another occasion, he was said to have issued ominously crude threats to no campaigners: “*Wanaume mtakimbia mpaka uume wenu urudi ndani*” which translates as ‘men you will run until your manhood will disappear.’⁴³
52. Mr. Serut denied dangling settlement in Chebyuk in front of voters as an inducement for voting yes. His explanation was that he had tried to present a vote for the constitution as a vote for development and government in general:

I told my people that, whether this referendum was going to succeed or not, we were to be on the right side so that we benefit. The right side was the child holding bread. That is the language we were using...What I was interested in was development. I told them; let us vote for “Yes”. I told them not to follow promises which would not work.⁴⁴
53. Mount Elgon, however, voted no. Almost immediately, drastic changes were introduced into Chebyuk Phase Three. As has been explained above, a scheme that was seen as being previously reserved for the Soy now had to admit the Mosop. The popular explanation in Mount Elgon for this redistribution was that, in Serut’s terms, the Mosop had chased the bees. In other words, the Mosop had supported the referendum and even though the cause was a losing one, they were still rewarded with—as it were--the honey. In the process, Mr. Serut began to emerge as a champion of sorts for the Mosop seeking to be considered and included in the allocation of land at Chepyuk. Serut’s co-option of Mosop causes would cost him the support of the majority Soy who gradually came

42 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 21.

43 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/ p. 45

44 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/ p. 22.

to believe that he no longer represented their interests. As one Commission witness bluntly put it, 'by that time, our MP, Honourable Serut, had become our enemy'.⁴⁵ And with a general election fast approaching in 2007, an alternative had to be found. This, roughly, was the *milieu* that Fred Chesebe Kapondi stepped into. It was a *milieu* in which land and specifically Chebyuk land had acquired an overtly political sheen.

54. Mr. Kapondi was no stranger either to Mr. Serut or to the rough and tumble world of Mount Elgon politics. Mr. Serut himself describes Mr. Kapondi as a relative through marriage to his first cousin and a kind of dependent for whom he paid rent and whom he had helped to find employment when he was younger.⁴⁶ At some point, Mr. Kapondi even campaigned on behalf of Mr. Serut. Fred Kapondi describes his own political career as stretching back over two decades in capacities and parties that typify the broad ebb and flow of Mount Elgon politics:

I was a force in Mount Elgon politics from 1992. As a young man in 1992 with a lot of energy and without resources, I believed in myself that I could make it to Parliament. I managed to crisscross Mount Elgon from Cheptais to Kaboiywo on foot. In fact, in 1992, I believed I won the election but was rigged out. Everybody believed I won the election but was rigged out. I have been having very faithful followers across Mount Elgon District from 1992. Again in 1997, I was a candidate and lost by a whisker. [In 2002]...I stood on a Ford People ticket. I was working then with Hon. Nyachae.⁴⁷

55. After losing yet again in the General Elections of 2002, (this time to Serut) Kapondi seemed to retreat somewhat. By his own admission, he accepted that he could not compete with Serut's popularity:

My message was not popular. The message by Hon. Serut of Nyumba kwa Nyumba was very appealing. I had played my part. The people had voted for Mr. Serut...I had played my part and the rest was up to Mr. Serut and the people. In any case, I did not have any elective post.⁴⁸

56. But Mr. Kapondi did not sit out for long. By 2005 he was back on the campaign trail for the constitutional referendum. Astutely, Kapondi did not loan his weight and influence to the sinking ship that was the Banana/"Yes" campaign. Instead, he hit the road on behalf of the "No" camp:

During the referendum, Mr. Serut was campaigning for banana camp while we were campaigning for the orange camp. He made it very clear particularly to the people of Phase III that if they were not going to vote for "banana camp", they would face the consequences.

45 TJRC/Hansard/ In-Camera Hearing/Bungoma/26th May 2011/p. 3.

46 Hon. Kapondi refutes Serut's portrayal of their relationship and insists that they only had a brief 'working relationship'. TJRC/ Hansard/Public Hearing/Bungoma/12th July 2011/ pp. 5 – 6.

47. TJRC/Hansard/In-Camera Hearing/Nairobi/14 September 2011/p. 14 & 18

48 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 52.

57. Unlike Mr. Serut, Mr. Kapondi was neatly placed with the triumph of the Orange/No vote against the proposed constitution. Two fortuitous trends seemed to combine. The first concerned the fall-out from the re-drawing of Chebyuk. There was a large group of Soy malcontents who had either been locked out of the scheme altogether or stood to lose huge swathes of land on account of the 2.5 hectares cap. Soy elders who were shell-shocked and disappointed in Mr. Serut's betrayal of their cause began to look around for someone else to represent them in the upcoming elections. This group of elders included Patrick Komon (Wilfred Matakwei's father) and Jason Psongoywo Manyiror who was one of the largest land owners in region. In Mr. Kapondi they found an ideal candidate. Quite apart from his recent break with the hated Serut, Mr. Kapondi had a long and documented history of working for Sabaot and particularly Soy land rights. The elders and those with long memories remembered that as KANU chairman, he had been part of a Sabaot delegation that had visited President Moi in 1989 and 1993 to present their claims for additional land.

58. The second trend was more political. After a few years in the political wilderness, Kapondi found himself as part of the "No" campaign that eventually transformed itself into a formal political party—the Orange Democratic Movement(ODM)—right in time for the electoral cycle of 2007. Mr. Kapondi became, as it were, the face of ODM in the region. As a Commission witness explained, it was a hugely popular move that catapulted Kapondi to new heights in Mount Elgon politics and more or less confirmed him as the next member of parliament for the constituency:

When the people refused the Banana Camp, a second rally for ODM was held courtesy of Kapondi. People really supported ODM. They sang with him in joy. They decided that he is the one they were going to chose. If Serut came with his rally, Kapondi would do the same with his ODM supporters. Kapondi was not very popular, but when he got into ODM he became very popular.⁴⁹

59. Mr. Kapondi's campaign for the Mount Elgon seat in the General Election of 2007 was an extraordinary one. The reason for this was that on the 13 April 2007 he was arraigned in court on charges of robbery with violence for the killing of a Jackson Kaibei Matei on the 17 of August 2006 after robbing him of 55, 000 shillings in cash and one cow worth 10,000 shillings while armed with an AK47 rifle. He was also charged with the wilful destruction of property, and promotion of war-like activities. Kapondi's position was that the charges were false, trumped up and politically motivated. He accused the then area Member of Parliament, Serut, of capitalizing on insecurity in the district to harass his political opponents. He remained in police custody for seven months.

49. TJRC/Hansard/In-Camera Hearing/Kimilili/25 May 2011/p. 19

Kapondi found himself in the absolutely unusual position of running both his nomination and parliamentary campaign from Bungoma Prison where he was held for several months.

60. The Kenyan press was intrigued by the unusualness of Kapondi's situation and conducted a number of interviews. Kapondi portrayed himself as a young, self-made man only interested in the growth and development of a poor and marginalized area. He also touched on other issues such as improving the distribution of the Constituency Development Fund, Local Authorities Transfer and bursaries money. His campaign was progressive and forward looking. His slogan was *Uongonzi Bora ni Ufunguo wa Amani na Maendeleo* which translates as 'Good leadership is the key to peace and progress'.⁵⁰ With the help of his wife and various political operatives on the outside Kapondi produced posters and t-shirts and all the other paraphernalia that accompany campaigns in modern Kenya.
61. The Commission heard extensive testimonies harking to another much darker under-current to Mr. Kapondi's run for the parliamentary. The recurrent claim is of a campaign with close connections to the SLDF, its members and associates. Mr. Kapondi's eventual success in both for the ODM nomination and for the 2007 campaign has therefore been credited to the ruthless elimination and intimidation of his rivals by people who are believed to have been SLDF fighters. Mr. Sammy Chemwei who was also contesting the Mount Elgon seat felt the wrath of these SLDF elements. Mr. Chemwei's home was set on fire by a large group of masked men all armed with AK47 rifles; these were all interpreted as hallmarks of the SLDF. In a subsequent interview with the *Nation* newspaper, Chemwei said that he had been threatened by a man who was known and wanted by the police.⁵¹ He was threatened, apparently, after refusing to step down for Mr. Kapondi. Various ODM civic aspirants including Moses Makoit of Cheptais ward and Nathan Warsama of Sasur ward and Benson Chesiskaki of Emai ward were all said to have benefited from SLDF-orchestrated violence. Claims have also been made that SLDF elements contributed to help Mr. Kapondi raise 100 000 shilling nomination fees required for contesting the ODM ticket. Mr. Kapondi's legal proceedings in Webuye have also been described as an opportunity for the SLDF to demonstrate its support for him. Militiamen supposedly showed up almost every day to listen to the hearings. Mount Elgon women were also forced to attend and to sing, dance and ululate:

All the ladies would be picked up by force to go to Webuye to listen to Mheshimiwa's case. They would want you to sing and do all things on the road. We were being monitored by the SLDF. Matakwei would call and ask how we were performing.⁵²

⁵⁰ "Controversial Man vows to win seat from Prison", *Daily Nation*, 27th October 2007.

⁵¹ "Jailed Aspirant's Mother and Wife Arrested", *Daily Nation*, Daily Nation, 18th November 2007.

⁵² TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/ p. 20.

62. On the 13th of December 2007, the state entered a *nolle prosequi*. It was just two weeks before the General Election. Mr. Kapondi portrays this timing as suspicious and indicative of his initial position that there had been a political motive behind his arrest: 'The objective was one – just to keep me in until after elections.'⁵³ Riding the ODM wave, Mr. Kapondi easily won the elections, defeating the incumbent MP and ruling Party of National Unity (PNU) candidate, his arch rival Mr. Serut.
63. Kapondi has portrayed Serut as the force behind his legal woes as part of a longer campaign to discredit him in the face of mounting violence in Elgon. In one particularly bitter parliamentary exchange on the 4 April 2007, Mr. Serut accused William Ruto, Musa Sirma, Jebii Kilimo, Charles Keter and Franklin Bett of bankrolling Mr. Kapondi and his supporters as they killed and displaced Mount Elgon residents. Serut claimed in what one parliamentary writer described as 'thunderous tones' that he

had evidence that Mr. Ruto, Bett, Kilimo and Sirma have been to Elgon to incite people to kill one another. In fact Mr Ruto told my people to reject the allocations in Chebyuk so that when ODM-K government comes into place, they will allocate them the whole forest.⁵⁴
64. There was uproar in the House. Mr. Raila Odinga and Mr. Charles Keter rose on points of order asking Mr. Serut to substantiate his utterances. Jebii Kilimo and Franklin Bett took issue with Serut's comment noting that they had gone to the area to address the plight of suffering women and children. Mr. Ruto too was having none of it. He jumped to his feet to describe Mr. Serut as 'a person who pretends.'⁵⁵ Mr. Ruto said that Serut was doing nothing about police beatings and burning of homes in Mount Elgon because inaction suited his political goals and that of the government he (Serut) was part of.
65. On the issue of SLDF support for his 2007 campaign, Mr. Kapondi was categorical that this was not the case. His claim is that while he knew some of the militia's members by virtue of being a public figure in Mount Elgon, he had never benefitted from either SLDF money or violence as has so frequently been claimed:

It sounds very ridiculous and very unfortunate for somebody in his right sense to say that Kapondi was handed over the seat by the SLDF. The SLDF never created me. I was in politics before. I was a formidable force in politics in Mount Elgon without the SLDF. To allude to that is sheer nonsense.⁵⁶

⁵³ TJRC/Hansard/Public Hearing/11th July 2011/p. 50.

⁵⁴ This account of the parliamentary exchange between Serut and is taken from the Kenya Times' parliamentary coverage which in turn was posted on an www.ogiek.org; a site that aggregates news and coverage of anything related to the Ogiek people.

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⁵⁶ TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 52.

Chepkurur and Korng'otuny Community Based Organization

66. The Commission took this small community based organization (CBO) as the final element responsible for the emergence of the SLDF. The CBO was formed in or around 2002 when intense discussions about the fate of Chebyuk III were being held. Its main goal of the organization has been explained as furthering Sabaot land rights at a time when arguments about rationalizing Chebyuk were gathering momentum:

The CBO was established to educate people about the problems encountered. The CBO was also supposed to tell the Government about the land problem in Chepkurur. It was one way of looking for money to enable the organization to go on with its programs and also to ask politicians from the area to help. The organization was also intended to go to court and seek redress.⁵⁷

67. The main members of this CBO were drawn from a very specific and distinctive group. Commission witnesses have described them as 'Soy elders' but what they were the men who had owned huge farms by virtue of having allegedly grabbed and settled upon land in the early 1970s when Chebyuk Phase One was first announced.⁵⁸ Men like Patrick Komon and Jason Psongoywo Manyiror Tirop a Soy *laibon* or ritual specialist were the long-term owners of 100 and 200 hectares of Chebyuk land and formed the core of group that stood to lose most from the successive attempts to regularize ownership of land in Mount Elgon. These men were unapologetic in their holding on to such vast spreads. As Mr. Manyiror explained, the land was theirs and had always been;

The farm belonged to my father. That is where I was born. It was not possible for anybody to go into that land because it was my grandfather's farm. I was on that farm together with my children and stayed there without any complaint. I had no problem with anybody. Nobody accused me and I did not have any boundary problems. It is jealousy which has brought animosity.⁵⁹

68. The CBO claimed to be entirely peaceful in its goals, methods and aspirations. The CBO seemed to concern itself mainly with the raising of monies to further their campaign and to file court cases meant to protect Sabaot land interests using legal and legitimate means. In 2004, members filed an injunction in Eldoret seeking to halt renewed surveying in Chebyuk Phase Three. What became of the case is unclear. Some witnesses claimed that it was thrown out; others that it collapsed. At any rate, disenchantment with Kenya's slow-moving and unresponsive judicial system had set in. Over the next couple of years, the CBO and its members gradually

57 TJRC/Hansard/In-Camera/Bungoma/26th May 2011/p. 3.

58. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 3

59 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/ p. 15.

became less civic- minded. Some of its members were engaged in violent crimes including robbery, murder, threats and intimidation against people who did not support Saboot claims. There is also some evidence that people were being coerced to contribute money to pay for the CBO's running and upkeep. Others have spoken of purchasing and stockpiling of weapons.⁶⁰

69. In 2005, the CBO was yet again spurred into action. The Mount Elgon District Commissioner, James Ole Serian, had announced the resumption of another round of surveying. Having exhausted all their legal options, CBO members decided to rush to Nairobi to seek audience with John Serut, their member of parliament. The reception they received was a frosty one no doubt because Mr. Serut may well have already been in the process of committing to the 50 – 50 split of Chebyuk:

We organized a delegation and visited him in Nairobi. When we got there, he dodged us. He gave us audience to only one old man called "Saso Laibon" and an elder by the name "Jason Manyuya Sanguywa".⁶¹

70. Defeated and desperate, the CBO members then remembered their 'son' in Nairobi, Fred Kapondi. They claimed to have spoken to him informally and to have received astonishing advice regarding the upcoming survey:

We approached Hon. Fred Chesebe Kapondi. Although Hon. Kapondi was not a member of parliament at the time, he was an active politician whom we recognized. So we talked to him several times. We talked to Hon. Kapondi, who was also in Nairobi. He was the one who gave us the idea of coming up with war – that maybe we could fight our neighbours, the Ndorobo.⁶²

71. There is no indication that Mr. Kapondi had any formal involvement with this CBO during initial months. But given their profile and position in the community as Soy elders, it is more than likely that Mr. Kapondi was well aware of them and their activism. According to this witness, in 2005 – 2006, the CBO sensed that their interests were being threatened by Mr. John Serut's political about-face and the adoption of the 50 per cent Soy and 50 per cent Mosop approach to Chepyuk III was looking more and more likely. At this point, the witness claimed, the members of the CBO approached Mr. Kapondi for advice and assistance. Mr. Kapondi is then supposed to have told them to 'take up arms' and to defend their lands.⁶³

60. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 10

61. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 3

62. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 3

63. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 3

72. Mr. Kapondi's rejection of these claims was vehement. He has completely denied any such contact and interactions with the CBO. His stand is that the claims were in essence fabricated as part of his sham trial and that CBO members have subsequently apologized for what they said:

Commissioner: Are you familiar with an organization allied to Chepkurur and Korng'otuny Community Based Organization?

Hon. Fred Kapondi Chesebe: That came in during my (trial?). Some of the witnesses who were giving evidence against me, who later came to me and apologized after I was elected member of Parliament, were part of this. What you are telling me was part of the statement by the witnesses against me. They later apologized to me.⁶⁴

73. In further testimony, Kapondi reiterated that the CBO witnesses had been untruthful and had confessed to the fallacy of their statements about him:

What they told me was: "Mheshimiwa, these things were set up. We came to testify but there was nothing we knew. We are sorry that we put you into the situation that you are in."⁶⁵

74. The General Election of 2013 saw yet another shift in Mount Elgon's political landscape. Running as an independent candidate, Mr. Serut defeated Mr. Kapondi to reoccupy the seat he had relinquished in 2007.

April 2006: A Call to Arms

75. April 2006 was a tense and difficult month in Mount Elgon. Much to the disgust of many Soy claimants, Chepyuk Phase Three had to be shared between them and the Mosop. Plots were capped at just two hectares. The grim news was confirmed when the list of beneficiaries was published and posted in the District Commissioner's office. The lucky ones were to await their letters of allocation. The unlucky ones faced a much less rosy future; dispossession and eviction was their fate. Those most bitter about these developments were a core group of very large land owners who had somehow over many years managed to avoid the Chebyuk dragnet. This time round however, things seemed quite different. Redistribution and eviction looked inevitable.
76. The Commission received testimony about a day in early April when, it seems, the decision was made to reject and protest the terms of Chebyuk Phase Three. A Mount Elgon resident was summoned to the home of Patrick Komon. Komon

64 TJRC/Hansard/Public Hearing/ Bungoma/12th July 2011/p. 4.

65. TJRC/Hansard/In-Camera Hearing/Nairobi/14 September 2011/p. 8

formed part of this coterie of large land owners. He was also Wycliffe Matakwei's father. Matakwei was the previously unremarkable and fairly average young man who became the commander of SLDF. Komon's home was hosting a meeting:

It was noon and the clock was ticking towards 1.00 p.m. I saw the son of Patrick Komon. He came to my home and told me: "There is a meeting at our place and my old man needs you." So I just accompanied him to their home. When I reached Mzee Patrick Komon's place, he welcomed me.⁶⁶

77. A meeting was underway as the witness arrived at and entered the Komon home:

When I arrived, I found that there was a meeting which was going on. The people I found there were known to me. I saw one of the sons of Patrick Komon, whose name was Matakwei. He was the chairperson of that meeting. In that meeting, I found people whom I could identify. I saw Patrick Komon. There was Hon. Fred Chesebe Kapondi. The others were Jacob Sawos, Benson Chesikak and Nathan Warsama.⁶⁷

78. The witness claimed that a Miss Komon, Mr. Maling'a and Titus Waikai were also present. Attendees were said to be holding discussions about what to do about next about the situation in Chebyuk. A solution was proposed:

Leader of Evidence: What did you hear them discuss or what did you see them do?

Witness: When Matakwei asked what we were supposed to do, Hon. Kapondi said that we had to protest about this, and that the only way to protest was by fighting so that our land could not be given to the other people. He said: "You must fight so that the Government can realize that your land should not be taken away from you. Then, finally you will be given your land."⁶⁸

79. Further allegations were made surrounding guns that were to be used in the fight for the land:

By the end of the meeting, many people had come and said that they would protest against the subdivision that was going on. Kapondi then said: "It is better if people had guns, so that you can protest and buy more guns." Then seven people came forward and said that they already had guns. The first person who said so was Nathan Warsama. We had Patrick Komon, who produced his gun. Baraza Ayub also produced his gun and Titus Weikai also produced his gun. So these people, produced guns, which amounted to eight guns.⁶⁹

66. TJRC/Hansard/In-Camera Hearing/Nairobi/14 September 2011/p. 30.

67. Nathan Warsama was a well known local politician in Mount Elgon. He stood and was elected unopposed as the councilor for Sasur Ward. From Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 33.

68. TJRC/Hansard/In-Camera Hearing/Nairobi/14 September 2011/p. 31.

69. TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/ p. 31

80. Soon afterwards, a second meeting was held at Warsama's residence. The witness did not give details. Those present, however, were described as undergoing an important ritual designed to bind them to each other and to their newfound cause. The ritual was overseen by Psongwoyo Manyiror, the Soy laibon who was also one of the largest land owners in Chebyuk:

After the guns were produced during the second meeting, Mzee Jason Psongwoyo said: "Bring one sheep outside." So, a male sheep was taken out and slaughtered. The dung was squeezed out of the intestines, which they used to smear the guns as they talked in tongues.

81. The Commission did not receive any additional evidence from any other witnesses on these two key meetings which supposedly took place in April 2006. There was no way for the Commission to verify what the witness saw and heard. Like Mr. Kapondi, Mr. Manyiror was arrested for promoting warlike activities and subsequently released.⁷⁰ The charges did not stick. And yet both men feature so prominently in narratives about the origin and emergence of the SLDF. It has made for a complex tableau of claims and counter-claims.

What the Commission can be certain about is that the publishing of the Chebyuk Phase III list in April 2006 marked a point of no return. Once that list was made public, there was no going back to a kinder, gentler time when differences might have been civilly discussed. As one witness put it, the list was an indication that 'blood would now flow' on Mount Elgon.⁷¹

The Onset of Violence

82. In August 2006, an assistant chief, Shem Cherowo Chemuny, who had been 'implicated in bribery to influence land allocation' was killed along with two guards and his daughter.⁷² This murder was followed by that of Cleophas Sonit, the chief of Kapkateny Location, who was related to [former MP] Serut and had refused to comply with SLDF demands. He was killed in his office in June 2006.⁷³ Ben Kipnusu, a councillor of Chepkube ward and a Serut supporter, was then murdered in January 2007.⁷⁴ Mr. Serut had complained to the police and high government structures on numerous occasions that his relatives were targeted by the SLDF and that no action was taken in response.⁷⁵

⁷⁰ The arrest is described in TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/ p. 13

⁷¹ TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/ p.18

⁷² TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/ p. 12

⁷³ See Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 23 and also TJRC/Hansard/Public Hearing/11th July 2011/p.10.

⁷⁴ Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 23.

⁷⁵ TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/pp. 11 – 12.

83. As has been explained above, the original and ostensible purpose of the protection of the Soy clan's land interests in Chebyuk Phase Three. Wycliffe Kirui Matakwei volunteered with other young men, mostly from the Soy tribe to take up arms against the evictions. Young people were mobilized by the community to defend them against the evictions:

The worst eviction was that of 2006. Most of these boys just went to the forest and formed the militia.⁷⁶

84. This group formed the fighting wing of the SLDF.⁷⁷ They initially called themselves Janja weed but later changed to SLDF, as that name was more telling of the nature of their fight⁷⁸. Initially, the group engaged in fairly low-scale skirmishes, mainly targeting the Mosop.⁷⁹ Full scale violence erupted after the publication of the final list of plot allocation for Chepyuk III in March 2006.

85. With time, the militia's ambitions changed somewhat with new rhetoric expanding to include taking back land not just in Mt. Elgon, but also those stretches of Trans-Nzoia which were forcefully taken from the community by the colonialists.⁸⁰ The expanded land interests echoed claims placed by the Saboot before the Carter Commission in 1932. The SLDF concentrated its activities in Kopsiro division where Chepyuk settlement scheme is located and in Cheptais where most of the SLDF commanders (including Matakwei) and majority of land claimants in Chepyuk III originally came from.⁸¹

86. The militia became involved in a variety of human rights abuses, including rape, torture, murder, abductions, and assaults. In February 2007, Matakwei had threatened that the SLDF would attack neighbouring areas if the government did not move swiftly to resettle squatters.⁸² As one witness told the Commission:

In 2007/2008 during the past elections, the SLDF came into Kimama and picked out people. There is a family that had all its members killed.⁸³

⁷⁶ TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/p. 22.

⁷⁷ TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/p. 23

⁷⁸ The group also used the name "ODM Boys" for a while but were told that they would embarrass the party. TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 13

⁷⁹ TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 23

⁸⁰ Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 24

⁸¹ See Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 23-24

⁸² TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 24

⁸³ TJRC/Hansard/Public Hearing/Kapsokwony/23 May 2011/p. 28

Membership, Leadership and Oath

87. The most prominent and widely-known member of the SLDF was Wycliffe Kirui Matakwei⁸⁴, the son of community elder Patrick Komon.⁸⁵ The militia included “within its ranks former army and police officers, such as David Sichei, who had been attached to the elite presidential security unit during President Moi’s administration and has been named by witnesses as the current leader of the militia. Sichei was reportedly responsible for military training for SLDF militiamen.”⁸⁶ Matakwei was killed in May 2008 in an operation carried out by the Kenyan army which apparently crushed the militia.⁸⁷
88. SLDF consisted of three distinct branches.⁸⁸ The first was a military wing headed by Matakwei. The second was a spiritual wing led by the Laibon (or spiritual leader), Jason Psongoywo Tirop, an 80-year old Soy. Psongoywo had the respect of locals and administered oaths⁸⁹. Psongoywo denies any involvement with the SLDF⁹⁰. The third was a political wing. This wing was the most difficult to pinpoint, and was also believed to be the source sustaining SLDF intellectually and financially. John Kanai acted as ‘its self-proclaimed spokesman’ but ‘many politicians have been linked to the militia’.⁹¹
89. Research emphasizes the prominent role that *laibons*—spiritual and ritual experts-- have played in war throughout the history of the Sabaot and other Kalenjin-speaking peoples.⁹² They are believed to possess extraordinary powers, though their influence has diminished in recent decades.⁹³ SLDF was no exception. Members of the militia took an oath of spiritual guidance administered by Jason Psongoywo the powerful and long-serving *laibon* who testified before the Commission. Mr. Psongoywo himself is somewhat reticent on his administration of the oath. Secondary literature has described him as being responsible for giving ‘combatants special charms, ostensibly to bind them to the SLDF cause and imbue them with supernatural powers that would protect them from authorities and

84 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/p. 20

85 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/p. 23

86 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/p. 28

87 The militia was neutralized by a joint police and military intervention known as “Operation Okoa Maisha” in March 2008. Nairobi Chronicle, “Kenya government celebrates death of rebel commander”, 18 May 2008, <http://nairobiChronicle.wordpress.com/2008/05/18/kenya-government-celebrates-death-of-rebel-commander/>

88 Ibid., p. 28

89 Ibid., p. 23 and 29

90 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 20

91 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 29

92 See for instance, P.K. Magut, “The Rise and Fall of the Nandi Orkoyoit, 1850 – 1957”, *Nairobi Historical Studies* 1 (1969), pp. 95 – 108.

93 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 27

enemy bullets during combat, making them invincible.⁹⁴ It has been speculated that belief in invincibility might explain why the group often informed its targets before strikes and also why it continued to gain young recruits despite prosecution by the state.⁹⁵

90. Most SLDF combatants seem to have operated from their own homes convening only when they had a specific operation to conduct. Upon completion of a particular mission, they melted back into the community which made it very difficult for security agents to track them down.⁹⁶ Only the leaders had defined bases of operation, 'such as caves on the forested mountain slopes.'⁹⁷ The combatants typically 'organized themselves in small groups of 10 to 12 people that made their movements difficult to detect.'⁹⁸
91. The SLDF was initially led by a single command structure but as the number of members grew bigger, it was subdivided into four camps each led by a commander.⁹⁹ Philip Tirot was the overall commander.¹⁰⁰ The Commission also received information that the SLDF established their own "courts" to judge and administer punishment of local area residents who failed to support the militia. One witness told the Commission of being taken before those courts several times; on one occasion, the court was presided by Matakwei himself.¹⁰¹
92. Membership in the group consisted mostly of boys and young men. Some of them were taken out schools.¹⁰² Others were abducted from their homes.¹⁰³ A number joined voluntarily, as they were told to defend their community.¹⁰⁴ Politicians were said to have supported the group and were involved in the political wing. Witnesses have told the Commission of a strong personal link between Wycliffe Matakwei and Fred Kapondi Chasebe. Several meetings have been reported to take place between Mr. Kapondi and important constituents of SLDF including initial founding meetings.¹⁰⁵ In subsequent meetings in 2005, planning allegedly took place for the murder of several people.¹⁰⁶

94 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 27

95 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 27

96 See Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya'p. 28

97 Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya'p. 28

98 Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya'. 28

99 Simba, Chui, Nyati and Headquarters camps headed by Fredrick Kituyi Chesaa, Kijiji Matia Itit, Samson Kanai and Philip Tirot respectively. See TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p.14

100 See TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p.14

101 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/pp. 7-8

102 TJRC/Hansard/Public Hearing/Kapsakwony/23rd May 2011/p. 10

103 TJRC/Hansard/Women's Hearing /24th May 2011/p. 9

104 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011

105 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 31

106 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 12



Sammy Cherobe who was injured on the arm during the clashes.

95. Mr. Kapondi has also been described as using the SLDF to facilitate his election in 2007 through intimidation of opponents and voters. As one witness put it, 'whoever opposed Kapondi would be killed or his house would be destroyed.'¹⁰⁷ The Commission received information on leaflets being distributed by SLDF on the eve of the election stating that any area that would register a high number of votes for PNU would be "dealt with"; an attack in which 18 people were killed in the Chesikaki area was allegedly in retaliation for voting for the 'wrong' candidate.¹⁰⁸ The house of a candidate for the Mt. Elgon seat, Mr. Sammy Chemwei, was set on fire by masked men armed with AK-47s, a hallmark of the SLDF. Mr. Chemwei told the *Daily Nation* that he had been attacked for refusing to step down for Kapondi.¹⁰⁹
94. As described above, Kapondi was incarcerated for nine months in 2007 managing to win the ODM nomination and the election from behind bars. It was reported to the Commission that Kapondi was allowed to remain in contact with the SLDF command while in prison and that senior ODM politicians such as Mr. Raila Odinga and Mr. William Ruto visited him on occasion and also may have sent him money. A witness told the Commission that Mr. Kapondi ordered the assassination of some people--including some members of Mr. Serut's family--by mobile phone.¹¹⁰ The Commission was not able to corroborate that information.

¹⁰⁷ TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/pp. 20-21

¹⁰⁸ TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p.22

¹⁰⁹ "Controversial man vows to win seat from prison", *Daily Nation*, 27 October 2007

¹¹⁰ TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 5

Financing and Connections with State Actors

95. SLDF has received financing from politicians,¹¹¹ but this financial assistance has been limited in its source, as the group largely sustained itself through looting, cattle rustling¹¹² and demanding taxes, food, and protection fees from local residents.¹¹³ The SLDF also created a taxation system for teachers.¹¹⁴
96. The Commission received information linking high ranking ODM party officials to Wycliffe Matakwei.¹¹⁵ There are allegations that John Bomet Serut, provided a small number of weapons to the SLDF in the initial stages of the creation of the militia,¹¹⁶ although he denies it. Fred Chesebe Kapondi, was also involved in the creation of the militia, although he also denies it.¹¹⁷
97. Mr. John Serut has also been linked to Moorland Defense Force and the Political Revenge Force, militias that were apparently established to respond to protect the Mosop and Serut's supporters respective against the SLDF onslaught and launch offensives against the SLDF.¹¹⁸ Mr. Serut is meant to have been close to members of the Sangulas; the family of a prominent Mosop *laibon* who provided spiritual inspiration and ritual protection for MDF fighters. The literature suggests that neither of these two groups seems have had much of an impact and any missions/operations that they launched were sporadic and limited in scope. Also, the witnesses may have erred in associating Mr. Serut with the Political Revenge Force. That was an entirely different group that did not feature in the Mount Elgon conflict. In March 2008 police raided the Kwanza farm of Mr. David Nakitare, the former Member of Parliament for Sabaoti.¹¹⁹ Two hundred young men calling themselves the Political Revenge Force were found training on the premises and a warrant was issued for Mr. Nakitare's arrest.
98. Serut has also been accused of trying to assassinate Kapondi and to have contributed, with the help of the Criminal Investigations Department (CID),¹²⁰ of fabricating charges for his arrest, in order to keep him out of the 2007 election campaign.¹²¹ Serut is reported acknowledging in public to have organised the killing of one of Kapondi's close collaborators, Absalom.¹²²

111. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 29. See also TJRC/Hansard/Women's Hearing/24 May 2011/p. 14

112. TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/p. 9-10

113. TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/p. 24 and 29. TJRC/Hansard/Women's Hearing /24th May 2011/p. 23

114. TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 13

115. TJRC/Hansard/In-Camera Hearing/Kimilili/25 May 2011/p. 32

116. Information was reported to the Commission that Matakwei announced the contribution from Hon. Serut in a public forum. See

TJRC/Hansard/In-Camera/Kimilili/25th May 2011/p. 13 and TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 25

117. TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p.20

118. Simiyu, *Militanisation*, p. 36.

119. "Police Sought Interpol's Help in Nakitare Hunt but he is still within". *Daily Nation*, 11th March 2008.

120. The DCIO Michael Kimiru has been named by witnesses before the Commission in relation to that incident.

121. TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 3 and p. 28

122. TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 32

99. The Commission received allegations of high ranking ODM officials¹²³ facilitating the purchase of food and a small number of weapons.¹²⁴ One witness told the Commission that an ODM official supported the SLDF as an instrument to attack political (PNU) opponents but that the support of ODM was gradually removed as the militia became more violent and unruly, and started killing civilians unrelated to the political fight.¹²⁵
100. Witnesses have also testified before the Commission on links between SLDF and the police. In several cases, informants have been killed after providing intelligence on SLDF, especially to the (Criminal Investigations Department)CID.¹²⁶

State Responses

101. As has been explained above, the descent into violence in Mount Elgon started in March and April of 2006 when the final list of Chepyuk Phase Three beneficiaries was published and posted at the District Commissioner's headquarters in Kapsakwony. Prior to this there had been isolated skirmishes and incidents. In June 2006 the SLDF announced itself with the splashy violent and brutal killing of a chief and assistant chief in the area. Mount Elgon then descended into the orgy of violence that the Commission has heard so much about in evidence and testimonies.
102. The security apparatus in Mount Elgon was very slow in getting to grips with the problem posed by the SLDF. The early characterization of the SLDF fighters as uneducated local thugs, hooligans and common criminals went some way to convincing the Kenya Government that the militia was first and foremost a security issue that could fairly easily be handled with the deployment of the regular police, administration police, general service unit officers and anti-stock theft officers. The Rapid Deployment Unit of the Administration Police unit was particularly prominent in these early operations.¹²⁷ These missions had limited and mixed results.
103. Prior to the inclusion of military personnel in the area in 2008, the police and the paramilitary police, the General Service Unit (GSU), launched several unsuccessful low-level security operations in Mt. Elgon targeting the SLDF forces.¹²⁸ These missions, however, were also riddled with allegations of human rights abuses, including beatings, looting and burning of houses and food granaries, raping of

123 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 35

124 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/pp. 15-16 and TJRC/Hansard/In-Camera/Kimilili/25th May 2011/p. 16

125 TJRC/Hansard/In-Camera Hearing/Bungoma/26th May 2011/p. 17

126 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 8-9

127 For more on the Rapid Deployment Unit, <http://www.administrationpolice.go.ke/aptrdu.php>

128 Human Rights Watch, *All the Men Have Gone: War Crimes in Kenya's Mt. Elgon Conflict*, at 27 (July 2008), available at <http://www.hrw.org/sites/default/files/reports/kenya0708webwcover.pdf> [hereinafter *Human Rights Watch Report 2*].

women and girls, indiscriminate arrests, extortion, and killings at the hands of the police.¹²⁹ There was a further spike in the Mount Elgon violence following the 2007 General Election. It was at this point that a decision was made to adopt the more militarily aggressive approach of *Okoa Maisha*.

Operation Okoa Maisha: Saving Lives?

104. In March 2008, the army moved into Mount Elgon. Kapkota, which lies a few kilometers north of Cheptais, became the main base; smaller bases were set up elsewhere on the mountain. The military continues to maintain a presence in Kapkota.
105. The military personnel identified were drawn mainly from two units: the elite 20 Parachute Battalion¹³⁰ and 1 Kenya Rifles Battalion¹³¹. The Kenyan General Service Unit (GSU) and regular police officers offered support. The end result was a mission that has been described as an 'extremely heavy handed'.¹³² In an attempt to flush out hiding SLDF members and hidden illicit weapons, the joint coalition of military, GSU, and police visited every village in the Mt. Elgon area, rounding up thousands of men and boys aged from ten and above.¹³³ It is alleged that the joint forces then tortured and unlawfully detained the Mt. Elgon residents, and there are also reports that an undetermined number were killed or disappeared.
106. Despite the reports that human rights abuses had occurred, the government largely considered the operation a success in subduing SLDF. The Ministry of State for Defence stated that when the operation ended, large quantities of weapons had been recovered, the leaders and members of SLDF had been identified and arrested, and that the people of Mt. Elgon 'were appreciative of the efforts made by the Army to rid them of the menace of SLDF that had dogged them for so long'.¹³⁴

129 Kenya National Commission on Human Rights, *The Mountain of Terror: A Report on the Investigations of Torture by the Military at Mt. Elgon*, at 10 (May 2008), available at <http://www.scribd.com/doc/6337545/KNCHR-Report-on-the-Mt-Elgon-Violence> [hereinafter *KNCHR Report*].

130 20 Parachute Battalion is the only commando unit in the Kenya Army that is trained in counter-terrorism tactics by both the United States and the UK-based "Operation Monogram." Operation Monogram provides counter-terrorism training and equipment to foreign security forces in parts of the world that the British Government sees as threatening or breeding extremism. Because of its shared border with war-torn Somalia and its own experiences with terrorist attacks, particularly the US embassy bombing in 1998, Kenya was one of the first beneficiaries of this program. After the allegations of human rights abuses at Mt. Elgon came to light, Human Rights Watch specifically called on the British Government to stop training Kenyan security forces. Ben Rawlence, *Trained in Terror*, Human Rights Watch (July 30, 2008), available at <http://www.hrw.org/en/news/2008/07/29/trained-terror>.

131 There are conflicting reports with regard to the exact number of troops deployed on the mission. While the District Security and Intelligence Committee (DSIC) stated that the mission was composed of about 400 security force members, including 120 from the 20 Para Battalion, the Chief of General Staff and the Assistant Minister for Defence stated that they deployed approximately 300 soldiers from the Alpha Companies of both the 20 Parachute Battalion and the 1 Kenya Rifles Battalion. Special Rapporteur on extrajudicial, summary or arbitrary executions, *Addendum: Mission to Kenya*, ¶ 48, U.N. A/HRC/11/2/Add.6 (May 26, 2009) [hereinafter *Special Rapporteur Report*].

132 *Human Rights Watch Report*, (n 128 above) 2-3.

133 *Human Rights Watch Report* (n 128 above) 2.

134 Kenya Ministry of State for Defense, *Operation Okoa Maisha* (2010), available at http://www.mod.go.ke/army/?page_link=okoa%20maisha.

Military Accountability

107. Although government spokespeople have referred to *Okoa Maisha* Operation as a 'joint police-military operation'—a term which has encouraged both the military and the police to attribute fault to one another—recent reports and interviews suggest that the military was in control of the operation.
108. In investigating the logistics of the operation and the chain of command, the Special Rapporteur on extrajudicial, summary or arbitrary executions questioned various Kenyan officials during a country visit in 2009. The Mt. Elgon District Security Intelligence Committee (DSIC) informed him that the operation was directed by the Western Province Provincial Police Officer, and that he directed both the police and the military.¹³⁵ They said that the police were responsible for arrests and interrogations, and that the military involvement was limited to providing vehicles to transport suspects and helping cordon areas in which the police carried out arrests.¹³⁶
109. Although the DSIC's account, as well as that of the government, portrays the army's role to primarily provide security to police units conducting search operations, witnesses and victims interviewed about the human rights abuses confirmed that those who passed through Kapkota were arrested by men in military uniform and transported in military trucks to Kapkota where soldiers were responsible for beatings and interrogations. Those interviewed specifically used the word "jeshi," which is the Swahili word meaning army soldier, as opposed to "askari" meaning an armed guard.¹³⁷ Victims and witnesses also described the men who arrested them as dressed in full military fatigue, wearing the black and navy berets of the army rather than the red berets of the GSU.¹³⁸
110. The Special Rapporteur on extrajudicial killings was also provided with credible information from citizen informants who worked directly with the military that members of the army were involved in abuses at the search stage of the operation.¹³⁹ An intelligence officer working with the military at the camps also described a very different chain of command from that detailed by the Kenyan Government in an interview with Human Rights Watch. The intelligence officer said that while many police were present at the camp in Kapkota, they were all dressed in military uniforms and taking orders from the military commander. He described the military as "firmly in control" of operations at Kapkota and

135. Special Rapporteur Report (n 131 above) para 49.

136. *As above*.

137. Human Rights Watch (n 128 above) 41.

138. *As above*.

139. Special Rapporteur Report (n 131 above) para 459.



Moses Okoit weeps as he recounts how he was tortured by security forces during Operation Okoa Maisha in Mt. Elgon

Chepkube. He also stressed that while orders passed directly from Nairobi to the military commander, Col. Boiwo, or the Provincial Commission, Abdul Mwasserah, *it was always the military commander that acted as the effective head of the operation on the ground.*¹⁴⁰ Finally, the army had control over the everyday operations of the mission as “the one in charge of combat operations, and the principle supplier of logistics in terms of trucks, jeeps, arms, and helicopters.”¹⁴¹

111. In consideration of these reports and interviews, it is clear that the military was in operational command over the purportedly “joint” mission. This chain of command suggests that not only did the commander of the military, Col. Boiwo, know what was taking place during the round-up in the villages and later at the camps, but he also played an active role in allocating orders that led to the alleged human rights abuses.
112. Requests for answers from the Kenya Defence Forces by the Commission were never responded to.

¹⁴⁰ As above at 41 [emphasis added].

¹⁴¹ *Id.* at 42.

Human Rights Violations and Operation Okoa Maisha

113. In recent years, numerous human rights organizations have reported on Operation Okoa Maisha. The reports and interviews conducted by Médecins Sans Frontières, Human Rights Watch, Independent Medico-Legal Unit, the Kenya National Commission on Human Rights, Mwatikho Torture Survivors Organisation, and Western Kenyan Human Rights Watch all reveal similar human rights violations that occurred during the initial round-up, at the military camps, and in the aftermath of the operation.
114. Commission's hearings and statements received from residents of Mt. Elgon region confirmed most of the findings of these reports. Other chapters of this Report record the nature and extent of such violations in detail.

Silences

115. Operation Okoa Maisha has been placed behind a wall of silence. The Commission's interactions with military were difficult; requests for reports, documentation and appointments went largely unanswered. Part of the problem, the Commission believes is found in the profile of the lead Kenya Army Battalion involved in Okoa Maisha. The 20th Parachute Battalion is, by some distance, the best trained and supported unit of the Kenya Army. As has been mentioned above, 20th Para has for the past decade been the focus of British, American and Israeli efforts to improve the ability of the Kenya military to respond to terrorist activity.
116. The importance and the centrality of 20th Para to the Kenya Army and the Kenya Government made it difficult to fully expose the Battalion's activities in Mount Elgon. Inquiry was further complicated by diplomatic interventions. On the 8th of August 2008, a diplomatic cable originating in London was sent out to a number of top-level intelligence organisations such as the CIA.¹⁴² The contents of this cable (subsequently made public through the Wikileaks) suggest that because of allegations made about 20th Parachute Battalion, the United Kingdom was reconsidering the battalion's participation in Operation Donzel and Operation Monogram. The British considered a number of options. One suggestion was

¹⁴² London Wikileaks. Kenya/CT: UK Reconsiders Counterterrorism Training Program Following Accusations of Human Rights Violations, The Telegraph, 4th February 2011. <http://www.telegraph.co.uk/news/wikileaks-files/london-wikileaks/8304711/KENYACT-UK-RECONSIDERS-CT-TRAINING-PROGRAM-FOLLOWING-ACCUSATIONS-OF-HUMAN-RIGHTS-VIOLATIONS.html>

to include 'human rights components' in the training offered to the 20th Para.¹⁴³ Another suggestion was to wait to see how the Kenyan courts handled the cases filed by victims.

117. Especially interesting is the Government's reaction to the concerns raised about 20th Para's behaviour and conduct in Mount Elgon. Kenyan authorities assured the British—and this is critical—that 20th Parachute Battalion had *not* committed any human rights violations during their pursuit of SLDF fighters. The government blamed *another* unnamed unit based near 20th Para. The Kenyan Government then assured the British that the military was addressing the problems. This may have gone some way to leading the Kenya Desk at Operations Donzel and Monogram to observe that there was no 'concrete evidence' behind the allegations. The Commission has come to the conclusion that there have been high level tactical and strategic attempts to shield 20th Parachute Battalion from allegations of human rights violations.

Impact

118. It was difficult for community members to distinguish SLDF fighters from government security agents because they deliberately wore very similar uniforms. This enabled the group to invade homes, attack and harass individuals, and extort money and property.¹⁴⁴ Furthermore, because most SLDF combatants operated from their own homes, they remained integrated in the community.¹⁴⁵ This gave the militia a certain intimacy and closeness with the people that they violated and preyed upon. Residents were threatened and remained fearful of retribution if they revealed information regarding the identity of combatants and activities of the group.¹⁴⁶
119. Over 600 individuals had died as a result of the conflict, and roughly 66,000 had been displaced by 2008.¹⁴⁷ Families have been separated and the education of thousands of pupils disrupted.¹⁴⁸ Furthermore, the economy suffered greatly due to disruptions to the farming environment because of displacement. This caused a negative impact on "food security, food prices, and nutrition in the district and beyond."¹⁴⁹

143 London Wikileaks. Kenya/CT: UK Reconsiders Counterterrorism Training Program Following Accusations of Human Rights Violations, The Telegraph, 4th February 2011

144 TJRC/Hansard/Public Hearing/Kapsakwony/25th May 2011/p. 18

145 Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 28

146 TJRC/Hansard/Women's Hearing/Kapsakwony/24th May 2011/p. 4

147 TJRC/Hansard/Women's Hearing/Kapsakwony/24th May 2011/p. 3

148 TJRC/Hansard/Public Hearing/Kapsakwony/23rd May/2011/p. 47.

149 TJRC/Hansard/Public Hearing/Kapsakwony/23rd May/2011/p. 47.

120. The Commission has received many testimonies of victims of SLDF attacks. The violations committed included murders, torture and sexual abuse. Several witnesses also spoke of beheadings¹⁵⁰, forced circumcisions¹⁵¹ and cutting of ears¹⁵². As one witness told the Commission:

They came into the house, they took my husband away and slaughtered him outside. As they were slaughtering him, he was crying and yelling, then one person said my husband should pray since his last day had come. When he finished praying, they killed him and dumped him there.¹⁵³

121. A witness testified as follows concerning the killing of her aunt by SLDF:

It was on a Monday at 3:00 pm and I was sitting with my Auntie. About 15 men came. They started beating us and took us to Chebyuk Forest. They tied our hands behind us and beat us all the way to the forest. When we were about to reach the forest, they told me to sit down and made my Auntie lie down. They then slashed her.¹⁵⁴

122. Another witness talked about how she was gang-raped by SLDF men in 2007 on her way to her house:

We reached a place and then they started raping me. I can remember very well that they were four men. [...] After finishing they woke me up. [...] We went on. [...] They put me down again and started raping me again. I was really injured and traumatised.

123. She was unconscious for some time. When she woke up, the men came back and tried to get her to stand and walk:

When I fell down, another one came from nowhere and urinated on me. [...] He forced me to swallow the urine. I swallowed it.¹⁵⁵

124. She was later disowned by her husband on the perception that she had contracted HIV from the rapes. Another witness told the Commission that:

On Sunday, 17th September 2006, in the evening, the SLDF came to my door and knocked. They entered and pointed guns at me. [...] they beat my husband and children. They also beat me up. [...] They slaughtered my son. They went with my husband and shot him six times at the back. They cut his head, his private parts and hands.¹⁵⁶

125. That witness was later displaced and is now forced to provide alone for her ten children. Attacks on teachers and the imposition of the heavy taxation system

¹⁵⁰ TJRC/Hansard/Women's Hearing/Kapsakwony/24th May 2011/p.11 and TJRC/Hansard/In-Camera/Kimilili/25th May 2011/p. 7

¹⁵¹ TJRC/Hansard/Women's Hearing/Kapsakwony/24th May 2011/p. 13

¹⁵² TJRC/Hansard/Women's Hearing/Kapsakwony/24th May 2011/p. 18

¹⁵³ TJRC/Hansard/Public Hearing/Kapsakwony/24th May 2011/p. 15

¹⁵⁴ TJRC/Hansard/Public Hearing/Kapsakwony/24th May 2011/p. 53

¹⁵⁵ TJRC/Hansard/Public Hearing/Kapsakwony/24th May 2011/page 28-30

¹⁵⁶ TJRC/Hansard/Women's Hearing/Kapsakwony/24th May 2011/p. 4



A woman telling her story to the Commission during the Mt. Elgon site visit

by the SLDF have caused many to leave the Mt. Elgon area. This has resulted in shortage of teachers, as recounted to the Commission by a witness:

I buried eight teachers and 30 pupils. Many of my teachers were punished. Many of them were given 200 canes. Sometimes, six inch nails would be used to sew up lips. It made teachers to flee this land. Up to now they have not come back. The shortage you are seeing is a result of that. Six schools were closed down and up to this time, they are still closed.¹⁵⁷

128. Several witnesses have indicated to the Commission that individuals connected with the SLDF and former SLDF fighters still represent a threat to security in the Mt. Elgon area. For example, David Chemaimak Sichei has been reported to be the current commander of the SLDF and is allegedly currently located in

¹⁵⁷ TJRC/Hansard/Public Hearing/Kapsakwony/25th May 2011/p. 10

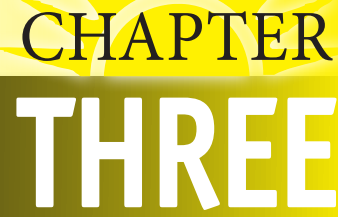
Uganda.¹⁵⁸ Witnesses were concerned about questions of re-formation and re-emergence of the militia because of continued failure to capture and try men like Sichei.

Conclusion

127. The Mount Elgon conflict is at once unique and typical. For the Commission its uniqueness comes from the fact that the region is home to a very particular mix of ethnicities, historical and contemporary experiences that cannot be reproduced. It is this unique combination that in turn gave rise to the Sabaot Land Defence Force (SLDF). The militia and the state's attempts to quash it are unprecedented. For all its uniqueness, however, Mount Elgon sits within an identifiable trend in modern Kenyan history: the inherent instability and disruptive potential of issues surrounding ethnicity, land and politics. The forces that eventually pulled Elgon are by no means limited to the mountain. They feature throughout the country and carry with them the capacity to manifest with similar violence and chaos.

¹⁵⁸ TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 14 and p. 29





CHAPTER THREE

Healing and Reconciliation

Introduction

1. Kenya's history has been characterised by tragic episodes of gross violations of human rights. Most of these atrocities were committed between 1963 and 2002 during which Kenya African National Union (KANU) was at the helm of power. KANU, the independence party, and under the leadership of President Jomo Kenyatta and later President Daniel Arap Moi, created an authoritarian, oppressive and corrupt state. It created a traumatised nation of thousands of individuals living with physical and psychological wounds in a country that had no time or space for their experiences and stories. Indeed, for decades, Kenya has remained a nation in which communities stand divided along ethnic and regional lines suspicious and distrustful of one another. Over the decades feelings of inter-communities distrust, even hatred, have festered mainly because a myriad of issues which are at the core of nation building have largely remained unresolved. These issues include land problems, inequality and regional imbalances, and impunity combined with a lack of transparency and accountability. These issues have eroded a sense of belonging, nationhood, and public trust in political and governance institutions.
2. Since independence, successive governments have employed silence, denial and selective amnesia whenever individuals and agencies have raised the need to address these fundamental issues. Painful memories of have being passed from one generation to another, and as a consequence, present generations continue to hold grudges for violations and historical injustices meted against

their forefathers and mothers. Until now, the scale and impact of human rights violations and historical injustices have neither been fully acknowledged nor sufficiently addressed. This has in turn nurtured an atmosphere of latent tension, hatred and suspicion among individuals and communities. This tension flared up in December 2007 following the declaration of the results of the Presidential Election. The outcome was an unprecedented tragedy in Kenya's history: a violent conflict in which an estimated 1,133 people died while approximately 650,000 were displaced from their homes and property worth billions of shillings destroyed through arson and other forms of attacks.

3. In the aftermath of the 2007/2008 Post Election Violence, the Truth, Justice and Reconciliation Commission was established and mandated to 'promote peace, justice, national unity, healing and reconciliation among the people of Kenya'.¹ Upon establishment, the question that starkly confronted the Commission was this: how can healing, reconciliation and national unity be fostered so that all the Kenyan people can be mobilized towards a common vision and future; a future characterised by a shared national identity, and common values and aspirations as captured in the words of the National Anthem? This Chapter is a synthesis of the feelings of Kenyans concerning the critical issue of national unity, healing and reconciliation.

Mandate and Conceptual Issues

4. The Commission mandate relating to the promotion of national unity, healing and reconciliation was outlined in several provisions of the Truth, Justice and Reconciliation Act (TJR Act). Firstly, the Commission was required under section 5(g) of the Act to 'provide victims, perpetrators and the general public with a platform for non-retributive truth telling' in the hope that such a conversation 'would chart a new moral vision' and ultimately lead to reconciliation. Secondly, section 5(j) of the Act required the Commission to provide 'repentant perpetrators or participants in gross human rights violations with a forum to confess their actions as a way of bringing reconciliation'. Further, the Commission was mandated under section 6(s) of the TJR Act to 'inquire into the causes of ethnic tensions and to make recommendations on the promotion of healing, reconciliation and coexistence among ethnic communities'. Finally, under Section 6(j) of the Act, the Commission was mandated to 'investigate any other matter that it considers requires investigation in order to promote and achieve national reconciliation'.

¹ Truth, Justice and Reconciliation Act, sec 5 [Hereinafter TJR Act].

5. In the course of its work, two competing interpretations regarding the Commission's reconciliation work emerged. There are those who expected the Commission to actually reconcile warring communities and individuals. In this regard, the success of the Commission's work lied in the actual reconciliation between a perpetrator and a victim or between warring communities. Another view was that the Commission's role was to promote and contribute to reconciliation. In other words, the Commission's processes were seen as a platform for beginning the process of reconciliation between individuals and communities. The Commission inclined towards the second view. Although it was and is desirable to see actual reconciliation between individuals and communities, the Commission recognised that meaningful reconciliation is not an event, but rather a long process and that the decision to reconcile is a personal decision, aimed at setting the stage and establishing the basis for the beginning of a reconciliation process. Accordingly, the Commission worked towards ensuring that its activities in the course of its life and the result of its work would substantially contribute to the process of reconciliation.
6. In essence, reconciliation is a complex concept. As the South African Truth and Reconciliation Commission learnt in its work, reconciliation is not only a highly contested concept, but it also has no simple definition.² As such, it was satisfied, justifiably so, with outlining the essential elements of reconciliation rather than defining the term. The elements it identified include that: reconciliation is both a goal and a process; it is experienced at different levels (intra-personal, inter-personal, community and national); and that reconciliation has linkages to redistribution in terms of material reconstruction and the restoration of dignity. Similarly, the Sierra Leone Truth and Reconciliation Commission conducted its reconciliation work on the premise that 'there is no universal model of reconciliation that can apply to all countries'.³
7. The Commission took a similar approach which it spelt out in its Reconciliation Policy. The Commission understood reconciliation to be a process rather than an event. It is a process undertaken by individuals who have committed or suffered violations and as such can be intensely private and personal. It is also a process that can be encouraged and even undertaken at the community and national level. Thus, the Commission saw its role in relation to reconciliation as that of laying the foundation for a long-term process. This approach finds validity when one considers the products of the KNDR negotiations.

² *Report of the South African Truth and Reconciliation Commission, volume one* (1998) 106.

³ *Report of the Sierra Leone Truth and Reconciliation Commission, volume 3B* (2004) 433.



The late NCIC Vice-Chair, Ms. Mary Onyango addressing the Stakeholders Consultative Workshop in Naivasha

8. The KNDR team wisely laid the foundation for the creation of two institutions to further reconciliation: this temporary Commission and the permanent National Cohesion and Integration Commission (NCIC). Entrusting reconciliation in a permanent commission dedicated to national cohesion acknowledges that reconciliation is not only a process, but a continuous process. Reconciliation, like freedom, democracy, national unity and many other fundamental values to which modern Kenya aspires, must always be nurtured and cared for. This Commission, therefore, does not claim to have achieved reconciliation for the nation. Rather, the hope of the Commission is that by uncovering the truth, providing a forum for individuals to share their experiences and by providing some accountability, the Commission will have placed the nation on a path to further reconciliation and national cohesion and unity.
9. As discussed in detail in the Chapter on Interpretation of Mandate in Volume 1 of this Report, the Commission acknowledged that truth, justice and reconciliation are interconnected and interrelated. These three factors work towards mending relationships. As was well explained to a witness by Commissioner Ronald Slye during one of the Commission's hearings:

[y]our ultimate goal is peace, national unity and reconciliation. This Commission is dedicated to furthering the process of national unity and reconciliation. But it is so eloquently stated that in order to have reconciliation, one needs to have some form of justice. If her water bottle has been taken from her, it needs to be returned or some compensation or reparation needs to be provided, but, of course, in order to have justice, one needs to know the truth to understand what happened and why it happened, the context in which it happened and who was responsible for this happening.⁴

Policy on Reconciliation

WHEREAS, the objectives and mandate of the Truth, Justice and Reconciliation Commission (TJRC), are set out in sections 5 and 6 of the Truth, Justice and Reconciliation Act no 6 of 2008 (TJR Act) respectively; and

WHEREAS, section 5 of the TJRC Act identifies national unity, healing and reconciliation as two of the five objectives and goals to be pursued by the TJRC; and

WHEREAS, section 6 of the TJRC Act grants the TJRC all powers necessary to fulfil its mandate; and

WHEREAS, the TJRC is mandated specifically by section 6 (s) to inquire into the causes of ethnic tensions and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities; and

WHEREAS, TJRC is required to provide space to both victims and perpetrators of gross violations of human rights to tell their stories; and

WHEREAS, section 42 read together with sections 2, 5(2), 6(2) empower the Commission to investigate, receive information and propose policies, measures and ways to the government by which identified victims of gross human rights violations can be redressed; and

WHEREAS, the TJRC is required to create an accurate and complete historical record of gross violations of human rights;

WHEREAS, the TJRC will make recommendations in relation to memorialisation;

THE TJRC HEREBY DECLARES:

1. The limited peace and harmony, justice and unity among Kenyans are attributable in part to the gross violations of human rights including tortures, assassinations, detentions, marginalisation and other serious socio-economic violations suffered by sections of the Kenyan population.
2. Reconciliation, national unity and healing are critical components of the mandate and three of the five key goals of the work of the Commission. As suggested by the name of the Commission, reconciliation is one of three key tasks assigned to the TJRC.

4 TJRC/Hansard/Public Hearing/Kisii/St.Vincent Catholic Centre/20 July 2011/p. 15

3. The objectives of reconciliation, national unity and healing are integrated in various activities of the TJRC, including statement taking, hearings, community dialogues, amnesty process and the final report. Therefore, the work of the Reconciliation Committee cuts across several units, and committees.
4. The TJRC understands reconciliation as a complex term that includes several relationships, levels and actors. In the English language, 'reconciliation' can connote: understanding, bringing together, reunion, compromise or squaring off. The various levels or 'types' of reconciliation include: intra-personal reconciliation; inter-personal reconciliation; inter-community reconciliation; and national reconciliation.
 - 4.1. Intra-personal reconciliation refers to the situation where an individual arrives at an accommodation with their situation and circumstances after the violation. For a victim, knowing the truth can bring closure, and in some cases, the understanding that they find themselves with a new situation that they have to cope with and move forward (e.g. disability brought about by a violation).
 - 4.2. Interpersonal reconciliation relates to reconciliation between specific victims and perpetrators. Knowing the truth about who did what, the whereabouts of bodies etc., can be a critical first step to reconciliation.
 - 4.3. In a context where inter-ethnic rancour and disharmony triggered by the struggles for power, resources, identity etc., has underpinned or facilitated some gross violations of human rights, the mending of social relations is an important goal for the TJRC. Communities include ethnic, religious groups and other groups. The TJRC will facilitate dialogues and other activities that commence the process of inter-community reconciliation.
 - 4.4. Healing is closely linked to reconciliation. The idea of healing invokes the idea of remedy, restoration, repair, mending. National healing will entail attending to and restoring social relations in communities and inter-ethnic relations. At a personal level, healing will take various dimensions, but begins with acknowledgement, restoration of dignity (reparations, apology).
5. Reconciliation is both a goal and a process. As a goal, it is a long term goal. The TJRC should not be expected to reconcile Kenyans at the end of its term: it will initiate dialogue and lay the groundwork, together with other relevant bodies (e.g., NCIC) for long term processes of reconciliation. As a process, rather than an event, it will occur in various sites and activities. It will involve numerous actors, and the TJRC is but one of these.
6. Informed by comparative experience and our own context, the TJRC places emphasis on the conceptual and practical links between reconciliation & national healing and justice, which includes redistributive justice, retributive justice and reparative justice. The goal of reconciliation at various levels will remain elusive unless those who have suffered are restored and repaired; unless those who were excluded are included in meaningful ways; and unless those in dire want as a result of marginalization are materially enabled to move forward.

7. The TJRC recognises the complex relationship between reconciliation, national healing and truth. While closure for victims and the ability to address violations of the past and prevent repetition of gross violations begins with knowing the truth about past events, truth telling may open wounds in ways that slow or impede reconciliation and healing especially at a personal level. The TJRC will engage with this paradox constructively in various activities.
8. The notion of truth is complex, and includes versions or types of truth: personal or narrative truth (personal versions of truth by witnesses, including victims and perpetrators); factual or forensic truth (the product of investigations, verification and corroboration); social truth (the product of dialogue, interaction, discussion and debate; and healing and restorative truth.
9. To achieve the goal of reconciliation, the TJRC puts emphasis on facilitating and/or recommend the following things
 - a. Dialogues and spaces for exchanges by and around individuals, communities and institutions
 - b. Truth discovery through confessions and other means in order to establish an accurate and complete historical record
 - c. Public acknowledgement violations and responsibility coupled with contrition and apologies, by individuals but also institutional and national leaders
 - d. Forgiveness (inter-personal; inter-community; state-community; state-individuals)
 - e. Ensuring accountability of individuals and institutions through: reparations (including restitution, compensation, memorialisation); and prosecutions
 - f. Restoring dignity of victims, through public acknowledgement, reparations and prosecutions.
 - g. Institutional reforms

Reconciliation Activities

10. The Commission's reconciliation activities were spearheaded, at the Commissioners' level, by the Reconciliation Committee established in terms of section 22 of the TJR Act, and at the Secretariat level, by the Department of Civic Education and Outreach.
11. In preparation for rolling out reconciliation activities and particularly to ensure the participation of relevant stakeholders in such activities, the Commission convened two meetings in March 2011. On 3 March 2011, the Commission held a Consultative Prayer Breakfast with religious leaders in Nairobi. This was followed a week later by a three-day Stakeholders Consultative Workshop in Naivasha.
12. In February 2012, the Commission hosted a Reconciliation Consultative Meeting which brought together various stakeholders including experts, governmental



Participants attending a Reconciliation Consultative Meeting hosted by the Commission in Naivasha

bodies and civil society organizations working in the field of peacebuilding and reconciliation. The outcome of this meeting was the establishment of a Reconciliation Reference Group which worked together with the Commissioner in conducting its reconciliation activities, especially the countrywide reconciliation forums.⁵

13. The Commission also initiated working relations with both governmental and non-governmental organisations including with the National Cohesion and Integration Commission (NCIC) and the National Steering Committee on Peace Building and Conflict Management (established within the auspices of the Ministry of State for Provincial Administration and Internal Security). The Commission's working relationship with the NCIC resulted in the formation of a Joint Task force on National Healing and Reconciliation composed of Commissioners and staff from the two commissions. Unfortunately, activities which the Joint Taskforce had planned to carry out never took off.

⁵ The members of the Reconciliation Reference Group were drawn from, inter alia, the following organizations and institutions: Nairobi Peace Initiative –Africa; Change Agents for Peace International Initiative; COPTRE; Peacenet; Kenya Inter-religious Consortium; Prophetic prayers Network; Bunge la Mwanainchi Human Rights Group; Kenya Correspondents Association; Kibera Women for Peace & Fairness; Daystar University; Ministry of Justice; KIRAC; National Steering Committee; Chemi Chemi ya Ukweli; Coalition For Peace in Africa; Jesuit Hakimani Centre; National Cohesion and Integration Commission; SUPKEM; Positive Peace Initiative; Nairobi School of Theology; PACT Kenya; Catholic Peace and Justice Commission; National Council of Churches; Refugee Consortium of Kenya; Damietta; Usalama Forum; and Refugee Consortium of Kenya

14. In 2011 and 2012, the Commission supported and participated in several reconciliation activities organized by other stakeholders.

Countrywide Reconciliation Forums

15. From 9 to 20 March 2012, the Commission held a total of 10 reconciliation forums around the country. The forums were held in Mombasa, Garissa, Isiolo, Machakos, Nyeri, Eldoret, Nakuru, Kakamega, Kisumu and Nairobi. The forums served as avenues to:
 - Listen and understand the meaning of reconciliation for communities in different regions of the country;
 - Find out specific issues in each region that bring about tension, hostility, hatred and conflict.
16. The forums also gave communities the opportunity to suggest specific options and solutions to problems and issues affecting them. They were able to share their dreams about the Kenya they want and to recommend ways of promoting healing and reconciliation in their regions and ultimately in the whole of Kenya.

Workshops on Trauma Healing and Strategy Formulation

17. Between December 2012 and March 2013, the Commission organized a series of workshops on trauma healing and strategy formulation. The workshops were held in Cheptais, Eldoret, Mombasa, Kilifi, and Kwale. The objectives of these workshops were to: assess levels of healing and reconciliation in selected communities; identify local actors who could then spearhead trauma healing and reconciliation; and explore local mechanisms for healing and reconciliation.

Healing and Truth Telling

18. The Commission provided victims, perpetrators and the general public with a platform for non-retributive truth telling. In all its activities, particularly during its public hearings, the Commission appealed to the general public not only to be at peace with their neighbours but also to work towards national unity and reconciliations. Various commissioners, as demonstrated below, made extensive remarks in this regard:

What I am here to say as Mama has so eloquently said before is that, in order for people to start to think about reconciling, they need to know what happened. They need to know who did what and then they need some form of justice, some form

of reparation. So, all that I would like to humbly request here is that those of you who are familiar with these conflicts and are familiar with individuals, maybe some of whom are here in this room and were involved in that conflict, to reflect upon where we are today and to reflect upon the need expressed here by many of you for national unity and reconciliation and to take advantage of this Commission to come forward to us, either publicly or privately, talk to us about what you saw, what you experienced and what you did [...] Everybody needs to step up. Everybody needs to take the risk. One takes risks easily for conflict; one also needs to take risks for peace and so this is just a humble plea for those of you who are here. I know you are here because you want peace, because you want national unity and because you want reconciliation. We ask you to take advantage of this process and of this Commission because if you do so, I can assure you that we will do everything within our power and abilities to assist you to reach that goal.⁶

19. For the vast majority of victims and witnesses, the oral testimony they gave before the Commission marked the first time they had spoken publicly about their pain, anger and suffering. Many of these individuals said that the Commission was the first public agency to show concern for their situation. Calvin Okeyo Ogutu, former army officer accused of taking part in the 1982 attempted coup stated:

For 30 years we have kept mum and some people have been telling our story. This is the first time that we have been given an opportunity to say exactly what happened, and especially those things that affected us.⁷

20. Similar sentiments were shared by the family of the late J.M Kariuki. Anthony Kariuki, while testifying on the effect the assassination of their father, JM Kariuki, had on their family had the following to say:

But imagine for once we are finally being given a chance to address the public nearly 40 years of wrongs. How late can we learn that this one chance in the aforementioned 40 years for a family of the JM Kariuki to have a public sanction hearing.⁸

21. For some of the victims, they had been approached by many previous commissions but the Commission was the first to give them audience. While recounting the horrific accounts of violations that they or their relatives or friends suffered, one of the survivors of the Wagalla Massacre observed:

If you [the Commission] are taking statements, I have written ten statements before but nobody did anything for me. This is the first time I have been told to talk openly about it and I thank you very much for that.⁹

⁶ TJRC/Hansard/Public Hearing/Kisii/St.Vincent Catholic Centre/20 July 2011/p. 25

⁷ TJRC/Hansard/Thematic Hearing /Attempted Coup/21 March 2012/p.23

⁸ TJRC/Hansard/ Thematic Hearing/Political Assassinations/ 5 March 2012/p. 28

⁹ TJRC/Hansard/Women's Hearing/Wajir/19 April 2011/p. 4



Secondary victims of Wagalla massacre at NHIF auditorium for Wagalla massacre hearings.

22. The hearings also served as an opportunity for some of the victims to not only speak out about their experiences but also a chance to tell the younger generation, which were mostly unborn at the time of the violation, what the victims went through at the hand of government agencies. It was a chance to write/rewrite history. In his testimony, Mr. Samuel Nyang'au Nyanchiengo stated:

I am very grateful because today I have been given a chance to speak the truth on how we were tortured in 1982. Most of you had not yet been born but it is good for you to know what happened.¹⁰

23. For other victims, it was an opportunity to relief their pains and shed off the social stigma that they had endured. As an example, Omar Qutara was arrested in 1982, detained, tortured and later sentenced to three years imprisonment for allegedly participating in the aborted army coup. For close to 30 years following his release from prison, he lived with the shame of being referred to as a 'rebel' or 'fugitive'. His children also suffered stigma as their father was publicly accused of being

¹⁰ TJRC/Hansard/Public Hearing/Kisii/20 July 2011/p. 57

'baba yao ni msaliti' (their father is a rebel). His eloquent and detailed testimony before the Commission was the first time that he had publicly spoken about his experience, and in conclusion, he was grateful for that opportunity. He said:

I can sleep today. I am a little relieved. That was the major problem. I wanted many people to come here because many of them call us fugitives or rebels here in town. I am sure they have heard it today with their own ears.¹¹

24. Not all of the victims who testified before the Commission experienced healing and reconciliation. For some of those victims, their experiences were too painful and grave that nothing, including narration and compensation, would make them feel better. Following the Commission's thematic workshop on the media, for instance, a survivor of the *Mwakenya* crackdown questioned not only 'the rationale of us as a nation re-living these horrors' but also 'the whole meaning' of the Commission. Another victim told the Commission that:

When I think about those issues, I feel so bad. I do not see the reason why we should talk over such issues, because it will not help me. I do not have any children. One of my ears cannot hear. I do not have any property. My son, who was a man, died because there was nobody who could take care of him when he was sick. I failed to get another person, who is a man, who will now inherit my wealth. Even if I talk from here, I do not know whether the Government that can really help somebody. What is the importance of all these discussions as we sit here?¹²

25. In most forums, it is the adult victims that usually got an opportunity to narrate their experiences. Some of them had suffered violations during their childhood and had carried painful memories into their adulthood. For instance, June Ndambuki, whose father was tortured and detained on allegation of his involvement in the 1982 attempted coup, narrated her struggles to come to terms with the torture, detention and dismissal from active service of his father. She had the following to say in relation to the subject of reconciliation:

We lost a lot of opportunities as children because my Dad had to balance to take care of us and to take us to school. Of course, he wanted us to go to the best schools in the nation but that was not possible because he went from one job to another, at one point, he had to start a business, which did not take off because he was not prepared for it. Just like the Swahili people would say: "*Maji yakimwagika, hayazoleki* or spilt milk can never be recovered." We cannot recover! Even if we asked for compensation as children, we cannot be compensated for the opportunities we lost. I am sure reconciliation can be reached, but who is to blame? Can they come into public and apologize and even explain to us why all these happened? [...] I believe reconciliation is a process. Can we start somewhere by understanding who is to blame and then move forward to the next level?¹³

¹¹ TJRC/Hansard/public Hearing/Marsabit/4 May 2011/p.38

¹² TJRC/Hansard/Public Hearing/Kapenguria/14 October 2011/p. 17

¹³ TJRC/Hansard/Thematic Hearing/Attempted Coup/12 March 2012/p. 34.

Reconciliation and Forgiveness

26. The process of truth telling is critical in the search for healing and reconciliation. As the individual narrative is shared collectively, a gradual process of re-humanizing the victim (and offender) begins. Therefore, a critical starting point is understanding the perspectives of victims on the subject of reconciliation.
27. As indicated elsewhere in this Chapter, the Commission presented the victims of violations with an opportunity to narrate their experiences. Most of those victims also used the opportunity to state what they felt about the people behind their suffering. While some of the victims were ready to forgive, absolutely or with some conditions attached, the persons alleged to have been responsible for their suffering, others categorically expressed resentment and unwillingness to forgive. For the latter group of victims, not even the thought of reparation would make them change their mind.

Perspectives of victims

28. The Commission encountered individuals with a remarkable willingness to forgive the people responsible for their suffering. The Commission learnt that the victims desire to forgive was influenced by various factors key among them being: the victims' religious beliefs that called upon them to forgive those who wronged them; lapse of time since the violations took place with some of the victims healing as the years went by; as well as a sense of helplessness and the sheer desire to 'move on.'
29. Fundamentally because of their faith, some victims were willing to forgive and to co-exist with those who had wronged them. Indeed, some stated that they would not wish their perpetrators to go through what they went through. Such were the sentiments of Pastor Peterkins James Ogola, who, when testifying about the killing of his nephew by a named police officer, stated as follows:

Allow me to state one thing that it is important as a family to team up with the TJRC in forgiving and in reconciling with the perpetrator. It is not the wish that the perpetrator should pass through the pain that we have passed through. So, let Mr. Njogu and his employer know very well that the family's heart is open to forgive. We are ready to sit and reconcile because you never know what life has in store for him and for us. You never know the son of Njogu might become a DC or a prominent person in this place and we will meet with him. This is the main purpose of reconciliation. Friendship comes from out of the pain. So, let the family of Njogu be encouraged. If they are ready to receive this token and the employer which is the Government of Kenya and come out and face our family we are very ready. Please, give that information to the parties concerned. God bless you.¹⁴

¹⁴ TJRC/Hansard/Public Hearing/Busia/1 July 2011/p. 32

30. When asked whether he would like to meet the police officer who had shot his nephew dead, Pastor Peterkins Ogola responded:

Of course, I would like even to see how he looks like, even shake his hand and even say something in his language, but it will also take the hand of God for me to bring him together with the young little widow and my eldest brother, who is the father. It is going to be a process but I will be very glad if you make that effort to bring us together. Let also the employer come out and tell us why he is hiding Njogu. Thank you.¹⁵

31. The same was the feeling of Gregory Onyuro, who, when asked what he would tell the police officer who shot and left him paralysed, he stated:

I am a Christian and I am a person who understands. I can only ask for forgiveness but if I can know the person, I want to tell him that if he is shot like he did for me, how could he feel? I forgive him.¹⁶

32. There were instances where even the victims showed sympathy for their perpetrators acknowledging that they too were victims of a bad system. While testifying about the torture he went through at the Nyayo Chambers, Mr. Wafula Buke stated the following on a question whether he thought his torturers enjoyed doing it:

When I was free to move around, I think I was an angry man with the torturers. I remember going to the reception of Nyati House and camping there to identify those who beat me. I stuck there from 8.00 a.m. to 1.00 p.m. and saw three. One I now know is called Wachira and he is my friend. That was the most violent. I also saw Opiyo who I think had retired. He did not look like money. I also saw another one whom I do not know. But I can say that in retrospect, I think we were all just in trouble. I remember when I was in Nyayo House I had just been beaten up there. So, when I came out, I was locked in the cell. I knocked to be taken to the toilets and when that fellow came, the guy asked me: "Why did you not do it earlier?" He gave me a hard blow and I fell down. Later on, when I reported him up to the *wazees* (elders), I think they talked to him. He told me: "I am sorry. You know these old men are stressing us. They are giving us a lot of problems and so, we are also just frustrated. So, I want to apologize." It is from him that I got information that students had rioted. I did not even know. I think the chain goes up to the torturers. They also must have had their problems; being pushed to beat other people's beautiful children. I think the people who take the ultimate responsibility and may have some enjoyment out of it are those who make lots of money and control power. Those are the only people who enjoy. But I think having lived through that experience I can say that Kenya was just a country of people suffering in various capacities. If you were in charge of agriculture, you had your problems. You were delivering qualitatively you were just like a police officer who was also delivering bad services. A medical officer was not any better. He was just a perpetrator like any other. So, my outlook these days is that I think we were victims of a system and that system needs to be dismantled.¹⁷

¹⁵ TJRC/Hansard/Public Hearing/Busia/1 July 2011/p. 33

¹⁶ TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.50-51

¹⁷ TJRC/Hansard /Thematic Hearing/Torture/7 March 2012/p. 36



Wafula Buke narrating his horrid ordeal to the Commission in one of the cells during a tour of Nyayo House Torture Chambers

33. While some of the victims talked of absolute forgiveness, others indicated their willingness to forgive subject to some conditions being met by the perpetrators as well as the government. These conditions ranged from the demand for the alleged perpetrators to confess their action and acknowledge their wrong doing, a demand for justice where perpetrators paid for their wrong, a demand for compensation; a demand for the alleged perpetrators to sincerely seek forgiveness on their own behalf; to a demand of meeting with the alleged perpetrators and having a conversation. For some of the victims, meeting of one demand was enough while others wanted more than conditions met by the alleged perpetrators as a prerequisite for forgiveness and reconciliation.
34. Ms. Nyarinda Moikobu's testimony is a clear indication of the conditions that some of the victims attached to forgiveness and ultimately reconciliation. While testifying on how her property had, on many occasions that coincides with the general elections, been looted, Ms. Nyarinda Moikobu stated as follows:

In conclusion, I would want to say that while people are going round asking for forgiveness, justice and reconciliation, if at all somebody is coming to say that "Nyarinda, I apologise", he or she must confess what he did before I forgive him. If they tell me that they took my property, I am ready to forgive them. We are very ready to forgive but we

do not want blanket forgiveness and reconciliation. Why are you asking for forgiveness? What have you done? Come out and say what you did, that is when we can see how we can forgive each other.¹⁸

35. While some of the victims were categorical that the individual perpetrators should seek forgiveness or offer an apology, others like Mr. Gregory Onyuro, extended the demand for an apology to the government and various government departments, for their inability to protect the victims from violations when the same occurred.

There should be proper civic education conducted to all our communities so that they understand issues. Secondly, parliamentarians should sit down and apologize to Kenyans. Thirdly, we need to look for a donor who will empower the youth and all those who were affected during the violence [...] We would like the President and the Prime Minister to come to Nyanza Province and talk to the IDPs in this region. They need to tell us that they are in power because of us. They need to apologize to us. This is because they are earning while we are suffering. Look at me here. I urinate here. I smell urine just because of post-election violence and I cannot perform sexually because of the post-election violence. How do you think my family feels? My children cannot go to school. They will now turn into thieves because I cannot help them. Women are becoming prostitutes! I want the President to come to Nyanza Province and apologize because my vote made him to be the President!¹⁹

36. This was also the case for Maj. (Rtd.) Maxwell Kivihya, a former Kenya Air Force Officer, who suffered for his alleged involvement in the 1982 attempted coup. In his testimony, below, he mentioned a list of government officials, including the former President Moi that he felt ought to apologize.

We would also pray that the Government publicly apologizes to these victims and all the others in Kenya. That, perhaps, might improve our morale. President Moi, General Mulinge and General Kariuki knew about this as expressed by Lieutenant Mwambura. We pray that these officers should be investigated by the International Criminal Court, so that we can get some justice because to date, we have got none. General Mulinge and General Kariuki had prior knowledge of this attempted coup d'état and they did not institute measures to prevent it. General Kariuki confessed it in my presence and discouraged Lieutenant Mwambura from discussing it. I am concerned that I was punished when I had been ordered to keep quiet.²⁰

37. For some victims, justice was key.²¹ Unfortunately, even when the alleged perpetrators had gone through the court system and 'paid for their sins', their respective communities were not ready to accept them back and indication that justice would not necessarily amount to reconciliation.

18. TJRC/Hansard/Public Hearing/Kisii/20 July 2011/p. 12

19. TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.43

20. TJRC/Hansard/ Public Hearing/ Bungoma/8 July 2011/p. 13

21. TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.31

There are those who are imprisoned, yet they did not commit a crime. After prison, some of them are able to continue with their lives. There are those who die in prison. I used to see that. They would die of starvation and disease. Many people have suffered. When these people leave prison, they should be accepted as human beings instead of being viewed as criminals.²²

38. In cases, where there had been no explanation as to the causes and the reasons for violations, the victims demanded to know the truth. Like the rest of the public, they were curious to know why they were attacked and the persons behind their violations. According to Gregory Onyuro:

Justice is to know how this thing happened and who caused it. Something cannot happen without a cause. Even a disease has a cause and if you want to treat it, you have to know the cause.²³

39. Some of the victims indicated to the Commission that it was necessary for them to meet the alleged perpetrators. They urged the Commission to organise for a meeting where they would get to their alleged perpetrators and hopefully forgive each other. As one witness noted 'that would be good medicine.'²⁴ This is also demonstrated by the testimony of Bernard Orinda Ndege, whose whole family of eleven were burnt to death during the 2007/2008 post elections violence. Bernard Orinda Ndege informed the Commission that it was his desire to meet the people that killed his family members and shared some of the questions that he planned to ask them, should the meeting materialize.

After seeing them and confirming that they are the ones who did this to me and my family, I will, first and foremost, ask them to identify me. Who am I? What did I do to deserve this kind of treatment? Why was my whole family burnt like charcoal? Why was I not taken to court and a legal process instituted and I be convicted? Why did you have to do this to me? Why have you done all this to me? So, between me and you, what is the next move? What are your views on this? What is the way forward for us all? So, therefore, I really feel I should go to court and face those people. If God grants me this opportunity, I feel I should not miss it. I want to face the people who did this to me and ask them a few questions. I would like us to meet face to face. Instead of them seeing me on television or listening to my voice over the radio, I would like to meet them. That is why I requested Ocampo, and I am also requesting this Commission now, to make sure that those who the Waki Commission listed as the culprits are taken to court. Let me be given chance to ask them a few questions. They are the only ones who can answer some of these questions. I look forward for the day I will ask them those questions.²⁵

22 TJRC/Hansard/In-Camera Hearing/Murang'a/10 November 2011.

23 TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.48

24 TJRC/Hansard/In-Camera Hearing/Murang'a/10 November 2011/p. 29.

25 TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.15.

40. There are victims who strongly felt that perpetrators do not deserve forgiveness and as such they should be held accountable. Even when they claim they were acting on behalf of someone else of merely 'obeying commands' they still needed to be held personally accountable and punished.

Perspectives of Adversely Mentioned Persons

41. As indicated at the beginning of this Chapter, the Commission was required to provide 'repentant perpetrators or participants in gross human rights violations with a forum to confess their actions as a way of reconciliation'. The Commission sent out invitations to persons who had been adversely mentioned requiring them to not only record their statements and submit memoranda, but also to respond to the allegations made against them.
42. Many of the adversely mentioned persons opted to respond to allegations of their involvements to violations as opposed to recording statements and submitting memorandum when the statement taking exercise was opened. Their response to allegations were characterised by denial of involvement and knowledge of violations. For instance, when asked whether he was either present in a security meeting that is said to have taken place in North Eastern Kenya to discuss 'a security operation' just days before the Wagalla Massacre took place, Ambassador Bethuel Kiplagat denied ever attending any meeting in the region and it was only after he was confronted with evidence that he accepted attending the meeting but refuted that 'security operations' was discussed in that meeting.
43. Even when some admitted knowing the existence of the violations, they defended and justified their action and at times blamed others for the violations.
44. While some of the adversely mentioned persons showed remorse to the victims for what had taken place and even tendered an apology, others demonstrated indifference and unwillingness to apologise. The difference reactions and responses to allegations by AMPs are discussed below.
45. Some of the AMPS who testified before the Commission showed some semblance of apology and may be remorse but not before they justified their actions. The testimony of Mr. Manasseh Tiema, while responding to question on the security operation that resulted in the Wagalla Massacre demonstrated this:

Commissioner: So you would be the person to answer anything involving whatever went wrong during the operation. Do you in your view think this operation was successful in getting firearms from the communities?

Mr. Manasseh Tiema: It was successful because according to the firearms that were surrendered physically, the response was okay. I saw the firearms at the police station and I think it improved the situation to some extent.

Commissioner: Mr. Tiema, that is despite the loss of lives?

Mr. Manasseh Tiema: I cannot account for the loss of lives precisely.

Commissioner: Look at page 5 of your statement.

Mr. Manasseh Tiema: Let me cut you short there. I am very sorry for the loss of lives despite the fact that we were able to get most of these firearms from the wrong hands.

Commissioner: [...] Mr. Tiema, many people died in this operation. You do not know the exact number and yet you were the head of the District Security Committee. Is that right?

Mr. Manasseh Tiema: I was given a figure.

Commissioner Ojienda: What figure?

Mr. Manasseh Tiema: I was given a figure by the District Special Branch Officer who had collected it from various sources. It said 57 people lost their lives which I am very sorry.

Commissioner Ojienda: You are very sorry for the loss of 57 lives?

Mr. Manasseh Tiema: Yes, I am.²⁶

46. Similarly, Benson Kaaria, the Provincial Commissioner in North Eastern Province when the Wagalla massacre took place, defended the security operation that resulted in the massacre as successful. This was despite the fact that it had been officially acknowledged that more than 57 people were killed and only four guns recovered.

Commissioner: Mr. Kaaria, did I hear you say it was a success?

Kaaria: After what they did, it was a success. Other than the incident of people dying, it was a success.

Commissioner: So, the operation was a success and the death of the people was an incident?

Kaaria: It was a success according to us. They had achieved what they wanted. The other one was unfortunate.

26. TJRC/Hansard/Public Hearing/Nairobi/16 May 2012/p. 23-24

47. Kaaria expressed sympathy for the overall loss of life during the Wagalla operation but he would not be drawn into issuing an apology. The former Provincial Commissioner was absolutely categorical on this: he would not apologise because he had nothing to apologise for. In this Kaaria returned to the underlying theme of all his submissions and representations to the Commission. Responsibility for the operation belonged not with the Provincial Security Committee but with the District Security Committee:

Commissioner: Would you take full responsibility for the wrong things that occurred during operation?

Benson Kaaria: I cannot. Everybody has to carry his own cross.

Commissioner: In this case, who should carry the cross, Mr. Kaaria?

Benson Kaaria: The DSC Wajir.

48. The exchange continued and Kaaria consolidated his position as sympathetic but unapologetic:

Commissioner: You have no apologies about the deaths; do you have any Mr. Kaaria?

Mr. Benson Kaaria: Even if I do, I cannot revive...

Commissioner: No! Do you have any?

Benson Kaaria: I sympathise, it was very sad.

Commissioner: You have no apologies as a member of the PSC for having authorised an operation in which people died?

Benson Kaaria: I cannot apologise.

Commissioner: You cannot!

Benson Kaaria: On behalf of the DC, I cannot.

49. Similarly, another AMP, Ambassador Betheul Kiplagat, could not be easily convinced that the government should apologize for the wrongs committed during the Wagalla security operation despite the fact that he described the incidence as tragic. This was evident from his responses to questions posed to him by three separate Commissioners on this particular subject. Here are his responses to questions posed by one of the Commissioners:²⁷

Commissioner: Do you think at the institutional level, the government should officially apologize because I believe they have not done so to date?

²⁷ TJRC/Hansard/Public Hearing/Nairobi/6 June 2011/p. 77-78.

Amb Bethuel Kiplagat: It is good to look at the total picture to see what kind of response the government can make in that whole situation. We have to be very careful in what we do, so that we do not cause more problems. So, I think it is important to see the bigger picture.

Commissioner: So, do I understand that you are not sure whether the government should apologize? We will need to have a better understanding or a more sophisticated understanding of what the effect of that apology would be.

Amb Bethuel Kiplagat: Not necessarily; I have not said so. However, we need to gather more information which will inform us on what we need to do.

Commissioner: Let me ask that question in another way. What sort of information to your mind, would be sufficient to say that the government should apologize?

Amb Bethuel Kiplagat: Let us continue receiving a lot of these documents so that we determine the truth and the facts as they happened. It is possible that we will discover other documents which can throw greater light into this incident and know exactly what happened. So, I am being cautious. Let us gather all the information and then with all the wisdom, we see what is it that we can do in order to heal all the people and to heal Northern Kenya.

Commissioner: I apologize. Maybe, I am beating this horse a little harder, but let me ask a similar question in a different way. Let us take this as hypothetical. If we find that 57 people died and seven weapons were recovered...let us leave aside people harmed, people raped, people kept outside for five days in the heat and so on. So, let us just say what we know; that, 57 people died and seven weapons were recovered. That was done by the government. We may not know exactly who from the government did it, but it was done by the government. Given that situation, would you suggest that the government should apologize for the loss of lives?

Amb Bethuel Kiplagat: It was a terrible loss of lives. The first thing is to determine who made the decision to carry out that operation. So far, we have not yet done so. I think it is absolutely essential to know which individual made that decision.

Commissioner: I think we all agree with you on that point. Assuming that, that body was a governmental.

Amb Bethuel Kiplagat: Then the government should apologize. First and foremost, we should ask ourselves: Who made the decision to carry out that operation?

Commissioner: So, I understand that if it was a government body that ordered the operation, then obviously, the individuals, the body involved and also the government should apologize? To your mind we do not really understand yet who did order it or who was responsible. We need to keep our minds open with respect to where that specific apology at a lower level should come from. But at the government level, which the question is and particularly where...

Amb Bethuel Kiplagat: For this case, let us wait. Collect more information and with hindsight, let us look at it and see what specifically we need to do. Something needs to be done; I am very clear in my own mind. As I said here, that was a terrible tragedy.

50. In general, remorse, sorrow and regret were in short supply among many of the AMPs who appeared before the Commission because of the association of these sentiments with responsibility, guilt and culpability.

Efforts Towards Reconciliation

51. The Commission was not the first institution to work towards national unity, healing and reconciliation. Indeed, there have been other reconciliation efforts carried about by various organisations, governmental as well as non-governmental.
52. The Commission learnt that nearly all the reconciliation efforts were initiated following prolonged massive violence that affected large ethnic populations. As a result, many of such interventions exist primarily in those parts of the country that are referred to as conflict prone areas, the 'hot spots'. The approaches employed have differed depending on the nature of the conflict. Further, their durations have been dependent on availability of funds to finance them. Most of the reconciliation efforts, until recently, focused more on violence prevention and humanitarian interventions and very little after the violence stopped.
53. The government efforts towards reconciliation have taken various forms including the establishment of commissions of inquiries and task forces in the hope that their findings would lead to reconciliation; the constitutional reform processes; introduction of community policing as well as peace committees;



Commissioner Gertrude Chawatama addressing women at a reconciliation forum.

disarmament exercises; establishment of conflict early warning mechanism; prosecution of alleged to have taken part in actual violations or contributed to heightened tensions among communities to act as a deterrence.

54. The government was also responsible for the establishment of the National Steering Committee on Peace building and Conflict Management (NSC), a multi-agency Committee housed within the Office of the President, Ministry of State for Provincial Administration and Internal Security for purposes of coordinating peace building and conflict management programmes countrywide. The NSC also doubles up as Kenya's Conflict Early Warning and Response Unit (CEWERU) that implements the IGAD-CEWARN Mechanism as provided for in the Protocol on the Establishment of Conflict Early Warning and Response Mechanism signed in Khartoum in January 2002. NSC has facilitated the establishment of Local Peace Committees that have continued to conduct peace building and conflict management initiatives across the country.
55. Civil society interventions have focused on reconciliation and building new relationships amongst the warring communities. Such activities include dialogue, negotiations, and problem solving workshops, information, education and communication. These have set precedence to the coexistence in places where violence was the norm. Several initiatives including conflict early warning have played a central role in facilitating a negotiated end to violent conflict among various warring communities.

Challenges

56. While acknowledging that there had been many efforts towards national unity, healing and reconciliation, the Commission sought information, from the people who appeared before it, on the possible reasons why such efforts have been unsuccessful in bringing cohesion and integration among the people of Kenya. The following were some of the main challenges that such persons highlighted.

Lack of political will

57. Promoting national unity and reconciliation requires strong political support. Such strong political support and leadership has not been available in Kenya even in the aftermath of the 2007/2008 PEV. In January 2009, about a year after the National Accord was signed bringing to a halt the PEV, the Kenya National Dialogue and Reconciliation Monitoring Project observed that:

Healing and reconciliation is yet to take place. Political leaders have not been at the centre of healing and reconciliation initiatives. The two principals will have to provide leadership and direction; the two principals should constitute groups to mobilise for national cohesion from the national level to the grassroots.²⁸

58. Two years later, the KNDR Monitoring Project had similar concerns:

The Truth, Justice and Reconciliation Commission (TJRC) and the National Cohesion and Integration Commission (NCIC) have continued their efforts to inquire into human rights violations and prevent future violence, respectively. *However, without political support for the work of these commissions, their impact on ethnic relations and deterrence capacity for future dissonance remains uncertain.*²⁹

59. In a nutshell, although there is a clear need for healing and reconciliation in Kenya, the political leadership has never really genuinely committed to pursuing these goals. On the contrary, political leaders have often undermined reconciliation and peace building efforts because of vested and other interests.³⁰

Reconciliation and access to social goods

60. Change of attitude and acceptance between former hostile groups in itself cannot amount to reconciliation. There is need for the government to put in place social processes and structures, as well as institutions to ensure reconciliation

²⁸ KNDR Monitoring Project *Project context and summary findings* (January 2009) 6.

²⁹ KNDR Monitoring Project *Progress in implementation of the constitution and preparedness for 2012: First draft review report* (January 2012) 8-9.

³⁰ See also TJRC/Hansard/Thematic Hearing/Ethnicity/2 February 2012/p.25-26.

processes are not only promoted, but also, where they exist, are solidified and maintained. The absence of such structures and institutions has meant that the reconciliation efforts in the country have not born any meaningful fruits.

61. Various stakeholders that appeared before the Commission during its hearings stated that it was not possible for reconciliation to take place when people lived under conditions that continuously reminded them of the suffering they went through. Accordingly, many victims stated that they wanted some form of compensation that would help them come out of destitution.

My expectations are that the Government will remember the victims, not just those who are living in tents, but also those who are integrated with the rest of the community that is trying to assist them. That is what I am recommending. I am also requesting that the victims be paid some kind of compensation so that they can look for another place where they can stay because going back to where they were before would not give them peace due to what they went through. When they remember what they went through, they still live in anxiety. They should be given some form of compensation so that they can see where they want to go and live in peace and settle. So, I would like to recommend that. If the victims think that they can be resettled in an area of their own choice that would be good. That is what I request the Government.³¹

62. While testifying about the destruction of property experienced in 2007/2008 post election violence, Hon. Samuel Omweri Kibwage wondered how people were expected to reconcile when they were still struggling to earn a livelihood:

How do you reconcile such cases? How do you help? So we feel the Commission should help us. Even if we are seeking peace, some of these people should be compensated just to comfort them and wipe their tears.³²

63. While addressing the question of cattle rustling, Hon. Samuel Omweri Kibwage reiterated his earlier stand by stating as follows:

So we would like to appeal that some compensation to these particular cases be given. Even those who lost animals, some of them have lost the entire herd, some maybe a few. But if they want to be compensated, they should be compensated. It is true we want peace and reconciliation, we want to trust each other but when these people suffer, even if you tell them to keep quiet and their animals will be recovered, it is like telling a hungry person to stay on and that the hunger will pass on. He will never forget.³³

31 Oral submissions made to the truth, TJRC on Thursday, 10th November, 2011, at Fortune Green hotel, Murang'a (in-camera sitting).

32 TJRC/Hansard/Public Hearing/Kisii/St. Vincent Catholic Centre/ 20 July 2011/p.7-8.

33 TJRC/Hansard/Public Hearing/Kisii/ St. Vincent Catholic Centre/ 20 July 2011/p. 8

Victim Participation and Follow-up Mechanism

64. Witnesses at the Commission's hearings noted that despite the various efforts by both governmental and non-government organisations towards reconciliation, nothing much seems to change. Communities remain polarised and tension continues to be heightened. Many of the witnesses felt that the conflicting communities and in other cases, the concerned individuals, have not been involved in such efforts/processes. They indicated there was need for a 'bottom top' approach to ensure that reconciliation efforts are not only home-grown but are also sustainable.
65. Other witnesses stated that there has been a failure to follow up such reconciliation processes and to evaluate them from time to time to guarantee success. The result has been that many reconciliation efforts have collapsed as soon as they were initiated. The Commission learnt that there has been duplication of efforts which unfortunately are uncoordinated and not harmonized.

Root causes and priorities

66. While speaking of the possible solutions to the conflict in the Tana Delta region between the farmers and the pastoralists, witnesses informed the Commission of how Government agencies were keen on apprehending perceived perpetrators of the violence as opposed to addressing the root causes of the violence and reconciling the warring communities. The result has been recurrence of the violence as soon as such agencies leave the area. In this regard, Mr. Mohamed Doyo Maro stated as follows:

These attacks have happened three times. The first time up to the second time it was a problem. By the third time, it had spread to the entire Tana River from Mbalambala up to Kipini. We have had a problem for nearly one year. When the Government would come all they would do would be to apprehend people, but I told them that as elders we must intervene. I was one of the members of the committee who tried to negotiate with the Orma elders, the Wardei elders and the Pokomo elders. I took 21 elders from our side and 21 from their side and we sat down and discussed until the issue abated slowly by slowly until there was no longer any conflict and now we eat together.³⁴

67. He further accused the Government of taking sides and therefore seen as an unfair arbiter in the conflict further complicating the situation and making it difficult for lasting peace to be achieved. He explained the situation thus:

There is one other issue which has come up which I should mention before I forget. This is the issue of security which has led to our not living in harmony. We have always had

³⁴. TJRC/Hansard/Public Hearing/Hola/12 January 2012/p. 7

problems regarding security with our neighbours because we are farmers and they are pastoralists. They are the ones who are usually the aggressors because they bring their livestock into our farms. In 2001, there was a conflict between us and the others, but instead of the Government being neutral to ensure security in a fair way, we realized that the Kenya Police Reservists had been deployed in so many areas. The weapons being held by the Pokomos were withdrawn by the Government. This left us exposed and led to the problem that we have had. Such issues are the ones which lead us to believe that it is a deliberate plot by the Government against us as a community to marginalise us and deny us our rights.³⁵

68. The Commission learnt that whereas victims of violations have been willing to forgive, persons alleged to have participated or facilitated violations have been reluctant to not only admit their involvement but also to seek forgiveness. The perpetrators reluctance to apologise or show remorse for their action has further complicated the search for reconciliation in the country. It is unfortunate that most of the victims of violations have died without having their suffering acknowledged.

Opportunities

69. During the Commission's mandate, there were various initiatives and reform processes that took place which had direct impact on and provided an opportunity to foster national unity, healing and reconciliation in the country. Key among them were the promulgation of the Constitution of Kenya 2010, the enactment of various legislation, establishment of institutions, as well as various reforms in various sectors especially the judiciary and the police service.
70. As part of the National Accord, which restored order after Kenya's post-2007 election violence, Parliament enacted the National Cohesion and Integration Act (2008). The Act outlaws discrimination on ethnic and other social grounds, and provides for the establishment of the National Cohesion and Integration Commission (NCIC) whose mandate is to: "facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof." The Act is the most explicit mechanism that has been set up to encourage national cohesion and integration by outlawing discrimination on "ethnic grounds", where ethnicity is defined to include race, religion, tribe and culture.

35. TJRC/Hansard/Public Hearing/Hola/12 January 2012/p. 10

71. The Act also criminalise harassment, hate speech, threatening, abusive or insulting conduct, and discrimination in employment based on ethnicity. In outlawing the distribution of resources by a public officer in an ethnically inequitable manner, the Act sets 30 per cent as the maximum share of employees of a public office that may come from one ethnic group. The Act and the NCIC present a mechanism to effectively manage the effects of hate speech, skewed employment in the public service, and discrimination on ethnic grounds, which have presented significant challenges to the achievement of national cohesion and integration in Kenya since the attainment of independence in 1963.
72. The Constitution of Kenya promulgated in 2010 has a number of provisions that touch specifically on national cohesion and integration. Article 10 of the Constitution emphasises the national values and principles of governance, including national unity, social justice, inclusiveness, and equity. Its Bill of Rights provides for equality and freedom from discrimination, guaranteeing the basic economic and social rights of all, while encouraging respect for diversity and fostering a sense of belonging. Further, the provisions on devolution means that all communities will access services and this is likely, if managed well, to restore a sense of belonging. Indeed, witnesses expressed new hope in the Constitution, as seen in the testimony of Mr. Charles Omondi Oyaya:

But coming back to your question, our Constitution in the preamble says: “PROUD of our ethnic, cultural and religious diversity---”. It does not presuppose that one Kenya means a faceless Kenya, but Kenya that is united by core values that bring all of them together as they celebrate their diversity. Again, I would like to say that we have a lot of hope in the Constitution; that it has created structures that celebrate diversity but also unite Kenyans on the things that unite them, and education is one of them. So, it is not by default that two key institutions are not devolved; education and the Judiciary, and I think this is key. We cannot afford to be a divided Kenya. I would like my child to be proud of who he is as much as he is proud of being a Kenyan. At the moment, if you ask any Kenyan “Why are you a Kenyan?” he or she will say that either because he or she has an identity card or, by accident, he or she was born in Kenya.³⁶
73. There exist a number of legislation which if implemented to the fullest would foster not just national reconciliation, but also integration and cohesion. Key among them include: National Cohesion and Integration Act No. 12 of 2008; the Political Parties Act No. 11 of 2011; Ethics and Anti-Corruption Commission Act No. 22 of 2011; National Gender and Equality Act No. 15 of 2011; Persons with Disabilities Act No. 14 of 2003 among other...The foregoing frameworks give rise to policies that have the ability for promoting national unity and reconciliation.

³⁶ TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.36

Conclusion

74. Healing and reconciliation requires political leadership; it cannot be left to faith based and other civil society organisations at the grassroots. The government should provide national direction especially by making clear policies on reconciliation followed by a commitment to implement those policies.

Now, on recommendations on how to address these conflicts, I think the most critical thing and the first step is the policy approach. We really have to take very decisive and brave steps in enacting and developing policies that we also implement with the same strength and commitment. Peace and reconciliation need to really have sound political and policy on which you can hinge them, and the rest of the initiatives. These have to be clear, concise and focused and really strong guidelines supported by firm commitment especially through implementing decisions. If we are faltering weak or kigeugeu, as many people say around nowadays, we will not reach far. Two, we really need to take a very open, robust and strong reconciliation and integration approach on a long term basis. Our problems are historical and deep rooted. We cannot afford to come up with a wishy washy short term project based one off initiatives. We really have to come up with a robust reconciliation process that is enshrined in cohesion, integration and peace building and other related mechanisms, linking with an institution like the National Cohesion and Integrity Commission, which has a long term mandate in engaging in this area and various other institutions. If possible, create other institutions to support those that are existing or in existence and strengthen them. The education and skill development approach is a very important one. It is actually a lifelong business and we really need to invest in education and skill enhancement for personal and societal growth. We can only achieve most of the changes that we desire through this approach.³⁷

75. There is need for inter-community dialogue facilitated by the communities under conflict. While commenting on how the conflict along the Tana River between farmers and pastoralists would be resolved, Mr. Wilson Sinema Timothy Komora stated as follows:

I know that there are committees that are trying to bring all the communities together in security issues. The important thing that we would want is that these committees should go on sensitizing both areas, so that each community will respect the other. We, as pastoralists, know that farming or agriculture is what the farmer depends on and it is just as important as his livestock so that every person respects the property of the other person. If we have that respect there will be no problem.³⁸

37. TJRC/Hansard/Thematic Hearing/Ethnicity/2 February 2012/p.26

38. TJRC/Hansard/Public Hearing/Hola/12 January 2012/p. 12

76. Answering to a similar question posed by a Commissioner on the ability of the community peace committee to foster reconciliation, Mr. Samuel Omweri stated as follows:

When they [elders] sit, they will address all injustices on both sides. They will also look into the origin of these problems and involve the Government and probably come up with a lasting peace in the region. I believe they will be able to reconcile all the communities living along border. With involvement of the political leadership, they will succeed.³⁹

77. To make this reconciliation sustainable, it is necessary to build confidence among the various parties to the conflict, through working together towards interdependence by reconstructing the social, economic and cultural life of the community, as well as by building a shared common future. Confidence will help to open channels for dialogue about the past, without obstruction from negative emotions. Embracing the past and the future is important in shaping the present.⁴⁰

³⁹ TJRC/Hansard/Public Hearing/Kisii/St.Vincent Catholic Centre/20 July 2011/p. 18.

⁴⁰ Chicuecue NM 'Reconciliation: The role of truth commissions and alternative ways of healing' 7 (4)(1997) *Development in Practice* 484.

Appendices

Appendix 1

NCIC Study on Ethnic composition of Public Service in Kenya



By Mzalendo Kibunjia

Parliament set up the National Cohesion and Integration Commission with a clear mandate to work towards the elimination of ethnic, religious and racial discrimination. In the time that this Commission has been in office, we have sought to promote equality of opportunity, good relations, harmony and peaceful co-existence between the various ethnicities, races and religious persuasions. By speaking boldly and frequently about the need for tolerance, we have helped to deepen public understanding of the need to manage our diversity. It is a role we are committed to, and shall continue to pursue with enthusiasm and verve.

We have taken another step in executing our mandate under the law.

The National Cohesion and Integration Act 2008 requires public entities to seek representation in the diversity of their staff. At no time should members of a single community occupy more than a third of employment positions in any Government body.

Sometime last year, we began to audit how public entities were complying with this requirement. We analysed the Integrated Personnel and Payroll Data System for March 2010 against the population census report of 2009, as well as other official documents. This exercise, the first of its kind in Kenya, is important because it establishes a baseline for monitoring diversity in future.

The results are an honest picture of where we stand. And the verdict is that Kenya has a crisis of exclusion.

Over 20 communities hold less than 1 per cent of the jobs in the Civil Service. In fact, seven of these communities each have less than 100 of their members working in the Civil Service.

In contrast, just seven communities each have between 5 per cent and 22 per cent of all Civil Service jobs. Although using the population size of a community to measure how represented it is in the Civil Service will likely miss the fact that not everybody is employable, it is a useful benchmark. Six communities' share of Civil Service jobs exceeds their population size by between 1 and 4 percentage points. Another five communities are under-represented by similar margins.

Up to eight Government departments are in clear breach of the law because more than 33 per cent of their staff are from one ethnic community. Two communities alone have a combined presence of 40 per cent of Civil Service jobs. Another seven communities are close to breaching the law because they each have members of one ethnic community holding 30 per cent of the jobs. Only one department does not have more than one community occupying at least 20 per cent of the staff positions. Even this position, though permissible under the law, is untenable. These statistics are worrisome in the way they point to a crisis of ethnic exclusion in the Civil Service. The bulk of Civil Service jobs are in the Office of the President, thus underlining the overweening influence this office has enjoyed in the past and the patronage attendant to it. This study indicts the personality-based leadership system Kenya has had and signals the need to strengthen institutions that check the creeping effects of patronage. The numbers in this study represent Kenya's present and past. They do not have to be its future.

There are many explanations for the current state of affairs. None of them can, however, change the fact that we have been insular and inward-looking in staffing the public service. That behaviour needs to change. Difficult as this task is, we delight in it because it is the public's agenda.

The composition of the Civil Service is important not only because it is the face of the Government and can speak volumes about inclusivity, but also because salaries from jobs are an important source of income for many people. Salaries form the initial bases for wealth accumulation. Furthermore, Government jobs also come with the responsibility to manage public resources.

Skewed composition of the Civil Service does not only distort incomes, but also excludes large populations from driving policy about the things that matter to them. Kenya must not allow itself to operate an informal apartheid system that could perpetuate an intergenerational transmission of inequality.

The information used for this study was willingly provided by the Government. The findings should not mislead officials to think it was a mistake to provide it. Some would rather these findings were hidden from public view. Others might fear that they could validate long-held suspicions that may further divide a fractious nation. Yet others will go into denial.

We must not shy away from a candid debate of the issues because in it shall be found the solutions to our problems. We have faith in the ability of the Kenyan people and their love for their country.

In the coming days, we shall ask the Head of the Civil Service and the President to take administrative actions that bring those departments with more than a third of their staff from one community back within the margins of the law. Additionally, we shall ask Parliament to exercise its powers of oversight to ensure that this is done.

Members of Parliament also have a duty to re-examine the law with a view to setting a less arbitrary measure for ensuring diversity in the public service.

The importance of this study has become even more pronounced after the promulgation of the Constitution of Kenya, 2010, which sets out the values and principles of the public service as, among others, diversity and equal opportunity across gender, ethnicity and ability.

The Constitution seeks to correct the errors emerging from an all-powerful presidency. This study demonstrates the need for urgency in making the new dispensation work while drawing lessons from the errors of the past. As Kenya prepares to devolve power, authority and resources to the counties, these findings should be a warning that the mistakes made nationally before could easily be replicated at the local level. In future, we hope that diversity can become a criterion for qualifying how money from the Equalisation Fund, as well as allocations to the county governments should be portioned out. We encourage the private sector to undertake similar audits, because it is not unlikely that diversity should also be a criterion for qualifying firms with which the Government should do business.

Dr Kibunjia is the chairman of the National Cohesion and Integration Commission

Brief #1: Research Methodology

The research was based on the Integrated Personnel and Payroll Data System. This is the Civil service payroll. The payroll is based on several variables:

1. Name
2. Job designation
3. Education level
4. Job group
5. Sex
6. Home district
7. Work district
8. Date of employment
9. Date of promotion for current position
10. Ministry or department

This is not a primary survey. No census was undertaken as the Civil Service does its own staff count. The data used is official, and the categories are as provided by the Government. The data is accurate because there is no opportunity for error in payroll administration.

The population and housing census which had been concluded in 2009 provided a useful reference point for comparative purposes.

Brief #2: A profile of exclusion

Over 50 per cent of Kenya's ethnic groups are only marginally represented in the Civil Service – the country's largest employer. Only 20 out of over 40 listed Kenyan communities are statistically visible in the Civil Service. Some 23 communities have less than 1 per cent presence in the Civil Service.

Civil Service by Ethnicity: Communities with Limited Presence		
Tribe	Numbers	Percentage
Teso	2,029	0.961%
Samburu	1,457	0.690%
Pokomo	1,303	0.617%
Kuria	1,207	0.572%
Mbere	1,062	0.503%
Gabra	648	0.307%
Bajun	579	0.274%
Basuba	462	0.219%
Other Kenyan	368	0.174%
Tharaka	365	0.173%
Orma	349	0.165%
Rendille	301	0.143%
Burji	288	0.136%
Taveta	237	0.112%
Njemps	220	0.104%
Swahili-Shirazi	122	0.058%
Dorobo	119	0.056%
Kenya Arab	90	0.043%
Kenyan Asian	74	0.035%
Boni-Sanye	44	0.021%
Elmolo	24	0.011%
Unknown	21	0.010%
Gosha	19	0.009%
Dasnach-Shangil	10	0.005%
Kenyan European	2	0.000%

Further, there are groups that are missing out or grossly under-represented in absolute terms. None of them has 100 of their number with jobs in the Civil Service.

Least represented communities in the Civil Service		
Tribe	Number	Percentage
Kenya Arabs	90	0.04%
Kenyan Asians	74	0.04%
Boni-Sanye	44	0.02%
Elmolo	24	0.01%
Unknown	21	0.01%
Gosha	19	0.01%
Dasnach-Shangil	10	0.00%
Kenyan Europeans	2	0.00%

There are racial and ethnic inequalities in the way the Civil Service is currently constituted.

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There are racial and ethnic inequalities in the way the Civil Service is currently constituted.

Briefing Note #3: Ministries/ departments exceeding the legal limit

The staff composition in more than 10 Government departments defies the law. The National Cohesion and Integration Act requires that no single ethnic community should constitute more than one third of the staff in any ministry or Government department.

The ministries and departments with more than a third of staff from a single community include State House, the ministries of Transport, Public Works, Tourism, Local Government, Higher Education and Nairobi Metropolitan.

Ministry/Department	Total	Single community share
Higher Education	386	33.70
Local Government	272	34.19
Nairobi Metropolitan Dev	92	33.70
Public Works	1903	34.63
Tourism	226	34.96
Transport	241	39.00
State House	373	45.31

Another nine Government ministries and departments are close to breaching the law. They have over 30 per cent of their staff from one community.

Ministry/Department	Total	Single community share
Cooperatives	1088	30.42
Energy	342	31.58
Environ/ Natural Resources	1255	31.2
Finance	3176	32.27
Labour/ Human Res. Dev	945	32.38
Livestock Dev	6415	32.46
Roads	3229	31.56
Water/ Irrigation	4672	31.23
State Law Office	941	32.62

A total of 22 departments and ministries have more than 25 per cent of their staff from one community. These are the Public Service Commission, the Cabinet Office, the Office of the Vice President and Ministry of Home Affairs, Youth Affairs and Sports, Trade, Special Programmes, Regional Development, Public Health and Sanitation, Planning and National Development, National Heritage, Medical Services, Land, Information and Communication, Justice, national Cohesion and Constitutional affairs, Housing, Forestry and Wildlife, Gender and Children, East African Cooperation, Foreign affairs, Department of Defence (civilian), Northern Kenya and arid Lands, Agriculture and Education.

Eight departments and ministries have over 20 per cent of their staff from one community: These are the Ministries of Fisheries, Immigration and Registration of Persons, Public Service, Office of the Prime Minister, Administration Police, and the Kenya Police.

Only the Provincial Administration, which hires district officers, chiefs, assistant chiefs and support staff had 16.84 per cent of staff from one community.

Briefing Note #4: Dominance, over-representation and under-representation

Only seven communities have a representation above 5 per cent in the Civil Service. The Kikuyu, Kalenjin, Luhya, Kamba, Luo, Kisii and Meru have a representation of above 5 per cent in the Civil Service. All the other communities' representation is below 5 per cent.

Five communities -- the Kikuyu, Kalenjin, Luhya, Kamba and Luo -- occupy nearly 70 per cent of Civil Service employment. Although they are the most populous, their numbers in the Civil Service are at variance with their population size. The seven communities have a combined population share of 76.7 per cent against a Civil Service presence of 81.7 per cent, a significant 5 percentage points.

Ethnic Group	Population (Census 2009)	Population %	Number in the civil service	Percentage in the civil service
Kikuyu	6,622,576	17.7%	47,146	22.3%
Kalenjin	4,967,328	13.3%	35,282	16.7%
Luhya	5,338,666	14.2%	23,863	11.3%
Kamba	3,893,157	10.4%	20,490	9.7%
Luo	4,044,440	10.8%	19,025	9.0%
Kisii	2,205,669	5.9%	14,287	6.8%
Meru	1,658,108	4.4%	12,517	5.9%
Mijikenda	1,960,574	5.2%	7,924	3.8%
Kenya Somali	2,385,572	6.4%	5,619	2.7%
Embu	324,092	0.9%	4,118	2.0%
Masai	841,622	2.2%	3,090	1.5%
Taita	273,519	0.7%	3,074	1.5%
Boran	161,399	0.4%	2,587	1.2%
Turkana		2.6%	2,112	1.0%

	988,592			
Teso	338,833	0.9%	2,029	1.0%

It is apparent that there is a variance between a community's share of population and share of civil service posts. Where some communities have a greater share of civil service jobs than their population, others have a lesser one. The Kikuyu and the Kalenjin have a disproportionate share of civil service posts compared to their population. Their proportion in the Civil Service exceeds the size of their share in the national population.

Ethnicity	Population (%)	Civil Service presence	Variance
Kikuyu	17.7%	22.3%	4.7%
Kalenjin	13.3%	16.7%	3.5%
Meru	4.4%	5.9%	1.5%
Kisii	5.9%	6.8%	0.9%
Boran	0.4%	1.2%	0.8%
Embu	0.9%	2.0%	1.1%

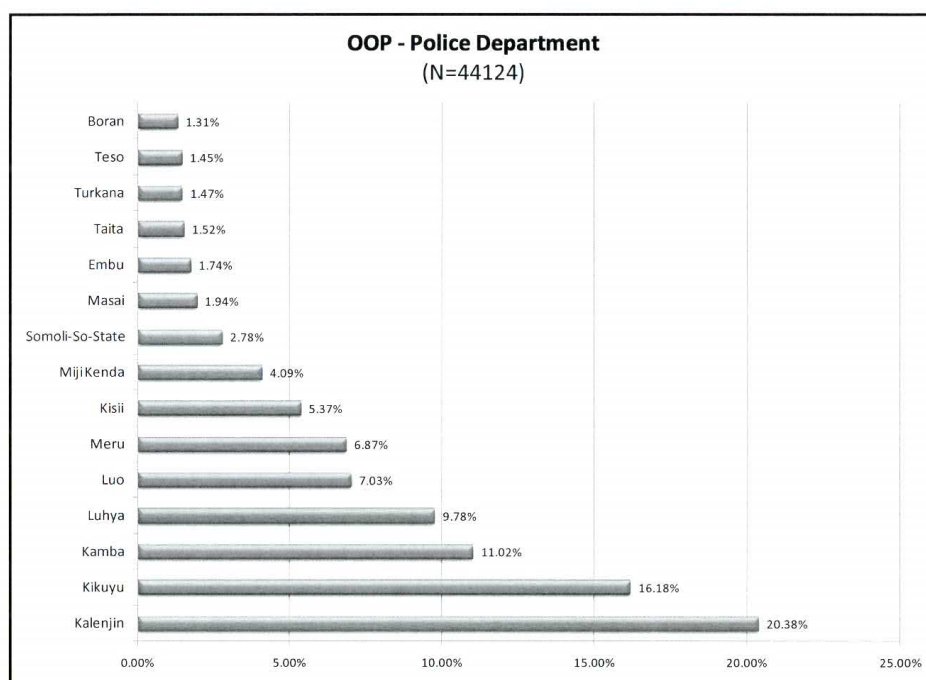
There are also communities whose presence in the civil service is lower than their share of the population. These are the Luo, Luhya, Somali, Kamba, Turkana and Maasai.

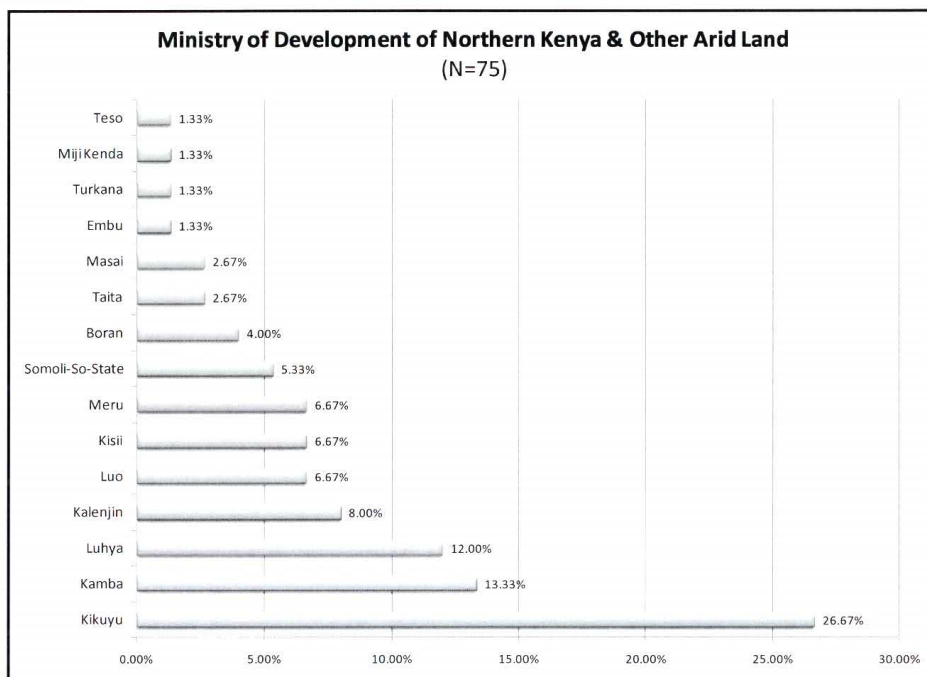
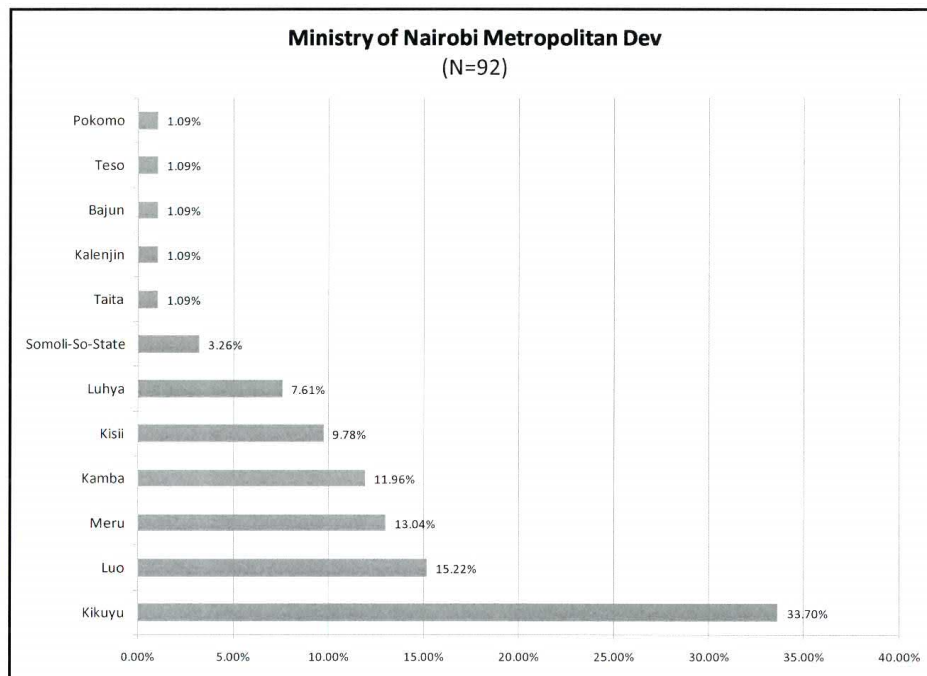
Ethnicity	Population (%)	Civil Service presence	Variance
Kenya Somali	6.4%	2.7%	3.7%
Luhya	14.2%	11.3%	2.9%
Miji Kenda	5.2%	3.8%	1.4%
Luo	10.8%	9.0%	1.8%
Turkana	2.6%	1.0%	1.6%

There are many explanations for these variances, including disparities in access to education, proximity to the location of Government offices as well as willingness to seek employment in the public service. Be that as it may, it is remarkable that a service once dominated by Europeans and Asians has so dramatically changed in its composition over 40 years. The emerging patterns of staffing suggest that power and leadership influenced the ethnic composition of the public service.

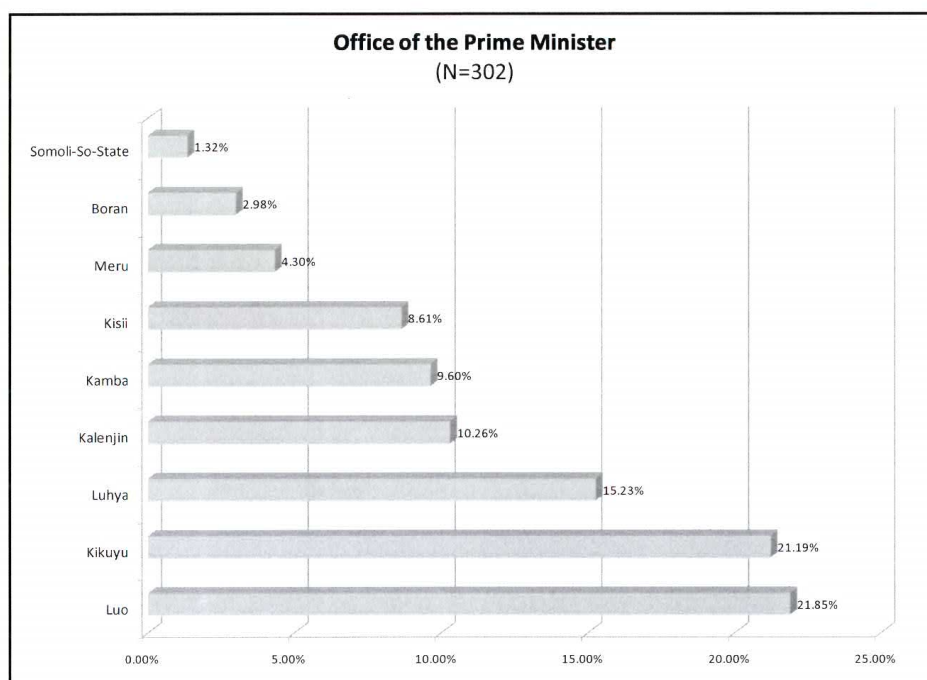
Brief #5: Patronage in hiring

The Kikuyu constitute the largest single dominant ethnic group in all ministries and departments, except in the Prisons Department, the Office of the Prime Minister and the Kenya Police. The Kalenjin are the second largest group in the Civil Service. They are also the most dominant group in the Prisons Department, and the Police Force. These two groups alone make up close to 40 per cent of the entire Civil Service. Their numbers in the Civil Service suggest a direct relationship with the tenure of the presidency, in that they have both had a member as President for over 20 years. It is also curious that in the newly constituted ministries, these patterns of ethnic patronage are still evident.





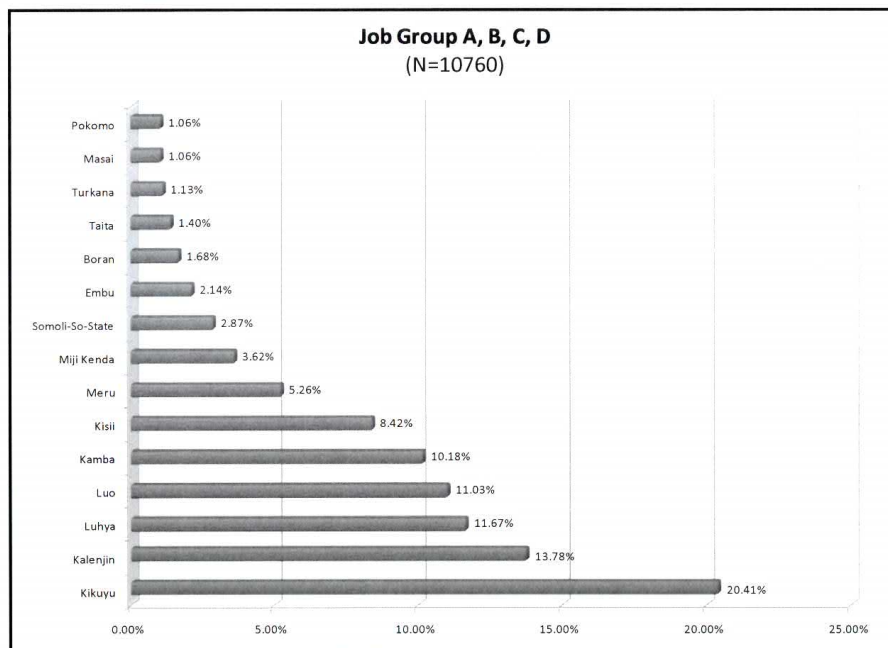
The new ministries are not doing anything differently. Nairobi Metropolitan has 33 per cent staff from one community, while the Ministry of Northern Kenya has 26.27 per cent. The Office of the Prime Minister has 21.87 per cent Luo staff and 21.19 per cent Kikuyu.



Brief #6: Exclusion at the lowest levels

Lack of access to education has been cited as undermining equitable hiring for the Civil Service across communities. Yet, the skewed recruitment into the Civil Service cuts across all job groups, including those that do not require high educational qualifications. In the lowest job groups – ABCD – the same seven major communities account for over 80 per cent of Civil Service jobs. Again, the number of those hired from each community is at variance with their population size. The communities that statistically insignificant remain outside this Civil Service group.

Ethnic community	Literacy rate (KIHBS, 2005/6)
Kisii	83.4
Kikuyu	83.0
Embu	82.4
Luo	80.8
Kamba	79.4
Luhya	71.9
Kalenjin	71.6
Meru	68.2
Mijikenda	55.0
Maasai	31.8
Somali	20.9



Brief #7: Conclusions and Recommendations

The Constitution calls for ethnic diversity in the Civil Service.

- Article 232 (1) (h) requires ‘representation of Kenya’s diverse communities’ as one of the **values and principles** of the public service.
- Article 232 (1) (i)(ii) requires ‘affording adequate and equal opportunities for appointment, training, advancement, at all levels of the public service of ... the members of all ethnic groups’.

A recruitment policy based purely on merit or competition may not give Kenyans a public service that represents the face of the country. Disparities in education infrastructure and imbalances in development generally mean that some communities are more likely to produce highly skilled people than others. It is these disparities in regional development and basic services that the country should have addressed in the past 50 years of independence.

The disparities noted point to the country’s failure to identify ethnic inequalities as a challenge to national cohesion. There is a need to develop and implement policies that can reduce these inequalities. In particular, there should be:

- a. Administrative action should be taken to ensure that all ministries and departments remain within the limit of one-third of all appointments being held by members of one community.
- b. A new criterion for representation, which recognised the need to urgently include the under-represented groups, needs to be negotiated and enacted into law. Affirmative action should be adopted for communities that are missing from the Civil Service. The current 33 per cent ceiling is too high. A figure between 15 per cent and 20 per cent would be closer to population realities.
- c. Regular reviews of how each ministry and department is addressing the problem of ethnic inequality. Performance contracts should include entrenching diversity as a major indicator of performance.
- d. Efforts to prevent a certain constellation of ministries, based on their strategic importance or resource base, from being staffed by one ethnic community beyond a certain limit.
- e. Accelerated affirmative action to build the human capital stock in areas historically marginalised -- by establishing schools, improving communication and infrastructure and offering training.
- f. A deliberate head hunting policy – similar to what the government does with Kenyans in international organisations that are occasionally recruited to the Civil Service. Because of long periods of marginalization, some communities have internalised logic of self exclusion, even when they are qualified. A headhunting policy for every employing opportunity should be adopted.

The Constitution has the potential to address some of these problems:

- i. For appointments requiring parliamentary approval, the submission of names should be accompanied by a memorandum stating how these new

appointments have affected the ethnic composition in the Civil Service. This should be one of the considerations Parliament should make in rejecting or accepting the nominee.

- ii. The relevant law should require that once every quarter, the Head of Civil Service should make a report on ethnic composition in the Civil Service (or whenever a wave of employment occurs, this report should be made).
- iii. Devolution should be turned into a space for integration. Incentives should be created for county governments and private sector to embrace diversity by making it a criterion for qualifying for the Equalization Fund or Government contracts.

Lastly, there is still need to reduce pressure on the Civil Service as one of the largest employer by creating jobs in the private sector. As those in Government make efforts to embrace diversity, so too must citizens desist from pressurizing people from their communities – be they politicians or officials – to secure them jobs in the public sector.

In the near future, we undertake to provide further analysis of diversity in other public sector positions in parastatal and other Government bodies.

Appendix 2

NCIC Study on Ethnic Diversity of Universities in Kenya



NATIONAL COHESION AND INTEGRATION COMMISSION

BRIEFS ON ETHNIC DIVERSITY OF PUBLIC UNIVERSITIES IN KENYA

VOLUME THREE

FEBRUARY, 2012

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Introduction

- ❖ One key mandate of the Commission is to ensure ethnic diversity in public employment. For example, Section 7 of the National Cohesion and Integration Act, 2008 that States in Part; “All public establishments shall seek to represent the diversity of the people of Kenya in the employment of staff. No public establishment shall have more than one third of its staff from the same ethnic community”.

Objectives

- ❖ Highlight the need to promote equality of opportunity for all staff and eliminate discrimination on ethnic and racial basis.
- ❖ Provide information that will be used to develop inclusive employment policy in the public (and private sector in Kenya).

Rationale

- ❖ Freedom from discrimination is a fundamental right espoused in the NCI Act, 2008 and other international legislations such as the UN Declaration on the elimination of all forms of discrimination
- ❖ Bringing equality and equity to the workplace has significant economic benefits, too. Employers who practice equality and equity have access to a larger and more diverse workforce.
- ❖ Diversity in workplace promotes understanding & appreciation of socio-cultural differences → unity.

Method

- ❖ Letters and questionnaire were sent to all the public Universities and Constituent Colleges and copied to the Ministry of Higher Education asking them to provide details of their employees covering date of employment, district of origin, ethnic affiliation, among others.
- ❖ Currently, Kenya has seven public universities and sixteen constituent colleges (including Rongo University College which has been gazetted but has neither admitted students nor employed staff). This ethnic audit covered the public universities and the constituent colleges.
- ❖ Six Public Universities and 9 Constituent Colleges responded and were analysed. Some universities and university colleges submitted both analysed and raw data.

Universities in Kenya

The distribution of public universities and their constituent colleges clearly shows the North/ South divide in Kenya which has gradually increased since the pre-colonial times and has been reinforced in the post independence era. For example, there is not a single university or constituent college above 2⁰ North. Attempts to place satellite campuses in the 'North' have been marred by difficulties in infrastructural development among other problems. For instance Moi University Northern Kenya Campus was opened on 1st September 2009 in Garissa. Nevertheless, the campus experienced a lot of challenges in its operationalization and has never picked up.

Kenyatta University on the other hand opened an Institute of Open, Distance and e-Learning located in Garissa Town. The Garissa Regional Centre serves all the Districts of North Eastern Province as well as Mwingi District in Eastern Province and Tana River District in Coast Province.

Brief One: General Representation of Communities in Public Universities

- The total number of employees working in the six public universities and the thirteen constituent colleges that responded to the study is 14,996.

Table 1: Ethnic Composition of Employees in Higher Education in Kenya

Community	Number	Percentages	Population ratio %
Kikuyu	4133	27.6	17.7
Luhya	2544	17.0	14.2
Kalenjin	2133	14.2	13.3
Luo	2086	13.9	10.8
Kisii	1253	8.4	5.6
Kamba	1041	6.9	10.4
Meru	644	4.3	4.4
Mijikenda	329	2.2	5.2
Taita	196	1.3	0.7
Embu	154	1.0	0.9
Others	87	0.6	-
Teso	60	0.4	0.9
Maasai	57	0.4	2.2
Somali	55	0.4	6.4
Borana	29	0.2	0.4
Mbeere	25	0.2	0.4
Turkana	23	0.2	2.6
Kuria	22	0.2	0.7
Suba	20	0.1	0.4
Other Africans	18	0.1	-
Asian	18	0.1	0.1
Samburu	17	0.1	0.6
Arab	14	0.1	0.1
Swahili	22	0.2	0.3
Nubi	4	0.03	-
Taveta	4	0.03	0.1
European	6	0.04	0.01
Americans	2	0.01	-
	14996	100	100

- ❖ The percentages of employment in the universities and constituent colleges of the Kikuyu, Luhya, Kalenjin, Luo, Kisii, Embu, Kenyan Europeans, Kenyan Asians, Nubi and Taita communities are higher than their national population ratio (as per the 2009 population census). Some of the differences such as that of the Embu community are however negligible (0.13%) while others such as that of the Kikuyu community is significant (about 11%).
- ❖ The communities whose representation in the universities' employment is less than their population ratio include the Somali (with the highest underrepresentation, at six percent), the Kamba, Mijikenda, Turkana and Maasai.

NB. We note that the population of the Somali community as per the 2009 population census has since been revised downwards by the Ministry of Planning and National Development

- ❖ There is a notable lack of some ethnic groups such as the Tharaka, Gabbra, Orma, Burji, Gosha, Dasnach and Njemps, among others.

Brief Two: Representation of the 'big five' communities

- ❖ In the public universities and constituent colleges, the five largest communities - the Kikuyu, Luhya, Kalenjin, Luo and Kamba who together make up about 66% of the Kenyan population constitute over 81% of the total workforce. This severs opportunities to enhance the face of Kenya in these institutions thus excluding the other more than 37 ethnic communities. For example, in the six public universities analysed, the representation of the five big communities is over 86% (see Table 2).

Table 2: 'Big Five' Ethnic Communities in Public Universities in Kenya

	University	Percentage of first five communities (%)
1	Masinde Muliro University	93
2	Moi University	89.8
3	Egerton University	87.3
4	Jomo Kenyatta University	86
5	University of Nairobi	82.3
6	Kenyatta University	81.7

Brief Three: The Relationship between Location and Ethnic Composition of Employees

- ❖ This audit reveals that most of the staff in the public universities and constituent colleges come from the communities within which the institutions are located – see Table 3.
- ❖ The spread of universities in Kenya excludes the northern part of the country with most of them located within Nairobi and its environs.
- ❖ Kenyans seem to perceive the university as a job creation enterprise for the community within which the university is located. It may be in this perspective that some regions agitate for the establishment of public universities in their areas.
- ❖ However, we note that despite the fact that Universities are national, drawing their students from all parts of the country and, in spite of the fact that their recruitment for regular programmes are national as well, locals can be employed mostly to undertake subordinate duties as part of the extension services of the university to the surrounding communities.
- ❖ The other universities located within ethnically mixed areas elicit assorted symptoms with some kind of ‘informal’ balance between two or three communities. For instance, Egerton University located in Njoro, Nakuru has 28.9% from the Kikuyu community and 25.8% from the Kalenjin Community. On the other hand, Multimedia University which is located in Ongata Rongai has 25% of its employees from the Kikuyu community, 21% from the Luhya community and 20% from the Luo community.

Table 3: Representation of ‘Local Community’ in the Employment of Universities

University	Local Community	Percentage
Bondo University College	Luo	84.3
Meru University College	Meru	83.0
Kisii University College	Kisii	79.1
Pwani University College	Mijikenda	71.0
Masinde Muliro University of Science and Technology	Luhya	68.9
South Eastern University College	Kamba	67.5
Kabianga University College	Kalenjin	57.6
Moi University	Kalenjin	55.0
Jomo Kenyatta University of Science and Technology	Kikuyu	49.7
Kenyatta University	Kikuyu	38.0
Laikipia University College	Kikuyu	36.7
Mombasa Polytechnic University College	Mijikenda	28.2
Egerton University	Kikuyu / Kalenjin	25.9 / 25.8

Brief Four: The Relationship between Vice Chancellors'/Principals' Ethnic Groups and the Majority of Employees

- ❖ Out of the 15 universities audited, 10 had the majority of their employees from the same ethnic group as the vice chancellor/principal.
- ❖ The remaining five institutions whose majority employees were not from the same ethnic group as the institution's chief executive drew the majority of their employees from the Kikuyu community.
- ❖ **NB.** It should however be noted that some of the Vice-Chancellors/principals have only recently been appointed to their positions.

Table 4: Vice Chancellor's/Principals' Ethnic Group and the Ethnic Group of Majority of the Employees

University	Ethnic Group of Vice Chancellor/Principal	Ethnic Group of Majority of the Employees	%
Kenyatta University	Kikuyu	Kikuyu	38.0
University of Nairobi	Luo	Kikuyu	38.0
Jomo Kenyatta University	Luhya	Kikuyu	49.7
Egerton University	Kalenjin	Kikuyu	25.9
Moi University	Kalenjin	Kalenjin	55.0
Masinde Muliro University	Luhya	Luhya	68.9
South Eastern Univ. College Kitui	Kamba	Kamba	67.5
Pwani University College	Swahili	Mijikenda	41.2
Kabianga University College	Kalenjin	Kalenjin	57.6
Kisii university college	Kisii	Kisii	79.1
Laikipia University college	Kamba	Kikuyu	37.0
Bondo University College	Luo	Luo	84.2
Multimedia University College of Kenya	Luhya	Kikuyu	20.0
Meru University College of Science and Technology	Meru	Meru	83.0
Mombasa Polytechnic University College	Mijikenda	Mijikenda	28.1

HERE**Brief Five: Senior Staff at Public Universities***Table 5: Senior Staff at Public Universities and Constituent Colleges*

University	Ethnic Group of Vice Chancellor/Principal	The Majority Ethnic Group	% of the Majority Ethnic Group	% of the Majority Ethnic Group among Senior Staff
Kenyatta University	Kikuyu	Kikuyu	38.0	42.2
University of Nairobi	Luo	Kikuyu	38.0	-
Jomo Kenyatta University	Luhya	Kikuyu	49.7	46.4
Egerton University	Kalenjin	Kikuyu	25.9	27.7
Moi University	Kalenjin	Kalenjin	55	36.2
Masinde Muliro University	Luhya	Luhya	68.9	68.7
South Eastern Univ. College Kitui	Kamba	Kamba	67.5	57.5
Pwani University College	Swahili	Mijikenda	41.2	-
Kabianga University College	Kalenjin	Kalenjin	57.6	-
Kisii university college	Kisii	Kisii	79.1	67.8
Laikipia University college	Kamba	Kikuyu	37	34
Bondo University College	Luo	Luo	84	-
Multimedia University College of Kenya	Luhya	Kikuyu	20	24.1
Meru University College of Science and Technology	Meru	Meru	83	-
Mombasa Polytechnic University College	Mijikenda	Mijikenda	28	-

- The data reveals that the representation of the majority of senior staff at the universities and constituent colleges is consistent with the representation of majority ethnic community at the institutions.
- Out of the nine institutions that submitted the grades of their employees, five have the percentages of the highest ethnic community in their employment reduce among the senior staff. Notably, while the general employment in Moi University has 55% from the Kalenjin community, this reduces to 36.2% among senior staff.
- On the other hand, the percentage of the highest represented ethnic community in three universities increase in representation at senior staff level. Kenyatta University and Multimedia University exhibits an increase in the percentage of the Kikuyu at Senior Staff level by 4% each.
- However, Masinde Muliro University seems to demonstrate the same trend both generally and at Senior Staff employment with the Luhya holding 68% at both levels.

Brief Six: Universities that Comply with the National Cohesion and Integration Act, 2008

- There is only one university and two constituent colleges that comply with the act. That is, no one community comprises over a third of their workforce.

Table 6: Universities that comply with the National Cohesion and Integration Act, 2008

Ser no	University	No of Employees	Highest Community	Percentage
1	Egerton	1,848	Kikuyu	25.9
2	Multimedia University College	125	Kikuyu	20.0
3	Mombasa Polytechnic University College	561	Mijikenda	28.1

Brief Seven: Public Universities that Flout the NCI Act, 2008

- The following universities violate the provision of the NCI Act, 2008 which stipulates that ‘no public establishment shall have more than one third of its staff from the same ethnic community’. In this regard, the institutions mentioned in this section have more than 33.3% of their employees from one community.
- As seen in Table 7, universities such as Masinde Muliro and Moi have more than 50% of their employees from one community. The situation is worse in constituent colleges (see Table 8).
- It should however, be noted that most of the constituent colleges inherited most of the staff who were in these colleges before they were converted in university colleges.

Table 7: Universities that Flout the National Cohesion and Integration Act, 2008

Ser no	University	No of Employees	Highest Community	Percentage
1	Masinde Muliro	946	Luhya	68.9
2	Moi	1082	Kalenjin	55.0
3	Jomo Kenyatta	1783	Kikuyu	49.7
4	Nairobi	4223	Kikuyu	38.0
5	Kenyatta	2613	Kikuyu	38.0

Table 8: Constituent Colleges that Flout the NCI, 2008 Act

Ser no	University College	No of Employees	Highest Community	Percentage
1	Bondo	127	Luo	84.3
2	Meru	146	Meru	83.0
3	Kisii	532	Kisii	79.1
4	South Eastern	250	Kamba	67.5
5	Kabianga	59	Kalenjin	57.6
6	Pwani	172	Mijikenda	41.2
7	Laikipia	357	Kikuyu	37.0

Suggestions/Way Forward

- As is the case in parastatals, these data being used to develop Policy on Inclusive Employment.
- Letters should be written to these universities and constituent colleges highlighting their areas of strength and weaknesses – and asking them to make deliberate efforts to comply with the constitutional requirement on ethnic diversity in recruitment and comply with the NCI Act, 2008.
- Meetings should be held with the various chief executives in these universities and officers from the parent ministries to discuss the way forward. These forums could also be used to gather information that would feed into the policy development.

NOTES



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REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION

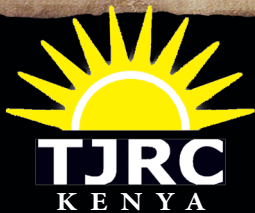
The Government should immediately carry out counselling services, especially to those who lost their entire families to avoid mental breakdown. It is not too late to counsel the victims because they have not undergone any counselling at all.

DISTRICT HOSPITAL
OPENING HOURS
FRIDAY 6. AM - 7.30 AM
1.15 AM - 12 NOON - 2 PM
2 PM - 4.30 PM - 6.30 PM
6.00 PM
AND PUBLIC HOLIDAYS
AL MANAGEMENT

The community also seeks an apology from the Government, the reason being that the Government was supposed to protect its citizens yet it allowed its security forces to violently attack them and, therefore, perpetrated gross violation of their rights.

My recommendation to this Government is that it should address the question of equality in this country. We do not want to feel as if we do not belong to this country. We demand to be treated the same just like any other Kenyan in any part of this country. We demand for equal treatment.

Anybody who has been involved in the killing of Kenyans, no matter what position he holds, should not be given any responsibility.



Volume IV

**REPORT OF THE TRUTH, JUSTICE AND
RECONCILIATION COMMISSION**

Volume IV

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**His Excellency
President of the Republic of Kenya**

Nairobi

3 May 2013

LETTER OF TRANSMITTAL

By Gazette Notice No. 8737 of 22 July 2009 and pursuant to section 10 of the Truth, Justice and Reconciliation Act No. 6 of 2008, the undersigned were appointed to be Commissioners of the Truth, Justice and Reconciliation Commission. The Commission was established with the objective of promoting peace, justice, national unity, healing, reconciliation and dignity among the people of Kenya.

Having concluded our operations, and pursuant to section 48 of the Truth, Justice and Reconciliation Act, we have the honour to submit to you the Report of our findings and recommendations.

Please accept, Your Excellency, the assurances of our highest consideration.

Amb. Bethuel Kiplagat
Chairperson

B. A. Kiplagat

Tecla Namachanja Wanjala
(Vice Chairperson)

Tecla Namachanja Wanjala

Judge Gertrude Chawatama

Gertrude Chawatama

Amb. Berhanu Dinka

Berhanu Dinka

Maj. Gen (Rtd) Ahmed Sheikh Farah

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Tom Ojienda

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Ronald Slye

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Foreword

This volume contains the core operational legacy of the Commission's work: its findings and recommendations; the blueprint for the institution tasked with monitoring and implementing the recommendations; and the Commission's proposed reparations policy and framework.

One of the most anticipated parts of a truth commission report is always the commission's findings and recommendations. Having spent four years engaging with Kenyans throughout the width and breadth of the country, including over a year of public hearings, the expectations of those who followed the process are understandably high, notwithstanding the Commission's efforts to educate the public about its powers and limitations. The Commission's statement taking form provided a specific avenue through which any Kenyan could suggest recommendations to the Commission. Every witness who testified before the Commission was asked what he or she would recommend given the violations they had witnessed or experienced. The Commission was thus presented with a wealth of information and creative ideas concerning our recommendations, including recommendations for individual and collective forms of reparations.

The first chapter in this volume sets out the Commission's findings and recommendations. The findings are based upon the facts and analysis in the Report itself, as well as additional research and investigations undertaken by the Commission. It is, understandably, one of the most highly anticipated parts of the Report. The Commission received a broad range of ideas concerning recommendations. Not all of them could be included. In choosing which recommendations to include, the Commission was conscious of, on the one hand, honoring the commitment and sacrifice of the thousands of people who participated in the process, and the thousands who suffered and continue to suffer from the legacy of historical injustices and gross violations of human rights, and on the other hand, the understandable limitations of a government that has a broad mandate in areas of economic development, welfare, education, and security. In other words, the Commission strove to make meaningful and reasonable recommendations which, it is hoped, will have a higher chance of implementation. Better to have fewer recommendations that are implemented, than many recommendations that gather dust on a bureaucrat's shelf.

The Commission was conscious of the fact that one of the biggest challenges that has traditionally faced truth commission recommendations is the lack of political will by

government to implement them. Every truth commission before this one has made recommendations that were not implemented in a timely fashion or, in most cases, not implemented at all. Often, the political pressure to implement the recommendations of a truth commission fades as soon as the commission finishes its work and issues its report. The drafters of the TJR Act clearly had this challenge in mind when they specifically empowered the Commission to design a monitoring and implementation mechanism to ensure that its recommendations are followed and implemented. The second chapter in this volume sets out the rationale for creating such an institution; describes the institution that should be created; and provides a justification for the same institution.

Lastly, the third chapter sets out the Commission's proposed reparations policy and framework. Reparations are key to the legitimacy of a truth commission, and particularly for this truth commission which is the first of its kind to have "Justice" in its title. Justice was achieved in part by the acknowledgement the Commission provided to witnesses who engaged with the Commission through the statement taking process and public hearings. Justice was also achieved in part by the identifying of individuals or institutions responsible for specific historical injustices and gross violations of human rights. Justice is further achieved by the recommendations the Commission made with respect to further investigations and prosecutions, set out in Appendix 1 of Chapter 1 of this Volume.

Equally important, however, to furthering justice is providing reparations to those who have been wronged. As set out in this chapter, international law makes clear that justice demands reparations for those who have been wronged. Reparations are not the same as compensation, though reparations may take the form of compensation to individuals. Reparations may also consist of memorials, community facilities (such as health clinics, schools, etc.), and other mechanisms by which the suffering of victims is acknowledged and addressed. The reparations framework provided here, along with the wealth of information the Commission collected in its four years of work, will guide the implementation mechanism in developing specific reparations awards. The Commission has recommended that the Government set aside an initial Ksh 500 million for reparations. It is not enough to redress all of the violations described in this Report, but we hope that it will provide a beginning that can later be supplemented.

List of Abbreviations

ADR	Alternative Dispute Resolution	MOU	Memorandum of Understanding
AMPs	Adversely Mentioned Persons	NCIC	National Cohesion and Integration Commission
CBOs	Community Based Organizations	NGOs	Non-Governmental Organizations
CDF	Constituency Development Fund	PEP	Post-Exposure Prophylaxis
CSOs	Civil Society Organizations	PEV	Post-Election Violence
DSC	District Security Committee	PMTCT	Prevention of Mother to Child Transmission
EACC	Ethics and Anti-Corruption Commission	PSC	Provincial Security Committee
ECOSOC	Economic, Social and Cultural Rights	SLDF	Sabaot Land Defence Force
FERA/M	February Eighteenth Revolutionary Army/ Movement	TRC SA	Truth and Reconciliation Commission of South Africa
GSU	General Service Unit	TRC SL	Truth and Reconciliation Commission of Sierra Leone
ICC	International Criminal Court	UNHCR	United Nations High Commissioner for Refugees
IDP	Internally Displaced Person		
ILO	International Labour Organization		
KIC	Kenya Intelligence Committee		
KNCHR	Kenya National Commission on Human Rights		

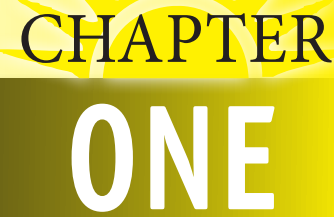
The Commission shall submit a report of its work to the President at the end of its operations. The Report shall:

- (a) summarize the findings of the Commission and make recommendations concerning the reforms and other measures, whether legal, political, or administrative as may be needed to achieve the object of the Commission;
- (b) make recommendations for prosecution;
- (c) recommend reparation for the victims;
- (d) recommend specific actions to be taken in furtherance of the Commission's findings;
- (e) recommend legal and administrative measures to address specific concerns identified by the Commission.

Truth, Justice and Reconciliation Act, sec 48(1) & (2)

All recommendations [of the Commission] shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation.

Truth, Justice and Reconciliation Act, sec 50(2)



CHAPTER ONE

Findings and Recommendations

Introduction

1. One of the most anticipated parts of a truth commission report is always the commission's findings and recommendations. This Chapter provides a catalogue of the Commission's findings and recommendations.
2. The Truth, Justice and Reconciliation Act (TJR Act) required the Truth, Justice and Reconciliation Commission (the Commission) to make findings in respect of gross violations of human rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12 December 1963 and 28 February 2008. The Act stipulated that such findings must include the Commission's conclusions on: the antecedents, circumstances, factors and context of such violations; the causes, nature and extent thereof; and perpetrator responsibility and motives.¹ The Act further required the Commission to summarize its findings in this Report.² This Chapter summarizes the main findings of the Commission as required by section 48 of the TJR Act.
3. The findings of the Commission are based upon the totality of its investigations and research. These include the detailed analysis of the statements it received, the investigations it carried out, conclusions drawn from its open and closed hearings, and the study of a large number of primary source documents and materials.

¹ TJR Act, sec 5(a)–(c) and (j).

² TJR Act, sec 48(2)(a).

4. The Commission has made findings of responsibility against individuals where such persons had an adequate opportunity to respond to allegations in interviews, hearings or in writing. However, a significant number of adversely mentioned persons did not respond to the Commission's invitation to respond to allegations levelled against them. In the absence of a response from such AMPs, the Commission presumed the allegations as levelled against them to be truthful. This is in accordance with the jurisprudence of quasi-judicial human rights bodies. In the practice of the African Commission on Human Rights and Peoples' Rights and the Inter-American Commission on Human Rights (IACHR) the facts alleged in a complainant's petition is presumed to be true if the respondent state has not provided responsive information during the maximum period set by the respective commissions.³ Similarly, the Human Rights Committee has established the practice of drawing its decision on the basis of information provided by the complainant when the respondent state fails to participate in the communications procedure.⁴
5. In making findings of responsibility against individuals and groups, the Commission employed the balance of probabilities standard of proof. This standard is akin to the preponderance of evidence normally used in civil cases. It is the same standard used by similar truth commissions internationally. The Commission was not a court of law and therefore the finding it has made in reference to an adversely mentioned person is not a finding of guilt.
6. It is noteworthy that some compared this Commission's work with that of the International Criminal Court (ICC) or asked about the relationship between the Commission and the ICC. As noted, the Commission was not a court of law, and while some of the purposes of the Commission were similar to that of the ICC, they were very different institutions. First, the Commission was a more victim-centered institution. The ICC, while more victim-centered than many courts, still has as the subject of its primary focus the suspect, and determining by a high standard of proof whether the suspect is guilty of the charges alleged. Second, the Commission was focused on historical narratives, context, and perspectives of victims, perpetrators, and witnesses. The ICC, like all courts, is much more narrowly focused. As a result of these and other differences, the Commission was able to interact with, and provide participation for, far more victims and other Kenyans than the ICC. Third, the ICC's temporal mandate is relatively narrow – from the time of the ratification of the Rome Statute by Kenya on 1 June 2005 to 26 November 2009 (the date of the ICC Prosecutor's filing of a request for the initiation of an

³ See IACHR Rules of Procedure, rule 38; *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

⁴ D McGoldrick *The Human Rights Committee: Its role in the development of the International Covenant on Civil and Political Rights* (1994) 145-150.

investigation into the Kenya situation). The Commission's temporal mandate is far broader, from 12 December 1963 to 28 February 2008, and in fact extends before and after that period.

7. Some also asked about the role of the Commission with respect to the 2007 PEV. As noted earlier, it was the 2007 PEV that provided the immediate impetus for the creation of the Commission, and that period of Kenya's history is clearly within the temporal mandate of the Commission. Consequently the Commission heard a good deal of testimony concerning the PEV. The Commission, however, limited the amount of resources that it devoted to that period for three reasons. First, the period of post-election violence was a very small part of the time period in which the Commission was to examine historical injustices and gross violations of human rights. Second, a previous commission of inquiry – the Commission of Inquiry on the Post-Election Violence, also known as the Waki Commission – had focused specifically and narrowly on violations during this period. Third, through its focus on initially six, and now three, individuals, the ICC was and is investigating this period of Kenya's history. In other words, it was the view of the Commission that a good deal of time and resources had already been, and were continuing to be, focused on this period within the mandate. Without commenting on the quality of either of these separate investigative institutions, it was the considered view of the Commission that its limited time and resources would be better served focusing on those broad areas of the mandate that were not the subject of any other investigative process.
8. The TJR Act also required the Commission to make recommendations concerning the reforms and other measures, whether legal, political, or administrative as may be needed to achieve the objects of the Commission.⁵ In this regard, the objects of the Commission were to promote peace, justice, national unity, healing, and reconciliation.⁶ In particular the Commission was enjoined to make recommendations regarding:
 - Prosecution;
 - Specific actions to be taken in furtherance of the Commission's findings;
 - Legal and administrative measures to address specific concerns identified by the Commission;
 - Measures to prevent the future occurrence of human rights violations.

⁵ TJR Act, sec48(2)(a).

⁶ TJR Act, sec 5.

9. The Commission was authorized to make recommendations concerning any other matter with a view to promoting or achieving justice, national unity and reconciliation within the context of the Act.⁷
10. The Commission was also mandated to recommend the grant of amnesty in respect of certain offences. However, as explained in the mandate chapter of this Report, the Commission did not process any amnesty applications and as such no recommendations pertaining to amnesty have been made. The Commission was also mandated to recommend a reparation framework that would serve as the basis for repairing the harm suffered by victims and survivors of gross violations of human rights and historical injustices. Chapter Three of this Volume sets out the Commission's recommendations in relation to reparations. Finally, the Commission was required to make recommendations on the mechanism and framework for the implementation of its recommendations. Chapter Two of this Volume makes recommendations relating to such a mechanism.
11. In essence, the legal framework provided by the TJR Act facilitated the making of comprehensive recommendations on a range of topics. As such, and to facilitate implementation and monitoring, the Commission has tried to make recommendations which are specific, feasible and which have measurable short, medium or long-term goals. Recommendations which strike a resonance with the Kenyan people are likely to be the subject of mobilization and lobbying. Such recommendations are more likely to be implemented by the Government. Each recommendation has been directed to a specific entity or office holder.
12. The recommendations made by the Commission are a synthesis of views expressed to the Commission and the Commission's own reflection on the findings reached with respect to various violations and issues. The recommendations reflect views expressed to the commission by victims, witnesses, civil society organisations, experts and government officials who interacted with the Commission. With respect to victims, the Commission solicited their views on recommendations through the statement taking process. Additional recommendations were proposed to the Commission by those who testified during the individual, thematic and institutional hearings held around the country.
13. With respect to recommendations concerning the investigation and possible prosecution of an individual, the following shall apply: The DPP or appropriate authority shall immediately commence an investigation into the individual named.

⁷ TJR Act, sec 5(2)

Unless otherwise provided in the specific recommendations, such an investigation shall conclude no later than twelve months after the issuance of this Report. At the completion of such investigation the DDP or appropriate authority shall make an immediate determination concerning whether the evidence warrants a criminal prosecution. The DPP or appropriate authority shall immediately make that determination public, and shall include in that public statement detailed reasons justifying its decision.

14. The above procedure with respect to investigations for possible prosecution is a recommendation of the Commission, and as with all recommendations as set out in the TJR Act is binding as a matter of law.
15. In thinking about and formulating recommendations, the Commission took note of the fact that the Commission was established as part of the Kenya National Dialogue and Reconciliation process which led to the initiation of numerous reforms and mechanisms intended to address long-standing historical issues. As a consequence, many of the issues that the Commission was tasked to address have been addressed (either in whole or in part) or are in the process of being addressed. For instance, the Constitution of Kenya 2010 has dealt with or laid the basis for addressing such issues as historical land injustices and economic marginalization.
16. The Commission was also aware that there have been established in recent time a number of permanent institutions charged with dealing with the very issues that the Commission was mandated to inquire into. These include:
 - The National Land Commission, which has the mandate to deal with, among other issues, historical land injustices;
 - The National Cohesion and Integration Commission, which has the mandate to foster national cohesion and unity;
 - The National Gender and Equality Commission, which has the mandate to promote and protect the rights of minority and vulnerable groups, including women and marginalized groups;
 - The Ethics and Anti-Corruption Commission, which has the mandate to investigate cases of corruption and economic crimes;
 - The Commission on Revenue Allocation, which has the mandate to determine allocation of revenue; and
 - The Independent Police Oversight Authority, which has the mandate to, *inter alia*, inquire into killings committed by the police.

17. In essence, the Commission's work evolved at a particular historical moment that coincided with a reform process. Thus, the Commission viewed its role as that of building on the existing reform initiatives.
18. Like truth commissions before it, the Commission had to consider whether or not to recommend lustration. The term lustration is derived from the Latin *lustrum* and refers to a process of purification. In the field of transitional justice, the process of lustration has been used to remove from public office individuals who are associated with past human rights violations. It has also been used to prevent individuals associated with human rights violations from holding public office in the future.
19. The United Nations recognize the important role that vetting and lustration can play in the prevention of future human rights abuses and violations by the State.⁸ Lustration can serve two purposes: preventing the recurrence of human violations by public officers who have committed such violations in the past, and restoring the population's trust in the State after a period of systematic human rights violations.
20. The process of lustration has been controversial in many societies when it has been used to remove from office all individuals associated with past political regimes. For example, lustration has been used in former communist countries to remove all individuals associated with the past communist regime, and in Iraq to remove all officials associated with the deposed Baath Party.⁹ In the context of Kenya, this kind of mass action is not recommended.
21. However, the prevalence of impunity throughout the history of Kenya compelled the Commission to consider lustration for past abuses committed by individuals while acting in an official capacity. The Commission considered that tackling impunity is a necessary and urgent step in the full restoration of the rule of law in Kenya, in establishing lasting peace and stability, and in fostering reconciliation. For this reason, the Commission has recommended that specific individuals should not hold public office in Kenya's constitutional order on account of their past conduct and/or decisions which resulted in gross violations of human rights.

⁸ Rule of Law Tools for Post-Conflict States: Vetting, an operational framework, Office of the High Commissioner for Human Rights (OHCHR), United Nations, New York and Geneva (2006) 1.

⁹ This process has been referred to as de-Baathification.








Primary Findings

22. The Commission finds that between 1895 and 1963, the British Colonial administration in Kenya was responsible for unspeakable and horrific gross violations of human rights. In order to establish its authority in Kenya, the colonial government employed violence on the local population on an unprecedented scale. Such violence included massacres, torture and ill-treatment and various forms of sexual violence.
23. The Commission also finds that the British Colonial administration adopted a divide and rule approach to the local population that created a negative dynamic of ethnicity, the consequences of which are still being felt today. At the same time the Colonial administration alienated large amounts of highly productive land from the local population, and removed communities from their ancestral lands.
24. The Commission finds that between 1963 and 1978, President Jomo Kenyatta presided over a government that was responsible for numerous gross violations of human rights. These violations included:
 - in the context of the Shifta War, killings, torture, collective punishment, and denial of basic needs (food, water and health care);
 - political assassinations of Pio Gama Pinto, Tom Mboya and J.M. Kariuki;
 - arbitrary detention of political opponents and activists; and
 - illegal and irregular acquisition of land by the highest government officials and their political allies
25. The Commission finds that between 1978 and 2002, President Daniel Arap Moi presided over a government that was responsible for numerous gross violations of human rights. These violations include:
 - massacres;
 - unlawful detentions, and systematic and widespread torture and ill-treatment of political and human rights activists;
 - assassinations, including that of Dr. Robert Ouko;
 - illegal and irregular allocations of land; and
 - economic crimes and grand corruption.

26. The Commission finds that between 2002 and 2008, President Mwai Kibaki presided over a government that was responsible for numerous gross violations of human rights. These violations include:
 - unlawful detentions;
 - extra judicial killings; and
 - economic crimes and grand corruption
27. The Commission finds that state security agencies, particularly the Kenya Police and the Kenya Army, have been the main perpetrators of bodily integrity violations of human rights in Kenya including massacres, enforced disappearances, torture and ill-treatment, and sexual violence.
28. The Commission finds that Northern Kenya (comprised of the former North Eastern Province, Upper Eastern and North Rift) has been the epicenter of gross violations of human rights by state security agencies. Almost without exception, security operations in Northern Kenya have been accompanied by massacres of largely innocent citizens, systematic and widespread torture, rape and sexual violence of girls and women, looting and burning of property, and the killing and confiscation of cattle and other livestock.
29. The Commission finds that state security agencies have as a matter of course in dealing with banditry and maintaining peace and order employed collective punishment against communities regardless of the guilt or innocence of individual members of such communities.
30. The Commission finds that during the mandate period the state adopted economic and other policies that resulted in the economic marginalization of five key regions in the country: North Eastern and Upper Eastern; Coast; Nyanza; Western; and North Rift.
31. The Commission finds that historical grievances over land constitute the single most important driver of conflicts and ethnic tension in Kenya. Close to 50 percent of statements and memorandum received by the Commission related to or touched on claims over land.
32. The Commission finds that women and girls have been the subject of state-sanctioned systematic discrimination. Although discrimination against women and girls is rooted in patriarchal cultural practices, the state has traditionally failed to curb harmful traditional practices that affect women's enjoyment of human rights.

33. The Commission finds that despite the special status accorded to children in Kenyan society, they have been subjected to untold and unspeakable atrocities including killings, physical assault and sexual violence.
34. The Commission finds that minority groups and indigenous people suffered state-sanctioned systematic discrimination during the mandate period. In particular, minority groups have suffered discrimination in relation to political participation and access to national identity cards. Other violations that minority groups and indigenous people have suffered include: collective punishment, and violation of land rights and the right to development.

Recommendations

-  The Commission recommends that the President, within six months of the issuance of this Report, offer a public and unconditional apology to the people of Kenya for all injustices and gross violations of human rights committed during the mandate period.
-  The Commission recommends that State security agencies, and in particular the Kenya Police, Kenya Defence Forces, and the National Intelligence Service apologize for gross violations of human rights committed by their predecessor agencies between 12 December 1963 and 28 February 2008, especially acts of extra-judicial killings, arbitrary and prolonged detention, torture and sexual violence.
-  The Commission recommends that the Kenyan Government considers entering into negotiations with the British government with a view to seeking compensation for victims of atrocities and injustices committed during the colonial period by agents of the colonial administration. This should be done within 12 months of the issuance of this Report.
-  The Commission recommends that the British government offer a public and unconditional apology to the people of Kenya for all injustices and gross violations of human rights committed by the colonial administration between 1895 and 1963.
-  The Commission recommends that the Judiciary apologize to the people of Kenya for failing to address impunity effectively and perform its role of deterrence to prevent the perpetration of gross human rights violations, during the period between 12 December 1963 and 28 February 2008.
-  The Commission recommends the creation of a National Human Rights Day on 10 December, to coincide with the international Human Rights Day, which will be used to promote respect for human rights in Kenya.
-  The Commission recommends that the judiciary fast-tracks the establishment of the International Crimes Division of the High Court which shall be responsible for the trial of some of the cases referred to the Director of Public Prosecutions for investigations and prosecution.

- The Commission recommends that the fast-tracking of the enactment of human rights related laws as envisaged by the Constitution of Kenya, including on: freedom of the media; fair hearing; and rights of persons held in custody or detained.
- The Commission recommends that the government makes a declaration in terms of article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights thus allowing individual victims of human rights violations who have exhausted local remedies to directly access the African Court.
- The Commission recommends that the Ministry of Justice fast-tracks the expansion of the national legal aid scheme to cover the entire country.

Factors that Encouraged Perpetuation of Gross Violations of Human Rights

35. The Commission finds that the following factors encouraged the perpetuation of gross violations of human rights during the mandate period:
 - The failure of the first government in independent Kenya (led by President Jomo Kenyatta) to dismantle the repressive state structures established by the colonial government.
 - The use of and subsequent enhancement of repressive laws, policies and practices initially employed by the colonial government by the first two post-independence governments (President Jomo Kenyatta's and President Daniel Arap Moi's administrations).
 - The creation of a *de jure* one party state by President Moi's government, resulting in severe repression of political dissent and intimidation and control of the media. Repression of political speech and the media allowed many violations to occur with little public scrutiny, much less accountability.
 - Consolidation of immense powers in the person of the President, coupled with the deliberate erosion of the independence of both the Judiciary and the Legislature.
 - The failure of the state to investigate and punish gross violations of human rights. The Commission finds that in most cases, the state has covered-up or downplayed violations committed against its own citizens, especially those committed by state security agencies. During the entire mandate period (1963-2008), the state demonstrated no genuine commitment to investigate and punish atrocities and violations committed by its agents against innocent citizens.

Findings and Recommendations on Specific Violations and Injustices

Colonial Era

36. The Commission finds that in order to establish and consolidate its rule in Kenya, the British government employed violence on a locally unprecedented scale. To force the local population into submission, the colonial administration in Kenya conducted punitive expeditions in the 1890 and 1920 against what they called 'recalcitrant tribes'. There were military expeditions against the Nandi in 1901, 1905 and 1906, against the Embu in 1905, against the Kisii in 1904, 1908 and 1914, against the Kipsigis in 1905 and against the Abagishu and Kabras in 1907. These military expeditions were characterised by massacres, torture, sexual violence, and destruction of property.
37. The British administration divided Kenyan territory into provinces and districts. These administrative boundaries were based on ethnic and linguistic units, in effect freezing cultural development and population mobility. The boundaries were arbitrary, in some cases dividing groups more sharply than had been the case and in some cases combining groups that were originally distinct. The Commission finds that the creation of these administrative units planted the seeds of ethnic hatred as communities started to establish ownership of their territories to the exclusion of others.
38. In certain cases, the British established its authority by establishing alliances with local leaders. These alliances were created through manipulation and, at times, through the circumventing existing indigenous systems of authority. The British manipulated leaders of the Maasai and Luhya (Mumia in Wanga and Sudi Namachanja in Bukusu). The British also imposed leaders on local populations as was the case of Karuri wa Gakure and Kinyanjui wa Gathirimu among the Kikuyu. Manipulations were more evident in the signing of treaties involving British administrators and African leaders such as the Anglo-Maasai treaties of 1904 and 1911.
39. After violently bringing the local population into some form of submission, the Colonial administration proceeded to find means of making the colonial territory self-financing. This was achieved through the creation of the chief as agents of local administration who were tasked with the responsibility of tax collection, maintenance of law and order and mobilization of labour for settler requirements. Chiefs were empowered by a series of labour laws to call out any number of able-bodied persons to labour without pay. This mandate was extended at the outbreak of World War 1 to finding able-bodied manpower for the war. Chiefs had retainers who in the process of tax collection, confiscated peoples' animals and produce,

seized their women and routinely whipped men. The Commission finds that such coercive authority, supervised and approved by the colonial administration, explains the intense hatred for chiefs and the provincial administration in general, even in the post-colonial period.

40. Colonial violence reached its zenith in the 1950s (and mainly during the emergency years), a time when communities in Kenya staged a fight for political and economic self-determination. The British interned thousands of Africans in detention camps set up around the country. The treatment at these camps was brutal. Information about what happened at the camps was carefully controlled and the British colonial office consistently denied reports of torture and other gross violations of human rights.
41. Although the British administration was responsible for atrocities during the emergency years, the Mau Mau also committed atrocities against those they perceived as local beneficiaries of colonial power, in effect turning neighbours and relatives against each other. Contrary to African customs and values, the Mau Mau assaulted old people, women and children.

Shifta War

42. The Commission finds that the Kenyan military inflicted violations and atrocities on innocent civilians during the conflict. In particular, the Commission finds that the Kenyan Army committed mass killings of civilians during the Shifta War and that the number of people who were killed during the War is possibly much higher than the official figure of 2000. Most of the killings took place in villages but the Commission also received evidence showing that killings took place in places of worship.
43. The Commission finds that violations against women were widespread and systematic. These violations included rape and other forms of sexual violence. The Commission received evidence that women were held as sexual slaves by members of the Kenyan Army. The Commission rejects the prevailing official view that sexual violence during the Shifta War was infrequent and isolated.
44. The Commission finds that the Kenyan Army was responsible for the killings and large-scale confiscation of livestock belonging to civilians. The shooting of especially camels was a particular strategy employed by the Army as it was believed that camels were used by the Shifta to transport guns and other supplies. The Army was responsible for the poisoning of livestock. Testimony received by

the Commission reveal that it was common for soldiers and government officers to invade villages and confiscate cattle, sheep, camels and goats. The owners of such livestock were never told what happened to their livestock. Nor were they ever compensated for their losses.





45. The Commission finds that as part of the Shifta War, the Kenyan government established restricted or protected villages or camps in which residents of Northern Kenya were essentially detained and their movement severely restricted. This villagisation programme was eerily reminiscent of the detention camps created during the colonial period. The conditions in the restricted villages in Northern Kenya were squalid. Accounts received by the Commission indicate that diseases such as dysentery, pneumonia, malaria and tuberculosis were common in the villages
46. The Commission finds that the Shifta War had a particularly devastating impact on minority groups living in Northern Kenya such as the Sakuye.
47. The Commission finds that while those fighting against the Kenyan government committed violations against the local civilian population, the vast majority of violations were committed by the Kenyan government through its military and police officers and provincial administrators
48. The Commission finds that those fighting against the government stole, often violently, from the local population in order to support their military activities.
49. The Commission finds that military and political leaders conducted the conflict with little if any regard to the basic rights of the Kenyan citizens in the region.
50. This inattention to the rights and welfare of the local population continued after the end of the conflict and to some extent even continues today. Economic marginalization and continued violations of the rights of those living in the former Northern Frontier District have their origins in the actions and attitudes of the colonial government and the newly independent Kenyan government.
51. The Commission finds that the Kenyan government made a deliberate and concerted effort to cover up abuses committed in connection with the conflict, and enacted the Indemnity Act in order to protect government officials for accountability for wrongful acts committed in the conflict.
52. The Commission finds that the Indemnity Act not only covered up human rights abuses and other violations of both Kenyan and International Law, but itself is a violation of international law as it denies the victims of the conflict access to truth,

We appeal for the revealing of the content of Arusha Declaration between Kenya and Somali governments about the North Eastern Frontier District, which could have led to the atrocities and marginalization of the people of NFD by successive Kenya regimes.

reparations, and accountability for what they suffered. The effects of the Indemnity Act, the amount of time that has passed since the atrocities occurred, and fading memories of victims and other witnesses to such atrocities, all contribute to making it difficult to identify individual combatants who committed violations of the Geneva Conventions and other applicable bodies of law.

53. The Commission finds that Brigadier Joseph Ndolo and Brigadier Jackson Mulinge (as they were then) bear command responsibility for the atrocities committed against civilians by the Kenyan Army during the Shifta War.

Recommendations

-  The Commission recommends that the President, as the Commander-in-Chief of the Armed Forces, within twelve months of publication of this Report, acknowledges that the military committed atrocities during the Shifta War and offer a public and unconditional apology to the people of North Eastern and all who were affected by the conflict.
-  The Commission recommends the repeal of the Indemnity Act within nine months of the issuance of this Report. If the Indemnity Act is not repealed within the stipulated time, the Attorney General shall immediately thereafter (and no later than one month after such six month period) issue a public report explaining why the Indemnity Act has not been repealed and what steps, if any, the government plans to take to ensure its repeal and to provide accountability for the violations committed during the Shifta War.
-  The Commission recommends that within nine months of the publication of this Report, the government, and particularly the Ministry of Foreign Affairs, publishes the entire Memorandum of Agreement (Arusha Agreement) signed between the Kenyan and Somalia governments and which marked the formal end of the Shifta War. The Agreement should be published in at least three local newspapers with wide circulation. Moreover, copies of this Agreement should be translated into local languages spoken in Northern Kenya and be widely disseminated in the region.
-  The Commission recommends the establishment of a public memorial to commemorate the victims of Shifta War. The memorial should be established within 24 months of the issuance of this Report.

Massacres

Primary findings

54. Massacres have occurred throughout the history of Kenya. While they increased during and as a result of colonialism, massacres predate the colonial period. The Commission has documented the following massacres which occurred during the colonial period:
 - Kedong Massacre
 - Massacres committed in the context of the Giriama Rebellion
 - Kollowa Massacre
 - Massacres committed in the context of Mau Mau War including Lari Massacre and Hola Massacre
55. The Commission finds that most massacres committed by state security agents in the post-independence period have occurred in Northern Kenya, that is, North Eastern, Upper Eastern and North Rift. These massacres were committed during security operations with the stated purpose of, among other things, combatting cattle rustling and disarming the population. The Commission finds that state security agencies were responsible for the following massacres: Massacres during the Shifta War; Bulla Karatasi Massacre, 1980; Wagalla Massacre, 1984; Lotirir Massacre; and Malka Mari Massacre.
56. Massacres committed by civilians mostly occurred as a result of cattle rustling and inter-ethnic or inter-communal conflict. The Commission finds that the motivation for inter-ethnic massacres was mostly contestations for control of land for pasture and water. Another motivation includes retaliation. As such, ethnic groups which were victims of massacres were often previously perpetrators of massacres themselves against the attacking group. Inter-ethnic conflict was characterised by reprisals and revenge attacks.
57. Most accounts of massacres that were presented to the Commission were undocumented which made investigating such incidents difficult if not impossible. The vast majority of perpetrators responsible for the massacres have not had to answer for their crimes. To this day they remain unpunished.
58. Massacres that took place during the mandate period were invariably accompanied by the committal of a range of other violations. These included rape and other

gender-based violations, torture, enforced disappearances and destruction of property.

59. The Commission finds that because most massacres committed by security agents have occurred in Northern Kenya, victims of massacres are therefore predominantly of Somali, Borana, Sakuye, Gabbra, Pokot and Turkana ethnic groups. Most victims of massacres in North Eastern and Upper Eastern were predominantly Muslims.
60. The communities targeted for attack by way of massacres in inter-ethnic conflict were in most cases isolated and far from police or government presence. Victims were mostly attacked or ambushed at watering points, while herding livestock or while in their homesteads.
61. Children were sometimes the targets of massacres. In the case of the Turbi Massacre of 2005 a primary school was specifically singled out for attack and 21 children killed. Similarly in the Murkutwa Massacre, a total of 12 children were killed.
62. In respect of massacres committed by state security forces, the Commission finds that these massacres were the products of a desire on the part of the relevant security forces to impose collective punishment on communities whose members were suspected of committing various transgressions.
63. The Commission finds that the prevailing security environment of lax controls and almost total impunity for perpetrators effectively encouraged and condoned the committal of such heinous crimes.
64. The Commission is not aware of a single criminal conviction for any massacre committed by the security forces in Kenya during the mandate period.
65. The Commission notes that command responsibility can be attributed to those who exercise actual authority over subordinates. It applies to both civilian and military officials. It arises when those in command knew, or had reason to know, that crimes were about to be committed or had been committed by their subordinates or those under their effective authority and control, and they failed to take the necessary and reasonable measures within their power to prevent or punish those subordinates. Commanders are under an objective responsibility to try to establish what their subordinates are doing and discipline them where appropriate. Responsibility can even be imposed where the commander does not take adequate steps to keep abreast of the criminal activities of his or her subordinates.

66. The Commission made formal requests to the Ministry of Defence for information in respect of the role of the Army in the Shifta War and other massacres but no response was received. The Commission finds it regrettable that the Ministry of Defence chose to ignore or refuse the request, and thus to act in clear violation of the provisions of the TJR Act. In so doing the Ministry of Defence has undermined Kenya's truth and reconciliation process.

Bulla Karatasi/Garissa Gubai Massacre

67. The Commission finds that the security operation conducted in Garissa in November 1980 resulted in the massacre of hundreds of civilians. Numerous other atrocities were committed by state security agents (the regular police, administration police, General Service Unit, and the Kenya Army), including torture, brutal beatings, rape and sexual violence, burning of houses and looting of property.
68. The Commission finds that the Bulla Karatasi Massacre, and the detention, torture, rape and sexual violation of women, burning of houses and the looting of property, was a systematic attack against a civilian population and thus qualifies as a crime against humanity.
69. The Commission finds that to cover up the massacre, security agents involved in the operation disposed of the bodies of those killed into the Tana River.
70. The Commission finds that collective punishment was a key component of the Bulla Karatasi security operation which resulted in the mass killings of civilians. Security agents operated on the presumption that the entire population of Garissa town and its environs was somehow responsible for the shooting of civil servants, the crime which prompted the mounting of the security operation. On this basis, all Somali male adults were rounded and detained at Garissa Primary School where they were screened, tortured and brutally beaten.
71. The Commission finds that the military participated in the Bulla Karatasi Massacre. The commander of the Kenya Army, amongst others, flew to Garissa the day after the operation on a fact-finding mission. It is difficult to see what would have necessitated a high ranking member of the Kenya Army to visit the site of the massacre other than some level of military involvement in the operation. The Commission therefore rejects the official position that the military did not participate in the operation.
72. The Commission finds that members of the North Eastern Provincial Security Committee (chaired by Benson Kaaria, the then Provincial Commissioner for

North Eastern Province) and Garissa District Security Committee at the time of the Bulla Karatasi operation bear responsibility for the massacre and other atrocities committed during the security operation. The members of both the Provincial and District Security Committees sat in the same emergency meeting at which the security operation and the collective punishment of male adults of the Somali ethnic community was authorised. The Commission also finds that the Minister for Internal Security at the time of the security operation, Godfrey Gitahi Kariuki (popularly known as G.G. Kariuki), bears responsibility for the operation and the ensuing atrocities.

73. The Commission finds that the conduct of Benson Kaaria and G.G. Kariuki, both of whom appeared before the Commission, is consistent with the official denials and deflections that followed in the aftermath of the Bulla Karatasi Massacre. Before the Commission, Benson Kaaria repeatedly asserted that the Bulla Karatasi operation did not result in any deaths nor were any women raped or otherwise sexually violated. Similarly, G.G. Kariuki denied knowledge of any deaths or rapes. The Commission finds that members of the North Eastern Provincial Security Committee and the Garissa District Security Committee and the Minister of Internal Security at the time of the Bulla Karatasi Massacre are unfit to hold public office in Kenya's new constitutional order.
74. The Commission finds that despite the numerous atrocities committed by security agents during the Bulla Karatasi operation no one was ever identified as responsible or held to account.

Wagalla Massacre

75. The Commission finds that the security operation conducted in Wagalla, Wajir, in February 1984 resulted in the massacre of hundreds of civilians. Numerous other atrocities were committed by state security agents including torture, brutal beatings, rape and sexual violence, burning of houses and looting of property
76. The Commission finds that the Wagalla Massacre, including the detention, torture and killing of the male members of the Degodia tribe at the airstrip, and the rapes, killing of livestock and burning of homes in the villages, was a systematic attack against a civilian population and thus qualifies as a crime against humanity.
77. The Commission was unable to determine the precise number of persons murdered in this massacre but accepts that a large number died, possibly close to a thousand. The official figure of 57 given by the state therefore grossly underestimates the number of people who were killed at Wagalla and is an example of the generally

thoughtless manner in which the state has traditionally treated massacres committed by its own agents.

78. The District Security Committee (DSC) at Wajir authorized the security operation that resulted in the massacre. The plan involved confining people at the airstrip, a place not officially gazetted as a detention center.
79. The Provincial Security Committee (PSC) at Garissa had a role to play in the authorizing of the operation as is evidenced from the signal that was sent from the Garissa PSC to the Wajir DSC that called for the rounding up of persons and livestock and for them to be *"treated mercilessly"*. The Commission finds such language in official communications to be highly inappropriate and reckless. Such words stood as an effective license for subordinates to take the law into their own hands. The Commission finds the PSC and in particular, the author of the signal, Provincial Police Officer Aswani, to be responsible for encouraging the recipients of the instruction to act in a lawless manner.
80. The Kenya Army is held to be responsible for the actual execution of the massacre. The military as a matter of necessity must also have played a role in the planning of the operation.
81. The Commission is satisfied that the DSC, the PSC and the Kenya Intelligence Committee (KIC) knew or should have known that the security approach adopted would lead to gross violations of human rights, including the deaths of innocent individuals. None of the members of these bodies learnt any of the lessons from earlier massacres, such as the 1980 massacre in Garissa (Bulla Karatasi). Alternatively these persons chose to ignore such lessons.
82. There was a deliberate effort by the government to cover up the details and extent of the massacre. The cover-up involved most if not all of those in positions of authority in Wajir, Garissa and Nairobi.
83. The Commission notes that members of the KIC visited Wajir the day preceding the Wagalla Massacre, during which visit they held a meeting with the District Security Committee. The Commission finds that members of the KIC deliberately mischaracterized to the Commission the nature of the KIC trip and withheld or concealed information concerning their knowledge and/ or involvement in the security operation. The Commission finds that while development may have been on the KIC's agenda as alleged by such members, its primary mission was in fact to assess the state of security in the region. This much is apparent from the documents

concerning the planning of the trip, as well as the documents prepared shortly after the trip. This conclusion is also confirmed by some of the witnesses who testified.

84. The Commission notes with deep concern that notwithstanding their positions and seniority, their specific brief in the area, the security briefings received, and their knowledge of ongoing incidents and the declining security situation in Wajir, that all of the KIC members interviewed or who appeared in the hearings denied any knowledge of the plans to follow up or deal with the security situation. The Commission finds that, in the circumstances described above, such denials are not credible.
85. The Commission accordingly finds that the KIC must have been apprised of the plans for the pending security operation. In fact the Commission was told that the security operation was planned by the National Security Council in Nairobi in January 1984 which, if true, makes it extremely difficult to believe that the KIC would not have been made aware of such plans in connection with their tour of the area. One of the questions the Commission was unable to answer is why the KIC members have chosen to feign total ignorance as to what measures were to be taken, even close to thirty years after the event.
86. The KIC members were likely to have received news of the massacre before most people. However they deny this. Some of them went so far as to claim that they only heard of the Wagalla Massacre through newspaper reports that surfaced weeks afterwards. The Commission finds these claims implausible
87. The conduct of the KIC members is consistent with the official wall of silence that descended over the facts and details of the Wagalla Massacre. In feigning ignorance, the KIC members have invited deep suspicion about answers to the most serious questions as to their specific roles in the days preceding and just after the Wagalla Massacre. The Commission finds the conduct of the KIC members unbecoming of their high offices. Indeed the Commission finds that particularly because of their continued cover up of the circumstances surrounding the massacre that none of the individuals who were members of the KIC are fit to occupy any position of responsibility in the new Kenyan constitutional order.
88. The Government refused to make available to the Commission specific documents related to its investigation of this and other massacres in clear violation of the TJR Act. Specifically the Commission did not receive the full set of minutes of meetings of the relevant PSC, DSC, and KIC meetings, and did not receive any minutes of the NSC, despite repeated requests. This violation of the TJR Act has severely hindered

the ability of the Commission to discover the entire truth and context of these and other violations.

Malka Mari Massacre

89. The Commission finds that the 1981 security operation in Malka Mari, Mandera, resulted in the massacre of hundreds of individuals. During the security operation, women were raped and were subsequently shunned in the community. Others suffered serious injuries, including the loss of limbs.
90. The Commission finds that the state has maintained an official silence over the massacre.

Turbi and Bubisa Massacres

91. The Turbi Massacre occurred on the morning of 12 January 2005 when raiders attacked Turbi village in Marsabit. Afterwards, nine people were killed in Bubisa in revenge for the killings in Turbi. This killing of nine people is commonly referred to as Bubisa Massacre.
92. The Commission finds that preceding the Turbi and Bubisa Massacres were numerous resource-based conflicts between the Borana and Gabbra communities.
93. The Commission finds that about 95 people were killed during the Turbi and Bubisa massacres, including 12 children who were killed at Turbi Primary School.
94. The Commission finds that the Turbi and Bubisa Massacres were both ethnic-based and politically motivated.
95. The Commission finds that the Turbi and Bubisa Massacres occurred partly as a result of the failure of the state to provide security for the people of Marsabit and particularly the victims and survivors of the massacres. While there were early warnings of looming violence in Marsabit, the government security apparatus failed to respond in good time.
96. The Commission finds that the Turbi and Bubisa Massacres has had severe impact on the communities living in Marsabit, especially the Gabras and Boranas.
97. The Commission finds that no one was ever identified as responsible or held to account for the Turbi and Bubisa Massacres. A criminal trial was against 3 people allegedly responsible for the Bubisa Massacre but the case was later withdrawn.

Lotirir Massacre

98. The Commission finds that the security operation conducted in West Pokot District between 22 February and 22 May 1984 by the Kenyan security agents (mainly the Kenya Army) resulted in what is popularly referred to as Lotirir Massacres.
99. The security operation also resulted numerous other gross violations of human rights, including torture, and sexual violence. The security agents used heavy artillery and bombed the following areas in West Pokot District: Kadam Hill; Achalau Hill; Lorusuk Hill; Kasei Hill; Chepyomot (Cheloboi arear); Tarakit Hill; Alale; Nauyapong; and Kishiaunet. Moreover, the security agents confiscated or killed livestock belonging to the local population.

Murkutwa Massacre







100. The Murkutwa Massacre took place on the morning of 12 March 2001 when heavily armed Pokot raiders attacked residents of Murkutwa location in Marakwet District.
101. The Commission finds that the Murkutwa Massacre occurred partly as a result of the failure of the state to provide security for the people of Murkutwa and particularly the victims and survivors of the massacre.

Loteteleit Massacre

102. Loteteleit Massacre occurred on 28 April 1988 when cattle raiders believed to be the Toposa of Southern Sudan and the Nyangatom of Ethiopia ambushed the Turkana at a water point at Loteteleit.
103. The Commission finds that the Loteteleit Massacre occurred partly as a result of the failure of the state to provide security for the people of Loteteleit and particularly the victims and survivors of the massacre.

The President and the Prime Minister should admit that atrocities like ... wanton killings, rape, looting and everything have happened and then they say, 'we apologize to the people of North Eastern Province (NEP)'. We can accept that.

Recommendations

-  The Commission recommends that within six months of the issuance of this Report, the President formally apologizes for those massacres committed by government forces, and for the failure of the state to avert the massacres at Turbi and Bubisa despite having prior information of the same.
-  The Commission recommends that the victims of the above-reference massacres be provided with reparations, both individual and collective, within 36 months of the issuance of this Report and consistent with the Reparations Framework of the Commission.
-  The Commission recommends that all of the individuals identified in this Report as responsible for the planning, implementation, and cover up of the Bulla Karatasi and Wagalla Massacres – including but not limited to the then members of the DSC, PSC, and KIC – be barred from public office or any other position of public authority.
-  The Commission recommends that within six months of the issuance of this Report, the Government shall release to the Implementation Committee all of the minutes of the relevant DSC, PSC, KIC, and NSC meetings with respect to each and every one of the massacres referred to above.
-  The Commission recommends that the Government take into account the history of such massacres and other violations, including the related economic marginalization of the region, in formulating relevant development policies, including in prioritizing crucial infrastructure development. An explicit goal of such development policies must be addressing the historic economic marginalization of this and other similar areas.
-  The Commission recommends that the Catholic Church facilitate the return of Father Adrian Joseph Janito to the country to testify about the massacre in Bubisa.

Political Assassinations

General findings

104. The Commission finds that during the mandate period, political assassination was one of the tactics used by the state and the political elite to repress dissent or eliminate political competition.
105. The Commission finds that political assassinations have exacerbated ethnic divisions and tensions. The assassination of Tom Mboya is a prime example of how assassinations can further divide communities and increase ethnic tensions.

106. The Commission finds that investigations into specific assassinations, when undertaken, were usually deliberately shut down before conclusion. Even in instances where such investigations had been concluded, their reports of findings and recommendations were never publicized. The multiple investigations into the assassination of Robert Ouko are an extreme example of this phenomenon, but it is not the only example. The Commission finds that there is a lack of critical political goodwill to conduct thorough and objective investigations into cases where the victims are suspected to have been assassinated for political reasons.
107. The Commission finds that the lack of a credible legal and institutional mechanism for witness protection continues to hamper any objective inquiry into cases of suspected political assassination. Witness intimidation and murder continue to pose fundamental challenges to such inquiries. While there have been attempts at fortifying legal and policy structures for witness protection, much more is needed before credible and thorough investigations in such sensitive issues can be undertaken.

Specific findings

Pio Gama Pinto

108. The Commission finds that the assassination of Pio Gama Pinto was motivated by ideological differences that were at the heart of the global Cold War but also mirrored in domestic Kenyan politics.
109. The Commission finds the conviction of Kisilu Mutua did little to clarify the circumstances and motives behind Pinto's assassination. The Commission agrees with the finding of Justice Ainley that "the case wears an unfinished aspect and that we may not have all who were involved in the crime before us."
110. The Commission finds that Kisilu, Chege Thuo and a third unidentified man who disappeared, were used as scapegoats to divert attention away from the true motive and the more responsible perpetrators of Pinto's assassination.
111. The Commission finds that there is sufficient circumstantial evidence, including the failure by the government to uncover the truth of who was responsible, to conclude that the government was involved in the killing of Pio Gama Pinto.

Tom Mboya

112. The Commission finds that Mboya was assassinated for his political beliefs, and the perception that he posed a threat to the political establishment.
113. The Commission did not receive any credible evidence refuting the involvement of Nahashon Isaac Njenga Njoroge in the assassination, but did receive sufficient evidence to find that Njoroge did not act alone.
114. The Commission finds that the circumstances surrounding Mboya's assassination – including the political rivalries he provoked, and the failure of the government to investigate fully the assassination – point to the involvement of government officials in the killing and subsequent cover up.

JM Kariuki

115. The Commission finds that J.M. Kariuki was assassinated for political reasons. Based upon credible and direct evidence presented to the Commission, the Commission finds that state officials, including members of the police and the Special Branch, were directly involved in the assassination of Kariuki.
116. The Commission finds that there is sufficient evidence implicating the following individuals in the assassination and/or subsequent cover up: Peter Kinyuanji (aka Mark Twist); Pius Kibathi; Ben Gethi; Patrick Shaw; Waruhiu Itote; Ignatius Nderi; Arthur Wanyoike Thungu; John Mutung'u; Silas Mburu Gichua; and Mbiyu Koinange.
117. The Commission finds that there is sufficient evidence implicating the following individuals in the cover up of the assassination: Lee Kinyuanji; Bernard Hinga; James Mungai, Senior Administrative Commissioner of Police for Rift Valley; Thuo, District Commissioner of Nyandarua; Inspector Henry Waga; and Superintendent Kiarie.
118. The Commission finds that President Kenyatta deliberately interfered in the independent investigation undertaken by the Parliamentary Select Committee by, among other things, directly removing the following two names from the report because they worked in the Office of the President: Mbiyu Koinange and Arthur Wanyoike Thungu.

Robert Ouko








That among other things, we would like the Government of Kenya to be compelled to give a public apology via print media on the way they have handled the investigation of the late J.M. Kariuki's murder, and the involvement of the state in the numerous cover-ups that have ensued.

119. The Commission finds that Robert Ouko was assassinated, and that there is sufficient evidence to find that government officials were involved in his assassination and in the subsequent cover up.
120. The Commission finds that government officials deliberately sabotaged every attempt to investigate Dr. Ouko's assassination, including the investigation undertaken by Scotland Yard.
121. The Commission finds that the government never intended to support an investigation that would unearth the truth of the assassination of Dr. Ouko.
122. The Commission finds that the multiple investigations into Dr. Ouko's murder have served to decrease clarity concerning the circumstances surrounding his assassination, including who was responsible and why he was killed.
123. The Commission finds that a number of individuals connected to the Ouko assassination have died in mysterious circumstances. The Commission finds that the failure to undertake a credible investigation into the deaths of these individuals is part of the official cover up.
124. The Commission finds that the failure to investigate the many deaths associated with the Ouko assassination has created a climate of fear that has deterred individuals with knowledge of the circumstances surrounding the assassination to reveal what they know.
125. The Commission finds that the failure to make any of the investigations into the assassination public – including the Troon Report, the report and materials collected by the Gicheru Commission – is a breach of public trust by the government and has contributed to the cover up of the killing.

Crispine Odhiambo Mbai

126. The Commission finds that Crispine Odhiambo Mbai was assassinated because of his political views related to his chairing of the Devolution Committee of the National Constitutional Conference.
127. The Commission finds that there is sufficient evidence to link Norman Nyaga to the assassination of Dr. Mbai.
128. The Commission finds that the State is either unable or unwilling to engage in a process that would shed light on the death of Dr. Mbai.







Recommendations

-  The Commission recommends that within six months of the issuance of this Report, all reports and materials of all previous investigations into these assassinations be made available to the public through the National Archives.
-  The Commission recommends that within three months of the issuance of this Report the President shall publicly apologize to the families of those assassinated, and to the nation, for these assassinations and the failure of previous governments to investigate adequately such killings.
-  With respect to the Ouko assassination, the Commission recommends that those individuals who have been identified by previous inquiries (including that of Troon, Gicheru, and Sungu) as individuals who should be further interviewed and investigated, and additional individuals identified in this Report linked to the assassination or its cover up, should in fact be interviewed and investigated, and the results of those investigations made public. These investigations and the submitting of a report setting out the result of such investigations to the public shall be finalized no later than eighteen months after the issuance of this Report.
-  With respect to the Kariuki assassination, the Commission recommends that an investigation be commenced into the circumstances surrounding the assassination, paying particular attention to those individuals identified in the report of the Mwangale Committee and in this Report. At the conclusion of such investigation, any individuals for whom sufficient evidence exists shall be prosecuted, and a report will be issued setting out all of the information discovered through such investigation concerning the circumstances, motives, and those responsible for the assassination and subsequent cover up. Such report shall be made public no later than eighteen months after the issuance of this Report.
-  With respect to the Mbai assassination, the Commission recommends that an investigation be commenced into the assassination and cover up, and that in particular such investigation include an investigation into Norman Nyaga. At the conclusion of such investigation, any individuals for whom sufficient evidence exists shall be prosecuted, and a report will be issued setting out all of the information discovered through such investigation concerning the circumstances, motives, and those responsible for the assassination and subsequent cover up. Such report shall be made public no later than eighteen months after the issuance of this Report.
-  The Commission recommends that the government establish public memorials commemorating the lives Pío Gama Pinto, JM Kariuki, Robert Ouko, Father Antony Kaiser, and Crispin Odhiambo-Mabi and that such memorials include an educational component detailing the contributions such individuals made to the nation. Such memorials may include statues, museums, or educational institutions and shall be completed within 2 years of the issuance of this Report.
-  The Commission recommends that an independent prosecutor be appointed to investigate and, if the evidence warrants prosecute, individuals linked to the death of Father Kaiser.

Extra-Judicial Killings and Enforced Disappearances

129. The Commission finds that throughout the mandate period there was a common trend pattern and state-sanctioned killings and disappearances. Indeed, the use of excessive and disproportionate force by the police has been a common theme running through Kenya's history.
130. The Commission finds that during the mandate period, it was common for the state, and particularly the police, to summarily execute individuals who were suspected to be criminals or members of proscribed criminal gangs.
131. The Commission finds that excessive use of force by the police resulted in significantly high numbers of death during, *inter alia*, the following contexts: security operations; the official opening of the Nyanza General Hospital in Kisumu in 1969; 1991 Saba Saba riots in 1991; and 2007/2008 Post-Election Violence.
132. The Commission finds that in the last half of 2007, state security agents, mainly the Kenya Police, summarily executed and/or forcefully disappeared large numbers of individuals suspected to be members of the outlawed Mungiki militia group. The Commission finds that the killing and disappearance of suspected members of Mungiki was a systematic attack against a civilian population and could thus qualify as a crime against humanity.
133. The Commission finds that in March 2008, as part of *Operation Okoa Maisha*, state security agents, including Kenya Police and Kenya Army, were involved in the summary execution and/or disappearance of suspected members of Sabaot Land Defence Force (SLDF). The Commission finds that the killing and disappearance of suspected members of SLDF was a systematic attack against a civilian population and could thus qualify as a crime against humanity.
134. The Commission finds that whenever the state has been faced with allegations of extra-judicial killings and/or disappearances, its traditional response has been to blatantly deny these allegations and attack the credibility and legitimacy of those making the allegations, rather than investigate those allegations.

Recommendations

-  The Commission recommends that the President and the respective heads of the Kenya Police and the Kenya Defence Forces, within six months of the issuance of this Report, offer a public and unconditional apology for extra-judicial killings committed during the mandate period.
-  The Commission recommends the fast-tracking of reforms in the Police Service, including introduction of new standard operating procedures on the use of force.
-  The Commission recommends that within two years of the issuance of this Report, the government ratifies the International Convention for the Protection of All Persons from Enforced Disappearance.
-  The Commission recommends the establishment of a fully equipped national modern forensic laboratory within 36 months of the issuance of this Report, and thereafter in every county.
-  The Commission notes that while Kenya is not an abolitionist state, it has not exercised the death penalty for close to three decades. The Commission recommends the abolition of the death penalty and the commuting all death sentences to life imprisonment or other appropriate sentence.
-  The Commission recommends reparations for families of victims of extra-judicial killings in accordance with the Commission's Reparation Framework.

Unlawful Detention, Torture and ill-Treatment

135. The Commission finds that the deliberate use of unlawful detention, torture and ill-treatment by security forces was encouraged and sanctioned by law in all three post-independence governments. Each of these successive political regimes failed to stop the practice, and failed to prosecute and punish the torturers. The use of torture as a government practice has its origins in the colonial period.
136. The Commission finds that both the colonial and post-independence state abused the provisions of states of emergency to sanction the use of unlawful detention and torture in quelling actual and perceived political opposition.
137. The Commission finds that systematic use of torture was employed by the Special Branch during interrogations of detained persons in Nyayo House, Nyati House, police stations, prisons, and other locations that victims were not able to identify.
138. The Commission finds that the practices of illegal detention and torture were used during joint security operations in Northern Kenya (North Eastern, Upper Eastern and North Rift), Likoni and Mount Elgon regions.

139. The Commission finds that the Nyayo House basement cells and the 24th, 25th and 26th floors were used for interrogations and torture after the attempted *coup* of 1982, during the *Mwakenya* crackdown, and the FERA/M crackdown, and further finds that the state sanctioned the use of these places for torture purposes. The Commission finds that the use of the Nyayo House basement cells as police cells was never an afterthought but a well meditated plan by the government. The cells at the basement of Nyayo House were designed and built specifically for torture purposes. Indeed, the State established a task force for the specific purpose of interrogation and torture of suspects.
140. The Commission finds that during the crackdown on political dissent by the government, torture was used to incriminate and incarcerate those who were considered critical of the government and perceived as a threat to the security of the regime. The Commission finds that the repression of political expression and dissent has been a fundamental threat to the development of a meaningful culture of democracy in Kenya.
141. The Commission finds that the judiciary frequently cooperated with the prosecution and security forces in the commitment of violations by refusing bail and by admitting evidence obtained through torture. The judiciary was also complicit in these violations by conducting trials beyond working hours, thus minimizing transparency and public scrutiny.
142. The Commission finds that torture and ill-treatment included the following: detention in water-logged cells; being sprayed with hot and cold water; denial of food, water and medical attention; beatings; humiliation; and the use of insects to terrorize and attack detainees.
143. The Commission finds that torture and ill-treatment by state operatives was often extended to families of suspects and political activists.
144. The Commission finds that victims of torture and their families suffered psychologically, including through post-traumatic stress disorder (PTSD). Direct victims of torture have had their professional lives and livelihoods destroyed while their families lived under great uncertainty and anxiety of not knowing the fate of their loved ones, especially as to whether they were dead or alive.
145. The Commission finds that unlawful detention in the form of prolonged pre-trial detention is a continuing violation of human rights even up to today. Thousands of inmates in Kenya are still awaiting an opportunity to defend themselves in court, sometimes for years.

146. The Commission recognizes the role played by the media, civil society organizations and faith based organizations in advocating for respect for human rights and championing the release of political prisoners.

Recommendations

- The Commission recommends the enactment of legislation prohibiting all forms of torture and other forms of cruel, inhuman or degrading treatment or punishment committed both by state and non-state actors. Such legislation shall be enacted within one year of the issuance of this Report.
- The Commission recommends the establishment, through legislation, of the Office of the Independent Inspector of Prisons and All Places of Detention. This office shall be charged with the function of inspecting prison conditions and investigating allegations of torture and death in custody. The office shall issue periodic reports to the public on the condition of prisons in Kenya and other matters under its mandate.
- The Commission recommends the rapid, effective and transparent implementation of the proposed police reforms, including the introduction of new standard operating procedures on the use of force based on international standards. In particular, Force Standing Order 51, which allows the use of lethal force to protect property, should be repealed.
- The Commission recommends the prosecution of police officers and other state agents who were involved in the torture and ill-treatment of individuals during the mandate period. The Commission has identified individuals who were involved in the torture and ill-treatment of, amongst others, Mwakenya and FERA suspects and recommends their investigation and, where there is sufficient evidence, prosecution. In particular, the Commission recommends the prosecution of the following: James Opiyo; James Mathenge; Sam Chelimo; Munene Muhindi; John Mburu; SP Okwemba; Petkay Miriti; G Koskey; James Kilonzo; James Gachanja Kariuki; Christopher Karanja Kiarie; Noah Arap Too; Geoffrey Kinoti; Leonard Wachira; Elias Mjomba; Thomas Kiarie; Nyaga Wambora; and Benjamin Ogo.
- The Commission recommends that the President offer a public apology to all victims of torture and unlawful detention and acknowledge the role of the state in the design and use of the Nyayo House torture cells.
- The Commission recommends that Nyayo House be converted into a memorial after consultation with victims of torture.
- The Commission recommends the provision of reparation for victims of unlawful detention, torture and ill-treatment as per the framework described in the Chapter on Reparation Framework.

Sexual Violence

147. The Commission finds that sexual violence was committed throughout the mandate period, and included gang rapes, sodomy, defilement, sexual slavery, sexual assault and torture, and forced circumcision and other mutilation of sexual organs. The Commission finds that cases of sexual violence increased during times of conflict. The perpetrators took advantage of the breakdown of social order, the increase in armed conflict, as well as general lawlessness to commit sexual violence with impunity.
148. The Commission further finds that, in most cases, victims were attacked on the basis of ethnicity and assumed political affiliations. Many are said to have been violated for belonging to ethnic groups alleged to have supported the 'wrong' political parties.
149. The Commission finds that cases of sexual violence remain largely unreported with victims citing reasons ranging from stigma; cultural taboos that prevent them from talking about sex let alone sexual violation; harassment by hostile or disinterested police officers; threats by the perpetrators; and lack of clear reporting lines, among others. Where sexual violence had been committed by police officers, the victims feared encountering their perpetrators at the police station and thus often did not report the violation.
150. The Commission finds that sexual violence took place in peoples' homes, on the roadside as victims tried to flee from violence, in places of confinement including police stations and prisons, centres of interrogations, and IDP camps where victims of displacement had sought refuge following the eruption of violence.
151. The Commission finds that sexual violence against women was rampant during forceful evictions conducted by the state and/or its agents. In one particular case, the Commission received about 30 statements from women who were raped in Kitui during an eviction referred to as 'Kavamba operation'.
152. The Commission finds that there is sufficient evidence implicating British soldiers for the rape and sexual violation of women in Samburu and Laikipia between the 1980s to early 2000. In October 1997, for example, soldiers attached to the British Regiment of Gurkhas were stationed in Archers Post not only attacked and raped about 30 women but also sodomised. As a result of the rapes, some Samburu or Maasai women now have children of Gurkhas or British origin. These children now face social stigma in the local community.

153. The Commission finds that the Kenyan government has neither committed to nor shown any political will to investigate allegations of rape and sexual violence committed by British soldiers stationed in Kenya for military training.

Perpetrators

154. The Commission finds that perpetrators of sexual violence included state security agents, ordinary citizens, members of organised militia groups, as well as British soldiers stationed in Kenya for training purposes.
155. The Commission further finds that of all the cases of sexual violence committed during conflict, the majority of them were committed by state security agents, primarily by the General Service Unit (GSU), the Kenya Police, the Administration Police, the Anti Stock Theft Unit, as well as the Kenya military. The Commission further finds that state security-led interventions in situations of conflict were the single most important cause of sexual violations including gang rape and sexual torture. Security agents used sexual violence as a weapon to terrorise, suppress, intimidate and humiliate communities, and they not only actively committed atrocities of a sexual nature, but also failed in their duty to ensure the security and protection of citizens, particularly women and girls.
156. The Commission finds that despite evidence of sexual violence perpetrated by state security agents during security operations, there have been few if any investigations, much less prosecutions, of those responsible. The Commission further finds that in most cases, security agents colluded with each other in the commission of sexual violence as well as in frustrating any efforts to have fellow security agents investigated or prosecuted, thus breeding a culture of impunity.

Victims

157. The Commission finds that contrary to the traditional belief that women and girls are the sole victims of sexual violence, men and boys have also been targeted. Unfortunately, reporting on sexual violence against men has been low compared to that of women and girls. Further, persons with disability have also been targeted.
158. The Commission finds that victims of sexual violence range from the very young to the very old. The Commission finds that most victims of sexual violence also experienced other forms of violations including displacements, loss of family members, loss of property, and torture.

Effects

159. The Commission finds that other than physical and psychological trauma stemming from being a victim of sexual violence, victims also suffered acute injuries; permanent disabilities; contracting, and in some cases spreading, incurable diseases like HIV/AIDS and Hepatitis B; ostracism; unwanted and unplanned pregnancies; miscarriages and other health complications including incontinence, impotence and infertility; abandonment by their spouses and parents; loss of abode and income; as well as extreme feelings of humiliation and shame. In some cases, sexual violence resulted in the death of the victims.
160. The Commission further finds that not only the victims but also the children who were born as a result of rape were equally shunned and suffered psychological harm even though they were not the primary victims. The Commission further finds that the situation is even worse for children of mixed race.

Access to justice

161. The Commission finds that despite Kenya ratifying many international human rights instruments and having enacted various pieces of domestic legislation with regard to sexual violence, the failure to implement fully such legislation has not only left many Kenyans exposed to sexual violence but also denied the victims of sexual violations access to justice.
162. The Commission finds that the government response to sexual violence has been wanting. While some victims tried to report sexual violence, their complaints were either not recorded or not followed up for investigations. Victims complained of being frustrated by the officers to whom they were supposed to report, who often blamed the victims for the violations.
163. The Commission further finds that the majority, if not all, of officers investigating cases of sexual violence lack the prerequisite ability and knowledge of not only preserving evidence but also successfully investigating and prosecuting cases of sexual violence. As a result, very few reported cases have successfully been prosecuted in court, thereby denying the victims an opportunity to achieve justice for their violation.
164. The Commission finds that the majority of victims of sexual violence cannot afford legal services. Reported cases are thus rarely pursued through the legal system as victims cannot afford legal representation. Although the government has established a pilot national legal aid scheme, the Commission finds that it is still limited in scope and capacity as it has only operated on a pilot basis. Victims also

expressed their lack of awareness of the legal process, while others complained of other obstacles such as long distances to the courts and the attendant cost of travelling there and perhaps having to spend a night away from home. Accordingly legal services are not widely and freely available across the country, thus negating the citizens' constitutional right to access to justice.

165. The Commission further finds that the requirement of victims of sexual violence to obtain, from the police, the Kenya Police Medical Examinations Report Form 3 (commonly known as P3 form), that is necessary for supporting medical evidence, has acted as a hindrance in their quest for justice. The Commission finds that although the form is required to be free, its unavailability in most police stations and the demand for a 'photocopy fee' of up to Ksh. 20 per sheet have discouraged many from obtaining it. The form's availability on the police website has not helped to make it easily accessible, especially for victims from rural areas where electricity and internet services are not readily available. Even where it is possible to download the forms, victims are forced to pay for downloading and subsequent printing of the form. Further, the Commission finds that where victims managed to get a P3 form and were attended to by a doctor, the doctor charged for the provision of that service. The fee was usually couched as facilitation for transportation to court to give expert testimony on the medical examination results. These requests for money are a further burden and cause for stress on already traumatised victims, and create barriers for many victims to access their constitutional right to justice.
166. The Commission also finds that in cases of sexual violence committed against children, parents, guardians and other authorities such as teachers are often willing to enter into agreements with the perpetrators to either 'compensate' the victim's parents or, in the case of girls, marry them off to the perpetrator. Public officers such as chiefs are sometimes complicit in these acts of subverting justice for the victim.

Access to medical services

167. The Commission finds that the majority of victims of sexual violence were not able to obtain the crucial medical attention (PEP) that is required to be administered within 72 hours after the violation to prevent HIV/AIDS and sexually transmitted infections as well as unwanted pregnancies. Even where the same was obtained, very few victims of sexual violence attended the required follow up medical check-up. The victims cited the following reasons: a breakdown in security and the fear of leaving home lest they expose themselves to further attacks; lack of transport; ignorance about PEP and not knowing that it is free and available in most public medical facilities; fear of being stigmatized if it were known they had been raped; and an overriding concern to protect, feed, and shelter their children and family

members at their own expense. As indicated elsewhere in this report, the majority of victims of sexual violence had also suffered other violations, and for some of them the provision of shelter and food was the biggest priority for them. For some, medical services were a luxury. The result is that many victims died while others' health deteriorated for lack of follow up medication.

168. The Commission further finds that there are insufficient public medical facilities countrywide with expertise and equipment to provide services to victims of sexual and gender based violence.

Recommendations

- The Commission recommends that the President, within three months of the issuance of this Report, acknowledges and offer a public and unconditional apology for acts of sexual violence committed by state security agencies during security operations and other periods of generalized violence such as the 2007/2008 Post-Election Violence.
- The Commission recommends the establishment of a gender violence recovery center in every county. Such a center shall serve as a one-stop centre for provision of comprehensive services for victims and survivors of sexual violence including medical and counseling services. Investigators trained in the investigation of sexual violence should also be permanently stationed in such a center. In respect to this recommendation, the governments may borrow good practices and lessons from South Africa's thuthuzela care centers and the Nairobi Women's Hospital.
- The Commission recommends the provision of reparation for victims and survivors of sexual violence as per the Reparation Framework proposed by the Commission.
- The Commission recommends the setting up of the Office of the Special Rapporteur on Sexual Violence as recommended by the Commission of Inquiry into the Post-Election Violence. This shall be done within 12 months of the issuance of this Report.
- The Commission recommends that the National Police Service Commission formulates a new Code of Conduct and Ethics for the National Police Service in line with the Constitutional values and principles and spelling out disciplinary and accountability measures for failure to adhere thereto.
- The Commission recommends the prosecution of Nganda Nyenze who allegedly planned, supervised or was otherwise involved in the Kavamba Operation in which women were raped and/or sexually violated.
- The Commission recommends that the British government apologizes for sexual violence committed against women in Samburu and Laikipia by British soldiers.
- The Commission recommends that the Kenyan Government considers entering into negotiations with the British government with a view to seeking compensation for victims of sexual violence committed by British soldiers in Samburu and Laikipia.

Women

169. The Commission finds that throughout the mandate period, women did not enjoy equal status with men. This is largely attributed to patriarchal customary norms and practices which relegated women to a subordinate status. These norms and practices, many of which still remain pervasive today, include disinheritance, preference for boys, polygamy, payment of dowry, cultural traditions relating to burial, early and forced marriages, chastisement of wives, female genital mutilation and widow inheritance. These norms and practices have, over the years, not only been entrenched but were also protected and permitted by legislation and sanctioned by the state itself.
170. The Commission finds that despite Kenya having ratified many international human rights instruments and having enacted various domestic laws that promote the rights of women, the existence of structural and systematic discrimination against women by the state itself prevented women from fully enjoying their rights. Some laws were manifestly discriminatory whereas others were discriminatory in their effects. Other laws such as the Judicature Act sanctioned customary practices which were manifestly discriminatory.
171. The Commission finds that although there have been deliberate constitutional, legislative and institutional reforms aimed at tackling gender discrimination in the country, thereby gradually advancing the rights of women in several spheres, women continue to be the subject of deeply rooted discriminatory norms and practices.
172. The Commission finds that violations of human rights have had greater consequences for the most vulnerable amongst women. These include: women with disabilities, women living with HIV/Aids, women in the rural areas and women from minority and indigenous communities. Moreover, economic marginalization of specific parts of the country has further marginalised women living in these regions.
173. The Commission finds that discriminatory cultural practices relating to access, use and ownership of land remain persistent despite legal provisions which guarantee everyone the right to property, whether they are female or male.
174. The Commission finds that although violence against women is prevalent during peacetime, it escalated during conflict and episodes of generalised violence, during which time women were specific targets of heinous crimes and violence including rape and sexual violence,.

175. The Commission finds that security operations conducted by state security agencies have almost without exception often resulted in rape and other sexual violations.
176. The Commission finds that violation of women's reproductive health is widespread and rampant. Many women are unable to access health facilities because of poverty. In many parts of the country, health facilities are physically inaccessible and women opt to give birth at home. The Commission further finds that the delivery of health services around the country does not take into account local cultural norms about health.
177. The Commission finds that although awareness on the subject of HIV/AIDS has permeated most parts of the country, discrimination and social stigma is still relatively common. Many HIV positive women are routinely evicted from their matrimonial homes after the death of their spouses. Moreover, patriarchal social norms make it difficult for women to exercise autonomy over matters of sex, and specifically, to negotiate safe sex.
178. The Commission finds that although the government has taken positive steps to address the nation's HIV epidemic, the rights of women living with and affected by HIV continue to be violated. These violations include: failure to seek informed consent before HIV-testing; breach of confidentiality and lack of proper disclosure; inadequate pre- and post-testing counseling; inadequate PMTCT and post-partum counseling; lack of medical attention or inattentive medical staff; lack of equipment, supplies, infrastructure, and hygienic conditions; and mistreatment and harassment in seeking delivery of services.
179. The Commission finds that although men were the predominant victims of repressive and authoritarian means employed by the state, women were also victims, both as primary and secondary victims. As primary victims, scores of women, especially politicians, academics or human rights activists, and female Members of Parliament who were vocal in their opposition to repressive rule in both Kenyatta's and Moi's administrations, were often detained, tortured and subjected to politically motivated charges. As secondary victims of state repression, many women were widowed after their husbands were killed in security operations or died in police custody after undergoing torture. Some were subsequently thrown into destitution following the detention or death of their spouses.
180. The Commission further finds that although men were the main active agents of President Kenyatta's and President Moi's repressive governments, some women were also involved in the perpetuation of gross violations of human rights.

181. The Commission finds that women constitute the majority of the poor, a situation that has been aggravated by various factors that range from their lack of access to productive resources (mainly land) and the labour markets.
182. The Commission finds that discrimination against women in the workplace remains despite years of concerted efforts to ensure that men and women are treated equally. Women with disabilities particularly find it difficult to access employment opportunities.
183. The Commission finds that throughout the history of Kenya, women have had limited access to education opportunities. During the colonial period, when formal schooling was introduced, it is boys rather than girls who were encouraged to join. When girls were allowed to go to school, it was not without resistance from communities, which invariably perceived the new education offered by missionaries as informed by the bad intentions of 'spoiling' good girls. The education offered to girls by colonial schools and later by schools in independent Kenya was not completely progressive either. The syllabus was designed to nurture girls' domestic roles as wives and mothers
184. The Commission further finds that although huge strides have been made towards promoting the education of the girl child, the rigidity of socially ascribed gender roles has seen girl child education interrupted by early marriage, female genital mutilation and other harmful cultural practices. In some areas, culture continues to dictate who, between the girl and the boy, should be given priority in accessing education. Further, in some areas, especially the arid and semi-arid regions of the country, girls' education is routinely interrupted by constant migration of families in search of pasture and water. Insecurity and poverty are other factors that impede girls' access to education. In addition, lack of sanitary towels has meant that girls periodically skip going to school during their menstrual flow. The Commission further finds that the situation is even worse for girls with disabilities.
185. The Commission also finds that girls' and women's limited access to education has strong and direct linkages with the multiple violations and abuses that they routinely suffer.
186. The Commission finds that although women are the majority of the population, they continue to be excluded in public spaces of influence and decision-making due to various factors, chief amongst which are cultural notions pertaining to the role and place of women and men in society. Discrimination against women and their exclusion in decision-making processes is also rampant and sanctioned

in religious institutions. Further, many women who aspire to be leaders lack the requisite resources to undertake political campaigns and have also been subjected to violence or threat of it.

187. The Commission finds that the Mt. Elgon Conflict and the subsequent security operation (*Operation Okoa Operation*) had a particularly devastating impact for women. In this regard, a vivid impact of the conflict and *Operation Okoa Maisha* is the huge numbers of widows (approximately more than 300) in Mt. Elgon whose husbands were killed or forcefully disappeared during the conflict.
188. A huge proportion of widows in Mt. Elgon witnessed the brutal and cruel killing by SLDF or state security agents of their husbands, children and relatives. In certain cases, the SLDF in particular forced wives to watch the killing of their husbands or children.
189. The Commission finds that rape and sexual violence against women was routinely committed by SLDF members during attacks at homes and in their hideouts in the forest. In many cases, these heinous acts were witnessed by family members, including children. Moreover, sexual violence was often accompanied by other forms of inhuman and degrading treatment.
190. The majority of Mt. Elgon women were sexually violated by SLDF members. However, state security agents – police and military officers – were also responsible for sexual violence during the entire period of *Operation Okoa Maisha*.
191. The Commission confirms the findings of the Commission of Inquiry into the Post Election Violence (CIPEV) in respect of experiences of and violations suffered by women during the 2007/2008 Post-Election Violence:
 - the Commission received evidence showing that female headed households were particularly targeted for looting and torching;
 - Many women were raped and sexually violated during the PEV;
 - Women were disproportionately affected by the PEV, including the fact that they constituted the largest percentage of internally displaced persons
192. The Commission finds that the state's response to the plight and needs of internally displaced women generated by the 2007/2008 Post-Election Violence was less than satisfactory. The resettlement programme, *Operation Rudi Nyumbani*, did not cater for the particular needs or interests of women. A considerable number of

women received neither the start-up capital nor the payment in lieu of housing. In certain cases, women were discriminated against in the registration process.

193. The Commission finds that Kenyan refugee women in Uganda (as is the case with refugee men and children) experience discrimination on the basis of their nationality. Due to their inability to speak the local language, Kenyan refugees find it difficult to access public services, especially medical and health care services.
194. On the question of returning to Kenya, statistics availed to the Commission by the Office of the United Nations High Commissioner for Refugees revealed that the majority of Kenyan refugees (60 percent) were not willing to return to Kenya. The Commission's visit and hearing at Kiryandongo Refugee Camp in Uganda revealed that many women have found themselves in a dilemma as to whether they should return or not. While some women were willing to return, their husbands were not. As such, these women could not return to Kenya without straining or breaking up their marriages.

Recommendations

- The Commission recommends that the President, within six months of the issuance of this Report, offers a public and unconditional apology for states' sanction of discrimination against women during the mandate period.
- The Commission recommends that the Gender and Equality Commission steps up measures to raise awareness about harmful cultural practices that adversely affect women's enjoyment of human rights.
- The Commission recommends that the Attorney General and Parliament expedites the enactment of the following bills relating to women's rights: Marriage Bill, 2007; Matrimonial Property Bill, 2007; Family Protection Bill, 2007; Equal Opportunities Bill, 2007
- The Commission recommends that within nine months of the issuance of this Report, the government, in conjunction with the UNHCR and the Uganda Government, conducts its own independent survey of the willingness of Kenyan Refugees in Uganda to return to Kenya and immediately facilitate the return and resettlement of those willing to return.
- The Commission recommends that within twelve months of the issuance of this Report, the government shall ensure that the composition of land dispute tribunals meets the Constitutional gender ratio requirement.
- The Commission recommends that within twelve months of the issuance of this Report, the Ministry of Health adopts a Plan of Action outlining measures to be taken to increase and improve maternal health facilities in the country and particularly to reduce the number of cases of delivery at home.

Children

195. The Commission finds that during the mandate period, children were both direct and indirect victims of gross violations of human rights. As direct victims, they suffered atrocities including killing, maiming, torture and sexual violence. Children also witnessed atrocities and as a result of which many of them remain traumatized.
196. During the Mau Mau War, children were subjected to traumatic experiences; many children witnessed the atrocious crimes committed against their parents and adults in generally.
197. The Commission finds that the Sabaot Land Defence Force and Mungiki militia forcefully recruited children into their militia. Some of these children were subsequently involved in atrocities.
198. The Commission finds that with the introduction of free primary education in Kenya in 2003, many children are now able to attend school. However, there still remain real impediments that prevent children from accessing education, such as lack of school uniforms and writing materials. Children with disabilities face particular challenges in this regard. Institutions catering for the education of children with disabilities are few and inadequately resourced.
199. The Commission finds that there are still alarming rates of gender inequality in some parts of the country where very few girls attend school. This inequality is attributed to cultural beliefs and practices which privilege male children. Female children are often forced to remain at home to carry out household chores and other tasks. If they do attend school they are often unable to focus on schoolwork due to responsibilities given to them at home. Finally, forced/early marriages and pregnancies are also barriers to girls accessing education.
200. The Commission finds that sexual violence against children is perpetrated by people holding positions of authority or individuals who ought to protect them, such as parents, family members, teachers, religious leaders and members of the police and military. Due to the nature of the relationships in this setting, many of the cases are unreported and victims experience the abuse repeatedly. Children have also been sexually violated by their peers. There is also evidence that female relatives perpetuate this vice either through complacency or even actively encouraging it.
201. The Commission finds that sexual violence against children increasingly occurs in environments that should be safe havens for them, such as homes and schools, with homes being the most common. The Commission finds that violations against children remain largely unreported.

202. The Commission finds that despite the implementation of a number of programmes aimed at improving child health, infant and child mortality rates remain unacceptably high in Kenya, a situation that has been linked to factors such as economic status, infrastructural factors, the mother's level of education; and health care and nutrition. The Commission further finds that even minimal fees payable at health care institutions are beyond the reach of a good number of families.
203. The Commission finds that child labour is an increasing problem, and is often the product of the vulnerable economic status of families. Children from indigent families are forced to fend for themselves and their families. HIV/AIDS infections and health crises in general have also increased the number of orphaned children and made them more vulnerable for child labour recruitment. Domestic violence also potentially increases the vulnerability of children to child labour. The absence or loss of parents often leads to children fending for themselves, leaving them susceptible to being exploited for labour.
204. The Commission finds that enforcing the law in cases of sexual exploitation is hampered by uncooperative relatives who opt to receive compensation instead of calling for the prosecution of the perpetrators.
205. Children experiencing violence at home sometimes opt to run away from home and end up as street children.
206. Children have traditionally constituted a huge proportion of displaced persons, a situation that has exposed children to extremely harsh conditions which negatively interfere with their enjoyment of other rights including access to education, health care, decent shelter, adequate food and other basic human needs
207. The Commission finds that the majority of Kenyan refugee children and youth living in Kiryandongo, Uganda, are willing to return to Kenya but are unable to do so because their fate is tied to that of their parents or guardians.
208. The Commission finds that whereas there have been attempts by the Government to establish institutions crucial to the protection and enforcement of children's rights, such institutions remain understaffed and do not have adequate resources. Where staff exists, they either lack proper training on children's rights or are stationed at the district level, and as a consequence the majority of children are not reached.
209. Non-state actors such as non-governmental organisations (NGOs) have stepped in and played a key role in the promotion and protection of children's rights in a variety of different ways including investigating and reporting about the abuses

committed against children; creating public awareness about the rights of children and promoting social change against practices that are not compatible with the realisation of these rights; providing technical assistance by training stakeholders who are directly involved in matters of children's rights, such as the police as well as providing financial assistance to key government departments. Their presence within communities has provided practical solutions preventing or dealing with violations of children's rights. In spite of their immense contribution in promoting and ensuring the realisation of children's rights, some non-state actors, especially some children's homes, have been accused of violating these rights.

Recommendations

- The Commission recommends that the President, within six months of the issuance of this Report apologizes for atrocities committed against children during the mandate period.
- The Commission recommends that psychosocial and counseling services be provided to children victims of gross violations of human rights and injustices.
- The Commission recommends that reparation be provided to children victims of gross violations of human rights and injustices in accordance with the Commission's Reparation Framework.
- The Commission recommends that Borstal institutions be placed under the Department of Children's Services in the Ministry of Gender, Children and Social Development as opposed to the Prisons Department in the Ministry of Home Affairs. These institutions should be removed from prisons' premises and should be run by children officers trained in counseling and psychology.
- The Commission recommends that children's desks at police stations be well funded and in the meantime only officers who have been trained on child rights should deal with children. Gradually all officers should be trained on child rights and child sensitive procedures.
- The Commission recommends that more remand homes be established to avoid placing of alleged juvenile delinquents in police cells and prisons.
- The Commission recommends that restorative justice mechanisms be formally introduced in the juvenile justice system and police officers should be sensitized and trained on how to set these in motion. Structures should be established to incorporate different players such as children's officers and community workers.
- The Commission recommends that the Department of Children's Services be well funded to adequately respond to violations of child rights. More offices should be established to enhance accessibility to children's officers. The role and availability of children's officers should be publicized for their services to be sought.
- Although court procedures to enforce parental responsibility are user friendly, there is need to provide more assistance to parties who cannot afford lawyers as

well as illiterate parties. It is acknowledged that judicial officers are proactive in this but there is need for formal mechanisms to ensure that needy parties are able to obtain justice.

- Children are subjected to harm and danger where institutions fail to provide safe custody. Adequate security must be provided in institutions such as schools which have children in their custody. Guidelines should be developed on the minimum security requirements for such institutions.
- Institutions that are mandated to have children in their custody must be regularly and closely monitored to ensure that child rights are not violated.
- While primary education is free, many children are still unable to enjoy the right to education due to various factors including lack of necessary amenities such as school uniform and writing materials. The Commission recommends that a scheme be established to provide further financial support to indigent children to enable them acquire these necessary amenities.
- In some marginalized areas, the schools are few and are inaccessible to children living far from where they are located. The Commission recommends that more schools be constructed and a policy be developed as to the minimum standards on the number of schools serving a given area.
- The Commission recommends that the Ministry of Education work towards the progressive integration of children with disabilities in the mainstream educational facilities by tailoring these facilities to suit the specific needs of children with disabilities. In this regard, the Ministry of Education should within one year formulate a Plan of Action outlining modalities for progressive integration of children with disabilities in mainstream educational facilities.

Minority Groups and Indigenous People

210. The Commission finds that throughout the mandate period the state failed to recognize the existence, unique culture and contributions of many minority and indigenous communities in Kenya.
211. The Commission finds that over a period of decades the state discriminated against minority and indigenous communities, specifically those residing in North Eastern, Upper Eastern, Rift Valley and Coast provinces, through emergency laws and regulations that violated their rights to equality before the law and due process of law.
212. The Commission finds that the state discriminated against the Nubian, Somali, Galjeel and other Muslim communities in Kenya through legislation and regulations on citizenship that has denied them equality before the law.

My recommendation to this Government is that it should address the question of equality in this country. We do not want to feel as if we do not belong to this country. We demand to be treated the same just like any other Kenyan in any part of this country. We demand for equal treatment

213. The state failed in its responsibility to protect communities in predominantly pastoralist areas from inter-communal violence. This failure has resulted in thousands of deaths, injuries, forced displacement, sexual violence, loss of property and destruction of entire homesteads and villages over a period of more than 40 years.
214. The state engaged in a pattern of oppressive security operations in pastoralist areas since independence that, in some cases, amount to crimes against humanity. Specific examples include the Wagalla Massacre targeting the Degodia Somali community, attacks on the Pokot community, bombings of Samburu communities, as well as multiple other operations.
215. The state failed to engage communities in addressing boundary disputes among Turkana, Pokot, Borana and Somali clans, which has led to constant conflicts and wanton killings, the displacement of thousands, loss of livelihood and undermining of social development, including education.
216. The Commission finds that the expulsion of Endorois, Ogiek, Sengwer, Wataa, Bajuni, Boni, Talai and other communities from their ancestral lands, and the allocation of forest lands to other communities, have led to the destruction of forests upon which the traditional livelihood of these communities depends, and has rendered it virtually impossible for hunter-gatherers to practice their culture.
217. The state failed to protect minority and indigenous women and girls from violence and harmful traditional practices that undermine their fundamental rights to personal integrity, health, and dignity.
218. The land regime in Kenya, whether Trust Land, Government land, or Group ranches, has resulted in *de facto* discrimination and led to the massive dispossession of ancestral lands of pastoralist and hunter-gatherer communities.
219. The state's development policies have failed to protect the rights of minorities and indigenous peoples to free, prior and informed consent.
220. The state's development policies have not created the conditions that would lead to qualitative improvement in the lives of minority and indigenous communities. On the contrary, the vast majority of development projects have deepened marginalization and exclusion of minority groups.
221. The state has failed to implement important judicial decisions related to promoting and protecting the rights of minority groups, such as the Ilchamus' and Endorois' decisions. This trend has consistently undermined minority groups' confidence in the ability of the Kenyan justice system to deliver substantive equality.

Recommendations

- The Commission recommends that within two years of the issuance of this Report, the government ratifies the following international and regional instruments: ILO Convention 169; Convention on the Prevention and Punishment of the Crime of Genocide; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Convention Against Discrimination in Education; and Statelessness Conventions.
- The Commission recommends that the President, within six months of the issuance of this Report, issues an official, public and unconditional apology to minority and indigenous communities in Kenya for the state's systematic discrimination against these groups and communities during the mandate period.
- The Commission recommends that obstacles experienced by minority groups such as members of Somali and Nubian ethnic communities in accessing the national identity cards be removed within 12 months of issuance of this Report.
- The Commission recommends that the Kenya Law Reform Commission examines all Kenyan legislation to ensure that it does not result in de jure or de facto discrimination against minority groups. In consultation with minority and indigenous groups, develop national legislation governing state-sponsored or private development programs that requires free-prior and informed consent of affected communities and that includes specific guidelines as to how to engage in a process of consultation with communities.
- The Commission recommends that the government develops a plan on data collection and disaggregation on minority and indigenous communities, with special attention to ensuring disaggregation of data related to minority and indigenous women. The process shall incorporate the principles of the United Nations Expert Workshop on Data Collection and Disaggregation for Indigenous Peoples.
- The Commission recommends the release and implementation by the Government of the recommendations of the Presidential Special Action Committee to Address Specific Concerns of the Muslim Community in Regard to Alleged Harassment and/or Discrimination in the Application/Enforcement of the Law. The recommendations of the Special Action Committee related to the following seven areas: citizenship and registration of persons; security; access to and administration of justice; lands; education; representation and participation; and development and investment.

Economic Marginalization and Violation of Socio-Economic Rights

Primary findings

222. The Commission finds perceptions of economic marginalization are deeply held in North Eastern and Upper Eastern, Coast, Nyanza, Western and North Rift. The Commission finds that economic and other policies adopted by the state during the mandate period resulted in the economic marginalization of these five regions.
223. In certain regions, there exist intra-regional narratives of marginalisation that are blamed on regional and local rather than national forces.
- In Central Province, residents of Nyandarua, where the assassinated leader JM Kariuki hailed from, considered themselves marginalised by others within the region.
 - Residents of Kuria see their counterparts in the broader region as somewhat advantaged vis-a-vis themselves and that they (Luo and Kisii) are in some way part responsible for their situation.
 - In Western Province, a region that appears to share Nyanza's political and economic fortunes, narratives of marginalisation are not uniform. Evidence shows that certain parts of Western that have been close to power, in particular Bungoma and Vihiga appear to be the main beneficiaries of the limited social goods due to co-option, at least under President's Moi administration.
 - In North Eastern and Upper Eastern, sub-regional claims of marginalisation invariably assume an ethnic or clan flavour. For instance, the Commission recorded testimony from members of the Ajuran clan who see themselves as victims of the Degodia clan, and with complicity from the Provincial Administration and central government.
224. The Commission finds that residents of regions that were not identified as economically marginalized also consider themselves to have been marginalised at one point or another in history. The Commission acknowledges and affirms these perceptions.
- In the case of Central Province, testimonies were received to the effect that the region's fortunes dwindled under President Moi, with social infrastructure being degraded and the vast majority of elites excluded at the top, at least after the 1982 coup attempt.

- Residents of Rift Valley see themselves as the main ‘victims’ of marginalisation under the Kibaki administration, at least as far as appointments to key positions in the public service are concerned

225. The Commission finds that while Lower Eastern is often not regarded as a marginalised region, at least not in popular narratives, this silence obscures shocking levels of poverty and lack of social facilities in parts of this region. Cases of drought, famine and starvation in parts of Ukambani have become a staple of national news and shame. This state of affairs is in part due to policies of marginalisation by President Kenyatta’s and President Moi’s administrations. Other than the harsh climatic conditions, the failure by successive regimes to take measures to arrest the perennial food insecurity situation and enhance access to basic goods such as potable drinking water must be acknowledged as a key factor

Context of economic marginalization

226. The Commission finds that economic marginalisation experienced by various regions, groups and communities in Kenya since independence has occurred in a historical, socio-economic and political context marked by certain factors. These include: an overly centralised state both in terms of power and resources; ethnicisation of politics and public life in general; an all-powerful ‘imperial’ presidency marked by lack of accountability, lack of judicial independence, weak rule of law and personalization of power; bad governance and rampant corruption; a stunted economy in which the state was the main dispenser of largesse; and conflicts revolving around land with large swathes of the population unable to access this important resource. All these evolved against a backdrop of historical irredentist/secessionist struggles marked by the ‘Shifta War’ and its aftermath in Northern Kenya as well as independence claims borne out of perceived marginalisation in the former Coast Province. While some of these factors were the root cause of marginalisation, they produced distortions that worsened the effects of economic marginalization
227. The Commission finds that the seeds of inequality and marginalisation were planted by the colonial administration. The practices of the colonial administration, mostly through its ‘divide and rule’ strategy planted the seeds of inter-ethnic rancour, but also set off a process that would produce economic marginalization.
228. The failure of subsequent governments (in particular the Kenyatta government), to correct this injustice by restoring communities to their lands from which they had been forcibly evicted by the colonial government can be said to be largely to blame

for inequities in land ownership and access in many parts of Kenya (especially in Central, Rift Valley, Western and Coast provinces).

229. While post-independence governments have had a role in skewing economic empowerment in favour of certain ethnic communities, certain communities – in particular sections of the Kikuyu community – got a head start by virtue of their proximity to centers of settler economy
230. The Commission finds that there is a perception, at least among residents of the former Northern Frontier District, that the claims of secession by a group of Somalis explains, at least in part, how the region and its residents have been treated by successive government over the years. Residents of this region complain of discriminatory laws, regulations, practices and procedures that apply to them only and not to other Kenyans. This is especially so in the area of citizenship and immigration laws

Role of the state in economic marginalization

231. The Commission finds that the seeds of economic marginalisation of certain regions were planted by the first formal economic blueprint, Sessional Paper No. 10 titled 'African Socialism and its Application to Planning in Kenya' published in 1965. Although this Policy was imbued with values of inclusion, human dignity, brotherhood and social justice and could have anchored equitable development, certain aspects of the policy, in particular its implementation, carried the seeds of inequality and economic marginalisation that would characterize the Kenyan state in succeeding years.
 - the policy justified prioritization of investment in certain regions to the exclusion of others
 - the economic policy took a decidedly capitalist slant, with a limited welfare component.
 - although the Policy recognized that land was previously owned communally with access regulated through membership in a particular group (clan or ethnic group), it asserted that a system of secure private title to land was necessary to anchor economic growth. Yet, the diversity of claims (that included communal title that governed property in most communities in the pre-colonial era) as well as the effects of dispossession during the colonial period was not taken into account.
232. The restructuring of the state by the Kenyatta government soon after independence did not match, and in fact undermined the vision articulated in the economic

policy based on African Socialism. The systematic dismantling of the independence constitution (abolishing of regional governments, the strengthening of the presidency while emasculating parliament and the judiciary) was inimical to the stated goals of African Socialism that underpinned economic policy

Economic Marginalization of North Eastern

233. The marginalisation of the North Eastern region is marked by four key developments: the carving off of the Northern Frontier District; the enactment and application of separate laws to the region; the Shifta War (1963 to 1967) waged by separatist ethnic Somali forces and; the application of discriminatory development policies by post-independence governments. The marginalisation of the communities in the former NFD, who are largely pastoralists, goes back to the colonial era
234. The Commission finds that there is a clear link between the government's policy of viewing every issue in the North from a security perspective and the economic marginalisation suffered by the region. Many residents attribute the marginalisation the region suffered in subsequent years to the fact that they had expressed an affirmative voice in favour of secession from Kenya that was brutally muzzled
235. The state has also been directly responsible for economic marginalisation as a result of deprivations visited on residents because of policies aimed at enhancing security. In particular the numerous security operations conducted in this region have often resulted in loss and confiscation of property, especially cattle, by state security agents.
236. Difficulties encountered by residents of this region in having their citizenship recognised, including acquiring identity documents and passports goes to the core of the economic marginalisation that they have experienced. Without citizenship, the people could not claim their rights. They became vulnerable to abuse. The Commission heard many heart-wrenching stories about lives that have been destroyed for lack of national identity cards and by extension passports

Economic marginalization of Nyanza

237. The disintegration of the Kikuyu-Luo coalition that formed the core of KANU at independence and the eventual fallout between Kenya's first President Jomo Kenyatta and first Vice-President Oginga Odinga in 1966 over differing visions for the country as described earlier forms an important context within which to contemplate the marginalisation of Nyanza

238. The Commission takes the view that while Luo personalities served in President Moi's administration, the co-option of these elites did not necessarily translate into economic inclusion in a broad sense. The inclusion of certain elites in government also had a political goal under the first two post-independence administrations: it served to politically isolate Odinga who had taken a hard-line stance against both the Kenyatta and Moi governments since the 1966 fallout and his eventual banishment in 1969.

Economic marginalization of Coast

239. Like the former North Eastern Province, the NFD in general and Nyanza, the Coast region could be placed in the category of 'politically dissident' regions that have suffered marginalization under successive regimes. However, marginalization experienced in the Coast, especially when understood from the point of view of dispossession, is due also to the confluence of interests arising from the region's strategic value as a principal gateway to the country and the East and Central African region and its valued seafront land resources.
240. Submissions from Coast residents invariably link their state of economic marginalisation marked by poverty, illiteracy and lack of access to basic services to frequent land-related dispossessions. The Commission heard many accounts of police brutality and other kinds of mistreatment by the provincial administration, including extra-judicial killings, arrest and imprisonment of those who agitate for restitution, as well as the destruction of property and evictions of those who live off these lands with contested titles.

Economic marginalization of Western

241. While many perceive Western as a marginalized region, this characterization has not featured as prominently in formal accounts as has been the case for Nyanza, Northern Kenya and the Coast regions. This depiction is perhaps attributable to a combination of factors, including the fact that due to its rich fertile soils that favour agriculture and relative security, Western has been perceived to be economically stable, in spite of the high levels of poverty.
242. Western has often been ignored in classification of marginalized regions in Kenya, yet its historical evolution and political fortunes are closely tied with that of Nyanza province, which is acknowledged in formal accounts as a marginalized region. Backed up with a history that lacks political favour with successive governments and the high level of poverty, it is evident that Western Kenya is marginalized. Recent trends reveal that the region has been forgotten in the development agenda.

Economic marginalization of North Rift

243. The North Rift region has experienced political marginalisation since the colonial period. Regarded as part of the Northern Frontier region (together with North Eastern Province), the closed-area policy imposed by the colonial regime isolated the region from the rest of the country and made it impenetrable by ‘outsiders’.
244. In contemporary times, the people of North Rift have complained that they are inadequately represented in national political institutions and the public service since independence. It is a glaring contradiction that in representation in Parliament, a vast county like Turkana (with an area covering 77 000 square kilometers and a population of one million) only has three constituencies. Furthermore, for a long time it has been administered as one district.

Recommendations

- The Commission recommends that, within 12 months of the submission of this Report, the government formulate, adopt and implement a policy that deliberately targets the socio-economic development of historically marginalised regions identified by the Commission.
- The policy must include strategic development plans and budgetary allocations aimed at the economic and social development of marginalised communities.
- The policy must recognise that these reparative actions are over and above the provisions of Article 204 of the Constitution (2010) in utilisation of the Equalisation Fund.
- The Government consider actions such as building an efficient road networks linking marginalized areas with the rest of Kenya, building boreholes and water-catchment systems, building hospitals within reach of all communities adequately stocked and well-staffed, schools with adequate facilities, courts of law, and ensure that all government services and public facilities are available to them.
- In the five years subsequent to the enactment of the policy, preference be given to marginalised regions in the sharing of national revenues as envisaged under Article 202 of the Constitution (2010) to ensure that the development projects are realised and the policy is implemented.

Land and Conflict

245. The Commission finds that there is a very close linkage between land injustices and ethnic violence in Kenya. More specifically, land related injustices are prominent factors that precipitate violence between and within ethnic tribes in Kenya.
246. The Commission finds that land-related injustices take many forms, including: illegal alienation and acquisition of individual and community land by public and private entities, illegal alienation of public land and trust lands, preferential treatment of members of specific ethnic groups in settlement schemes at the expense of the most deserving landless, forceful settlement of members of a community outside of their homelands, forceful evictions and the phenomenon of land grabbing, especially by government officials.
247. The Commission finds that land-related injustices started recognizably during the period of colonization at the coast by Arabs and, later, by the British both at the coast and in mainland Kenya. However, indigenous Kenyans expected the injustices to be fully addressed soon after independence but the first independence government failed to fully and genuinely address the problems.
248. The Commission finds that all post independence governments have failed to honestly and adequately address land-related injustices that started with colonialism.
249. The Commission finds that failure of both colonial and post-independence governments to address the problem of landlessness is the reason individuals and communities often resort to self-help measures, including violence.
250. The Commission finds that existing land-related injustices are sometimes taken advantage of or used to address other societal problems, especially political differences.
251. The Commission finds that although land-related injustices have affected virtually every part of Kenya, communities at the coast, especially the Mijikenda, the Taita and Pokomo have suffered the most and the longest.
252. The Commission finds that land-related injustices at the coast constitute one of the key reasons for underdevelopment in the area. Land-related injustices at the coast lie at the root of the emergence of the Mombasa Republican Council (MRC).
253. The Commission finds that the Provincial administration has pervasively and significantly perpetrated land-related injustices including forceful evictions of individuals and communities and land grabbing for personal gain, and should

not at all participate in any efforts to redress land related problems in the new constitutional dispensation because of their lack of moral authority and support.

254. The Commission finds that the current constitutional dispensation, including the new constitutional body on land and related laws, provide a sound basis to fully address land-related injustices, including historical ones, but only if there is political will to so use these laws and institutions.





Recommendations

- The Commission recommends that the Ministry of Lands or other appropriate government authority immediately begins a process of surveying, demarcating and registering all remaining government lands, including those that were formerly owned or managed by local authorities, all protected wildlife areas and river banks, among other public lands.
- The Commission recommends that the National Land Commission commences work with the Ministry of Lands and settlement to undertake adjudication and registration exercises at the coast and all other areas where the same has not been conducted. Measures shall be designed to revoke illegally obtained titles to and re-open all public beaches, beach access routes and fish landing beaches, especially at the coast.
- The Commission recommends that the National Land Commission in furtherance of its mandate expedites the process of addressing and/or recovering all irregularly/illegally acquired land. Measures should be designed by the Ministry of Lands and settlement to encourage individuals and entities to surrender illegally acquired land.
- The Commission recommends that the Ministry of Land in conjunction with the National Land Commission design and implement measures to revoke illegally obtained titles and restore public easements
- The Commission recommends that the National Land Commission develops, maintains and regularly updates a computerized inventory of all lands in Kenya, including private land that should be accessible to all Kenyans as required by law. Land registries country wide should be computerized and made easily accessible as required by the law.
- The Commission recommends that the National Land Commission formulates and implement strict guidelines in terms of maximum acreage an individual or company can buy hold in respect of private land.

Economic Crimes and Grand Corruption

255. The Commission finds that corruption is endemic in Kenya. This is despite of the fact that there has been a growing public awareness of the consequences of corruption, its negative and destructive effects on the economy and development, and the need to eliminate corruption.
256. There is a direct link between corruption and gross violation of human rights. Individuals have been killed, tortured and subjected to other violations of human rights because of their efforts to combat corruption.
257. Corruption has a disproportionate impact on vulnerable groups such as the poor, minorities and indigenous people, women, children, persons with disabilities, people living with HIV/AIDS, refugees and internally displaced persons, and prisoners. Members of these groups are more and are less able to defend themselves.
258. Poor people are affected by corruption because it diverts resources from investment in infrastructure that is crucial to lift them out of poverty. Corruption undermines the quality of public services on which the poor depend particularly to meet their basic needs. Minority and indigenous people suffer effects of corruption when they are displaced by, for example, corruptly approved infrastructure developments.

Recommendations

-  The Commission recommends the formulation of a national anti-corruption policy to guide the war against corruption. It is necessary to criminalise other offences that are in United Nations Convention Against Corruption but not yet domesticated in Kenya.
-  The Commission recommends that the provisions of Anti-Corruption and Economic Crimes Act, Public Officers Ethics Act, Ethics and Anti-Corruption Commission Act and the Leadership and Integrity Act be harmonised to avoid confusion and duplicity. The Commission recommends the merging of all the four pieces of legislation into one.
-  The Commission recommends that the number of commissioners of the Ethics and Anti-Corruption Commission (EACC) be increased to the maximum constitutional limit of nine (9). An increased number of staff is also required to deal with the increased workload created by the two levels of government with the attendant huge sums of public funds being allocated to the 47 counties. There is a real danger of corruption being 'devolved' to the counties unless the EACC is quickly restructured, empowered and visible at both levels of government.
-  The Commission recommends that the EACC be given a sound constitutional grounding through amendment of Article 79 of the Constitution to specifically provide for its powers and functions as is the case with other Constitutional commissions.

- The Commission recommends the clarification of the definition of integrity and the attendant integrity threshold that should be used to either disqualify or remove a person from public office. Chapter 6 of Constitution of Kenya 2010, if properly interpreted and applied, will definitely be a major boost in the war against corruption in Kenya. It should be clearly defined as to when the integrity bar begins to operate, that is, whether it is at the time:
 - when mere allegations are made against an individual
 - when an individual is under investigation
 - when an individual is under prosecution
 - when an individual is convicted, or
 - when an individual has exhausted his right of appeal after conviction
- The EACC shall commence or hasten investigations into grand corruption scandals mentioned in this Report, which have remained unresolved for many years. Appropriate criminal and or civil sanctions must thereafter be taken against the perpetrators of grand corruption and economic crimes.

Ethnic Tension

259. The Commission finds that colonial government pursued a policy of 'divide and rule' in order to consolidate their hold on the country, and to lessen the possibility that the African population would resist colonial rule. To that end, the colonial government magnified the differences between the various communities and regions, and stereotyped each community in a manner that would sow suspicion, hatred and the sense of 'otherness'.
260. The Commission finds that the colonial government created ethnically defined administrative boundaries. In determining such boundaries, no serious thought was given to historical inter-ethnic interactions and relations.
261. The Commission finds that the colonial government focused on developing infrastructure and social services in productive areas of the country (the so called 'White Highlands') at the expense of the rest of the country. The resulting inequality remained largely unaddressed in the policies and practices of independent Kenya. The preferential treatment given to some areas of the country because of their clear productivity thus led to differential treatment of ethnic communities that were patterned around the ethnic enclaves created by the colonial government.

262. The Commission finds that the colonial land policy, particularly in the so-called 'white highlands,' contributed enormously to regional and ethnic marginalisation from the economy. Colonial land policies resulted in displacement, the creation of 'native reserves,' as well as the movement of masses of population from areas of their habitual residence to completely different regions and settling them on lands that traditionally belonged to other communities.
263. The Commission finds that Kenya entered the era of independence with a heightened sense of ethnicity that continued to divide rather than unite the country. However, ruling elites in independent Kenya did not have the political will or commitment to create a truly democratic and prosperous Kenya for all its citizens. The result was the worsening of ethnic relations such that by 2007 long standing grievances erupted into an unprecedented scale of violence.
264. The Commission finds that in the post-independence period, causes of ethnic tension include the following:
- **Insider/Outsider dynamics:** Ethnic tension and violence occur when communities assert a superior claim over a territory at the expense of or to the exclusion of others. Such superior claims are based on the assumption that ownership or occupation at some point in the past created an exclusive claim for such ownership or occupation in the present. Such exclusive claims to territory inevitably create classes of 'insiders' and 'outsiders'. This perception of people as outsiders as opposed to fellow citizens often lead to increased tension based on ethnicity which, in turn, created the potential for ethnic violence.
 - **Of names and their meaning:** In Coast and Rift Valley alike, a thorny issue that is intricately tied to the notion of insiders and outsiders relates to names of places. In particular, local communities in these two regions are aggrieved that places occupied by those they consider outsiders have been given 'outside names'.
 - **State sanction of outside/insider notions:** The designation of a community as 'other' or as an outsider has sometimes found support in state policy. In the northern region of the country, particularly in those areas that made up the former North Eastern Province, the Government has institutionalised the disparate treatment of Kenyans based on ethnicity by requiring that Kenyans of Somali origin carry a special pass

- **Negative perceptions and stereotypes:** Negative perceptions and stereotypes are a major cause of ethnic tension in the country. Labels have been put on certain communities, portraying them in broad, often negative terms that generalise certain traits and apply them to all individuals belonging to the described community, regardless of how individuals perceive themselves. For example, the Kikuyu are sometimes described as thieves, the Maasai as primitive, the Somali as terrorists, etc.
- **Culture and stereotypes:** While the colonial government played an important role in cultivating ethnic stereotypes, the Commission also received evidence that some stereotypes are drawn from and driven by traditional cultural beliefs and practices. For instance, the Commission heard that men from communities that do not practice male circumcision have always been stigmatised and regarded as lesser or weaker men, and therefore, incapable of or unsuitable to take political leadership of the country.
- **Ethnicity and access to public office:** The perception that ethnic representation in government results in direct economic and other benefits to the represented community is pervasive in Kenya. While the Commission acquired evidence that such benefits do not necessarily accrue to those communities who are represented - even in the highest offices of the land - the perception that they do leads to intense competition for such representation, and thus increases the likelihood of violence during elections.

Ethnic Tension, Land and Politics in Mt. Elgon

265. The Commission finds that the emergence of the Sabaot Land Defence Force in the Mt. Elgon region was precipitated largely by government failure to fully address land-related injustices that members of the Sabaot community have suffered since the colonial period.
266. The Commission finds that the SLDF was responsible for numerous gross violations of human rights including killings, torture, mutilation, and sexual violence.
267. The Commission finds that during *Operation Okoa Maisha* the Kenya Police and the military were equally responsible for gross violations of human rights including killings, enforced disappearance, torture, and sexual violence.

Recommendations

- The Commission recommends that within six months of the issuance of this Report, the President offers a public and unconditional apology to the people of Mt. Elgon for the atrocities committed against them by the Kenya Police and the Kenya Army and for the failure of the state to protect them against atrocities committed by SLDF
- The Commission recommends that within six months of the issuance of this Report, the Government establishes a trauma and healing center in Mt. Elgon region for purposes of providing psychosocial support to the victims and survivors of Mt. Elgon conflict. Special attention be paid to widows in the region.
- The Commission recommends that individuals who suffered atrocities during the Mt. Elgon conflict be provided with reparation in accordance with the Reparation Framework proposed by the Commission.
- The Commission recommends the establishment of a monument in Mt. Elgon to commemorate the victims and survivors of the Mt. Elgon conflict, especially those who were killed or forcefully disappeared both by the SLDF and state security agents.
- The Commission recommends that within 18 months of the issuance of this Report, the Government maps all mass graves and other locations where bodies were dumped or disposed of during the Mt. Elgon conflict, with a view to exhuming and identifying the bodies for proper burial.
- The Commission recommends the prosecution of the following individuals against whom it received evidence of involvement in militia activities in Mt. Elgon including financing, planning and instigating violence in the region: Fred Chesebe Kapondi; John Bomet Serut; and Jackson Psongoiywo.
- The Commission recommends the prosecution of Colonel Stephen Boiywo who was serving as the Commanding Officer during the military intervention in Mt. Elgon in 2008 referred to as *Operation Rudi Nyumbani* during which numerous gross violations were committed by members of the Kenya Army.
- The Commission recommends that the Police Service Commission ensures that every police station in Kenya reflects ethnic diversity and gender balance.

Reconciliation

268. For decades, Kenya has remained a nation in which communities stand divided along ethnic and regional lines, suspicious and distrustful of one another. Over the decades, feelings of inter-community distrust, even hatred, have festered mainly because a myriad of issues which are at the core of nation-building have largely remained unresolved. These issues include access to land, inequality and regional imbalances, and impunity combined with a lack of transparency and accountability. These issues have eroded a sense of belonging, nationhood, and public trust in political and governance institutions.
269. Since independence, successive governments have employed silence, denial and selective amnesia whenever individuals and agencies have raised the need to address these fundamental issues. Painful memories have been passed from one generation to another, and as a consequence present generations continue to hold grudges for violations and historical injustices meted against their forefathers and mothers. Until now, the scale and impact of human rights violations and historical injustices have neither been fully acknowledged nor sufficiently addressed.
270. Meaningful reconciliation is not an event, but rather a long process. The decision to reconcile is a personal decision, aimed at setting the stage and establishing the basis for the beginning of a reconciliation process.
271. The Commission acknowledges the efforts undertaken by civil society and faith-based organizations in fostering organizations. However, it is noteworthy that most of these efforts have been reactive rather than proactive, short term rather than long term, and uncoordinated and unsustainable.
272. The Commission finds that at the individual level, many Kenyans who have been victims of injustices and atrocities require psycho-social support. This is a necessary in order for them to engage in a process of reconciliation.
273. The Commission finds that District Peace Committees are under-utilized and not widely known amongst many Kenyans. This is partly due to lack of adequate funding of the District Peace Committees.

Recommendations

- The Commission recommends that within six months of the issuance of this Report, the President convenes a National Reconciliation Conference/Day, during which the President and heads of the various security agencies shall offer a public apology for violations and injustices committed during the mandate period. The President shall also outline the nation's Reconciliation Agenda. Representatives of victim groups from around the country shall be facilitated to attend the conference. The Commission further recommends that the day on which the Reconciliation Conference will be held should be declared a public holiday in order to ensure a nation-wide focus on the subject of national healing and reconciliation.
- The Commission recommends that alleged perpetrators of ethnic incitement and violence be investigated and prosecuted accordingly, notwithstanding their official or other status. The Director of Public Prosecutions shall ensure that those individuals recommended for investigation or prosecution by previous commissions of inquiry on ethnic violence, namely the Parliamentary Select Committee to Investigate Ethnic Clashes in Western Kenya and Other Parts of Kenya (Kiliku Commission), and Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission), are prosecuted or investigated. The Director of Public Prosecutions shall also take action in respect to the recommendations of various reports of the Kenya National Commission on Human Rights on ethnic and political violence including its report on the 2007/2008 PEV. The Commission has compiled a list of adversely mentioned persons in these reports to aid their identification.
- The Commission recommends that within 3 months of the issuance of this Report, the Director of Public Prosecutions shall issue a public report indicating the progress that the office has made in investigating and prosecuting the 2007/2008 Post-Election related cases.
- The Commission notes that there is a lack of a coordinated and streamlined approach to the subject of peacebuilding and reconciliation in the country. Multiple state organizations are involved in this endeavor without much formal coordination. The Commission recommends the evaluation of all institutions and mechanism involved in peacebuilding, reconciliation and early warning with a view to harmonizing their activities and adopting a coordinated approach.
- The Commission recommends that concerted efforts be taken to foster reconciliation and cohesion in areas where there has been a perennial problem of ethnic tension and violence. In this regard, the Commission recommends that comprehensive and sustained community dialogues be carried out in these areas.
- The Commission recommends that District Peace Committees be adequately funded and the public be made aware of the existence of these committees.
- The Commission recommends that the Ministry of Education develops a peace education curriculum for use in schools.

Annex:

Recommendations and Implementation Matrix

#	THEME/SUBJECT	RECOMMENDATIONS	RESPONSIBILITY FOR IMPLEMENTATION	TIMELINE
1	Atrocities committed during colonial era	Acknowledgment and apology	British government	
		Negotiation for compensation from the British government	Kenyan government and British government	12 months
2	Shifta War	Acknowledgment and apology	President and Chief of Defence Forces	6 months
		Repeal of Indemnity Act	Attorney General and Parliament	9 months
		Publication and dissemination of the 1967 Arusha Agreement between Kenya and Somalia	Ministry of Foreign Affairs/Office of the President	9 months
		Establishment of a public memorial	Implementation Mechanism/Ministry responsible for National Heritage/ National Museum	24 months
3	Massacres	Acknowledgment and apology	President, Inspector General of Police and Chief of Defence Forces	6 months
		Reparation for victims and survivors	Implementation Mechanism	36 months
		Release of all minutes of the relevant District Security Committees, Provincial Security Committee, Kenya Intelligence Committee and National Security Council	President/Office of the President	6 months
		Further investigations of individuals found to have played a role in a security operation that led to a massacre	Director of Public Prosecutions	18 months
		Lustration of individuals found to have played a role in a security operation that led to a massacre	Public Bodies	
		Establishment of memorials at the sites of massacres	Implementation mechanism/Ministry responsible for National Heritage/ National Museum	24 months
		Return of Father Adrian Joseph Janito for purposes of giving testimony on Bubisa Massacre	Catholic Church	
4	Political assassinations	Acknowledgment and apology	President	6 months
		Release of all reports and materials of all previous investigations of political assassinations	President/Office of the President	6 months
		Further investigations relating to the assassination of JM Kariuki, Robert Ouko, Crispin Odhiambo-Mbai and Father Antony Kaiser	Director of Public Prosecutions	18 months
		Further investigation of the assassination of Father Antony Kaiser	Director of Public Prosecutions to appoint independent investigator(s)	18 months
		Establishment of public memorials	Implementation Mechanism/ministry responsible for national heritage/ National Museum	24 months

#	THEME/SUBJECT	RECOMMENDATIONS	RESPONSIBILITY FOR IMPLEMENTATION	TIMELINE
5	Extra-judicial killings	Acknowledgment and apology	President, Inspector General of Police and Chief of Defence Forces	6 months
		Ratification of International Convention for the Protection of All Persons from Enforced Disappearance	Ministry of Foreign Affairs	24 months
		Fast-tracking of reforms in the Police Service, including introduction of new standard operating procedures on the use of force	Inspector General of Police and Police Service Commission	
		Establishment of a fully equipped modern national forensic laboratory	Ministry responsible for internal security and other relevant ministries/institutions	36 months
		Establishment of fully equipped modern forensic laboratories in each county	Ministry responsible for internal security and other relevant ministries/institutions	36 months
		Abolition of the death penalty and commuting of all death penalties to life imprisonment	Attorney General and Parliament	24 months
		Reparation for victims and survivors	Implementation mechanism	36 months
6	Unlawful detention, torture and ill-treatment	Acknowledgment and apology	President	3 months
		Enactment of legislation prohibiting torture	Attorney General and Parliament	12 months
		Legislation on and establishment of the Office of the Independent Inspector of Prisons and All Places of Detention	Attorney General and Parliament	12 months
		Prosecution of individuals involved in torture and ill-treatment	Director of Public Prosecutions	18 months
		Designation of Nyayo House as memorial for victims of detention and torture	Implementation mechanism/Ministry responsible for National Heritage/ National Museum	12 months
		Reparation for victims and survivors	Implementation mechanism	36 months
7	Sexual violence	Acknowledgment and apology	President, Inspector General of Police and Chief of Defence Forces, and British government	6 months
		Negotiation for compensation (in relation to victims and survivors of sexual violence committed by British soldiers in Laikipia and Samburu)	Kenyan government and British government	
		Establishment of one-stop gender recovery centers for provision of comprehensive services to victims and survivors of sexual violence, including medical, counseling and legal services	Relevant government ministries, departments and bodies including: Ministry of Health; Ministry of Justice; Director of Public Prosecutions; Police Service; NGEC; etc.	
		Legislation on and establishment of the Office of the Special Rapporteur on Sexual Violence	Attorney General and Parliament	12 months
		Fast-tracking of the establishment of a sexual offenders registry	Chief Registrar of the Judiciary	12 months
		Reparation for victims and survivors	Implementation Mechanism	36 months

#	THEME/SUBJECT	RECOMMENDATIONS	RESPONSIBILITY FOR IMPLEMENTATION	TIMELINE
8	Access to justice and promotion of human rights	Fast-tracking of the establishment of the International Crimes Division of the High Court	Chief Justice	12 months
		Fast-tracking of establishment of a nationwide legal aid system	Ministry of Justice/National Legal Aid (And Awareness) Programme in Kenya (NALEAP)	18 months
		Declaration under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights	Ministry of Foreign Affairs	12 months
		Issuance of a public report on the progress of investigations and prosecution of 2007/2008 post-election related violence	Director of Public Prosecutions	3 months (and in 3 months intervals thereafter)
		Designation of 10 December as a National Human Rights Day	Parliament	6 months
		Fast-tracking of enactment of human rights related laws as envisaged by the Constitution of Kenya: <ul style="list-style-type: none"> Legislation on freedom of the media (section 34) Legislation on fair hearing (section 50) Legislation on the rights of persons detained, held in custody or detained (section 51) 		
9	Women	Acknowledgment and apology	President	6 months
		Stepping up of measures to raise awareness about harmful cultural practices	Equality and Gender Commission	
		Enactment of relevant laws (e.g. marriage; matrimonial property; family protection/domestic violence)	Attorney General and Parliament	18 months
		Adoption and implementation of a Plan of Action to increase and improve maternal health facilities and measures to reduce delivery at home	Ministry of Health	12 months
		Equitable representation of women in all land dispute tribunals in accordance with the Constitution	Ministry of Lands	12 months
10	Children	Acknowledgment and apology	President	6 months
		Psychosocial counseling for children victims of atrocities	Implementation Mechanism and relevant government departments/institutions	
		Reparation for children victims of atrocities and injustices	Implementation Mechanism	36 months
		Reorganization of Borstal institutions to fall under the Department of Children's Services	Office of the President	12 months
		Adequate funding of the Department of Children's Services	Ministry of Finance	Continuous
		Robust plan for Integration of children with disabilities in mainstream educational facilities	Ministry of Education	12 months

#	THEME/SUBJECT	RECOMMENDATIONS	RESPONSIBILITY FOR IMPLEMENTATION	TIMELINE
11	Minority groups and indigenous people	Acknowledgment and apology	President	6 months
		Implementation of decisions relating to minority/indigenous communities: <ul style="list-style-type: none"> Decision of the African Commission on Human and Peoples' Rights in Communication No. 276/2003 Center for Minority Rights Development (Kenya) & Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya Decision of the African Committee of Experts on the Rights and Welfare of the Child in Communication No. 002/09 IHRDA & OSJI (on behalf of children of Nubian descent in Kenya) v Kenya Decision of the High Court of Kenya in Charles Lekuyen Nabori & 9 Others v Attorney General and 3 Others [Petition No. 466 of 2006, High Court at Nairobi] 	Various relevant ministries and institutions	12 months
		Ratification of relevant treaties: <ul style="list-style-type: none"> ILO Convention 169 Convention on the Prevention and Punishment of the Crime of Genocide Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Convention Against Discrimination in Education Statelessness Conventions 	Ministry of Foreign Affairs	24 months
		Fast-tracking of legislation on as envisaged by section 100 of the Constitution of Kenya	Attorney General, Constitutional Implementation Committee, and National Gender and Equality Commission	
		Removal of existing obstacles experienced by minority groups (e.g., members of Somali and Nubian ethnic groups) in accessing national identity cards	Ministry of Immigration and Registration of Persons	12 months
		Review of all legislation to eliminate de jure and de facto discrimination against minority/indigenous communities	Kenya Law Reform Commission and National Gender and Equality Commission	6 months
		Development and implementation of a plan on data collection on minority and indigenous communities	Kenya Bureau of Statistics and Ministry of National Planning	
		Implementation of the recommendations of the Presidential Special Action Committee to Address Specific Concerns of the Muslim Community in Regard to Alleged Harassment and/or Discrimination in the Application/Enforcement of the Law	Relevant ministries and institutions	

#	THEME/SUBJECT	RECOMMENDATIONS	RESPONSIBILITY FOR IMPLEMENTATION	TIMELINE
12	Economic marginalization and violations of socio-economic rights	Formulation, adoption and implementation of a policy on the economic development of marginalized regions identified by the Commission Focus: ▪ Roads and infrastructure ▪ Health ▪ Education ▪ Water	Relevant Ministries and institutions including Ministry for Finance, Ministry of Health, Ministry of Education, Commission on Revenue Allocation, etc.	12 months
		Collective reparation for communities in marginalized regions identified by the Commission	Implementation mechanism and relevant state ministries and institutions	36 months
13	Land	Further investigations of alleged illegal or irregular acquisition of land	National Land Commission	
		Survey, demarcation and registration of public land		
		Adjudication and registration of land at the Coast and other areas where this has not been done	National Land Commission	
		Development and maintenance of a computerized inventory of all land	Ministry of Lands and National Land Commission	
		Reparation for historical land injustices	Implementation Mechanism and National Land Commission	36 months
14	Economic Crimes and Grand Corruption	Harmonization of the various laws relating to combating economic crimes and grand corruption	Attorney General and Parliament	18 months
		Domestic criminalization of certain offences stipulated in the UN Convention Against Corruption	Attorney General and Parliament	18 months
		Expansion of the Ethics and Anti-Corruption Commission (from 3 to 9 commissioners)	Attorney General and Parliament	18 months
		Fast-tracking of investigations of corruption cases which have remained unresolved for many years	EACC	18 months
		Clarification of 'integrity test'	EACC	6 months
15	Ethnic tension and reconciliation	National Reconciliation Conference/ Day	President/Implementation Mechanism/ NCIC/NSC	6 months
		Investigation and prosecution of all adversely mentioned persons in official reports on political instigated ethnic violence or clashes	Director of Public Prosecutions	
		Audit of institutions and mechanism involved in peacebuilding, reconciliation and early warning with a view to harmonizing their activities and adopting a coordinated approach.	Joint Task Force of the NCIC, NSC and CSOs/CBOs	6 months
		Comprehensive and sustained nation-wide community dialogues	NCIC and National Steering Committee on Peacebuilding and Conflict Management (NSC)	Continuous

#	THEME/SUBJECT	RECOMMENDATIONS	RESPONSIBILITY FOR IMPLEMENTATION	TIMELINE
16	Mt. Elgon conflict	Acknowledgment and apology	President/Inspector General of Police/ Chief of Defence Forces	6 months
		Establishment of a counseling and healing center	Implementation Mechanism and relevant government ministries/ institutions	12 months
		Establishment of a memorial for victims and survivors	Implementation mechanism/Ministry responsible for National Heritage/ National Museum	36 months
		Reparation for victims and survivors	Implementation Mechanism	36 months
		Exhumation and reburial	Implementation Mechanism and relevant government ministry/ institution	36 months
		Prosecution of individuals alleged to have been involved in the planning, financing and instigating violence and other atrocities	Director of Public Prosecutions	18 months
		Prosecution of army commander in charge of Operation Okoa Maisha	Director of Public Prosecutions	18 months
17	Forced displacement	Facilitation and resettlement of Kenyan refugees in Uganda who are willing to return to Kenya	Relevant Government Ministry/ Department responsible for matters relating to internal displacement.	18 months
		Fast-tracking of the operationalisation of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, No. 56 of 2012	Relevant Government Ministry/ Department responsible for matters relating to internal displacement.	6 months
		Audit and registration of all IDPs who did not benefit from Operation Rudi Nyumbani with a particular focus on integrated IDPs	Implementation Mechanism and National Consultative Coordination Committee on Internally Displaced Persons	12 months
		Reparation for IDPs and refugees	Implementation Mechanism	36 months
		Ratification of the African Union Convention for the Protection and Assistance of Internally Displaced Persons	Ministry of Foreign Affairs	24 months
18	Reports of commissions of inquiry	Release of reports of previous commission of inquiries and related bodies: <ul style="list-style-type: none"> ▪ Report of the Commission of Inquiry into the 1992 Raid on Bishop Gitari's House in Kirinyaga ▪ Report of the Commission of Inquiry into the Conduct of the Artur Brothers and their Associates ('Kiruki Report') ▪ Report of the Presidential Action Committee to Address Specific Concerns of the Muslim Community in Regard to Harrassment and/or Discrimination in the Application and Enforcement of the Law ('Sharawe Report') 	President	6 months

I CALL FOR JUSTICE

(poem narrated by students of Garissa High School during the launch of the Commission's hearings in Garissa)

*Justice! I call for justice
Fear is in my heart*

*In the street, I pass calling for justice
In the police station, I pass calling for justice
In the court, I pass calling for justice*

*When I saw streams of blood flowing down the road
I could not believe my eyes
For what man had done
Killing innocent people mercilessly
Fear is in my heart
Justice! I call for justice*

*Children are left orphans
Rolling on the street meaninglessly
Sleeping on the street hungry
And the cold breaking their ribs
I am afraid of losing my life
Fear is in my heart
Justice! I call for justice*

*The widows are stressed
Recalling the love of their husband
Recalling the loss of their children
Fear is in my heart
Justice! I call for justice*

*Justice! where are you?
In the police?
In the court?
In the local tribunal?
In the ICC?
Justice? where are you?*

*Truth be told
Justice to prevail
Justice! justice! Justice!
I call for justice*

The report [of the Truth, Justice and Reconciliation Commission] shall ... make recommendations on the mechanism and framework for the implementation of its recommendations and an institutional arrangement in that connection.

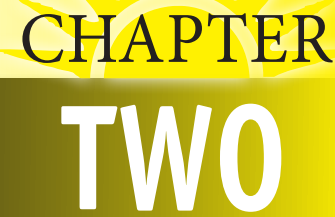
Truth, Justice and Reconciliation Act, sec 48(2)(f)

The implementation committee shall ... submit its own quarterly reports to the public evaluating the efforts of the Government and the efforts of any other person or body concerned to implement the recommendations of the Commission.

Truth, Justice and Reconciliation Act, sec 49(2)

The Minister shall report to the National Assembly within three months of receipt of the report of the Commission, and twice a year thereafter, as to the implementation of the Commission's recommendations.

Truth, Justice and Reconciliation Act, sec 50(1)



CHAPTER TWO

Implementation and Monitoring Mechanism

Introduction

1. Past experiences with the work of truth commissions and commissions of inquiry around the world have shown that a major challenge lies in the implementation of the recommendations contained in the reports of these commissions. More often than not, the life of these commissions ends at the point of submission of their final report, leaving the implementation to other actors who often do not follow through with the recommendations. This challenge has also characterized the work of many commissions of inquiry in Kenya in the past.
2. The consequences of this challenge have been to limit the impact of the work of these commissions and to contribute to public fatigue and disappointment about such commissions after expectations were raised. The drafters of the TJR Act must have had this challenge in mind when they empowered the Commission to recommend an implementation mechanism to ensure its recommendations are duly and timely implemented, and to monitor progress in that implementation. The government is expressly obligated under the TJR Act to create the implementation mechanism as set out in this Report. In this Chapter, the Commission provides for the nature, composition and functions of the Implementation Committee envisaged in the law.

Mandatory Nature of Commission's Recommendations

3. Recommendations contained in this Report are, in Parliament's wisdom, of mandatory application and must be complied with by all constitutional, legislative and administrative institutions and bodies so as to achieve the object and purpose of the TJR Act expressed in the Preamble and the relevant sections therein. This is clearly stipulated under Section 50(2) of the TJR Act which states that:

All recommendations shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation.

4. Furthermore, the Minister (or Cabinet Secretary in the language of the Constitution of Kenya, 2010) is tasked with reporting on the progress of the implementation of the Commission's Report to the National Assembly within three months of submission of the Report, and twice a year thereafter.¹ Section 49(3) further states that implementation of the Report of the Commission shall commence within six months upon publication of the Report.
5. In relation to the provisions of section 50(2), the Commission recommends that the Cabinet Secretary's reasons for any non-compliance and non-implementation with its recommendations must take cognizance of and be evaluated on the basis of the following principles:
 - The primary responsibility of implementing the recommendations resides with the State;
 - The State shall ensure all state organs and public officers with a duty to implement the recommendations are indeed doing so and that organs or officers not in compliance shall face appropriate sanction;
 - The State shall be required to demonstrate that it is undertaking the legislative, policy and other measures required to implement the recommendations.
 - In the event that the State cites resource constraints as the cause for non-compliance, the State shall be required to demonstrate that the resources are not available and further articulate an action plan for resource mobilization.

¹ TJR Act, sec 50(1).

6. In addition to the express provisions of the TJR Act, it is noteworthy that in terms of international best practice governments are obliged to 'undertake to give due consideration' to the findings and recommendations of investigative reports into human rights violations.² The United Nations High Commissioner for Human Rights has issued a statement on the obligation of member states to facilitate truth-seeking tribunals and 'encourages the States concerned to disseminate, implement, and monitor implementation of, the recommendations of non-judicial mechanisms such as truth and reconciliation commissions, and provide information regarding compliance with the decisions of judicial mechanisms.'³

Authority for an Implementation and Monitoring Mechanism

7. Section 48(2)(f) of the TJR Act mandates the Commission to 'make recommendations on the mechanism and framework for the implementation of its recommendations and an institutional arrangement in that connection.'⁴ The Act then requires the Minister of Justice to *operationalise* the implementation mechanism as proposed by the Commission:

The Minister shall, upon the publication of the report of the Commission, operationalize the implementation mechanism or arrangement in accordance with the recommendations of the Commission under section (48) (2) (f) to monitor the implementation of the recommendations of the Commission and to facilitate their implementation.⁵

8. The provision for an implementation mechanism in the TJR Act is no doubt borne out of the experience of past truth commissions and other commissions of inquiry in Kenya. Indeed, the drafters had foresight in proposing that a body be created to lead and facilitate implementation of the Report. This model is replicated in the implementation of the Constitution with the creation of the Commission for the Implementation of the Constitution, albeit with a decidedly different and broader mandate.
9. The Commission notes that section 49(1) of the Act enjoins the implementation mechanism '*to monitor the implementation of the recommendations of the Commission*

² Report of the independent expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, Addendum: Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Commission on Human Rights, E/CN.4/2005/102/Add.1, principles 12 and 19.

³ UN Commission on Human Rights, *Human Rights Resolution 2005/66: Right to the Truth*, 20 April 2005, E/CN.4/RES/2005/66.

⁴ TJR Act, sec 48(2)(f).

⁵ TJR Act, sec 49(1).

and to facilitate their implementation’. This provision thus envisages a dual mandate for the mechanism: to *monitor* and to *facilitate* implementation of the Commission’s recommendations.

Objectives of the Mechanism

10. The objectives of the implementation and monitoring mechanism are to:
 - Work with relevant agencies and departments of government, civil society, faith based organisations, the private sector, international donors, and any other relevant individual or organisation to facilitate the implementation of the Commission’s recommendations
 - Monitor and report to the public with respect to the fulfilment of specific recommendations, including progress made on implementation since the last monitoring report
 - Manage and administer the Reparations Fund
 - Any other activity necessary to fulfil the letter and spirit of the recommendations in this Report.

Nature of the Mechanism

11. The Commission is sensitive to balancing a number of important objectives in its recommendation for an implementation mechanism. First, it is imperative that the Commission’s Report, the result of close to four years of work, be widely disseminated and accessible to the Kenyan public, and in particular to the thousands of Kenyans who directly participated in and contributed to the Commission’s work. As noted in other parts of this Report, far too often commissions of inquiry have been established in Kenya at the expense of the public taxpayer only to have their reports withheld from public dissemination.
12. Second, it is imperative that the Commission’s recommendations, including but not limited to recommendations related to reparations, be fully implemented. Most truth commissions are criticized for having engaged with victims, raised their expectations, and then dashed their hopes by not providing for or resulting in concrete reparations. This is often not because the commissions themselves do not recognize the need for such reparations; rather it is often because the commissions themselves do not have the power to grant reparations, and while they recommend such reparations there is little or no political will to implement such recommendations. The drafters of the TJR Act must have been aware of

this problem with previous truth commissions, and thus both provided that our recommendations would be binding as a matter of law, and that the Commission would be empowered to create its own implementation mechanism.

13. Third, given the importance of many of the recommendations included in this Report, including the recommendations related to reparations, the Commission realized that the implementation mechanism would need to be independent of those bodies to which such recommendations are directed in order to monitor them effectively. In addition, the Commission was concerned that the implementation mechanism be sufficiently resourced in terms of time and staff to ensure effective monitoring and that its recommendations were in fact implemented. With effective monitoring and other related activity it is more likely that the recommendations would be implemented thus ensuring that Kenya would not be subject to the same criticism as other countries which had created truth commissions but then done little or nothing to provide for reparations and the fulfilment of other important recommendations.
14. Based upon these and other considerations, the Commission decided not to recommend that an already existing organization be the primary entity tasked with monitoring and implementing the Commission's recommendations. First, those existing independent organizations whose mandate is related to the work of the Commission (such as the KNCHR and NCIC) already have a full plate of activities and already face challenges with respect to inadequate resources to fulfil their current obligations. Placing even more obligations on such bodies would risk them being spread too thin with inadequate resources, or force them to choose between their existing activities with those activities related to the Commission. Second, while government agencies are less likely to have resource constraints, they are tasked with implementing many of the recommendations in this Report and thus would not be able to provide the independent and credible monitoring of their own activities. Finally, given that the implementation mechanism will also be continuing some of the work of the Commission – most notably administering the Reparations Fund – it is proper that the mechanism be an independent legal entity in the same way that the Commission was.
15. The Commission thus recommends the establishment of a Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission (the "Implementation Committee"). The Implementation Committee shall be established by legislation. A proposed bill title 'Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission Act' is annexed to this Chapter.

The Implementation Committee

16. The Implementation Committee shall be the main body responsible for implementing and monitoring the implementation of the Report of the Commission. It shall be an independent body with its own offices and budget, including the ability to raise its own funds. The Implementation Committee will be supported by a Technical Secretariat.
17. It is recommended that Parliament pass a law establishing the Committee and providing for its functions, powers and other related issues as proposed in this part within one month of the issuance of this Report. The TJR Act provides that the Commission shall be dissolved within three months of submission of its Report to the President and the public. In this regard, it is important that the Implementation Committee be in place before the Commission is dissolved in order to allow for a smooth and direct handover of sensitive documents in the custody of the Commission to the Implementation Committee.
18. The Committee shall be an independent body corporate with perpetual succession and a common seal. The Committee shall in its corporate name, be capable of —
 - suing and being sued;
 - acquiring, holding, charging and disposing of movable and immovable property;
 - borrowing and raising money from governmental and non-governmental sources; and
 - doing or performing all such other things or acts for the proper discharge of its functions under the Constitution and this Act.
19. The headquarters of the Committee shall be in Nairobi, but the Committee may establish other offices at any place in Kenya.

Composition of the Committee

20. The Implementation Committee shall consist of a Chairperson and four (4) other members appointed through an open and transparent process.
21. The Chairperson and members of the Committee shall have the following qualifications:

- Knowledge and experience in matters of transitional justice, human rights, reparations, law, gender or governance. The Chairperson shall be a person of 15 years experience in his/her field of experience while the members shall be persons of 10 years experience in their field of expertise.
 - A citizen of Kenya
 - Satisfy the requirements of Chapter Six of the Constitution
 - Shall not be a state officer
22. Appointment of the Chairperson and members of the Committee shall be through an open and transparent process involving as set out by Parliament.

Functions of the Committee

23. The Committee shall have the following functions:
- Primary responsibility for the implementation of the aspects of the report assigned to it, in particular:
 - management and administration of the Reparations Fund;
 - map, register and process victims' claims using the Commission's database as the starting point (see details below);
 - facilitating, in consultation with the relevant government body, the process of memorialization in line with the recommendations set out in this Report; and
 - management and securing of the archives of the Commission, with due regard to the importance of transparency and access to information, and consistent with the promises of confidentiality made to specific individuals and organizations.
 - Monitor the implementation of the aspects of the Commission's Report assigned to government ministries, departments and commissions.
 - Solicit, accept, manage and administer funds from the government, donors, and others dedicated to the Reparations Fund.
 - Ensure public awareness of the process at each stage, through appropriate media activity, public education forums and liaison/information sessions with victims, community based organisations, faith based organisations and civil society in general. In particular, the Committee shall implement a public

outreach and awareness campaign through the development of a transparent and comprehensive outreach plan in consultation with relevant government bodies, civil society groups, and victim representatives. The plan will be publicly available for comment and input and will specify measures of cooperation with local organizations and victim advocacy groups, as well as measures to reach out to women and girls, persons with disabilities, people living with HIV/AIDS, minorities and marginalized communities who have traditionally been excluded from public life. The Committee's Outreach Strategy should be carefully conceptualized so as to:

- Manage victim expectations about the reparations process
 - Clearly explain who is eligible for what type of reparations under the scheme
 - Clearly explain why and how decisions about eligibility have been made
 - Pilot-test outreach methods before creating any nationwide effort
 - Take advantage of new technologies to save costs and reach previously marginalized groups
 - Reflect the stepped approach to reparations registration and the priorities of the eligibility policy, described below.
 - Encourage group claims when appropriate.
- Recruit in an open and transparent process, the Chief Executive Officer and other staff of the Technical Secretariat
 - Disseminate the final report and other Commission-related published materials to the public
 - Facilitating the preservation, security, and public access to the archives of the Commission
 - Create a monitoring and evaluation plan to measure progress periodically on the implementation process;
 - Prepare and publish periodic reports relating to its activities including implementation and monitoring of implementation of the Report.

Powers of the Committee

24. The Commission recommends that the Committee shall have all powers necessary for the execution of its functions related to the implementation and monitoring of the Report of the Commission.

25. The Commission recommends that the Act establishing the Committee shall impose an obligation upon government departments and all organs of state to respond timeously to each reasonable request made by the Committee in pursuance of its obligations.

Technical Secretariat

26. The Committee shall be supported by a Technical Secretariat headed by a Chief Executive Officer and have a core staff comprising of experts in the following fields: communications/outreach; reparations and transitional justice; land; human rights; reconciliation and peacebuilding; and such other experts whose skills may be relevant in the implementation and monitoring of the Commission's Report.
27. The Commission recommends that the core staff at the Technical Secretariat be full time employees. The Technical Secretariat should be empowered to engage such other staff on full-time and consultancy basis as is necessary for the effective performance of its duties.
28. The Committee should, where appropriate, set up a reference group and or ad hoc thematic sub-committees consisting of key government departments, civil society and victims' organisations to provide focused policy orientation of the implementation process.

Staffing of the Secretariat

29. It is recommended that the Implementation Committee's Technical Secretariat establish the following units, or a comparable structure that ensures it can effectively fulfil its functions:
 - Outreach & Registration Unit
 - Evaluation & Classification Unit
 - Individual Claims Section
 - Group Claims Section
 - Victim Participation, Gender and Minorities Unit
30. Each unit will make an assessment of its staffing and support needs based on its functions. Moreover, each unit should include a gender focal point to ensure equal access for women in the reparations process. The Implementation Committee will then assess the capability of relevant existing structures to provide services and staff

support to be coordinated by the Implementation Committee. The Implementation Committee will make specific requests to government bodies, ministries, INGOs and NGOs to second staff, provide services (based upon a transparent list of criteria), and make available other support to the Implementation Committee. Memoranda of Understanding will be completed with relevant actors to delineate roles and supervising structures.⁶

31. For example, the Implementation Committee might establish MOUs with civil society organizations across the country to undertake effective outreach related to the reparations program. CSOs would undergo training coordinated by the Implementation Committee, would undertake activities as designated by the Implementation Committee, but would remain employees or volunteers of their respective organizations.⁷ The Implementation Committee would closely monitor the implementation of activities in such a case and would take corrective action, even to the extent of revoking an MOU, should that become necessary.⁸

Operationalization of the Implementation Committee

32. The TJR Act provides that the Minister shall upon the publication of this Report operationalize the implementation mechanism as recommended by this Commission.⁹ The Act also states that the implementation of the Report shall commence within six months upon publication. As already indicated above, it is imperative that Implementation Mechanism be put in place before the Commission is dissolved. This will allow for the smooth and direct transfer of sensitive and confidential documents in the custody of the Commission to the Implementation Committee. In making this proposal, the Commission took note of its mandatory obligation under section 52(2)(a)(ii) which requires the Commission to organize its archives and records giving special consideration to 'the measures that may be necessary to protect confidential information'.

⁶ This model is proposed in order to ensure maximum efficiency of the reparations programme and to ensure that entities with relevant expertise are mobilized to carry out the reparations mandate. Because resources are necessarily limited, it is critical to ensure that any reparations structure does not create a large bureaucracy that consumes resources that could otherwise be directly used on reparations programmes. It must be made clear in any enabling legislation that government bodies at the national and local level have a responsibility to cooperate with the Implementation Committee and to provide such staff and support as is reasonably requested. This will also require that the enabling legislation mandate ministries to allocate funds for reparations support and implementation in their budgets.

⁷ Guidelines related to funding arrangements for the implementation of service by non-governmental organizations will need to be developed, depending on the overall budget for the Implementation Committee and the types of organizations involved.

⁸ Clear performance criteria should be drafted into every MOU, linked to victim participation and satisfaction, so that the conditions for revocation of the MOU are clear to both parties to the agreement.

⁹ TJR Act, sec 49(1).

33. Should the Implementation Committee not be operationalized within three months, it is recommended that the Secretariat of the Commission remain in place until such a time as the Implementation Committee is operationalized. In this regard, the Commission Secretariat shall be the immediate successor in law to the Commission. The Secretariat shall be charged with the safe custody of the Commission's documents and materials. The Secretariat shall stand dissolved upon the transfer of its materials to the Implementation Committee.

Annex 1: Draft Bill

AN ACT of Parliament to provide for the functions, powers, qualification of, and appointment procedure for members of the Committee for the Implementation of the Report of the Truth Justice & Reconciliation Committee

Part I- Preliminary

Short Title and Commencement

1. This Act may be cited as the Committee for the Implementation of the Report of the Truth Justice and Reconciliation Committee Act, 2013 and shall come into operation six months upon publication of the Report of the Truth Justice and Reconciliation Committee and upon subsequent publication in the Gazette.

Interpretation

2. In this Act, unless the context otherwise requires —
“Chairperson” means the chairperson appointed in accordance with section 8 of this Act;
“Committee” means the Committee for the Implementation of the Truth Justice and Reconciliation Act established under this Act.
“Secretary” means the Secretary appointed in accordance with section 14 of this Act.
“Report” means the Report of the Truth Justice and Reconciliation Committee
“Cabinet Secretary” means secretary responsible for matters relating to the administration of justice.

Part II – Administration

Incorporation of the Committee

3. (1) The Committee shall be a body corporate with perpetual succession and a common seal and shall in its corporate name, be capable of —
 - a) suing and being sued;
 - b) acquiring, holding, charging and disposing of movable and immovable property;
 - c) borrowing and raising money from governmental and non-governmental sources; and
 - d) doing or performing all such other things or acts for the proper discharge of its functions under this Act.
- (2) The headquarters of the Committee shall be in Nairobi, but the Committee may establish other offices at any place in Kenya.

Functions of the Committee

4. The functions of the Committee shall be to—

- (i) monitor, and report to the public with respect to the fulfilment of specific recommendations, including progress made on implementation since the last monitoring report;
- (ii) co-ordinate with the relevant agencies and departments of government, civil society, faith based organizations, the private sector, international donors, and any other relevant individual or organisation to facilitate the implementation of the Commission's recommendations;
- (iii) manage and administer the Reparations Fund;
- (iv) map, register and process victims' claims using the Commission's database as initial reference point;
- (v) facilitate, in consultation with the relevant government body, the process of memorialisation in line with the recommendations set out in the Report;
- (vi) manage and secure the archives of the Commission, with due regard to the importance of transparency and access to information, and consistent with the promises of confidentiality made to specific individuals and organisations;
- (vii) monitor the implementation of the aspects of the Commission's Report assigned to government ministries, departments and commissions;
- (viii) solicit, accept, manage and administer funds from the government, donors and others dedicated to the Reparations Fund;
- (ix) ensure a public awareness of the process at each stage, through appropriate media activity, public education forums and liaison/information sessions with victims, community-based organisations and civil society in general;
- (x) recruit in an open and transparent process, the Chief Executive Officer and other staff of the Technical Secretariat;
- (xi) Disseminate the final report and other commission-related published materials to the public;
- (xii) facilitate the preservation, security, and public access to the archives of the commission;
- (xiv) prepare and publish periodic reports relating to its activities including implementation and monitoring of implementation process;
- (xv) formulate and develop an Outreach Strategy to—
 - a) manage victim expectations about the reparations process;
 - b) clearly explain who is eligible for what type of reparations under the scheme;
 - c) clearly explain why and how decisions about eligibility have been made;
 - d) pilot-test outreach methods before creating any nationwide effort;
 - e) take advantage of new technologies to save costs and reach previously marginalized groups;
 - f) reflect the stepped approach to reparations registration and the priorities of the eligibility policy, described below; and,

- g) encourage group claims when appropriate.
- (xvi) exercise such other functions as are provided for by the Truth Justice and Reconciliation Act, 2008 or any other written law necessary for the fulfilment of the letter and spirit of the recommendations in the Report

Powers of the Committee

- 5. The Committee shall have all powers generally necessary for the execution of its functions under the defunct Truth Justice and Reconciliation Act, 2008 and this Act.

Composition of the Committee

- 6. (1) The Committee shall consist of a Chairperson and four (4) other persons appointed through an open and transparent process.

Qualifications of Chairperson and Members

- 7. (1) A person is qualified for appointment as the chairperson or a member of the Committee if such person –
 - a) is a citizen of Kenya;
 - b) has knowledge and experience or has had a distinguished career of not less than fifteen years in, but not limited to, any of the following fields –
 - (i) law;
 - (ii) transitional justice’
 - (iii) human rights;
 - (iv) reparations;
 - (v) gender or governance;
 - (vi) public administration;
 - c) meets the requirements of Chapter Six of the Constitution.
- (3) No person shall be qualified for appointment as a member if such person—
 - a) is a State officer;
 - b) is a member of a local authority;
 - c) is a person against whom an adverse recommendation has been made in the Report, or in any other report of a Committee of inquiry; or
 - d) is bankrupt.
- 8. (1) For the purposes of this Act, the Cabinet Secretary shall constitute a selection panel consisting of -
 - (a) two people jointly nominated by a joint forum of religious organizations comprising -
 - (i) the Kenya Episcopal Conference;
 - (ii) the National Council of Churches of Kenya;

- (iii) the Evangelical Alliance of Kenya;
 - (iv) the Hindu Council of Kenya;
 - (v) the Seventh Day Adventist Church; and
 - (vi) the Supreme Council of Kenya Muslims;
 - b) one person nominated by the Law Society of Kenya;
 - c) one person nominated by Federation of Kenya Women Lawyers;
 - d) one person jointly nominated by the Central Organization of Trade Unions and the Kenya National Union of Teachers;
 - e) one person nominated by the Association of Professional Societies of East Africa;
 - f) one person nominated by the Kenya National Commission on Human Rights;
 - g) one person jointly nominated by the Kenya Private Sector Alliance and the Federation of Kenya Employers; and
 - h) one person nominated by the Kenya Medical Association.
- (2) The function of the selection panel shall be to nominate persons for appointment as commissioners in accordance with the Second Schedule.
 - (3) Members of the selection panel shall elect a chairperson and vice-chairperson of the selection panel from amongst their number.
 - (4) The chairperson and vice-chairperson elected under subsection (3) shall be persons of opposite gender.
 - (5) Subject to the provisions of the First Schedule, the selection panel shall determine its own procedure for the purposes of considering the applications, interviewing and shortlisting three persons qualified for appointment as chairperson and eight persons who qualify for appointment as members and shall forward the shortlisted names to the President for nomination.
 - (5) The President shall, within seven days of the expiry of the period prescribed under subsection (4), nominate the person for appointment as chairperson and four persons for appointment as members of the Committee, and shall forward the names of the persons so nominated to the National Assembly.
 - (6) The National Assembly shall, within fourteen days of receipt of the names under subsection (5), consider all the nominations received and approve or reject any nomination.
 - (7) Upon consideration and approval by the National Assembly, the Speaker shall, within seven days, forward the names of the approved persons to the president for appointment.
 - (8) Where the National Assembly rejects any nomination, the Speaker shall, within three days, communicate its decision to the President to submit fresh nominations.
 - (9) Where a nominee is rejected by Parliament under subsection (6), the President shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons short listed and forwarded by the Public Service Committee under subsection (4).

- (10) If Parliament rejects all or any subsequent nominee submitted by the President for approval under subsection (9), the provisions of subsection (8) shall apply.
- (11) The President shall, within seven days of receipt of names from the Speaker, by notice in the Gazette, appoint the chairperson and members approved and forwarded by the National Assembly.
- (12) In shortlisting, nominating or appointing persons as Chairperson and members of the Committee, the shortlisting Committee, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender.

Chairperson

9. (1) The chairperson and members of the Committee shall be appointed by the President in accordance with section 8.
- (2) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Committee at which the members shall elect the vice-chairperson of the Committee from amongst the members.
- (3) The chairperson shall—
 - a) preside over all meetings of the Committee and
 - b) be the spokesperson for the Committee
- (4) In the absence of the chairperson, the vice-chairperson shall act as the chairperson and in the absence of both the chairperson and the vice-chairperson, a member elected by the Committee shall act as the chairperson.

Tenure of Office of Chairperson and Members

10. The term of office of the chairperson or a member shall be from the date of appointment and shall, unless the office falls vacant earlier owing to any reason specified in section 11 of this Act, terminate on the dissolution of the Committee

Vacancy

11. (1) The office of the chairperson or a member shall become vacant if the holder—
 - a) dies;
 - b) by a notice in writing addressed to the President, resigns from office;
 - c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution;
 - d) is unable to discharge the functions of his office by reason of physical or mental infirmity;
 - e) is absent from three consecutive meetings of the Committee without good cause; or
 - f) is declared bankrupt.
- (2) The chairperson or a member may be removed from office for misbehavior or misconduct incompatible with the functions of the Committee.

- (3) The President shall notify every resignation, vacancy or termination in the Gazette within seven days.

Filling of Vacancy

- 12. (1) Where a vacancy occurs in the membership of the Committee in accordance with section 11, the President, shall nominate a member for approval by the National Assembly in accordance with section 8.
- (2) Notwithstanding the provisions of subsection (1), the President, may select a nominee from the list provided by the selection panel under section 8(4) for the purposes of filling a vacancy.
- (3) The member appointed under subsection (1) shall serve for the remainder of the term.

Establishment of Reparation Fund

- 13. (1) There is established a fund to be known as the Reparation Fund which shall-
 - a) be a national fund consisting of moneys for reparation to victims of gross human rights violations and historical injustices;
 - b) be a charge on the Consolidated Fund;
 - c) comprise of any moneys accruing to or received by the Committee from any other source;
 - d) disbursed by the national government through the Committee as a grant to be channelled to the Fund in the manner provided for by this Act, and by regulations made thereunder ;
 - e) be administered by the Committee.
- (2) During the life of the Implementation Committee, assets recovered through proceedings of the Ethics and Anti-Corruption Commission and the Kenyan Courts shall be used to fund the reparations process.

Appointment of Secretary

- 14. (1) There shall be a Secretary of the Committee and whose term of office shall be from the date of appointment until dissolution of the Committee unless the office falls vacant earlier owing to any reason specified under subsection (4).
- (2) The secretary shall be the Chief Executive Officer of the Committee and the head of the Secretariat and shall be responsible to the Committee for –
 - a) the day to day administration and management of the affairs of the Committee;
 - b) the co-ordination of the studies, research and evaluation of the Committee;
 - c) the recording of the proceedings of the Committee;
 - d) recruitment of such other staff on full time and consultancy basis as is necessary for the effective performance of its duties.
 - d) the custody of all records and documents of the Committee and

- e) the performance of such other duties as may be assigned by the Committee from time to time.
- (3) The secretary shall be appointed by the Committee through a competitive recruitment process.
- (4) The secretary may be removed by the Committee only for—
 - a) inability to perform the functions of his office arising out of physical or mental incapacity;
 - b) misbehavior or misconduct; or
 - c) incompetence.
- (5) Before the secretary is removed under subsection (4), he shall be informed of the case against him and shall be given an opportunity to defend himself against any allegations against him.

Oath of Office

- 15. The chairperson, members and the secretary shall each make and subscribe before the Chief Justice, the oath or affirmation set out in the First Schedule.

Sub Committees

- 16. (1) The Committee may, from time to time, establish sub-committees for the better carrying out of its functions.
- (2) The Committee may hire experts or consultants whose knowledge and skills are found necessary for the functions of the Committee.

Procedure of the Committee

- 17. (1) Subject to this section, the Committee shall regulate its own procedure.
- (2) The Committee shall hold such number of meetings in such places, at such times and in such manner as the Committee shall consider necessary for the discharge of its functions under this Act.
- (3) The quorum of the Committee shall be two-thirds of its members.

Independence of the Committee

- 18. (1) In the exercise of its mandate, the Committee shall be subject only to this Act and the law and shall not be subject to the control or direction of any person or authority.
- (2) The provisions of the Official Secrets Act and the Indemnity Act shall not apply to any matter that is the subject of implementation by the Committee.

Terms and Conditions of Service

- 19. (1) The salaries and allowances payable to, and other terms and conditions of service of the chairperson and the members shall be determined by the Salaries and Remuneration Committee in consultation with the Treasury.

- (2) The salaries and allowances provided for under subsection (1) shall be charged on the Consolidated Fund, but not the salaries of the Secretariat.

Appointment of Staff

20. (1) There is established a Secretariat which shall consist of the following and such other units as it may require in fulfilling its functions:-
 - (i) Outreach and Registration Unit;
 - (ii) Evaluation and Classification Unit;
 - (iii) Individual Claims Section;
 - (iv) Group Claims Section; and,
 - (v) Victim Participation, Gender & Minorities Unit.
- (2) The Committee may appoint such officers and other staff as are necessary for the proper discharge of its functions under this Act, upon such terms and conditions of service.
- (3) The officers and other staff appointed under subsection (1) shall serve on such terms and conditions as the Committee, in consultation with the Salaries and Remuneration Committee and the Treasury, may determine.
- (4) The Government may, upon request by the Committee, second to the Committee such number of public servants as may be necessary for the purposes of the Committee.
- (5) A public servant seconded to the Committee shall, during the period of secondment, be considered an officer of the Committee and shall be subject only to the direction and control of the Committee.

The Common Seal of the Committee

21. (1) The Common seal of the Committee shall be kept in such custody as the Committee shall direct and shall not be used except on the order of the Committee
- (2) The common seal of the Committee when affixed to a document and duly authenticated shall be judicially and officially noticed and unless the contrary is proved, any necessary order or authorization of the Committee under this section shall be presumed to have been duly given.

Protection from Personal Liability

22. No matter or thing done by a member of the Committee or any officer, employee or agent of the Committee shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Committee render the member, officer, employee or agent personally liable to any action, claim or demand whatsoever.

Part III- Financial Provisions

Funds of the Committee

23. The funds of the Committee shall consist of—
 - a) monies provided by Parliament for the purposes of the Committee;

- b) such monies or assets as may accrue to the Committee in the course of the exercise of its powers or the performance of its functions under this Act; and
- c) all monies from any other source provided, donated or lent to the Committee

Financial Year

24. The financial year of the Committee shall be the period of twelve months beginning first July and ending on the thirtieth June in each year.

Annual Estimates

25. (1) Before the commencement of each financial year, the Committee shall cause to be prepared estimates of the revenue and expenditure of the Committee for that year.
- (2) The annual estimates shall make provision for all the estimated expenditure of the Committee for the financial year concerned and in particular, shall provide for—
- a) The payment of the salaries, allowances and other charges in respect of the staff of the Committee
 - b) The payment of pensions, gratuities and other charges and in respect of benefits which are payable out of the funds of the Committee
 - c) The maintenance of the buildings and grounds of the Committee
 - d) The funding of training, research and development of activities of the Committee
 - e) The creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the Committee may think fit.

Audit and Accounts

26. (1) The Committee shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Committee.
- (2) Within a period of three months after the end of each financial year, the Committee shall submit to the Auditor-General the accounts of the Committee in respect of that year together with a—
- a) statement of the income and expenditure of the Committee during that year; and
 - b) statement of the assets and liabilities of the Committee on the last day of that financial year.
- (3) The annual accounts of the Committee shall be prepared, audited and reported upon in accordance with the provisions of the Constitution and the Public Audit Act, 2003.

Part IV - Miscellaneous Provisions

Progress Report

27. (1) The Committee shall prepare a progress report every three months and submit the report to the Parliamentary Select Committee and the President.

- (2) The progress report shall—
 - a) state the progress in the implementation of the Report;
 - b) identify any impediments to the implementation of the Report;
 - c) recommend any legal and administrative measures to address specific concerns identified by the Committee; and
 - d) state any other information relating to its function that the Committee considers necessary.
- (3) The Committee shall publish the report in the Gazette and in such other manner as the Committee may determine.

Annual Report

28. (1) The Committee shall cause an annual report to be prepared for each financial year.
- (2) The Committee shall submit the annual report to the President and Parliament within three months after the end of the year to which it relates.
- (3) The annual report shall contain, in respect of the year to which it relates—
 - a) the financial statements of the Committee;
 - b) a description of the activities of the Committee;
 - c) such other statistical information as the Committee considers appropriate relating to the implementation of the Report;
 - d) any other information relating to its functions that the Committee considers necessary.
- (4) The Committee shall cause the annual report to be published in the Gazette and in such other manner as the Committee may determine.

Duty to Co-operate

29. (1) A public officer, State Organ or State office shall at all times co-operate with the Committee in ensuring the successful implementation of the Constitution and the provisions of this Act and shall in particular;
 - a) respond to any inquiry made by the Committee;
 - b) furnish the Committee with periodic reports as to the status of implementation of the Constitution in respect of the question raised;
 - c) provide any other information that the Committee may require in the performance of its functions under the Constitution and any other written law.
- (2) Any public officer who breaches any of the provisions of this Act shall be deemed to be in contempt of Parliament and shall be liable, on conviction, to a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding one year, or to both.

Regulations

30. (1) The Committee may make regulations generally for the better carrying into effect of the provisions of this Act.
- (2) The regulations made under subsection (1) shall be tabled in the National Assembly for debate and approval before publication in the Gazette.

Dissolution of the Committee

31. (1) The Committee shall stand dissolved fifteen years after it is established or at the full implementation of the Report as determined by Parliament, whichever is sooner, but the National Assembly may, by resolution, extend its life.
- (2) Upon dissolution of the Committee under this Act, this Act shall lapse.
- (3) During the period prescribed in subsections (1) and (2), the Committee shall ensure that its affairs are wound up in an orderly manner and, in particular shall ensure that—
 - a) those aspects of its work that will be of value to other institutions are preserved, documented and transferred; and
 - b) its files and records are preserved and transferred to the Kenya National Archives and Documentation Service.
- (4) Upon the dissolution of the Committee under subsections (1) and (2), any assets and liabilities of the Committee, shall become assets and liabilities of the Government.
- (5) The terms of the Chairperson and members shall expire upon dissolution of the Committee.

Transitional Provisions

- 32 (1) The secretariat of the Truth, Justice and Reconciliation Commission shall continue to operate until such a time that the Committee is duly established.
- (2) The Secretariat shall stand dissolved upon the transfer of its materials to the Committee.

Schedules

FIRST SCHEDULE

(s. 14)

OATH/AFFIRMATION OF THE OFFICE OF CHAIRPERSON/A MEMBER/SECRETARY

I having been appointed (the chairperson/member of / Secretary to) the Committee for the Implementation of the Truth Justice and Reconciliation Committee under the Committee for the Implementation of the Report of the Truth Justice and Reconciliation Committee Act, 2013, do solemnly (swear/ declare and affirm) that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD).

Sworn/Declared by the said

Before me this Day of.....

Chief Justice

SECOND SCHEDULE

(s.29)

CRITERIA FOR VETTING/APPROVAL OF NOMINEES FOR APPOINTMENT TO PUBLIC OFFICE BY THE NATIONAL ASSEMBLY

QUESTIONNAIRE

Notes:

- a) This questionnaire applies to appointments to public office arising by or under the Act where parliamentary approval is required.
- b) The questionnaire shall be used by the relevant parliamentary committee to vet a nominee appearing before the committee in the process of parliamentary approval.
- c) The questionnaire shall be filled and submitted by the nominee to the relevant parliamentary committee through the Clerk of the National Assembly on or before a date set by the committee.
- d) The submission of false information in the questionnaire is an offence and may result in prosecution.
- e) Any form of canvassing by a nominee shall lead to disqualification.
- f) The nominee must answer all the questions.

1. Name: (State full name).
2. Position: (State office to which you have been nominated).
3. Sex:
4. Date of Birth: (State year and place of birth).
5. Marital Status:
6. Daytime phone number:
7. Mobile phone number:
8. Email Address:
9. ID Number:
10. PIN Number:
11. Nationality:
12. Postal Address:

13. Town/City:
14. Knowledge of Languages: (Specify Languages).
15. Education: (List, in reverse chronological order, each university, college, or any other institution of higher education attended and indicate, in respect of each, the dates of attendance, academic award obtained, whether a degree was awarded, and the dates on which each such degree was awarded).

Employment Record: (List in reverse chronological order all government agencies, business or professional corporations, companies, firms or other enterprises with which you have been affiliated as an officer, director, partner, proprietor, employee or consultant).
16. Honours and Awards: (List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards and any other special recognition for outstanding service or achievement and in respect of each, state the date of award and the institution or organization that made the award).
17. Professional Association (where applicable): (List all professional associations of which you are or have a member and give any positions held and the respective dates when each such position was held).
18. Memberships: (List all professional, business, fraternal, scholarly, civic, charitable or other organizations, (other than those listed in response to Question 16) to which you belong or have belonged).
19. Published Writings:
 - a) List the titles, publishers and dates of books, articles, reports letters to the editor, editorial pieces or other published materials you have authored or edited.
 - b) Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of any bar association, committee, conference or organization of which you were a member.
20. Public Office, Political Activities and Affiliations:
 - a) List chronologically any public offices you have held or are currently holding, including the terms of service and whether such positions were elected or appointed.
 - b) List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities. Also include any linkage you have to a political party at present.
 - c) Have you ever been dismissed or otherwise removed from office for a contravention of the provisions of Article 75 of the Constitution?
 - d) Have you ever been adversely associated with practices that depict bias, favoritism or nepotism in the discharge of public duties?
21. Deferred Income/Future Benefits: (List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and

other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, etc).

22. Outside commitment during service in office: (Do you have any plans, commitments or agreements to pursue outside employment with or without compensation during your service in office? If so explain).
23. Sources of Income: (List sources and mounts of all income received during the calendar year preceding your nomination and in the current calendar year).
24. Tax Status: (State whether you have fully complied with your tax obligations to the State to date).
25. Statement of Net Worth: (State your financial net worth).
26. Potential Conflicts of Interest:
 - a) Identity the family members or other persons, parties, categories of litigation or financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to rise.
 - b) Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.
27. Pro-Bono/Charity Work: (Describe what you have done by way of pro bono or charity work, listing specific instances and the amount of time devoted to each).
28. Have you ever been charged in a court or law? If so, specify the nature of the charge, where the matter is ongoing, the present status of the matter, or where the matter is concluded, the judgment of the court, or otherwise, how the case was concluded.
29. Have you ever been adversely mentioned in an investigatory report of Parliament or any other Committee of inquiry?
30. Have you any objection to the making of enquiries with your present employer/referees in the course of consideration of your nomination?
31. References: (List three persons who are not your relatives who are familiar with your character, qualification and work).

We need total compensation for both economic and social crimes.

How do we get compensation? Our version of compensation will be in terms of infrastructural development and educational development. When I talk of infrastructure, I want all the roads in North Eastern Province to be tarmacked. There is only one kilometre of tarmac, even as we are talking, in the entire province which is one third of Kenyan land mass. The roads are usually impassable during the rainy season. If that is done urgently, some kind of healing will come up. It will be difficult to ascertain individual compensation because they are in thousands..

We want this community to have a tarmac road in Teso District and if possible, it be named after Tito Adungosi. We need something monumental about Tito. This monument has to be built at the county headquarters as a reminder of Tito's struggle, his blood and martyrdom. As we celebrate the Kenyattas, Kagias and Onegos of this country, let us also celebrate Tito Adungosi as a national hero.
We need an apology to the family.

Reparation Framework

Introduction

1. The Truth, Justice and Reconciliation Act (TJR Act), under Section 6 (k) (i), requires the Truth Justice and Reconciliation Commission (the Commission) to:

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

Reparation is defined as “dignifying the victims by measure that will alleviate their suffering, compensate their social, moral and material losses, and restitute their rights.”¹ A primary responsibility of the proposed Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission (hereinafter ‘the Implementation Committee’) shall be to manage and administer reparations. Therefore, this Chapter outlines the Commission’s recommendations relating to reparation and how the Implementation Committee shall manage and administer such reparations.

¹ TJR Act 2008, Section 2

The Concept of Reparation

2. The State of Kenya is responsible for reparations for the violations covered under the mandate of the Commission, either because violations were perpetrated by State agents or the State failed to protect its citizens. The right to reparation is recognized² under international law and Kenyan law. Victims can obtain reparation either through state administrative programmes, or through recourse to the courts. The burden of pursuing damages through the courts is high both for the victims and the legal system. The reparation recommendations of the Commission contained in this chapter aim to achieve the objective of reparation while avoiding high burdens upon the victims, both individual and groups.

Grounds for reparation

3. The Commission recognizes that the key objective of reparations is to restore the dignity of victims through acknowledging the wrongdoing, the harm suffered and the state responsibility to promote, protect and fulfil human rights. In that way reparations are a means to contribute to a rebalancing of society and a healing process. These reparation recommendations are designed to be practical and implementable. Other truth commissions' recommendations have demonstrated that this is most often a challenge. Unfortunately, recommending a proportionate and tailored reparation measure for each individual victim would be impractical and impossible to implement.
4. In designing recommendations for reparation the Commission considered a number of factors. These included, among others, the large number of victims in Kenya and the extreme vulnerability of some groups of victims.
5. It is against this background that priorities for reparations are set out and that the Commission recognizes that realistically implementable reparations measures cannot satisfy individual victims or respond adequately to individual suffering and harm.

² The Constitution of Kenya (2010) at Article 2(5)-(6) stipulates that general rules of international law and any treaty or convention ratified by Kenya shall form part of the law of Kenya. Several regional and international treaties have asserted the right to a remedy and reparation for violations of serious human rights. International Covenant of Civil and Political Rights (1966) (Art 2(3), 9(5) and 14(6); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) (art 6), Convention on the Right of the Child (1989) (Art 39) Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984) (Art 14) and the Statute of the International Criminal Court (1998) (Art 75). Also the African Convention on Human and Peoples' Rights 1981 (Art 21(2), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art 5(5), 13 and 41) and the American Convention on Human rights 1969 (Art. 25, 63(1) and 68). This right has also been affirmed by regional human rights courts, United Nations bodies and other declarative instruments. E.g. Human Rights Committee, General Comment No. 31 [80] nature of the General Legal Obligation Imposed on State parties to the Covenant 26/05/2004, (u.N. Doc. No. CCPR/C/21/Rev.1/Add.13. atparas. 15-17; United Nations Committee against Torture, GC No.2, Implementation of Article 2 by State Parties (U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007)), at para 15.

Types of reparation

6. The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*³ have distinguished five forms of reparations.
 - Restitution: restores the victim to the original situation before the violation occurred. It includes restoration of liberty, enjoyment of identity and citizenship
 - Rehabilitation: includes medical and psychological care
 - Compensation: provides money for damage suffered
 - Satisfaction: includes official declarations restoring dignity and reputation, public apology, commemoration and tributes
 - Guarantees of non-repetition: includes structural measures that will prevent re-occurrence of the violations.
7. The reparation recommendations below are a combination of measures that fall within these five forms.⁴ The reparation measures below can also be distinguished according to the beneficiary of the measure. Individual reparation measures will be available for certain individuals, while collective reparation measures will benefit a group of people or a community. Collective reparation measures aim to reach a larger group of people both from the perspective of increasing the effective use of resources and improving sustainability.
8. Another distinction is made between material reparation measures and non-material reparation measures. Material reparations measures imply a tangible benefit (e.g. monetary pension, provision of health services, socio-economic measure). Non-material reparations do not involve any provision of any monetary payments or free service provision, but instead address the harms suffered in ways that may not have any economic component. The latter are critical in restoring the dignity of victims and survivors, through the restoration of rights (expunging criminal records, granting citizenship), the provision of critical documents (identity cards) or honouring the memory of those who have suffered violations (through monuments, naming ceremonies or days of remembrance).

³ Resolution 2005/35 (UN Doc. No.E/CN.4/RES/2005/35 (2005)) and GA Res'n 60/147 (UN Doc. No.A/RES/60/147 (2006)).

⁴ Other recommendations of the TJRC can be considered as being part of guarantees of non-repetition and therefore are not detailed again in this chapter.

Methodology

9. The chapter is based on international standards concerning reparation. The Commission considered the full extent of data it collected throughout its work with victims, including from statements and memoranda, from hearings and from other forms of interactions with the public. In addition, the Commission worked closely with various state institutions, Kenyan and international civil society organisations that have specific expertise on the topic of reparation.⁵

Analysis of proposed forms of Reparation

Moreover, the Commission's Statement Taking Form included a section for recording recommendations for reparation. The Form specifically asked statement givers to indicate what form of reparation they preferred both at an individual and community level. They were also asked to recommend what was best for the nation. Figures 1 and 2 below show the analysis of recommendations proposed by individuals and communities respectively.

Forms of reparation proposed by individuals	
Reparations Category	Statement/Memo Count
Compensation (Financial reparation)	31,020
Prosecution	5,716
Identification of perpetrators	2,620
Exhumation & burial	130
Apology	1,929
Memorials	59
Support for Children	2,038
Counseling	1,081
Tangible Goods Reparations	1,613
Traditional Justice	459
Resettlement	5,304
Other	2,053
Not Given	5,798

⁵ Those included the International Commission of Jurists – Kenya (ICJ), the Kenya Human Rights Commission (KHRC), GLZ, the Open Society Institute for East Africa (OSIEA), the International Center for Transitional Justice (ICTJ) and the Kenya National Commission on Human Rights (KNCHR).

Forms of reparation proposed by communities	
Reparations	Statement/memo Count
Promote Peace	7122
Build a school	4280
Build hospital	1604
Repair or build roads	725
Repair or build water facilities	633
Repair or Build houses	733
Improved security	2,297
Identification of perpetrators	273
Exhumation and burial	222
Annual religious service	1,550
Recovery of stolen funds/property	3,611
Affirmative action	4,103
Replacement of goods	575
Community service	61
Other	5,009

10.3 *Reparation proposed for the Nation*

Following table shows the analysis of the reparations for the nation extracted from the statements and memos.

Reparations for Nation	
Reparations	Statement/memo Count
Monuments	1,071
Recovery of stolen funds	2,143
Prosecutions	4,356
Apology	2,966
Legal/institutional reforms	10,589
National day of remembrance	3,067
Enhance peace and unity	5,892
Other	1,340
Not Given	14,123

Fig 1.85 Statement /Memo Count Vs Reparations for Nation

For recommendations for reparations to the nation, 'legal and institutional reforms' was the most popular at 23.2%. The second highest category was to 'enhance the peace and unity' among the people of Kenya. Similar analysis was carried out at regional levels when the TJRC reconciliation team went across the country to conduct the reconciliation forums.

Commission's Recommendations relating to Reparation

10. The Commission recommends that the National Assembly should append to the proposed Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission Act, a set of regulations relating to reparation. The Reparation Regulations shall mirror the provisions of the reparations policy framework outlined in this Chapter.

Principles for the implementation of reparation measures

11. The Commission underscores the importance of victims' involvement in the implementation of reparation measures and the need for victim empowerment to this end. The responsible institutions have to be integrated as much as possible in existing structures in order to avoid additional costs. The service logic has to be applied by all structures involved; victims should not be faced with unnecessary bureaucratic practices or burdens (e.g. avoidance of duplication of submission of documents, etc.).
12. It is through the combination of the various types of reparation measures and the active involvement of victims in the implementation process that the recommendations below aim to contribute to a process of reconciliation and healing in Kenya.

Eligibility for reparation measures

13. The eligibility is determined by type of violations, the time of occurrence of the violation and the type of beneficiaries. Both individuals and groups can be beneficiaries of reparation measures.

Violations

14. Reparation measures are limited to gross violations of human rights as defined in the Commission's mandate under the TJR Act. Gross violations of human rights are those violations that were perpetrated by:
 - State agents as part of a policy or systematic course of action
 - Non-state actors acting with state complicity as part of a policy or systematic course of action

- State or non-state actors as a result of the failure to protect in the context of large-scale human rights violations

15. Only violations occurring between 12 December 1963 and 28 February 2008 are considered eligible within this reparations framework. Gross violations of human rights are categorized as follows:

■ ***Category 1. Violations of the right to life***

- Massacres
- Summary or arbitrary executions
- Political assassinations
- Disappearances or killings of political actors and human rights defenders in which the state was complicit.

■ ***Category 2. Violations of the right to personal integrity***

- Torture
- Inhuman and degrading treatment or punishment of political detainees or human rights defenders
- Arbitrary arrests and illegal/prolonged detention of political detainees or human rights defenders
- Rape
- Sexual and gender-based violence other than rape
- Mutilation and grievous bodily harm⁶

■ ***Category 3. Forcible transfer of populations***

- Conflict-induced displacement
- Development-induced displacement⁷ without appropriate consultation, compensation, and resettlement plans for communities
- Deaths or disability directly resulting from conditions of forced displacement
- Violations of ECOSOC rights within the context of forced displacement

⁶ Penal Code of Kenya, Ch. 63, sec. 263.

⁷ This category specifically refers to large-scale development projects by the state or parastatal actors.

- **Category 4. Historical and contemporary land injustices**
 - Illegal acquisition or occupation of land of communally held land
 - State seizure of private, community or Trust lands without sufficient public purpose or for evident personal gain
 - Violations of the right to free, prior and informed consent in allocation of rights to, or legal designation of, the ancestral lands of indigenous communities specifically including hunter-gatherers, fisher peoples, and pastoralists.
- **Category 5. Systematic marginalization**
 - Direct discrimination through state policy (including identifiable patterns of action or lack of action)
 - Facially neutral laws that have a discriminatory effect
 - Violations of minority rights to language, culture and religion
 - Violations of the right to nationality
 - Violation of indigenous peoples' rights to identity and recognition
 - Violation of the group right to participation in decisions that directly affect the minority or indigenous group in question
 - Violations of ECOSOC rights in the context of marginalization.

Reparation measures and their prioritization

16. This section details the beneficiaries and benefits available through the reparations programme as recommended by the Commission. Under this programme, both individuals and groups are eligible for reparations, but the criteria for determining who ultimately benefits from reparations are designed to ensure that the programme is manageable. Accordingly, the reparations programme prioritizes extremely vulnerable individuals, groups who have suffered injustice specifically including historical land injustices, and individuals who have been victims of violations of the right to life as well as the right to personal integrity.
17. Human rights violations are by their nature interconnected. As described elsewhere in this Chapter, individuals and communities are eligible for a series of reparation measures. It is the intention of the Commission that this use of multiple measures

will more effectively address the interconnected nature of the violations that Kenyans have experienced as well as the ripple effects that violations may have on a family or community throughout the generations.

Category of Violation	Priority A – Most Vulnerable	Priority B – Collective Reparations	Priority C – Individuals, Non-expedited	
1. Violations of the Right to Life	Victims in this block are eligible for pensions, medical & psychosocial vouchers.	Victim groups in this block are eligible for land reparations, socio-economic measures, government policy interventions, as well as non-material reparations such as restitution of rights, recognition, self-determination measures, and memorials.	Victims in this block are eligible for standardized pensions.	
2. Violations of Personal Integrity, including SGBV				
3. Forcible Transfer of Populations	If a victim died as a direct result of conditions of displacement, family can claim reparations as above.			
4. Historical and Contemporary Land Injustices	These violations can only be eligible for reparations under Priority B.			
5. Systematic marginalization				

Priority A: Most Vulnerable

Who is eligible under Priority A?

18. Victims who are defined as most vulnerable, using the criteria below are eligible for reparations in Priority A:
- Individual victims⁸ of gross human rights violations in Categories 1 & 2 above who meet any of the following criteria will have their claims expedited:
 - Child victims (under 18 years of age at the time of filing)
 - Elderly victims (above 60 years of age at the time of filing)
 - Victims demonstrating urgent health concerns with a causal relationship to the violations in categories 1 and 2
 - Single heads of household demonstrating significant economic hardship with a causal relationship to the violations in categories 1 and 2

⁸ In the case of an individual victim who has died as a result of the violation, her or his beneficiaries may apply for reparation and receive the reparation on his or her behalf, subject to regulations established by the TJRC recommendations or by the Implementation Mechanism .

- Orphans (under 30 years at the time of filing) as a result of the violations in Categories 1, 2, & 3 above also will have their claims expedited.
 - Individuals who died as a direct result of violations in Category 3 above.
19. The Implementation Committee will conduct outreach and proactively register victims in this category first. These claims will undergo an expedited adjudication and will be eligible for the various forms of individual reparation specified under Priority C below.
 20. Individuals who have already received monetary compensation should not be available for additional monetary measures. Appendix 1 details monetary compensation already awarded by courts to individual victims. However, the Implementation Committee should inquire whether the amounts awarded have actually been paid by the State and, if not, follow up to advocate compliance with court orders.

What reparations measures are available under Priority A?

21. The number of victims of gross human rights violations that took place in Kenya between 1963 and 2008 is vast. As expressed in several research and survey reports, there is a clear demand among victims from across the spectrum that monetary compensation would be the most effective type of reparation for them. However, the class of eligible individuals who may receive financial compensation must be narrowed in order to make any reparations programme financially feasible. In addition, it has to be recognized that the necessarily limited amounts of monetary compensation may not be sufficient to have a sustainable and meaningful impact on the lives of the victims.
22. Individuals who are determined to be eligible for reparations under Priority A will receive the following reparation:
 - **Compensation:** Monetary compensation in the form of a standardized ten-year annual payment (pension). If the eligible victim is deceased, compensation will be paid to the immediate family of the victim pursuant to guidelines established by the Implementation Committee.
 - **Rehabilitation:** Medical care and psychosocial service vouchers will be provided to victims demonstrating need pursuant to guidelines established by the Implementation Committee.

What are the evidentiary standards⁹ for Priority A?

23. Individuals registered for reparations should be considered for expedited processing if on the face of the claim it appears more likely than not that an individual is eligible for reparations under Priority A. Final eligibility of the individual for Priority A reparations should be determined based on a preponderance of the evidence demonstrating that the individual meets the criteria above. Evidence might include birth and death certificates, medical records, recommendations from the Implementation Committee's partners (NCIC, KNCHR, CBOs, CSOs, NGOs), or other evidence as specified by the Reparations Regulations.

Priority B: Collective Reparations

24. This reparation framework adopts a deliberate policy of encouraging collective reparation so as to maximize the efficient use of available resources for reparations and because a substantial percentage of the grievances raised before the Commission relate to policies and practices that negatively impacted entire groups of people. As a result, collective reparation measures will receive the second highest priority for registration and processing. Collective reparation measures will be specifically handled by a Group Claims unit that will focus on helping communities document, register and administer a multidimensional for reparation package.

Who is eligible under Priority B?

25. Collective reparations will be awarded to groups of victims to remedy violations of individual and group rights. The beneficiary groups of victims may be bound by a common identity, experience or violation. Collective reparations will be available to groups of victims in the following instances:
 - For victims who have suffered human rights violations as a group including
 - Systematic marginalization of minority and indigenous communities, communities living in arid and semi-arid areas
 - Historical land injustices
 - Violations targeting and/or affecting populations of a specific area, such as massacres, environmental degradation
 - To address individual reparations through collective measures that could

⁹ Evidentiary requirements should not be onerous on victims and should take into account the availability of different types of proof in the context of the violations listed in the categories above.

promote collective reconciliation and/or facilitate optimal use of available resources. Such measures may include enhancing victims' ability to secure micro-financing for business opportunities; provision of health services to groups or regions; peer group support and counselling; and skills training.

- To address structural inequalities such as identity and gender-based dimensions of individual violations (e.g. violations targeting groups on the basis of their gender, ethnicity and/or religion such as rape as a means of repression, denial of citizenship rights, etc.)
- To address needs for symbolic reparations, such as apologies, recognition of groups, or memorials.

What reparation measures are available under Priority B?

26. This reparation framework identifies several collective reparation measures, both material (such as socio-economic measures) and non-material (commemorative measures). The collective reparations measures respond to various violations and types of harm, both individual and collective. The interconnection between the different violations and harms is fully recognised as well as the fact that the interconnectedness may lead to aggravating effects. Though the set of violations and the harm suffered are not considered as isolated occurrences, separate material reparation measures and non-material measures are identified to deal with the variety of violations and harms. It is recognised that none of these measures, individually or jointly, will be able to undo the harm suffered by both individual and communities. The measures aim to contribute to restore the balance in society, provide material benefit and enhance public recognition of the suffering.

Reparations for Historical Land Injustices

27. The Commission prioritizes historical land injustices in reference to its mandate to examine the causes and consequences of marginalization as well as the root causes of ethnic conflict in Kenya.¹⁰ This is not to say that the Commission does not recognize that individuals have also been victims of land injustices, but the Commission's mandate does not require it to deal directly with those violations. It was clear in the Commission's individual public hearings around the country that land injustices are one of the major contributors to conflict and that land loss and development of lands without any benefit to surrounding communities is one of the major contributors to marginalization and ethnic tensions. The Commission recognizes that land injustices are interconnected with many other human rights violations experienced by

¹⁰ TJR Act 2008, Functions of the Commission, Section 6(p) and (s)

communities. As described elsewhere in this Chapter, communities are eligible for a series of reparation measures to address other human rights violations.

28. The Commission also recognizes that groups who have experienced documented and proven historical land injustices shall be eligible for reparations through the National Land Commission (as specifically mandated by Article 67(2)(e)) of the 2010 Constitution and the National Land Commission Act No. 5 of 2012). *The role of the Implementation Committee shall be limited to processing and forwarding to the National Land Commission all claims of historical land injustices received by the Truth, Justice and Reconciliation Commission.* In this regard, the Implementation Committee shall review group claims and make recommendations to the National Land Commission as to the following potential reparations measures:

- Restitution of land (including conversion of public land to community land when feasible and appropriate)
- Formal recognition and registration of specific areas as 'community land' as defined under Article 63 of the Constitution (2010)
- Resettlement and/or access to alternative community lands
- Compensation
- Benefit-sharing schemes related to land on which development has taken place (e.g. Turkwell Gorge Dam, National Parks such as Hell's Gate or Lake Bogoria, or the Lamu Port)

29. In processing and reviewing land claims for onward transmission to the National Land Commission, the Implementation Committee shall develop guidelines for:

- The standardization of historical injustice claims from communities.
- Investigating land claims in a participatory manner based on international best practices, and considering examples such as South Africa and New Zealand, and incorporating multiple forms of evidence, such as cultural memory, oral tradition, natural markers (i.e. trees, rivers, etc.), recognition by neighbouring groups, and other forms of evidence as determined in consultation with community groups.
- The level of evidence required, specifying at a minimum that groups must present clear and convincing evidence of their claims.
- Identifying overlapping land claims amongst communities and recommend

facilitated alternative dispute resolution (ADR) that takes account of customary dispute resolution practices.

- In recommending reparations measures, the Land Unit will:
 - a. Consider the rights of bonafide third party purchasers in determining the appropriate reparations measure (e.g., compensation instead of restitution);
 - b. Prioritize delineation and registration of community land through an approved Government of Kenya process;
 - c. Whenever possible define community land in terms of ancestral boundaries, and in consideration of mapping exercises that have credibility amongst the community itself (whether those maps are from the colonial period, government surveys, or from recent community mapping exercises);
 - d. Give enhanced weight to ritual and spiritual use of land by communities who are claiming restitution or ownership.

30. These guidelines will also be forwarded to the National Land Commission as recommendations for its work on historical land injustices.

Socio-economic measures

31. The Commission recommends that communities or groups of victims¹¹ have access to a process in which they can collectively decide upon the use of the reparations funds for the community. A wide range of measures or combination of measures can be envisaged; examples are a library for the community, a micro-credit facility, a psychosocial service, or a child-care service for women at work. In principle, the focus of the Commission's recommendations for this socio-economic collective reparation measure does not lie with the substance. The Commission's recommendations focus on the process to be followed by the community to arrive at the determination of socio-economic reparation measures. The final measures should however be guided by the principles of non-discrimination, fairness and equality.
32. Whether a community is eligible for a collective reparation fund should be determined based on guidelines established by the Implementation Committee. Those guidelines should minimally require that evidence of group harm and need for a fund meets the more likely than not evidentiary standard. The

¹¹ See definition of who is a group or community for the purpose of Priority B above.

amount of money available to the group or community will be determined by the number of victims in the community and the harm suffered. The amount available for collective reparations for a given group should also take into account any previous measures that have addressed part of the harm suffered, such as permanent resettlement of displaced persons. Immediate relief measures and/or humanitarian assistance, however, should not be taken into account in determining the amount available.

33. The groups will be supported by the Implementation Committee to propose a collective reparation measure or a set of measures. The Implementation Committee will, in consultation with victims, survivors, civil society groups and technical experts, develop clear guidelines and procedures for this engagement by and with the groups. These guidelines will aim to avoid elite capture and enable broad ownership of the proposed measures.
34. The Implementation Committee will develop guidelines to specify that socio-economic measures can be incorporated as a component of reparations only under the following minimum standards of participation:
 - Affected communities have to be informed through a participatory and inclusive decision making process.
 - The information process specifically targets inclusion of women and children.
 - The proposed socio-economic measures have to include sustainability aspects.
 - An independent, credible expert assessment of the impact of the proposed socio-economic measures has to be conducted. The assessment has to be shared with the communities in a way that they can understand, so as to enable them to be fully informed and give their opinions (local consultation rounds).
 - The independent voices of most affected persons in the community (e.g. women, children or persons with disabilities, as the case may be) must be included in the consultation.¹² A community decision to not adopt a specific socio-economic measure will be based on a qualified majority decision making.

¹² See the United Nations Declaration on the Rights of Indigenous Peoples, Human Rights Council, Report to the General Assembly on the First Session of the Human Rights Council, at 58, U.N. Doc. A/HRC/1/L.10 (2006) and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993) for specific parameters related to the right to participation and development. Guidelines should also be based on best practices related to implementation of ILO 196, which can be found at Indigenous & Tribal People's Rights in Practice - A Guide to ILO Convention No. 169.

The Implementation Committee will determine the principles for qualified majority decision making thresholds for specific situations. For example, when women or girls particularly suffered from the violations being addressed, a qualified majority decision making means that at least a high percentage of the people in favour of the measures must be female. Another example would be the approval by a minimum percentage of persons with disabilities in cases where the measure responds to an event that has caused a lot of physical impairment. Modern technology or community practices can be used when expressing support or non-support (e.g. SMS voting systems or community information boards).

- The participatory processes should recognise and incorporate customary structures of decision making, to the extent they respect the minimum standards here above.
- The Implementation Committee has to overview the participation process or mandate a local actor to do so.

35. The Implementation Committee will formalize the principles of participation into a procedure of participation.

Government policy measures

36. The government must also prioritise socio-economic development as a significant component of reparations for groups, under Priority B above, especially as a means of correcting historic marginalisation of communities. The use of development as a component of reparation is often problematic as States have a clear obligation to ensure the right to development, which is separate from any obligation to provide reparations. Whereas reparations and development are often conceptualised and approached independently, for victims the demand for both arises simultaneously.¹³ Unlike the State's obligations to provide basic services to all its citizens, this particular reparation programme has to be linked with the State's previous neglect and/or oppression of marginalised areas or groups and its attempt to correct this injustice.
37. The issue of exclusion from national social, cultural and political processes is central to marginalization. Reparative measures must include specific and deliberate efforts by the government to prioritise development of marginalised regions and communities in order to build trust and integrate them into the national fabric.

¹³ 'A Complementarity Relationship: Reparations and Development' Research Brief, International Centre for Transitional Justice, July 2009

What will distinguish these reparative measures from other development projects is the moral and political content under which they are undertaken. They must not be implemented in isolation but will be accompanied by a symbolic dimension. For instance, the government needs to *acknowledge* that it is prioritising development of marginalised areas such as North Eastern Kenya because of previous neglect. The victims on the other hand need to feel *entitled* to the development because their rights have been violated.

38. The Commission therefore specifically recommends that:

- Within one year of the submission of the Commission's Final Report to the President of Kenya, the government enact and implement a policy that deliberately targets the socio-economic development of historically marginalised areas in Kenya.
- This policy must include strategic development plans and budgetary allocations aimed at the economic and social development of marginalised communities.
- The policy recognizes that these reparative actions are over and above the provisions of Article 204 of the Constitution (2010) in utilisation of the Equalisation Fund.
- The Government consider actions such as building an efficient road networks linking marginalized areas with the rest of Kenya, building boreholes and water-catchment systems, building hospitals within reach of all communities adequately stocked and well-staffed, schools with adequate facilities, courts of law, and ensure that all government services and public facilities are available to them.
- In the five years subsequent to the enactment of the policy, preference be given to marginalised areas in the sharing of national revenues as envisaged under Article 202 of the Constitution (2010) to ensure that the development projects are realised and the policy is implemented.

39. The government can utilise development of marginalised areas as a tool to create sustainable, culturally relevant change. The development policies and implementation cannot, and should not, replace long-term development strategies. They should be designed to be the initial transformative face of the government in order to create trust and set the stage for more positive long-term interaction between the government and the marginalised communities.¹⁴

¹⁴ *Ibid*

Non-material reparation measures

40. Collective reparations will include non-material measures which, while insufficient to fully address the harm suffered by victims, will provide recognition of victims' experiences, restore their dignity and reputation, and demonstrate the State's acknowledgement of responsibility for violations and its resolve to ensure non-recurrence. Non-material measures have the potential to rebuild civic trust in the government, particularly among communities that have hitherto suffered systematic violations. These measures also provide an opportunity for closure for victims. The Implementation Committee shall engage with groups to develop proposals, and then with State institutions and other appropriate entities to ensure implementation of the above non-material measures.
41. Some of the non-material reparative measures that should be provided to victims include:
 - i) Restitution of civil rights including expunging criminal records of victims who were wrongly convicted of crimes for political reasons;
 - ii) provision of citizenship documents to those who have been denied this right due to discriminatory policies etc.
 - iii) Revocation of laws and policies that perpetuate discrimination on the basis of gender and ethnic or religious identity
 - iv) Removal of legal and other obstacles to the realization of accountability for violations, e.g. the Indemnity Act.
 - v) Official recognition of marginalized communities, e.g. in official census processes, and in registration of community groups.
 - vi) Clarification of historical facts to facilitate a common public understanding of Kenya's past e.g. in education curricula; and expositions in museums.
 - vii) Identification of disappeared individuals, including through exhumation and reburial.
 - viii) Official State acknowledgement of responsibility and formal apologies to victims
 - ix) Establishment of memorials and tributes to commemorate victims including observance of special days of remembrance, naming of streets, buildings or other public places, and creation of monuments.

42. Points viii and ix are discussed in more detail below.

Public Apologies and Memorialization

43. Of the five types of reparations internationally recognized, *satisfaction* refers to a series of measures including public apologies, commemorations and memorialization¹⁵. This form of reparation is considered “symbolic” in that it entails recognition of wrongdoing, acceptance of historical injustices and recognition of the suffering and experiences of victims rather than material compensations. Symbolic reparations are aimed at fostering recognition, at restoring the dignity of victims and at making the suffering and experiences of victims part of the public domain, thus transferring the burden of keeping the memory alive from victims and their families to society as a whole.¹⁶
44. The right to satisfaction for victims of gross human rights violations is internationally recognized by UN General Assembly Resolution 60/140 of 2005¹⁷ on the right to remedy and reparation, which states under Article 22 that “satisfaction should include any or all of the following: public apology, including acknowledgement of the facts and acceptance of responsibility; and commemorations and tributes to the victims.
45. Section 5 (h) (i) of the TJR Act 2008 defines one of the objectives of the Commission as to promote healing and reconciliation by, among other things, “providing repentant perpetrators or participants in gross human rights violations with a forum to confess their actions as a way of bringing reconciliation.” In addition, the Commission is mandated to looking specifically at the perspectives of victims.¹⁸

The concept of public apologies

46. Public apologies are acknowledgement of wrongdoing by governments and other political entities. States have a general duty to acknowledge past human rights abuses.¹⁹ This duty is rooted in the notion of the State’s responsibility to provide security for its citizens and ensure law and order²⁰. The Oxford Dictionary defines public apology as a regretful acknowledgment of an offense or failure or a formal, public statement of regret, such as one issued by a government.²¹

15 Rule of law tools for post-conflict states: reparations programmes, Office of the High Commissioner for Human Rights, United Nations, 2008, page 8

16 Ibid., page 23

17 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/140 of 16 December 2005.

18 TJR Act 2008, Section 5 (ii)

19 International Centre for Transitional Justice, “Truth and Memory”, <http://ictj.org/our-work/transitional-justice-issues/truth-and-memory>

20 In various international treaties and conventions, for example the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Genocide Convention, etc.

21 <http://oxforddictionaries.com/definition/apology>

47. The principle of State continuity in Public International Law recognizes that “a State’s identity as a legal person persists notwithstanding unconstitutional or even violent changes in its government.”²² Accordingly, the State is legally responsible for actions and omissions of previous regimes and governments.
48. To be reconciliatory, a public apology needs to be sincere, and to include at least the following elements:
 - Acceptance of blame by the State for past abuses²³: the State must recognize that it failed in its fundamental duties;
 - Specificity of the apology: it must be made clear what violations and abuses the apology is meant to cover; it is not sufficient to apologize in general;
 - Recognition of victims: the apology must recognize the suffering of victims and aim at restoring their dignity;
 - Recognition of the immoral character of the violations and abuses committed²⁴;
 - Recognition of the need for reform: the apology must include an aspect of redress and a guaranty of non-repetition²⁵;
 - The apology needs to be public in that it needs to be given sufficient publicity in the media or otherwise to reach victims.

The concept of memorialization

49. Complementary to the State’s duty to apologize for past violations is the State’s responsibility to preserve the memory of those violations²⁶. Memorialization refers to the process of perpetuating the memory of a person, group of persons, incident, event or era.²⁷ Memorialization and commemoration can assist divided societies to re-write the narratives of the past, recognize victims of human rights violations and begin the process of healing and reconciliation.
50. Possible measures include the renaming of public spaces and buildings; the creation of memorials, statues and museums; the dedication of places of detention and torture to sites of memory; calls for artistic contributions and art exhibits; and **the establishment of national days for remembrance.**

²² Public International Law, 2nd edition, John H. Currie, 2008

²³ *I was wrong: the meanings of apologies*, Nick Smith

²⁴ *Reconciliation in Divided Societies: Finding common ground*, D Erin & S Jeremy, 2006, page 162

²⁵ Idem

²⁶ International Centre for Transitional Justice, “Truth and Memory”, <http://ictj.org/our-work/transitional-justice-issues/truth-and-memory>

²⁷ *Transitional Justice In Kenya: A toolkit for Training and Engagement Justice Final*, 2010

51. In order to contribute to reconciliation efforts, victim groups and communities need to be involved in the design, the choice of location and the use of memorials. Making the wrong choices can lead to re-traumatization of victims and feelings of exclusion and marginalization if a group of victims or a specific community is left out. Equally, politicization of the process of memorialization and commemoration can be offensive and insulting to victims, for example when repressive governments build statues to the glory of a dictator or establish national days to commemorate the use of repressive authority.²⁸
52. Memorials can foster reconciliation in the following ways:
 - Memorial sites can serve as spaces to foster public dialogue and discussions on past abuses and a common vision for the future;
 - Memorialization processes can assist in correcting distorted versions of the past and enabling societies to build consensus on a common historical narrative;
 - Memorials can help keep social and political issues on the agenda and can be used for advocacy and pedagogical purposes;
 - Memorialization can serve as a reminder of the futility of violence and a pledge for the non-repetition of the past.

Public Apologies and Memorialization in other Truth Commissions

53. To determine its approach to symbolic reparations and design recommendations, the Commission considered experiences of other truth commissions around the world and their work on public apologies and memorialization.
54. The Truth and Reconciliation Commission for Sierra Leone (TRC SL) used the concept of “symbolic reparations” to recommend, among other things, the creation of memorials as a means to restore the dignity of victims and facilitate healing and reconciliation, and recommended that victims and their communities be consulted in the creation of the memorials.²⁹ Further, the TRC SL considered that symbolic reparations can address the needs of victims for remembrance. In this line, the TRC SL recommended that the government recognize the suffering of victims and apologize publicly for the “actions and inactions of all

²⁸ Daniel T arapMoi, the former President of the Republic of Kenya, set aside the 10th of October as a public holiday to commemorate his rule and named the day after himself.

²⁹ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Volume 2, page 235.

governments" since independence³⁰. Finally, the TRC SL recommended the use of commemoration ceremonies and dates, including the creation of a national reconciliation day.³¹ The TRC SL issued a call for public contributions in the form of works of art to express people's experiences of the conflict and aspirations for the future; this initiative was called the National Vision for Sierra Leone and contributions received³² were integrated in an exhibit that was toured around the country and abroad.

55. The South African Truth and Reconciliation Commission (SA TRC), in its final report, defined symbolic reparations as "measures aimed at restoring the dignity of victims and survivors of gross human rights violations. These include measures to facilitate the communal process of commemorating the pain and celebrating the victories of the past."³³ The SA TRC recommended interventions at the individual, community and national levels. The SA TRC also considered the role of works of art in memorialization, for example plays that contribute to remembrance and public dialogue on past violations.
56. The National Commission for Truth and Reconciliation in Chile also recommended symbolic reparations in the form of creation of memorials and artistic projects to recognize the memory of victims and promote peaceful coexistence. The Commission also recommended that the government fully use the National Human Rights Day to promote respect for human rights.³⁴
57. The Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR) as, among other initiatives, created a public interactive exhibition on its final report, located in the old Dili prison.³⁵ It also recommended that victims and communities be consulted in the design of memorials, which it considers "symbolic measures to honour victims of past atrocities, strengthen the social commitment to oppose repetition of such acts, are educative and promote reconciliation."³⁶

On-going memorialization initiatives in Kenya

58. Current initiatives at memorialization and commemoration in Kenya include:
 - The Dedan Kimathi memorial at the Junction of Kimathi street and Mama

³⁰ Ibid., page 264

³¹ Idem

³² In the form of plays, essays, paintings, drawings, poems, songs and sculptures

³³ Report of the Reparations and Rehabilitation Committee, Vol. 6, Section 2, Chapter 1, Truth and Reconciliation Commission for South Africa Final Report, 1998

³⁴ Report of the National Truth and Reconciliation Commission, Chile, Part 4, Chapter L, 1991

³⁵ <http://www.cavr-timorleste.org/>

³⁶ Chegal, *Final report of the Timor-Leste Commission for Reception, Truth and Reconciliation*, Part 11 Recommendations, page 35

Ngina Street.

- Tom Mboya monument erected along Moi Avenue in Nairobi. It stands about twenty meters from where the late Tom Mboya was assassinated in 1969.
- Mashujaa Day on 20 October in commemoration of the arrest of Mau Mau fighters by the British colonial government during the state of emergency declared in 1952.
- Naming of streets and highways, e.g. Muindi Mbingu Street, Tom Mboya Street, Waiyaki Way and Pio Gama Pinto Road.
- Naming of public institutions or public buildings, for instance, Kimathi, Masinde and Muliro Universities.

Recommendations on public apologies and memorialisation

59. The Commission in section 6(k)(i) of the TRC Act was mandated to ‘make recommendations with regard to the policy that should be followed or measures that should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims’. In this regard, and in the spirit of fostering reconciliation and recognizing the suffering of victims, the Commission makes the following recommendations:

- a) The Commission recommends that the Government of Kenya, through the President, formally acknowledge the occurrence of and apologize to Kenyans for gross violations of human rights committed in Kenya between 12 December 1963 and 28 February 2008.
- b) The Commission recommends that State security agencies, and in particular the National Police Service, the National Defence Forces and the National Intelligence Service, apologize for gross violations of human rights committed by their predecessor agencies between 12 December 1963 and 28 February 2008, especially acts of extra-judicial killings, arbitrary and prolonged detention, torture and sexual violence.
- c) The Commission recommends that the Judiciary apologize to the people of Kenya for failing to address impunity effectively and perform its role of deterrence to prevent the perpetration of gross human rights violations, during the period between 12 December 1963 and 28 February 2008.
- d) The Commission recommends that the air strip in Wagalla, Wajir, be made a

national monument to commemorate the victims of the Wagalla massacre. The Commission recommends that sites of other massacres also be considered for memorialization, in close consultation with the communities affected.

- e) The Commission recommends that the Nyayo House basement (which served as torture chambers) be converted into a museum and a monument in commemoration of the victims of torture by state security agencies.
- f) The Commission recommends that the Implementation Committee create a sub-committee to call for and consider community proposals for memorialization and for funding for community initiatives aimed at commemoration of past violations, specific events and victims of gross human rights violations.
- g) The Commission recommends the creation of a National Human Rights Day on 10 December, to coincide with the international Human Rights Day, which will be used to promote respect for human rights in Kenya.

Priority C: Individual Reparations – Non Expedited

Who is eligible under Priority C?

- 60. Priority C applies to individual victims who have experienced violations in Category 1 or 2. Individuals who have the opportunity to access material reparations under Priority A or B cannot access reparations under this Priority. Reparations in this Priority are functionally a symbolic payment designed only to acknowledge the violation and state responsibility. The harm that victims experienced can never be fully repaired, and this policy does not attempt to do so.

What reparations are available under Priority C?

- 61. Individuals are eligible for monetary compensation in the form of a standardized five-year pension.³⁷ If the victim is deceased, compensation will be paid to the immediate family of the victim.³⁸ The amount of the pension per deceased victim is

³⁷ The pension for individual compensation is proposed because of the problematic implementation of lump-sum payments in multiple contexts, including in Kenya, such as the compensation granted for Maasai land claims. Moreover, the pension scheme is time-bound so as to allow the government of Kenya to plan for a defined cost, as opposed to an indefinite term based on the lifetime of the beneficiaries.

³⁸ The Implementation Mechanism will be required to determine appropriate regulations to equitably distribute reparations to deceased victims' families. See the Chilean pension scheme for an example of a potential formula which allocated 40% to a surviving spouse, 30% to the mother of the deceased, and 15% for each child of the deceased, even if this amounted to more than 100%. Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006), p. 754.

standard and does not vary regardless of the number of family members eligible as indirect victims. Individuals are eligible for non-material reparation such as restitution of rights, dignity and recognition. Restitution of rights, dignity, and recognition, including for example:

- i. Criminal records of those who were wrongly convicted of crimes for political reasons or whose confessions were extracted as a result of torture should be expunged.
- ii. Individuals who were denied citizenship or identity documents as a result of discriminatory policies should be granted appropriate documentation.

What are the evidentiary standards³⁹ for Priority C?

52. Certain classes of individuals may be determined to be eligible for reparations based on the victim mapping exercise. In the event that evidentiary assumptions cannot be made based on mapping, individual victims should demonstrate their claim based on a preponderance of the evidence standard.

Victim Participation

63. Participation of victims in the process of design, implementation, and monitoring of the reparations programme is a fundamental principle. The Implementation Committee will be required to develop policies on engagement with victims and their representatives through each stage of the reparations process. The policies should consider:
 - How victims currently are mobilized/organized
 - Which victims may be left out of existing structures
 - How women and girl victims can most effectively participate in reparations processes
 - How marginalized victims can be facilitated to participate in reparations processes
 - How participation in reparations programs can enhance victim capacity building to advocate for their own interests and contribute to empathy amongst victims
64. The Implementation Committee will develop operational guidelines and principles

³⁹ Evidentiary requirements should not be onerous on victims and should take into account the availability of different types of proof in the context of the violations listed in the categories above.

for victim participation to be applied when collective reparation measures are designed and implemented.

65. The Implementation Committee will review all operational plans with the view to integrating the voices of victims in the process. The Implementation Committee will be specifically tasked with procuring regular and independent evaluations of the Implementation Committee interaction with victims throughout its mandate. Reports on victim participation and victim satisfaction with the Implementation Mechanism and other reparations service providers will be submitted to the Implementation Committee every six months, and will include a scientific sampling of victim opinion on these issues.

Financing Reparations

66. The Reparation Fund shall be appropriated annually from the Consolidated Fund. Because many aspects of the reparations programme should be implemented by existing government entities, this provides the opportunity for donor support to those institutions to enhance their capacity to effectively provide the required services under the reparations mandate.
67. The Commission specifically recommends that during the life of the Implementation Committee, assets recovered through corruption proceedings of the Ethics and Anti-Corruption Commission and the Kenyan Courts are used to fund the reparations process.

Annex 1:

Victims' Reparations Fund Guidelines

1. The TJRC's understanding of reparations is in line with the definition provided in section 2 of the TJR Act and the UN's Basic Principles on the Right to a Remedy and Reparation. Section 2 defines reparations as follows

Reparation means dignifying the victims by measure that will alleviate their suffering, compensate their social, moral and material losses, and restitute their rights.

2. The UN's Basic Principles on the Right to a Remedy and Reparation, which provides a comprehensive understanding of reparations, lists five basic categories of reparations: restitution or restitutio in integrum: compensation; rehabilitation; satisfaction and; guarantees of non-repetition.
3. While the scope of reparations is broad, the resources of the Victims' Reparations Fund shall be applied for the following purposes:
 - a. Compensation of victims, both individually and communally
 - b. Rehabilitation of victims by providing medical and psychosocial assistance
 - c. Memorialization
 - d. Exhumation, identification and reburial of victims
4. The Commission appreciates that the ongoing constitutional and institutional reforms accommodate and address various aspects of reparations, including lustration (administrative sanctions), and guarantees of non-repetition (by reforming institutions implicated in gross violations such as the security forces and prisons). In addition, the Constitution provides for various mechanisms and facilities that are reparative in nature. For instance, in addition to extensive affirmative action measures that should guarantee inclusion of previously marginalized groups in political life, the equalization fund to be used to supplement provision of social services for previously marginalized regions and counties is partly reparative. Equally, as outlined in the Report's chapter on economic marginalization, the devolution framework, through which a portion of national revenues will flow to counties, constitutes a structural response to economic injustice and marginalization. A number of other devolved funds such as the Constituency Development Fund (CDF) have a similar function.
5. For the reasons advanced in the preceding paragraph, the Reparations Fund proposed will, in as far as compensation is concerned, be applied in favour of individual victims and establish flagship projects in favour of communities identified through set criteria.
6. The Commission recommends that in line with the Annexed policy on reparations, the implementation of the reparations program must prioritize urgent interim measures that provide immediate assistance, services and facilities to the most vulnerable victims.
7. Aware that a recent reparations program by government favored or focused on a

specific category of victims (IDPs from PEV), the Commission recommends that in line with its report (that relates to a wide range of gross violations of human rights), that the implementation of reparations program must relate to and cover all categories of victims.

8. The Commission recommends that the Victims' Reparations Fund shall operate as a 'no liability model', in terms of which eligibility for an award is based on being a victim who meets set criteria (based on loss or injury suffered) even in the absence of an identified perpetrator. Having considered various approaches adopted by other reparations programs, the Commission believes that this is the best approach as it guarantees access to justice for the greatest number of deserving victims who would face difficulties should the identification of perpetrators be a precondition for eligibility. Funds obtained from identified perpetrators through avenues provided in the law can benefit specific victims or be added to the Fund to benefit a larger group in appropriate cases.
9. The Commission proposes the adoption of the definition of 'victim' used in its report, which is consistent with international human rights instruments, in particular, the Basic Principles on the Right to a Remedy and Reparation and Rule 85 of the International Criminal Court's Rules of Procedure and Evidence. In line with these instruments, a victim is a natural person who has suffered harm as a result of the commission of any gross violation of human rights. A victim includes someone directly affected by the violation, as well as relatives of that direct victim.
10. The Commission notes that because the nature and design of the body that implements reparations is crucial to the success of a reparations program, the Reparations Fund must conform to at least the following imperatives:
 - a. Gender sensitivity and perspectives in the design, structure, operations and evaluation.
 - b. Implementation at the County and National levels;
 - c. Involvement of actors across various government ministries and departments given that reparations needs are dispersed across almost all ministries (infrastructure, housing, lands, education health and finance etc);
 - d. Consultation of victims at all stages of the design and implementation of the reparations program
11. The Commission recommends that the government commit an initial KES 500m to the Reparations Fund.

Annex 2:

Sample list of detention and torture victims who have been awarded variable compensation by the courts

NAME	CASE NO.	VIOLATION TYPE & DATE	REPARATIONS
Wafule Buke		Illegal arrest, torture and illegal detention – 1995	KES 500,000
Dominic Amolo Arony	HC. Misc. App. 494/2003	Torture – 1982	KES 2.5m
Odhiambo Olel	HCCC. 366/1995	Torture – 1987	KES 12,477,675
David Mbewa Ndede	HCCC. 284/1994	Torture – 1987	KES 2.7m
Rumba Kinuthia	HCCC. 1408/2004	Torture – 1990	KES 1.5m
Ngotho Kariuki		Illegal detention – 1986	KES 1m
WanyiriKihoro	HCCC. 151/1998	Torture and illegal detention – 1986	KES 400,000
NjugunaMutahi	HCCC. 1410/2004	Torture – 1986	KES 1.5m
Andrew M. Ndirangu	HCCC. 1409/2004	Torture – 1986	KES 1.5m
Margaret W. Kinuthia	HCCC. 1412/2004	Torture – 1986	KES 1.5m
Alex O. Ondewe	HCCC. 384/2004	Torture – 1986	KES 1.5m
Naftaly K. Wandui	HCCC. 385/2005	Torture – 1986	KES 1.5m
Joseph G. Karanja	HCCC. 386/2005	Torture – 1986	KES 1.5m
Elijah G. Kabubu		Illegal detention and torture	KES 651,000
Wallace Gichere	HCCC. 1235/2002	Torture – 1991	KES 9.4m
Harun Thung'u Wakaba	HC Misc. App. 1411/2004	Illegal detention and torture – 1990	KES 3m
Samuel Kaberere Njenga	HCCC. 1187/2003	Illegal detention and torture – 1987	KES 1.5m
Ali Cheptegei Salkwa	HC. Misc. App. 35/2005	Illegal detention and torture – 1987	KES 2.5m
James Mwangi Kariuki	HC. Misc. App. 36/2005	Illegal detention and torture – 1986	KES 2.5m
Paul Amina	HC. Misc. App. 37/2005	Illegal detention and torture – 1987	KES 1.5m
Sylvanus Oketch Oduor	HC. Misc. App. 1311/2004	Illegal detention and torture – 1987	KES 2.5m

NAME	CASE NO.	VIOLATION TYPE & DATE	REPARATIONS
Edward AkongoOyugi	HC. Misc. App. 1309/2004	Illegal detention and torture – 1990	KES 2.5m
Joe Njoroge	HC. Misc. App. 1310/2004	Illegal detention, torture, and unfair trial – 1990	KES 2m
Kiongo Maina	HC. Misc. App. 1323/2004	Illegal detention and torture – 1986	KES 2m
Florence Nyaguthie Murage	HC. Misc. App. 1313/2004	Illegal detention, torture, and unfair trial – 1990	KES 1.5m
Kamonye Manje	HC. Misc. App. 34/2005	Illegal detention and torture – 1986	KES 1.5m
Munene Kamau	HC. Misc. App. 1743/2004	Illegal detention and torture – 1987	KES 1m
Fredrick Murage Gathuku	HC. Misc. App. 1741/2004	Torture - 1986	KES 1m
Stephen Mulili Kituu	HC. Misc. App. 1744/2004	Illegal detention and torture – 1989	KES 1.5m
Wilson Nduati Njoroge	HC. Misc. App. 1742/2004	Illegal detention and torture – 1987	KES 2m
Francis Nduthu Karanja	HC. Misc. App. 1745/2004	Illegal detention and torture – 1987	KES 2m
James H. Gitau Mwara	HC. Misc. App. 56/2005	Torture and unfair trial – 1990	KES 1.5m
George Chitechi Osundwa	HC. Misc. App. 409/2004	Torture – 1986	KES 1.5m
Zacharia Kariuki Mwati	HC. Misc. App. 1183/2003	Illegal detention and torture – 1988	KES 2m
Jackson Maina Wangombe	HC. Misc. App. 1182/2003	Illegal detention and torture – 1988	KES 2m
Peter G Kihara	HC. Misc. App. 1189/2003	Illegal detention and torture - 1986	KES 2.5m
James Njau Wambururu	HCCC. 3829/1994	Torture – 1993	KES 800,000
Gitari Cyrus Muraguri	HC. Misc. App. 1185/2003	Illegal arrest, detention, and torture – 1988	KES 7,907,011
Wachira Weheire	HC. Misc. App. 1184/2003	Illegal detention and torture – 1986	KES 2.5m
Mwangi Stephen Mureithi	HCCC. 625/2009	Illegal detention	KES 50m

Appendices

Appendix 1:

List of Adversely-Mentioned Persons and Recommendations of the TJRC

#	NAME	ALLEGED VIOLATION	DATE OF NOTICE/ SUMMONS	RECEIPT OF RESPONSE/ HEARING	NATURE OF RESPONSE	COMMISSION'S FINDINGS & RECOMMENDATIONS
1	NGANDA NYENZE TJRC/L/ITR/038/13	Between 2001 and 2004 while leading a group called "Ndieteleka", incited members to violence, which led to torture and grievous harm to innocent individuals; forceful eviction, arson and looting of property; rape and sexual abuse on residents of Mwakini village, Mwakini farm, Kitui County, an operation which came to be known as "Kavamba Operation." He drove the gang using his own motor vehicle, Registration Number KAA 197X canter lorry.				Recommendation to the Director of Public Prosecution for prosecution
2	AMOS CHEBOI (Former OCPD, Marsabit)	Abuse of office; assault of a police officer while serving as an Officer Commanding Police Division in Marsabit.			He appeared before the Commission during the hearings in Marsabit.	Recommendation to the Director of Public Prosecutions for prosecution
3	JAMES MATHENGE TJRC/LM/Vol.1	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta	Recommendation to the Director of Public Prosecutions for prosecution
4	SAM CHELIMO TJRC/LM/Vol.1	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
5	MUNENE MUHINDI	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
6	JOHN MBURU	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
7	SP OKWEMBA	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
8	PETKAY MIRITI TJRC/LM/Vol.1	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
9	G. KOSKEY TJRC/LM/Vol.1	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution

#	NAME	ALLEGED VIOLATION	DATE OF NOTICE/ SUMMONS	RECEIPT OF RESPONSE/ HEARING	NATURE OF RESPONSE	COMMISSION'S FINDINGS & RECOMMENDATIONS
10	JAMES KILONZO TJRC/LM/Vol.1	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
11	JAMES GACHANJA KARIUKI TJRC/LM/Vol.1	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
12	CHRISTOPHER KARANJA KIARIE TJRC/LM/Vol.1	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
13	NOAH ARAP TOO	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.			He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
14	JAMES OPIYO	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects..			He attended the Commission's hearings on 21 st March 2012	Recommendation to the Director of Public Prosecutions for prosecution
15	GEOFFREY KINOTI	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.			He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
16	DAVID WACHIRA TJRC/LM/Vol.1	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He attended the Commission's hearings on 21 st March 2012.	Recommendation to the Director of Public Prosecutions for prosecution
17	LEONARD WACHIRA	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May, 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
18	ELIAS MJOMBA TJRC/LM/Vol.1	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May, 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
19	THOMAS KIARIE	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May, 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
20	NYAGA WAMBORA	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2011		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution
21	BENJAMIN OGOL TJRC/LM/Vol.1	It is alleged that he was involved in the torture and ill-treatment of Mwakenya suspects.	20 th May 2013		He failed to attend the Commission's hearings on 24 th June 2011 at 9.00 a.m. at the Kenyatta International	Recommendation to the Director of Public Prosecutions for prosecution

#	NAME	ALLEGED VIOLATION	DATE OF NOTICE/ SUMMONS	RECEIPT OF RESPONSE/ HEARING	NATURE OF RESPONSE	COMMISSION'S FINDINGS & RECOMMENDATIONS
22	SAMUEL MOROTO TJRC/L/HRG/13/07	Incitement of the Pokots and facilitating the youths to attack & evict non-pokots during his tenure as M.P. He also held public meetings where he would incite the Pokots to fight the other communities for instance in Kolongolo area, in Kitale.	25 th March 2013			Recommendation to the Director of Public Prosecutions for prosecution
23	HON. ALFRED KHANGATI TJRC/L/ITR/OP/1	He is alleged to have abused his office while serving as an Assistant Minister in the defunct Office of the Prime Minister.	8 th February 2013		He responded by denying the allegations	Recommendation to the Director of Public Prosecutions for prosecution.
24	ELIZABETH ONGORO TJRC/L/ITR/093/13	On diverse dates between 27 th - 31 st December 2007, issued inflammatory statement calculated at inciting other communities and/or perceived sympathizers of President Kibaki living in Kasarani Constituency, Mathare North Area kijiji cha Chewa. She publicly directed and/or urged the removal; of "madoadoa" (Kikuyu and Kamba communities) from the aforesaid areas. As a result of the statements, houses of persons of Kikuyu and Kamba descent were burnt, property looted and lives lost as her supporters carried out her above stated directives.	25 th January 2013			Recommendation to the Director of Public Prosecutions for prosecution.
25	JACKSON KIBOR	Financed and/ or facilitated the 2007/8 Post –Election Violence			Previously invited to attend Commission's hearings in Eldoret. However, he did not testify. He was invited a second time to appear before the Commission on the 10 th of April, 2013, but he failed to attend.	Recommendation to the Director of Public Prosecution to undertake further investigations
26	HON JOSHUA KUTTUNY	Planned, facilitated, and/or directed attacks against non-Kalenjins living within Cherangany area, acts which led to the displacement, serious injuries, deaths and loss of property during 2007/8 Post-Election Violence in Eldoret.	25 th March 2013		Failed to honour invitation to appear before the Commission on 8 th April 2013.	Recommendations to the Director of Public prosecutions to undertake further investigations
27	FRANCIS SIGEI (Former District Commissioner, North Eastern Province)	He is alleged to have been involved in the security operation that led to the Galmagalla Massacre.			He appeared before the Commission during the hearings in Garissa.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
	HON NJENGA MUNGAI (Former Molo Member of Parliament)	Incitement of persons of Kikuyu origin against those from other ethnic communities in 1992; Purchasing for and arming the youth with weaponry (pangas)				Recommendation to the Director of Public Prosecution to undertake further investigations
28	SHADRACK KIRUKI TJRC/AMP/LU/007	In 1997, he participated in the funding and facilitation of an illegal group "Kabuithu" that illegally and forcefully evicted over 2,000 Tharaka families	19 th March 2013			Recommendation to the Director of Public Prosecutions for prosecution

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29	MAJ GEN(Rtd) JOSEPH NKAISSERY and PETER LANGAT (then a District Commissioner)	From 22 nd February to 22 nd May, he spearheaded Operation "Nyundo" where many people lost their lives and over 20,000 animals starved to death. Operation was also punctuated with rape and beating of the locals. The disarmament exercise resulted in deaths of civilians in what has come to be known as "Lotiriri Massacre."	25 th March 2013		Major (Rtd) Nkaissery failed to appear before the Commission for hearings on 23 rd February 2013 and again on 8 th April, 2013.	Recommendation to the Director of Public Prosecution for prosecution
30	MAMO WAKO ROBERT GUYO DAMOCHA DIBO GALGALO BARILLE	The four are alleged to have been involved in the Bubisa Massacre.			Counsel for Galgalo Barille appeared before the Commission during its hearings in Marsabit and objected to the proceedings.	Recommendation to the Director of Public Prosecutions for prosecution
31	HON JOHN BOMET SERUT	He is alleged to have been directly involved in financing, planning and instigating violence in Mount Elgon between 2006 and 2008, which acts led to death, serious injuries, displacement and destruction of property.			The witness on two occasions appeared before the Commission	The Commission is satisfied that there is ample evidence capable of sustaining prosecution. Recommendation to the Director of Public Prosecutions for prosecution.
32	HON FRED CHESEBE KAPONDI	He is alleged to have been directly involved in financing, planning and instigating violence in Mount Elgon between 2006 and 2008, which acts led to death, serious injuries, displacement and destruction of property.			The witness on two occasions appeared before the Commission	The Commission is satisfied that there is ample evidence capable of sustaining prosecution. Recommendation to the Director of Public Prosecutions for prosecution.
35	COL STEPHEN K. BOIYWO	While serving as the Commanding Officer during the military intervention in Mount Elgon in 2008, dubbed, "Operation Okoa Maisha", he allegedly instigated and/or directed the commission of gross violations of human rights including but not limited to extra-judicial killings, torture, maiming, illegal detentions, destruction and loss of property of the residents of Mount Elgon.			The Commission was unable to effect personal service on him as the Department of Defence misled the Commission on his whereabouts. The Commission has since established that he is still in service.	The Commission is satisfied that there is ample evidence capable of sustaining prosecution. Recommendation to the Director of Public Prosecutions for prosecution.
36	JACKSON PSONGOIYWO	As the "mawoitwo" (spiritual leader), he is alleged to have administered unlawful oath to the SLDF members, and was directly involved in planning and instigating violence in Mount Elgon between 2006 and 2008, which acts led to death, serious injuries, displacement and destruction of property.			The witness appeared before the Commission during its hearings in Bungoma.	The Commission is satisfied that there is ample evidence capable of sustaining prosecution. Recommendation to the Director of Public Prosecutions to prosecute.

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37	ANTHONY OYIER TJRC/AMP/LU/007	He was involved in the Mitheru massacre on 11 th October 1992, by virtue of his position then as PC, where 5 people were killed at Mitheru village.	19 th March 2013		He failed to attend the Commission's hearings scheduled for 10 th April, 2013.	Recommendation to the Director of Public Prosecutions for prosecution.
38	JOSEPH MANGIRA TJRC/AMP/LU/007	Involved in the Mitheru massacre on 11 th October 1992, by virtue of his position then as DC, where 5 people were killed at Mitheru village.	19 th March 2013	Personally served on 30 th March 2013	He failed honour the invitation to attend hearings scheduled for 10 th April, 2013.	The Commission recommends that the individual should not hold public office.
39	I. N. MUTHUURI (Former OCPD, Garissa) INSPECTOR MULI (Police officer Wajir, 1984) J.K. KINYANJUI (Member, Kenya Intelligence Committee) A.H. LINDAMBISA (Former District Commissioner in North Eastern Province) AMOS BORE (Former Provincial Commissioner) J.P. GATUI (Representative of the Commissioner of Police at the mission to Wagalla) NJERU MUGO (Kenya Army, Wajir, 1984) MAJOR ISAIAH KAMAU (5Kenya Rifles, Garissa) GITAU (Criminal Investigations Officer, Wajir, 1984) MARETE (District officer, Wajir, 1984) PATRICK MUGO (Deputy Criminal Investigations Officer, North eastern Province) WABWIRE (Officer Commanding Police Division, Garissa) Sgt. AHMED BISHAR ABDILLE STEPHEN AMARATIA (police officer)	The named individuals ordered the security operations that led to the Wagalla Massacre			The individuals were invited to appear before the Commission in Nairobi but failed to attend.	Recommendation to the Director of Public prosecutions to undertake further investigations. Should not hold public office

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40	<p>JAMES MATHENGE (Head of Delegation and permanent Secretary, Ministry of State in charge of Internal Security)</p> <p>ALEX NJUE (Former Deputy Provincial Commissioner, North Eastern Province)</p> <p>JOSEPH KAGUTHI</p> <p>DAVID MWIRARIA (Kenya Intelligence Committee Member)</p> <p>DAVID MATIVO (Former District Commissioner, Wajir (1984-1986)</p> <p>J.P. MWANGOVYA (Former Office of the President Intelligence Committee Representative)</p> <p>MANASSEH TIEMA (Acting District Commissioner, Wajir, 1984)</p> <p>BENSON KAARIA (Former Provincial Commissioner, North Eastern)</p> <p>BETHUEL KIPLAGAT (permanent Secretary, Foreign Affairs and member, Kenya Intelligence Committee)</p> <p>JOHN GITUMA (Former Permanent Secretary, Information and Broadcasting and member, Kenya Intelligence Committee)</p> <p>Z.J.M. KIMENCU (Former Deputy Secretary, Office of the President, Kenya Intelligence Committee)</p> <p>L.T MURIUNGI (Kenya Army, Wajir)</p> <p>MAJ. (Rtd) PHILLIP CHEBET (Kenya Army, Garissa)</p> <p>M. ASWANI (Former Provincial Police Officer, North Eastern Province)</p> <p>GEN. (Rtd) J. R. KIBWANA (Former member, Kenya Intelligence Committee)</p> <p>JOSHUA MATUI (Former District Commissioner, Wajir, 1982-1984)</p> <p>J.M. NDIRANGU (Deputy provincial Special Branch officer, Garissa)</p> <p>P.N. KING'ORI (Former Criminal Investigations Officer, North Eastern Province)</p>	The named individuals ordered the security operations that led to the Wagalla Massacre		.	The individuals were summonsed by the Commission to appear before it on 31 st March 2011 and on 25 th May 2011.	<p>Recommendation to the Director of Public Prosecutions to undertake further investigations. To determine criminal culpability if any.</p> <p>Should not hold public office.</p>

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41	GODFREY GITAH KARIUKI	He was the Minister of State in-charge-of Internal Security during the Wagalla Massacre	3 rd May 2011		He attended the Commission's hearings in Nairobi.	Recommendations to the Director of Public Prosecutions to undertake further investigations.
42	FRED MACHOKA SILA (Former security officer who served in northern Kenya)	He is alleged to have been involved in the Wagalla massacre.			He appeared before the Commission during the hearings in Nairobi.	The allegation was disproved.
43	BERNARD CHUNGA	As the Deputy Public Prosecutor and State Counsel, he is alleged to have infringed fair trial guarantees of Mwakenya and February Eighteenth Army dissidents.			The witness appeared before the Commission for a hearing on 8 th April, 2013 and denied the allegations.	The Commission recommends that the individuals should not hold public office.
44	SHARAD RAO	Was a public prosecutor during the trial of persons suspected of having taken part in the 1982 coup attempt, and in the prosecution of Mwakenya dissidents.	25 th March 2013		He was invited to shed light on his role in the said trials but declined, claiming he had no documents or exhibits of any value to the Commission. He also denied having been a prosecutor at the material time as he had left government services and was in the Netherlands serving other institutions.	The Commission's investigations revealed that Mr. Rao left employment as a public prosecutor in September 1983 and might have participated in the prosecutions. Recommendations to the Director of Public Prosecutions for further investigations.
45	JEREMIAH ODEDE TJRC/AMP/LU/007	On or about March 1981 as a Senior Superintendent of Police in Machakos, he participated in unlawful arrest, detention, torture, persecution of innocent civilians in the course of his duty.	19 th March 2013			Recommendation for further investigations by the Director of Public Prosecutions.
46	BRIG JOSEPH MBYATI MUSOMBA	As the Chairman of the Court-martial, he is alleged to have infringed fair trial guarantees of persons suspected of having taken part in the attempted coup of 1982.				Recommendation to the Director of Public Prosecution to undertake further investigations.
47	JOHN MORENGO TJRC/L/ITR/001/13	Between 1999 and 2003, he was a member of Sungusungu vigilante group. He unlawfully detained and meted physical violence and intimidated citizens suspected of having stolen.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
48	MWITA MAGIGE TJRC/L/ITR/007/13	In 2003, he was a member of Sungusungu vigilante group. He unlawfully detained and meted physical violence and intimidated citizens suspected of having stolen.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
49	KIRONGI BUSUNGU TJRC/L/ITR/002/13	In 2003, he was a member of Sungusungu vigilante group. He unlawfully detained and meted physical violence and intimidated citizens suspected of having stolen.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
50	MAGANYA KINYANYI TJRC/L/ITR/003/13	In 2003, he was a member of Sungusungu vigilante group. He unlawfully detained and meted physical violence and intimidated citizens suspected of having stolen.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations

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51	BURURE SABAI TJRC/L/ITR/004/13	In 2003, he was a member of Sungusungu vigilante group. He unlawfully detained and meted physical violence and intimidated citizens suspected of having stolen.	17 th January 2013	26 th March 2013	He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations
52	JOSEPH RIOBA MAIRUGWA TJRC/L/ITR/005/13	In 2003, he was a member of Sungusungu vigilante group. He unlawfully detained and meted physical violence and intimidated citizens suspected of having stolen.	17 th January 2013	26 th March 2013	He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations
53	MRENGO MWITA TJRC/L/ITR/006/13	In 2003, he was a member of Sungusungu vigilante group. He unlawfully detained and meted physical violence and intimidated citizens suspected of having stolen.	17 th January 2013	26 th March 2013	He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations
54	OKELLO OKETCH TJRC/L/ITR/008/13	In the wake of 2007/8 post election violence, he was a member of a gang that committed arson in Malongo, Gwassii.	17 th January 2013	11 th February 2013	He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations
55	AGGREY MUDINYO TJRC/L/ITR/009/13	In 1983 while he was a DO in Taveta, he authorized the unlawful arrest of 45 people from Kitobo Location, Bomeni Division, Taita Taveta District in Coast Province and detained them at Taveta Police Station and Voi Remand Prison.	17 th January 2013	4 th April 2013	He responded by denying the allegations in toto and stated that he was not in Taita Taveta in 1983, but was a DO I in West Pokot up to October of the same year before proceeding to the UK for further studies. He claimed he was DO in Taita in 1980 but did not handle Kitobo and at the time, Taita Taveta District had only three divisions, viz: Wundanyi, Taveta and Voi.	Our investigations revealed that the evidence of alibi was convincing. Hence individual culpability disproved.
56	JUDE WESONGA TJRC/L/ITR/085/13	In 1983, while he was a DO in Msambweni in 1983, he authorized the unlawful arrest of residents in Msambweni, Kwale district in Coast Province and detained residents and destroyed property.	23 rd January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
57	JUMA NASSORO MWANYALU TJRC/L/ITR/086/13	While a Chief in Msambweni, authorized the arrest of residents of Nyumba Sita, Msambweni, Kwale District of Coast Province; intimidation, arrest and unlawful detention of residents and destruction of property	23 rd January 2013	20 th March 2013	He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations
58	MSHENGU RUGA TJRC/L/ITR/087/13	While being the Chair, Kwale County Council, authorized the arrest of residents of Nyumba Sita, Msambweni, Kwale District of Coast Province; intimidation, arrest and unlawful detention of residents and destruction of property	23 rd January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations

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59	RICHARD KIBWARATA TJRC/L/ITR/010/13	While serving as a Chief of Kitobo-Madarasani in Taita-Taveta District, in July/August 1983, he authorized the unlawful arrest of 45 people from Kitobo Location, Bomeni Division, Taita Taveta District in Coast Province; illegal detention at Taveta Police Station and Voi Remand Prison	23 rd January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
60	JEREMIAH KIMUYA TJRC/L/ITR/012/13	While serving as a Sub Chief of Kitobo-Madarasani in Taita-Taveta District, in July/August 1983, he authorized the unlawful arrest of 45 people from Kitobo Location, Bomeni Division, Taita Taveta District in Coast Province; illegal detention at Taveta Police Station and Voi Remand Prison	23 rd January 2-13			Recommendation to the Director of Public Prosecutions to undertake further investigations
61	ERASTUS ARAMIS NAMUNANE TJRC/L/ITR/026/13	On or about 26 th February 2008, whilst a member of the SLDF militia group, was involved in the abduction and beating of victims, in Burkeino area, Chepkube Location, Mt Elgon District,	17 th January 2013			Recommendations to the Director of Public Prosecutions to undertake investigations.
62	TIMOTHY SICHEI AKA CHONGA VIAZI TJRC/L/ITR/027/13	As a leader of SLDF, planned, instigated, and/or ordered killings of persons by use of guns and other crude weapons in an attack on 3 rd July 2007 at about 7.00 p.m. in Toroso Village, Cheptais Village.	17 th January 2013			Recommendations to the Director of Public Prosecutions to undertake investigations.
63	ARAMOGI JACKSON TJRC/L/IRT/028/13	During an attack by SLDF on 3 rd November 2006 at about 11.00p.m., in concert with others, planned, instigated, ordered killings within Cheptais Location, Mt Elgon.	17 th January 2013			Recommendations to the Director of Public Prosecutions to undertake investigations.
64	CHENAI ALIAS MSITUNI TJRC/L/IRT/029/13	During an attack in September 1992 by Baghdad Boys militia group in which he was a member, he planned, instigated and/ or ordered killings of persons at Chesurubu, Chebweek Sub-Location, Chepkube Location, Cheptais Division, Mt Elgon District; In the course of the said attacks, involved himself in the beating of victims who had refused to cooperate with the militia men.	17 th January 2013			Recommendations to the Director of Public Prosecutions to undertake investigations.
65	CHESANG KITII TJRC/L/ITR/030/13	During an attack by SLDF militia, of which he was a member, he, in collaboration with others planned, instigated, and /or ordered the killing of persons in Kang'ang'a village, Cheptais Division, Mt Elgon.	17 th January 2013			Recommendations to the Director of Public Prosecutions to undertake investigations.
66	CHEPANGUR aka AMOS SAMOEI SIMOTWO TJRC/L/IRT/032/13	During the 1989 Chepyuk Phase I Settlement Programme, and more particularly on or about 14 th April 1989, a violent land conflict erupted between the Mosop and Soy clans, in which he shot victims, thereby causing them serious bodily injuries.	17 th January 2013	26 th March 2013	Allegations denied. That no violence ever took place, but admits that he had a dispute with neighbours over a parcel of land.	Recommendations to the Director of Public Prosecutions to undertake investigations.

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67	NATHAN WASAMA MASAI TJRC/L/IRT/033/13	During an attack on or about 3 rd July 2007 by the SLDF militia group, in which he was a member, he planned, instigated and/or ordered the killing of persons in Toroso Village, Cheptais Division, Mt Elgon.	17 th January 2013			Recommendations to the Director of Public Prosecutions to undertake investigations.
68	ROBIN KABONGE TJRC/L/IRT/033	During an attack on or about 3 rd July 2007 by the SLDF militia group, in which he was a member, he planned, instigated and/or ordered the killing of persons within Kapnashome Village, Cheptais Division, Mt Elgon; During the said attack, he was involved in collecting fines and looting property.	17 th January 2013			Recommendations to the Director of Public Prosecutions to undertake investigations.
69	AMOS CHEMINGWA TJRC/L/IRT/035/13	During an attack on or about 3 rd July 2007 by the SLDF militia group, in which he was a member, he planned, instigated and/or ordered the killing of persons within Kapnashome Village, Cheptais Division, Mt Elgon; During the said attack, he was involved in collecting fines and looting property.	17 th January 2013			Recommendations to the Director of Public Prosecutions to undertake investigations.
70	KISO SIOI TJRC/L/IRT/035/13	During an attack some time in September 1992, the Baghdad Boys militia group of which he was the leader, planned, instigated and/or ordered killings within Chesurubu (near Lama Stream) , Chebweek Sub-Location, Chepkube Location, Cheptais Division, Mt Elgon District.	17 th January 2017			Recommendations to the Director of Public Prosecutions to undertake investigations.
71	MATU WAMAE TJRC/L/IRT/037/13	Some time between 1999 and the year 2000 irregularly and illegally benefitted from irregular allocation of Hombe Forest land, within Mathira Constituency. The said allocation is said to have been orchestrated by the then Central Provincial Commissioner, Mr. Peter Kiilu.	17 th January 2013	28 th February 213	Allegation denied	Recommendations to the National Land Commission to undertake further investigations.
72	JUDICIARY (CHIEF REGISTRAR JUDICIARY) TJRC/L/IRT/039/13	Delayed and/or denied justice to 38 members of Kugitimo Livestock Farmers. Reference was made to Nairobi Civil Suit No. 989 of 2004 filed by 38 members of Kugitimo Livestock Farmers, Kegonga regarding illegal attachment of their cattle worth Kshs. 6,444,900.00. The Commission was informed that despite the plaintiffs having duly lodged civil proceedings at the High Court, for the last eight years, little or no effort has been expended by the latter to have the matter expedited to conclusion.	17 th January 2013		No response to the allegation	Recommendation to the Commission on the Administration of Justice for intervention.
73	FRANCIS M NYENZE TJRC/L/IRT/040/13	As Minister in charge of forests, oversaw the illegal excision of 3000 acres of Hombe forest and irregularly allocated the same to himself and to others.	17 th January 2013			Recommendation to the National Land Commission to undertake further investigations.

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74	ESAU LURONGA TJRC/L/IRT/041/13	On or about November 2004 in a police operation at Nalado area, Keiyo Sub-Location in Kwanza, Trans Nzoia District of Rift Valley Province, he killed and/or participated in the extrajudicial killing of civilians.	17 th January 2013		He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
75	DOMINIC LANGAT TJRC/L/IRT/042/13	Directly involved in perpetrating violence during PEV of 2007/2008 at Jogoo Village in Mau Summit Location, Kamara Division Molo District in Rift Valley Province, which led to the killing of civilians, arson, looting and destruction of property within the area.	17 th January 2013	20 th March 2013	He denied the allegations	Recommendation to the Director of Public Prosecutions to undertake further investigations.
76	RICHARD ROTICH TJRC/L/IRT/043/13	He was directly involved in perpetrating violence during PEV of 2007/2008 at Total Molo District in Rift Valley Province, which led to the killing of civilians, arson, looting and destruction of property within the area.	17 th January 2013	20 th March 2013	He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
77	ERIC KIBET TJRC/L/IRT/044/13	Directly involved in the perpetration of the 2007/2008 post-election violence at Kimura Village, Kagera Farm in Timboroa Sub-Location, Rift Valley province where three civilians were killed as a result of his conduct.	17 th January 2013		He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
78	SHADRACK LANGAT TJRC/L/IRT/045	Directly involved in the perpetration of the 2007/2008 post-election violence at Jogoo Village, Mau Summit Location, Kamara Division, Molo in Rift Valley province where three civilians were killed as a result of his conduct.	17 th January 2013		He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
79	STANLEY KIPKOECH TJRC/L/046	On or about late 2007, was privy to illegal meetings that coordinated, directed and/or facilitated the attacks at Kio Farm in Kuresoi Location, Kuresoi District, Rift Valley Province, leading to loss of lives and destruction of property.	17 th January 2013		He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations
80	FRANCIS CHEPTALAM TJRC/L/IRT/047/13	On or about December 2007 after land demarcation exercise at Chebyuk, was a member of SLDF and participated in the illegal acts and/or omissions of the group including meting out physical violence on innocent civilians at Embakassi Village, Teldet Sub-location, Kisawai Location, Saboti Division, Trans Nzoia District of Rift Valley province.	17 th January 2013		He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
81	PATRICK NAIBEI TJRC/L/IRT/050/13	Between January and February 2008 at Kalaha Farm, Teldet Sub-Location, Kisawai Location, Saboti Division, Trans Nzoia District of Rift Valley Province, he conducted violent attacks against members of other communities living within the said area, which acts led to the forceful eviction, killing and grievous assault of innocent individuals.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.

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82	PETER MIBEI TJRC/L/ITR/051/13	Involved in the planning, facilitating and/or executing 2007/8 Post-election Violence at Kio Farm in Kuresoi Location, Kuresoi District, Rift Valley Province, which led to the killing of civilians and destruction of property.	17 th January, 2013	28 th February 2013	He denied the allegations	Recommendation to the Director of Public Prosecutions to undertake further investigations.
83	SAMUEL NAMUNI TJRC/L/ITR/052/13	On or about January 2008 during the Post-Election Violence, killed and/or participated in the killing of civilians at Muserechi Trading Centre, in Muserechi Location of Esageri Division, Koibatek District, Rift Valley Province, while ethnic profiling along Ravine- Nakuru Road	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
84	MOSES CHEMIAT TJRC/L/ITR/052/13	Between January and February 2008 at Kalaha Farm, Teldet Sub-Location, Kisawai Location, Saboti Division, Trans Nzoia District of Rift Valley Province, he conducted violent attacks against members of other communities living within the said area, which acts led to the forceful eviction, killing and grievous assault of innocent individuals.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
85	MODING RENGEI TJRC/L/ITR/053/13	On or about 1998, while serving as the area Assistant Chief for Kapedo Location, Lomelo Division, Turkana East in Rift Valley Province, ordered the killing of civilians within the area.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
86	JOHANA CHEPKUTO TJRC/L/ITR/054/13	Some time in the year 1993 at Arimi Farm in Kuresoi District, Rift Valley Province, he issued inflammatory statements calculated at inciting members of his community into violence, leading to arson, killing of civilians, rape and destruction of property.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
87	JOHN LANGAT TJRC/L/IRT/055/13	Some time in the year 1993 at Arimi Farm in Kuresoi District, Rift Valley Province, issued inflammatory statements calculated at inciting members of his community into violence, leading to arson, killing of civilians, rape and destruction of property.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
88	ALEXANDER NGETICH TJRC/L/IRT/056/13	Some time in the year 1993 at Arimi Farm in Kuresoi District, Rift Valley Province, issued inflammatory statements calculated at inciting members of his community into violence, leading to arson, killing of civilians, rape and destruction of property.	17 th January 2013	11 th February 2013	He denied the allegations and claimed he was in Kitale, Trans Nzoia District and only came to Kuresoi in 1994 when he bought a parcel of land at Soliat Company.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
89	SIMON CHESIKTES TJRC/L/IRT/058	Some time in the year 1993 at Arimi Farm in Kuresoi District, Rift Valley Province, issued inflammatory statements calculated at inciting members of his community into violence, leading to arson, killing of civilians, rape and destruction of property.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.

#	NAME	ALLEGED VIOLATION	DATE OF NOTICE/ SUMMONS	RECEIPT OF RESPONSE/ HEARING	NATURE OF RESPONSE	COMMISSION'S FINDINGS & RECOMMENDATIONS
90	ALICE KOECH TJRC/L/IRT/059/13	In late 2007 and in early 2008, he was privy to illegal meetings that coordinated, directed and/or facilitated the attacks at Kio Farm in Kuresoi Location, Kuresoi District Rift Valley Province, leading to loss of lives and destruction of property.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
91	CHELUK KIPKOGE TJRC/L/IRT/063/13	On or about January 2008 during the Post-Election Violence period, killed and/or participated in the killing of civilians at Muserechi Trading Centre, in Muserechi Location of Esageri Division Koibatek District Rift Valley Province, while ethnic profiling along Ravine-Nakuru Road.	17 th January, 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
92	KIBWOT SANG TJRC/L/IRT/065/13	On or about January 2008 during the Post-Election Violence period, killed and/or participated in the killing of civilians at Muserechi Trading Centre, in Muserechi Location of Esageri Division Koibatek District Rift Valley Province, while ethnic profiling along Ravine-Nakuru Road.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
93	KIPTOROMOS KIBWALE TJRC/L/ITR/066/13	On or about January 2008 during the Post-Election Violence period, killed and/or participated in the killing of civilians at Muserechi Trading Centre, in Muserechi Location of Esageri Division Koibatek District Rift Valley Province, while ethnic profiling along Ravine-Nakuru Road.	17 th January 2013	27 th February, 2013	Allegations denied. Request for particulars.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
94	JEREMIAH ESSEKON TJRC/L/ITR/067/13	On diverse dates in 1998 while serving as the area Chief for Nadome Location within Turkana East District in Rift Valley Province, authorized and/or directed the killing of civilians within the aforesaid area.				Recommendation to the Director of Public Prosecutions to undertake further investigations.
95	FUNDI OCHIENG TJRC/L/ITR/064	On or about January 2008 during the Post Election Violence period, killed and/or participated in the killing of civilians at Muserechi Trading Centre, in Muserechi Location of Esageri Division Koibatek District Rift Valley Province, while ethnic profiling along Ravine-Nakuru Road.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
96	GENERAL NDOLO TJRC/L/ITR/069/13	Some time in 1964, planned, instigated, ordered and/or abetted the invasion of Modogashe Ada area of Isiolo in eastern region, maimed and/or killed civilians while forcing them to move into concentration camps	22 nd January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
97	INSPECTOR JAMES KARISA TJRC/L/ITR/068/13	As a military officer, he was involved in extrajudicial killings during the 1998 Shifita wars which took place within Iresa Guyo and Turucho areas near Garba Tulla.	22 nd January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.

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98	KIIA NGUSO TJRC/L/ITR/070/13	Between 1982 and 1983 during the conflict between residents of Nzalae area and Nzalae Group Ranchers, as Chairman, he planned, instigated, ordered and/or abetted torture and forceful eviction of residents of Nzalae from the area; was involved in the looting of property belong to Nzalae residents.	22 nd January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
99	CHIEF OLENKOI TJRC/L/ITR/071/13	In the years 1972, 1978 and in 1989, severally led a group of youth in forcefully evicting non-Maasais from Kalemwani village, Kapatai Location, Kajiado District, Rift Valley Province.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
100	DIDA KALICHA TJRC/L/ITR/072/13	In the year 1967 during the Shifta war while participating in a State operation, invaded the Waso Boran community in Machuro village of Garba Tulla in Eastern region, and maimed and/or summarily executed civilians.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
101	DAVID MUSILA TJRC/L/ITR/073/13	Between 1982 and 1983 during the conflict between residents of Nzalae area and Nzalae Group Ranchers, as Chairman, planned, instigated, ordered and/or abetted torture and forceful eviction of residents of Nzalae from the area; was involved in the looting of property belong to Nzalae residents; in 1988 as a Member of Parliament for Mwingi Constituency, unduly influenced the dismissal of area's administrative officers who did not support your interests regarding the disputed land in Nzalae.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
102	MAJOR HALKANO TJRC/L/ITR/074/13	While participating in a State operation during the Shifta wars between 1964 and 1967, within Bisan Dero area near Garba Tulla, he drove people into concentration camps, executed them and killed their livestock.	22 nd January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
103	OLEKEOKO TJRC/L/ITR/075/13	He planned, instigated, ordered and/or abetted several raids and forceful evictions during the Kalemwani ethnic clashes of 1972 and 1992.	22 nd January 2013	27 th February 2013	Allegations denied.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
104	KULLY SOMO TJRC/L/ITR/076/13	On 20 th June, 2005, planned, instigated, ordered and/or abetted the forceful eviction of members of Gabbra community from Saku Constituency in Marsabit.	22 nd January 2013	15 th February 2013	The allegations were malicious and motivated by politics.	The Commission's investigations revealed that the allegations were malicious and the matter was motivated by politics. It was recommended that the matter be laid to rest.

#	NAME	ALLEGED VIOLATION	DATE OF NOTICE/ SUMMONS	RECEIPT OF RESPONSE/ HEARING	NATURE OF RESPONSE	COMMISSION'S FINDINGS & RECOMMENDATIONS
105	ADAN CHUKULIZA TJRC/L/ITR/077/13	On 20 th June, 2005, planned, instigated, ordered and/or abetted the forceful eviction of members of Gabbra community from Saku Constituency in Marsabit.	22 nd January 2013	22 nd February 2013	The allegations were malicious and motivated by politics.	The Commission's investigations revealed that the allegations were malicious and the matter was motivated by politics. It was recommended that the matter be laid to rest.
106	ROBA ODHA TJRC/L/ITR/078/13	On diverse dates between 1964 and 1969, he planned, instigated, ordered, ordered, committed and/or abetted killings in Garba Tulla Town.				Recommendation to the Director of Public Prosecutions to undertake further investigations.
107	NGIYE KIMANI TJRC/L/ITR/080/13	He planned, instigated, ordered and/or abetted several raids and forceful evictions during the 1972 and 1992 Kalemwani ethnic clashes.	22 nd January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
108	GALGALO GURGURU TJRC/L/ITR/081/13	Some time in 1969, he unlawfully arrested and detained innocent civilians in Manyilla after which he bundled them in a lorry and executed them in Toiboto area.	22 nd January 2013			Recommendation to the Director of Public Prosecutions to order further investigations.
109	NZIOKI KILETA TJRC/L/ITR/082/13	Between 2001 and 2004 while leading a group called "Ndieteleka", he incited members to violence, which led to torture and grievous harm to innocent individuals; forceful eviction, arson and looting of property; rape and sexual abuse on residents of certain two villages.	22 nd January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
110	OWINO OTANDA TJRC/L/ITR/088/13	On or about late 2008 and early 2009, in the company of Mr. Otulo Justus, Mr. Abdalla, Mr. Oduor and Mr. Oscar Loreh, authored and authorized the sending of, had knowledge of and/or sent threatening letters to the members of the Kikuyu and Kamba communities living within Mathare North requiring them to vacate the area or face reprisals from the authors for, inter alia, causing an escalation of rent within Mathare North area; their association or perceived association with the Mungiki sect.	25 th January 2013			Recommendation to the Director of Public Prosecutions to undertake investigations.
111	OTULO JUSTUS OTULO TJRC/L/ITR/089/13	On or about late 2008 and early 2009, in the company of Mr. Owino Otanda, Mr. Abdalla, Mr. Oduor and Mr. Oscar Loreh, authored and authorized the sending of, had knowledge of and/or sent threatening letters to the members of the Kikuyu and Kamba communities living within Mathare North requiring them to vacate the area or face reprisals from the authors for, inter alia, causing an escalation of rent within Mathare North area; their association or perceived association with the Mungiki sect.	25 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations

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112	OSCAR LOREH TJRC/L/ITR/090/13	On or about late 2008 and early 2009, in the company of Mr. Otulo Justus, Mr. Abdalla and Mr. Oduor authored and authorized the sending of, had knowledge of and/or sent threatening letters to the members of the Kikuyu and Kamba communities living within Mathare North requiring them to vacate the area or face reprisals from the authors for, inter alia, causing an escalation of rent within Mathare North area.	25 th January, 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
113	NOAH NONDIN ARAP TOO TJRC/L/ITR/091	While serving as a Director and/or senior officer of the Special Branch on or about May 1995, directed and/or facilitated the killing of Senior Superintendent of Police Bernard Nganga Kahumbi who was attached to the then Special Branch Division after he allegedly refused, failed and/or neglected to execute an unlawful order to kill a named prominent person. In the alternative, it is alleged that he may have been involved in covering up the cause of the said death.	25 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
114	MR ODUOR (aka Kiritho) TJRC/L/ITR/092/13	On or about late 2008 and early 2009, in the company of Mr. Otulo Justus, Mr. Abdalla and Mr. Oscar Loreh, he authored and authorized the sending of, had knowledge of and/or sent threatening letters to the members of the Kikuyu and Kamba communities living within Mathare North requiring them to vacate the area or face reprisals from the authors for, inter alia, causing an escalation of rent within Mathare North area.	25 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
115	CAPT GITHIORA TJRC/L/ITR/095/13	Following the attempted coup of 1 st August 1982, and while serving as captain with the Kenya Army, he allegedly authorized and/or unlawfully detained Commissions' Witness NRB 80 for 71/2 months without trial at Kenya Air Force –Eastleigh Barracks and Naivasha. He further required of him to implicate another named officer as also having participated in the planning of the coup so that the witness could secure his own release from detention.	25 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.

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116	MR ABDALLAH TJRC/L/ITR/096/13	On or about late 2008 and early 2009, in the company of Mr. Otulo Justus, Mr. Oduor and Mr. Oscar Loreh, he authored and authorized the sending of, had knowledge of and/or sent threatening letters to the members of the Kikuyu and Kamba communities living within Mathare North requiring them to vacate the area or face reprisals from the authors for, inter alia, causing an escalation of rent within Mathare North area.	25 th January 2013			Recommendation to the Director of Public Prosecutions to order further investigations.
117	HON WILLIAM OLE NTIMAMA TJRC/L/ITR/097/13	Some time in the year 1992 at different locations and as a respected Maasai leader and elder, made utterances capable of inciting ethnic violence against non-Maasai community members living in Enoosupukia of Narok District and particularly within Sintagara area. This led to the killings of scores of individuals, destruction of property and mass evictions.	25 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
118	WILLIAM OLE LITIT TJRC/L/ITR/098/13	Some time in the year 1992 as the local area Assistant Chief, led a group of Maasai youths in a violent attack targeting non-Maasai community members living in Sintagara, Enoosupukia, Narok District, leading to the killing of individuals, destruction of property and mass evictions.	17 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
119	KWAMBAI TJRC/L/099/13	Some time in the month of June 2006, while in the company of some police officers, he arrested a youth by the name of Henry Kaberia Mwangi from his parents' home, on allegations of being a member of the outlawed Mungiki sect and took him to an unknown location. He was later found dead with gunshot wounds after about a week.	28 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
120	KEMBOI TJRC/L/ITR/0100/13	That some time in the year 2003, while in the company of police officers, he oversaw the torching of Mama Mary Karanja's house located at Kahiga Kogi village of muranga District, following allegations that her sons were members of the outlawed Mungiki sect.	28 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
121	DUNCAN KAGAMBO Police Officer TJRC/L/ITR/0101/13	Some time in the year 2001, while in the course of his duty as CID officer attached to the Murang'a Police Station, he physically assaulted Kenneth Irungu Macharia by kicking him hard on his chest occasioning him difficulties in breathing from which he succumbed to death.	28 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations

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122	SOLICITOR GENERAL TJRC/L/ITR/0102/13	Following judgment against the Attorney General (on behalf of the State) in Civil Suit Embu CMCC No. 385, Susan Njeri Waweru v AG, the office failed to honour the said compensatory judgment wherein the Plaintiff had sued the Attorney General following the unlawful shooting and killing of her husband, Mr. Francis Weru Kanyago.	28 th January 2013			Recommendation to the Commission on Administrative Justice to investigate the matter and report to the Implementation Committee.
123	COUNCILLOR OLE GETISHE TJRC/ITR/0103/13	That some time in year 1992 in his capacity as a local area Councillor, he led a group of Maasai youths in a violent attack targeting non-Maasai community members living Sintagara, Enosupukia, Narok District. This led to the killing of scores of individuals, destruction of property and mass evictions.	28 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
124	SIMEON NG'ETICH TJRC/L/ITR/0104/13	That on or about 30 th December 2007, at Kondoo Farm, Burnt Forest, while in the company of others, he stabbed to death Mr. Henry Mugo Kinuthia.	28 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
125	BENJAMIN LAMAI TJRC/L/ITR/0105/13	On or about 1 st January 2008, in the company of other youths from the Kalenjin community and while armed with crude weapons, he participated in the destruction and looting of property belonging to the non-Kalenjin community living in Kiambaa of Uasin Gishu District of Rift Valley. Further, he similarly participated in the torching of Kiambaa KAG Church, an act which led to the death of many innocent civilians.	28 th January 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations
126	HON NORMAN G.K. NYAGA	He is alleged to have been involved in the assassination of Crispine Odhiambo Mbai while serving as the Chief Whip.			The Commission was unsuccessful in establishing his whereabouts for purposes of effecting service.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
127	GILBERT KITIYO TJRC/L/ITR/084/13	While a DC in Msambweni, he authorized the arrest of residents of Nyumba Sita, Msambweni, Kwale District of Coast Province; intimidation, arrest and unlawful detention of residents and destruction of property	23 rd January 2013	19 th March 2013	He denied the allegations and gave a brief background of Nyumba Sita and admitted certain aspects of the facts as alleged.	Recommendation to the Director of Public Prosecutions to undertake further investigations
128	EPHANTUS NJUHIU TJRC/L/ITR/013/13	Some time in the year 2000 as the area Councilor, he illegally benefitted from irregular allocation of Hombe Forest land, within Mathira Constituency to the tune of 40 acres or thereabouts. The said allocation is said to have been orchestrated by the then Central Provincial Commissioner, Mr. Peter Kiilu.	17 th January 2013			Recommendations to the National Land Commission to undertake further investigations

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129	GATURUKU TJRC/L/ITR/014/13	Some time in the year 2000 as the area Councilor, he illegally benefitted from irregular allocation of Hombe Forest land, within Mathira Constituency to the tune of 40 acres or thereabouts. The said allocation is said to have been orchestrated by the then Central Provincial Commissioner, Mr. Peter Kiilu.	17 th January 2013			Recommendations to the National Land Commission to undertake further investigations
130	JACK KANJA TJRC/L/ITR/015/13	Some time in the year 2000 as the area Councilor, he illegally benefitted from irregular allocation of Hombe Forest land, within Mathira Constituency to the tune of 40 acres or thereabouts. The said allocation is said to have been orchestrated by the then Central Provincial Commissioner, Mr. Peter Kiilu.	17 th January 2013	21 February 2013	He denied the allegations.	Recommendations to the National Land Commission to undertake further investigations
131	MR KEGA TJRC/L/ITR/016/13	Some time in the year 2000 as the area Councilor, he illegally benefitted from irregular allocation of Hombe Forest land, within Mathira Constituency to the tune of 40 acres or thereabouts. The said allocation is said to have been orchestrated by the then Central Provincial Commissioner, Mr. Peter Kiilu.	17 th January, 2013	26 th March 2013	Allegation denied	Recommendations to the National Land Commission to undertake further investigations
132	PETER KIILU TJRC/L/ITR/017/13	As the Central Province Provincial Commissioner, in the years between 1999–2000, spearheaded the grabbing of a 240 acre piece of forest land Muhuruini in Magutu Location. He also illegally oversaw the excision of 3000 acres of Hombe forest land and irregularly allocated it to himself and others including the then Mathira Constituency MP Matu Wamae, Hon Nyenze Francis (who was then the Minister in charge of forests) and a host of local councilors.	17 th January 2013	25 th March 2013	He denied the allegations	Recommendations to the National Land Commission to undertake further investigations
133	MWANGI KIBARA TJRC/L/ITR/018/13	Some time in the year 2000 as the area Councilor, he illegally benefitted from irregular allocation of Hombe Forest land, within Mathira Constituency to the tune of 100 acres or thereabouts. The said allocation is said to have been orchestrated by the then Central Provincial Commissioner, Mr. Peter Kiilu.	17 th January 2013			Recommendations to the National Land Commission to undertake further investigations
134	MR NDIRA KIHURIA TJRC/L/ITR/019/13	Some time in the year 2000 as the area Councilor, he illegally benefitted from irregular allocation of Hombe Forest land, within Mathira Constituency to the tune of 100 acres or thereabouts. The said allocation is said to have been orchestrated by the then Central Provincial Commissioner, Mr. Peter Kiilu.	17 th January 2013			Recommendations to the National Land Commission to undertake further investigations

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135	PETER NGARI TJRC/L/ITR/021/13	Some time in the year 2000 as the area Councilor, he illegally benefitted from irregular allocation of Hombe Forest land, within Mathira Constituency to the tune of 40 acres or thereabouts. The said allocation is said to have been orchestrated by the then Central Provincial Commissioner, Mr. Peter Kiilu.	17 th January 2013			Recommendations to the National Land Commission to undertake further investigations
136	LT COL L.N.NYAKERI TJRC/L/ITR/SIT/1	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 147, 148, 149, 150, 151, 152, 153, 154, 155, 156 and 157)	8 th February 2013	26 th March 2013	Allegations were denied. The owner is deceased, but documents of ownership were supplied.	Recommendation to the National Land Commission to undertake further investigations.
137	JOSEPH GICHOGO TJRC/L/ITR/LYV/1B	Irregular/illegal allocation of parcels of land meant for Sitatunga Farmers Co-operative Society	18 th February 2013		Summoned for hearings on 10 th April, 2013; failed to attend.	Recommendation to the National Land Commission to undertake further investigations.
140	CAPT WILLIAM K. RONO TJRC/L/ITR/SIT/2	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plots no. 11, 12, 25 and 26)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
141	CAPT C.B.MALOPA TJRC/L/ITR/SIT/3	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 170, 179, 180, 195, 196, 205, 206, 207 and 232)	8 th February 2013	6 th March 2013	The witness requested for more information and claimed that TRANS NZOIA/SITATUNGA/100 is a first registration under the Registered Land Act, whose effect is preserved under the Land Registration Act, 2012.	Recommendation to the National Land Commission to undertake further investigations.
142	DR. N.W.WAMBUGU TJRC/L/ITR/SIT/4	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 118, 119, 166, 167, 181, 182, 193, 194, 208 and 209)	8 th February 2013	20 th March 2013	Allegations denied. Evidence of ownership supplied.	Recommendation to the National Land Commission to undertake further investigations.
143	JOHN.K.KIMARENG TJRC/L/ITR/SIT/5	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 125, 126, 127, 128, 129, 130, 131, 132, 133 and 134)	8 th February 2013	1 st March 2013	The family stated that the witness was deceased and the family was yet to institute succession proceedings. A letter was written to their lawyer who never responded to the allegations.	Recommendation to the National Land Commission to undertake further investigations.
144	PIUS CHELIMO TJRC/L/ITR/SIT/7	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 191 and 192)	8 th February 2013	28 th February 2013	The allegations were denied by the witness' family, who claimed to be a purchaser for value without notice. Documentation in support of acquisition were supplied.	Recommendation to the National Land Commission to undertake further investigations.
145	SAMUEL.M.MANGARE TJRC/L/ITR/SIT/8	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 93, 94, 95, 96, 97, 98, 99, 100, 101 and 102)	8 th February 2013	12 th March 2013	The allegations were denied by the witness' family, who claimed to be a purchaser for value without notice. Documentation in support of acquisition were supplied.	Recommendation to the National Land Commission to undertake further investigations.

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146	TOM IMBWAGA TJRC/L/ITR/SIT/9	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 228, 229 and 230)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
147	WALTER KIPTARUS TJRC/L/ITR/SIT/10	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 221 and 213)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
148	RUTTO TOROITICH TJRC/L/ITR/SIT/11	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 231 and 233)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
149	CHEBII CHEMWENO TJRC/L/ITR/SIT/12	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 234 and 235)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
150	CHARLES KOLONGEI TJRC/L/ITR/SIT/14	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 225)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
151	JOHN N. KINGARA TJRC/L/ITR/SIT/15	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 223)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
152	JOHNSTONE O. NYAMIKA TJRC/L/ITR/SIT/16	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 221)	8 th February 2013	18 th March 2013	The allegations were denied by the witness' family, who claimed to be a purchaser for value without notice. Documentation in support of acquisition were supplied.	Recommendation to the National Land Commission to undertake further investigations.
153	WILLIAM K. RONO TJRC/L/ITR/SIT/17	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 16, 17, 18, 19, 20 and 21)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
154	ELIZABETH NYAKOTHE TJRC/L/ITR/SIT/18	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 145)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
155	TOM W. WASWA TJRC/L/ITR/SIT/19	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 140)	8 th February 2013	6 th March 2013		Recommendation to the National Land Commission to undertake further investigations.
156	SGT. J. ASHIMENE TJRC/L/ITR/SIT/20	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 123 and 188)	8 th February 2013	1 st March 2013	The allegations were denied by the witness. Documentation in support of acquisition were supplied.	Recommendation to the National Land Commission to undertake further investigations.
157	WYCLIFFE S. WERUNGA TJRC/L/ITR/SIT/21	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot No. 144)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.

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158	CYRUS WANANGWE TJRC/L/ITR/SIT/22	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot No. 124)	8 th February 2013	6 th March 2013		Recommendation to the National Land Commission to undertake further investigations.
159	MWANGI KABURA TJRC/L/ITR/SIT/24	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 123)	8 th February 2013	6 th March 2013	The allegations were denied by the witness' family, who claimed to be a purchaser for value without notice. Documentation in support of acquisition were supplied.	Recommendation to the National Land Commission to undertake further investigations.
160	JAMES MWALA TJRC/L/ITR/SIT/25	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 116, 117, 168 and 169)	8 th February	18 th March 2013	A letter was sent from Advocate, requesting to be furnished with more information.	Recommendation to the National Land Commission to undertake further investigations.
161	JOHN J. LETTING TJRC/L/ITR/LYV/26	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 227)	6 th February 2013	8 th March 2013	He denied the allegations and supplied documents in support of ownership.	Recommendation to the National Land Commission to undertake further investigations.
162	JOHN M. MARITA TJRC/L/ITR/SIT/27	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 222)	8 th February 2013	18 th March 2013	He denied the allegations and supplied documents in support of ownership.	Recommendation to the National Land Commission to undertake further investigations.
163	JULIUS S. KUNDU TJRC/L/ITR/SIT/28	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 237)	8 th February 2013	6 th March 2013	He denied the allegations and supplied documents in support of ownership.	Recommendation to the National Land Commission to undertake further investigations.
164	SGT. G. K. KIPKURUI TJRC/L/ITR/SIT/30	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot No. 14)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
165	J. K. KOSGEY TJRC/L/ITR/LYV/31	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot Nos. 188)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
166	AMBASSADOR BETHUEL KIPLAGAT	Illegal/irregular acquisition of land in Liyavo Farm, Kitale			.	Recommendation to the National Land Commission to undertake further investigations
167	CPL.V.MUTUNGI TJRC/L/ITR/LYV/31	Irregular/illegal acquisition of parcels of land meant for Sitatunga Farmers Co-operative Society (Plot Nos. 121)	8 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
168	A.MAKILA TJRC/L/ITR/LYV/1	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No.7) (25 Hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
169	ALICE CHEPKEMOI TJRC/L/ITR/LYV/2	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot Nos. 110)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.

#	NAME	ALLEGED VIOLATION	DATE OF NOTICE/ SUMMONS	RECEIPT OF RESPONSE/ HEARING	NATURE OF RESPONSE	COMMISSION'S FINDINGS & RECOMMENDATIONS
170	ANDREW.K.SIKA TJRC/L/ITR/LYV/3	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot Nos. 83)(10 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations..
171	BENJAMIN K. CHEPSAT TJRC/L/ITR/LYV/5	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot Nos. 9)(5 hectares)	12 th February, 2013			Recommendation to the National Land Commission to undertake further investigations.
172	ANDREW M. ONDIEKI TJRC/L/ITR/LYV/4	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 15)(5 hectares)	12 th February 2013	1 st March 2013	He denied the allegations and supplied documents in support of ownership.	Recommendation to the National Land Commission to undertake further investigations.
173	BENJAMIN K. KATTAM TJRC/L/ITR/LYV/6	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 89)(20 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
174	CHARLES KIGEN TJRC/L/ITR/LYV/7	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 118)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
174	DANIEL KAMAU MUNA TJRC/L/ITR/LYV/9	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 108)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
176	E.OKINYI NANGA TJRC/L/ITR/LYV/10	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 130)(20 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
177	DAVID KASUTO TJRC/L/ITR/LYV/11	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 169)(5 hectares)	12 th February 2013	26 th March 2013		Recommendation to the National Land Commission to undertake further investigations.
178	DIANA C.W. IMBOGO TJRC/L/ITR/LYV/12	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 92)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
179	DORCAS CHEROTICH TJRC/L/ITR/LYV/13	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 172)(5 hectares)	12th February 2013			Recommendation to the National Land Commission to undertake further investigations.
180	DR MUKASA MANGO TJRC/L/ITR/LYV/14	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 133)(50 hectares)	12th February 2013			Recommendation to the National Land Commission to undertake further investigations.
	DR ESTHER K. KEINO TJRC/L/ITR/LYV/15	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 187)(10 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.

#	NAME	ALLEGED VIOLATION	DATE OF NOTICE/ SUMMONS	RECEIPT OF RESPONSE/ HEARING	NATURE OF RESPONSE	COMMISSION'S FINDINGS & RECOMMENDATIONS
181	DR. J.A. TINDI TJRC/L/ITR/LYV/16	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot Ns 248 and 249) (5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
182	ELIZABETH W. KINYANJUI TJRC/L/ITR/LYV/18	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 248 and 249) (20 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
183	ELLY.K.SIGOT TJRC/L/ITR/LYV/19	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 90)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
184	HON.EZEKIEL K.BARNGETUNY TJRC/L/ITR/LYV/20	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No.3)(50 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
185	FRANCIS.K.CHEROGONY TJRC/L/ITR/LYV/21	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 5)(50 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
186	FRED CHEROTWO TJRC/L/ITR/LYV/22	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 20 (5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
187	GEORGE.K.KANGOGO TJRC/L/ITR/LYV/23	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 35)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
188	HARISON OPEMI TJRC/L/ITR/LYV/24	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 24)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
189	IBRAHIM.O.KUTAYI TJRC/L/ITR/LYV/25	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 19)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations..
190	INGATI MUKUNA TJRC/L/ITR/LYV/26	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 242)(10 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
191	J.S.ONGUKO TJRC/L/ITR.LYV/27	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 87)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
192	JAMES.K.LETING TJRC/L/ITR/LYV/28	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 11)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.

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193	JAMES TIRENI TJRC/L/ITR/LYV/29	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 36)(20 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
194	JAPHETH KEGOKO TJRC/L/ITR/LYV/30	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 115)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
195	CPL.S.KEITANY TJRC/L/ITR/SIT/31	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 11)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
196	JOHN BORE TJRC/L/ITR/LYV/32	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 32)(20 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
197	JOHN KIBERENG TJRC/L/ITR/LYV/33	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 34)(20 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
198	KIPTOLO ROTICH TJRC/L/ITR/LYV/34	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 123)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
199	KUTO A KOGU TJRC/L/ITR/LYV/35	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 135)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
200	LEAH CHEMUTAI TJRC/L/ITR/LYV/36	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 176)(5 hectares)	12 th February 2013			Recommendation to the National Land Commission for further investigations.
201	MICAH.K.CHESEREM TJRC/L/ITR/LYV/37	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 8 (20 hectares)	12 th February 2012	1 st March 2013	He denied the allegations and supplied documents in support of the acquisition.	Recommendation to the National Land Commission for further investigations.
202	MICHAEL.K.MAINA TJRC/L/ITR/LYV/37	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 6 (30 hectares)	12 th February 2013			Recommendation to the National Land Commission for further investigations.
203	MICHAEL.K.SANG TJRC/L/ITR/LYV/39	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 8 (20 hectares)	12 th February 2013			Recommendation to the National Land Commission for further investigations.
204	MILKA.K.ONYONI TJRC/L/ITR/LYV/40	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 2 (30 hectares)	2 th February 2013			Recommendation to the National Land Commission for further investigations.

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205	MUTUNGI MISI TJRC/L/ITR/LYV/41	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 18 (5 hectares)	12 th February 2013			Recommendation to the National Land Commission for further investigations.
206	P.M.MAHEBO TJRC/L/ITR/LYV/42	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 14 (20 hectares)	12 th February 2013			Recommendation to the National Land Commission for further investigations.
207	PAUL K. CHERUIYOT	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 91 (20 hectares)	12 th February 2013	6 th March 2013	Letter responded to by James Alusiola. Documents in support of occupation supplied.	Recommendation to the National Land Commission for further investigations.
208	NELSON OSIEMO TJRC/L/ITR/LYV/44	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 212 (5 hectares)	12 th February 2013			Recommendation to the National Land Commission for further investigations.
209	PETER GICHUKI THUKU TJRC/L/ITR/LYV/45	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 112 (5 hectares)	12 th February 2013			Recommendation to the National Land Commission for further investigations.
210	PETER M. MANYARA TJRC/L/ITR/LYV/46	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 131 (20 hectares)	12 th February 2013			Recommendation to the National Land Commission for further investigations.
211	REUBEN CHERUIYOT TJRC/L/ITR/LYV/47	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 30 (20 hectares)	12 th February 2013			Recommendation to the National Land Commission for further investigations.
212	REUBEN KATAM TJRC/L/ITR/LYV/48	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 85 (20 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
213	R.M.RAINA TJRC/L/ITR/LYV 48B	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 8 (20 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
214	ROBERT ONGWAE TJRC/L/ITR/49	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 117 (5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
215	SILA KIMAIYO ARUSEI TJRC/L/ITR/LYV/50	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 125,126, and 127 (15 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
216	SILAS M. OMBENGI TJRC/L/ITR/LYV/51	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 150 (10 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.

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217	SOLOMON ANJEGA TJRC/L/ITR/LYV/53	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 96 (5hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
218	SOLOMON LEBU OBUOR TJRC/L/ITR/LYV/54	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 124 (5 hectares)	12 th February 2013	26 th March 2013	Allegation denied. Documents in support of ownership supplied.	Recommendation to the National Land Commission to undertake further investigations.
219	STANLEY O. NYAMBOCHO TJRC/L/ITR/LYV/55	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 173 (5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
220	WILLIAM KEITANY TJRC/L/ITR/LYV/56	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 213 (0.5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
221	WILSON NATO TJRC/L/ITR/LYV/57	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 93 (5 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
222	Z.T. ONYONKA TJRC/L/ITR/LYV/58	Irregular/illegal acquisition of parcels of land meant for Liyavo Farmers Co-operative Society (Plot No. 121 (110 hectares)	12 th February 2013			Recommendation to the National Land Commission to undertake further investigations.
223	STEPHEN KALONZO MUSYOKA (Former Vice President) TJRC/AMP/LU/007	In the year 1997, he and others participated in the funding and facilitation of an illegal group "Kabuithu" that evicted over 2,000 Tharaka families. After the eviction, he and others awarded themselves huge tracts of deserted land at Tholoni. The piece on which Mwingi Cottages stand was irregularly and illegally acquired.	19 th March 2013	5 th April 2013	He denied the allegations that he sponsored the eviction. The vendor for Mwingi cottages produced evidence of sale of the property to Hon Kalonzo Musyoka.	Recommendation to the National Land Commission to undertake further investigations in regards to Kabuithu. The Commission was satisfied with the response in respect of the Mwingi cottages.
224	CHAIRMAN, KITUI COUNTY COUNCIL TJRC/AMP/LU/007	Irregular allocation of land; irregular allocation of Plot No. 124 belong to Kilivi Self Help Group to a local politician.	19 th March 2013			Recommendation to the National Land Commission to undertake investigations.
225	GODFREY MUNG'ANIA TJRC/AMP/LU/007	Involved in the Mitheru massacre on 11 th October 1992, by virtue of his position then as DC, where 5 people were killed at Mitheru village.	19 th March 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
226	MAJ. GEN (Rtd) JOSEPH MUSOMBA TJRC/AMP/LU/007	Participated in the grabbing of 20,000 hectares of land belonging to 19 th Mukaambita Ranching & Farmers Cooperative Society, Sultan Hamud, Machakos.	19 th March 2013	27 th March 2013	Allegations were denied	Recommendation to the National Land Commission to undertake investigations.
227	SHADRACK MUTIA MUIU TJRC/AMP/LU/007	Participated in the grabbing of 20,000 hectares of land belonging to 19 th Mukaambita Ranching & Farmers Cooperative Society, Sultan Hamud, Machakos.	19 th March 2013	4 th April 2013	The Allegations denied and documents of ownership supplied	Recommendation to the National Land Commission to undertake investigations.

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228	KALEMBE NDILE TJRC/AMP/LU/007	Participated in the grabbing of Kiboko A, B and C schemes in Makindu belonging to Muungano wa Wanavijiji, Kibwezi Constituency, and allegedly allocated it to his supporters, leaving out legitimate squatters.	19 th March 2013		The allegations were denied by the witness, and he stated that he is the one who assisted the squatters to settle in Koboko A.B and C.	Recommendation to the National Land Commission to undertake further investigations.
229	HUSSEIN MAALIM TJRC/AMP/LU/007	On or about 14 th February 1984, while serving as Minister of State in the Office of the President in charge of Provincial Administration, State agents caused several violations during the Wagalla Massacre which is believed to have been sanctioned by the Government.	19 th March 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
230	SWALEH A. BAJABER TJRC/L/10/106/2013	Fraudulent acquisition of land in Koreni, LR. No. 26781 allegedly belonging to the Koreni community; Improper use of the Provincial Administration machinery to suppress the community's claim and evicting them	5 th March 2013	8 th April 2013	He denied the allegations and supplied documents in support of the acquisition and ownership.	The Commission's investigations and perusal of the documents revealed no evidence of irregularity.
231	BONIFACE MGHANGA TIMOTHY SIRMA (Former Provincial Commissioner, Nairobi) TOSHIBAI PATEL (Former Senior Lands Officer, Ministry of Lands) JOHN MWAURA (Former Physical Planning Officer, Coast Province) ANDERSON KARIUKI JAMES ISAAC	The listed public officers illegally acquired large tracts of land in the Mtwapa Settlement Schemes and Kijipwa Settlement Scheme yet they were not squatters.				Recommendations to the National Land Commission to undertake investigations.
232	KING'ORI MWANGI and Officers from the Special Crimes prevention Unit: SNR. SGT. PETER MUTHEE SGT. NJOROGI CPL. MBOGO CPL. ZABED MAINA CPL. ISAAC SANG	The officers were involved in cover-up after extrajudicial killing of youths in Malindi. An Inquest Court disagreed with Mwangi's assertion that the slain youth were armed robbers and recommended the prosecution of the officers and directed him to arrest and arraign the said officers in court, but he neglected the order and/ or refused.				Recommendations to the DPP for further investigations.
233	PHILEMON MWAISAKA	Grabbing of land measuring approximately 81 hectares in Mtwapa.				Recommendations to the National Land Commission to undertake investigation.

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234	HON JOHN KEEN	Fraudulent dealing in land belonging to Kibarani squatters.				Recommendations to the National Land Commission to undertake investigation.
235	JULIUS L. SUNKULI	While serving as the area Member of Parliament, he was involved in the forceful evictions of persons within Trans Mara on 2 nd February, 1989 where lives were lost, women raped, property lost.			The witness responded to the allegations and stated that he was not in Government at the time.	Investigations revealed that the witness was not a Member of Parliament in 1989. The allegations were therefore disproved.
236	HON LUCAS CHEPKITONY (Former MP, Kerio North)	He illegally acquired a parcel of land belonging to St. Patrick Iten School.	24 th February 2012		The witness appeared before the Commission on his own volition and produced documents in support of his claim that he had leased the land from St Patrick Iten, and has since given it back.	The parcel of land has since been returned to its rightful owners. The allegations were therefore disproved.
237	KOMBO MWERU	He illegally acquired land in Tebeson and Kaptich Farm in Eldoret.	24 th February 2012			Recommendation to the National Land Commission to undertake further investigations.
238	NATHANIEL TUM	He is alleged to have illegally/irregularly acquired a parcel of land in Sitatunga Farm, Trans Nzoia.			He appeared before the Commission during the hearings in Kitale and produced documents of ownership.	Recommendations to the National Land Commission to undertake further investigations
239	ELIZABETH KEGODE	She is alleged to have illegally/irregularly acquired a parcel of land in Sitatunga Farm, Trans Nzoia.			She appeared before the Commission during the hearings in Nairobi and produced documents of ownership.	Recommendations to the National Land Commission to undertake investigations
240	AINEAS INDAKWA, Clerk, County Council of Trans Nzoia)	He is alleged to have been involved in the fraudulent allocation of Chebarus Trading Centre, situated in Sitatunga Farm			He appeared before the Commission during the hearings in Nairobi and produced documents of ownership.	Recommendations to the National Land Commission to undertake investigations
241	LAZARUS SUMBEIYWO	He is alleged to have illegally/irregularly acquired a parcel of land in Sitatunga Farm, Trans Nzoia.			He appeared before the Commission during the hearings in Nairobi and produced documents of ownership.	Recommendations to the National Land Commission to undertake investigations
242	MAJOR (Rtd) WANAMBISI	He is alleged to have illegally/irregularly acquired a parcel of land in Maridadi Farm, Trans Nzoia.				Recommendations to the National Land Commission to undertake investigations
243	CHRIS ABIR (MANAGER, DOMINION FARMS, YALA)	The Company has been adversely mentioned in regards to the illegal encroachment of private land, pollution and environmental degradation in Yala.			Failed to honour invitation to appear before the Commission on 8 th April 2013.	Recommendation to the National Environmental Management Authority for further investigations and appropriate action.

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244	BISHOP, CATHOLIC ARCHDIOCESE OF NYERI TJRC/AMP/LU/007	Alleged boundary dispute between Hill Farm belonging to the Catholic Diocese and the witness who appeared before the Commission.			The witness has had a long standing boundary dispute with the Hill Farm owned by the catholic church which has seen the witness and his family suffer persecution. Another witness had been charged with assaulting one Father Ndumia at Hill Farm, whereupon he was harassed and assaulted by state agents. There was corroborative evidence of the allegations of state harassment on account of the land dispute.	Recommendations to the National Land Commission for investigations and resolution of the dispute. Recommendations to the Director of Public prosecutions to undertake investigations in respect of the claim of assault.
245	KINGFISHER FISHING INDUSTRY TJRC/L/10/116/2013	The Company is alleged to have been using its jetty for purposes of drug trafficking in Malindi and in the nearby towns. The jetty has been used for illegal sale, production, transport, movement, and distribution of illegal drugs and controlled substances.	5 th March 2013			Recommendation to the Director of Public Prosecutions to undertake further investigations.
246	ANUAR ALI "BAGRUSSEIN" TJRC/L/10/117/2013	The witness is alleged to have been engaging in drugs trafficking in Malindi and the nearby towns. In particulars he is involved in illegal sale, production, transport, movement, and distribution of illegal drugs and controlled substances.	5 th March	5 th April 2013	He denied the allegations.	Recommendation to the Director of Public Prosecutions to undertake further investigations.
247	MUNYU INDUSTRIES LIMITED TJRC/L/10/114/2013	Forceful evictions at Msumarini with the help of the state security agents and the local provincial administration; and encroachment into private land under the false pretence of future compensation and confiscation of property, beating of victims of eviction; environmental degradation of the ecosystems adjacent to the industrial areas, lack of audits and assessments; violation of various labour rights.	5 th March 2013			Recommendation to the National Land Commission to investigate the circumstances of acquisition of the said parcels of land; National Environmental Management Authority to undertake comprehensive Environmental Audits and sanction accordingly for non-compliance; Ministry of Labour to address the concerns on the protection of labour rights..

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248	MOMBASA SALT WORKS LTD TJRC/L/10/112/2013	Forceful evictions at Msumarini with the help of the state security agents and the local provincial administration; and encroachment into private land under the false pretence of future compensation and confiscation of property, beating of victims of eviction; environmental degradation of the ecosystems adjacent to the industrial areas, lack of audits and assessments; violation of various labour rights.	5 th March 2013			Recommendation to the National Land Commission to investigate the circumstances of acquisition of the said parcels of land; National Environmental Management Authority to undertake comprehensive Environmental Audits and sanction accordingly for non-compliance; Ministry of Labour to address the concerns on the protection of labour rights.
249	KENSALT LIMITED TJRC/L/10/109/2013	Forceful evictions at Kadzuhoni with the help of the state security agents and the local provincial administration; and encroachment into private land under the false pretence of future compensation and confiscation of property, beating of victims of eviction; environmental degradation of the ecosystems adjacent to the industrial areas, lack of audits and assessments; violation of various labour rights.	5 th March 2013			Recommendation to the National Land Commission to investigate the circumstances of acquisition of the said parcels of land; National Environmental Management Authority to undertake comprehensive Environmental Audits and sanction accordingly for non-compliance; Ministry of Labour to address the concerns on the protection of labour rights.
250	MALINDI SALT WORKS LIMITED TJRC/L/10/111/2013	Forceful evictions at Kambi ya Waya with the help of the state security agents and the local provincial administration; and encroachment into private land under the false pretence of future compensation and confiscation of property, beating of victims of eviction; environmental degradation of the ecosystems adjacent to the industrial areas, lack of audits and assessments; violation of various labour rights.	5 th March 2013	2 nd April 2013	Allegations denied	Recommendation to the National Land Commission to investigate the circumstances of acquisition of the said parcels of land; National Environmental Management Authority to undertake comprehensive Environmental Audits and sanction accordingly for non-compliance; Ministry of Labour to address the concerns on the protection of labour rights.

#	NAME	ALLEGED VIOLATION	DATE OF NOTICE/ SUMMONS	RECEIPT OF RESPONSE/ HEARING	NATURE OF RESPONSE	COMMISSION'S FINDINGS & RECOMMENDATIONS
251	SOLAR LIMITED TJRC/L/115/2013	Forceful evictions at Msumarini with the help of the state security agents and the local provincial administration; and encroachment into private land under the false pretence of future compensation and confiscation of property, beating of victims of eviction; environmental degradation of the ecosystems adjacent to the industrial areas, lack of audits and assessments; violation of various labour rights.				Recommendation to the National Land Commission to investigate the circumstances of acquisition of the said parcels of land; National Environmental Management Authority to undertake comprehensive Environmental Audits and sanction accordingly for non-compliance; Ministry of Labour to address the concerns on the protection of labour rights.
252	KRYSTALLINE SALT LIMITED TJRC/L/10/110/2013	Forceful evictions at Marereni with the help of the state security agents and the local provincial administration; and encroachment into private land under the false pretence of future compensation and confiscation of property, beating of victims of eviction; environmental degradation of the ecosystems adjacent to the industrial areas, lack of audits and assessments; violation of various labour rights.	5 th March 2013	3 rd April 2013	Allegations denied	Recommendation to the National Land Commission to investigate the circumstances of acquisition of the said parcels of land; National Environmental Management Authority to undertake comprehensive Environmental Audits and sanction accordingly for non-compliance; Ministry of Labour to address the concerns on the protection of labour rights.
253	KEMUSALT WORKS LTD TJRC/L/10/107/2013	Forceful evictions at Kanagoni with the help of the state security agents and the local provincial administration; and encroachment into private land under the false pretence of future compensation and confiscation of property, beating of victims of eviction; environmental degradation of the ecosystems adjacent to the industrial areas, lack of audits and assessments; violation of various labour rights.	5 th March 2013			Recommendation to the National Land Commission to investigate the circumstances of acquisition of the said parcels of land; National Environmental Management Authority to undertake comprehensive Environmental Audits and sanction accordingly for non-compliance; Ministry of Labour to address the concerns on the protection of labour rights.

#	NAME	ALLEGED VIOLATION	DATE OF NOTICE/ SUMMONS	RECEIPT OF RESPONSE/ HEARING	NATURE OF RESPONSE	COMMISSION'S FINDINGS & RECOMMENDATIONS
254	ATHI RIVER MINING COMPANY TJRC/L/10/108/2013	<p>The Company's mining activities have resulted in land degradation through loss of vegetative cover, soil erosion, and contamination of water sources and severe dust and noise pollution in Bondora Village. As a result, the inhabitants have contracted respiratory ailments and other occupational lung diseases.</p> <p>Blast activities within the quarry site have led to solid debris flying into the neighbouring residences, thereby endangering the lives of the inhabitants.</p> <p>Heavy vibrations from rock blasting have caused serious cracks in houses and pit latrines, some of which have crumbled.</p> <p>There are concerns that the necessary environmental impact assessments were not conducted prior to the commencement of the mining and blasting project.</p> <p>Following several complaints by the inhabitants against the company, it has in the past promised to put in place measures to mitigate against these environmental concerns but has reneged on them. It has consistently ignored or refused to comply with environmental requirements and specified directives from the Ministry of Environment and Natural Resources.</p> <p>The Company has illegally and/or irregularly expropriated land belonging to inhabitants of Kambe, destroyed trees and crops thereon, and converted the same to access roads for its exclusive usage.</p>	5 th March 2013			<p>Recommendation to the National Land Commission to investigate the circumstances of acquisition of the said parcels of land; National Environmental Management Authority to undertake comprehensive Environmental Audits and sanction accordingly for non-compliance; Ministry of Labour to address the concerns on the protection of labour rights.</p>
255	KURAWA INDUSTRIES LIMITED TJRC/L/10/113/2013	<p>Forceful evictions at Kanagoni with the help of the state security agents and the local provincial administration; and encroachment into private land under the false pretence of future compensation and confiscation of property, beating of victims of eviction; environmental degradation of the ecosystems adjacent to the industrial areas, lack of audits and assessments; violation of various labour rights.</p>	5 th March 2013		<p>Appeared before the Commission on 10th April 2013.</p>	<p>Recommendation to the National Land Commission to investigate the circumstances of acquisition of the said parcels of land; National Environmental Management Authority to undertake comprehensive Environmental Audits and sanction accordingly for non-compliance; Ministry of Labour to address the concerns on the protection of labour rights.</p>

Appendix 2:

List of Adversely Mentioned Persons in Official/Public Reports Relating to Politically Instigated Ethnic Violence/Clashes

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
1	Hon. Willy Kamuren, Former MP Baringo North	Ethnic Clashes 1991 – 1992, 1997-1998, Kericho District Ethnic incitement	Investigations and legal action to be taken	No action taken	<ul style="list-style-type: none"> Akiwumi Report Pg 50 Kiliku Report Pg 9, 10. 	Implement recommendations of Akiwumi and Kiliku Reports
2	Hon. Kimunai Soi, Former MP Chepalungu	Ethnic Clashes 1991-1992. Nakuru District Ethnic Incitement	Investigation and prosecution for incitement.	No action taken	Akiwumi Report Rift Valley province	Implement recommendation of Akiwumi Report
3	Jackson Kibor, Former KANU Chairman Uasin Gishu	Ethnic Clashes 1991-1992. Nakuru District Ethnic Incitement	Investigation and prosecution for incitement.	No action taken	Akiwumi Report Rift Valley province	Implement recommendation of Akiwumi Report
4	R.K. Kirui Former DO, Tinderet Division	Ethnic Clashes 1991-1992. Nakuru District Involvement in ethnic clashes in Meteitei Farm	Investigation with a view to charges of being an accessory.	No action Taken	Akiwumi Report, Rift Valley Province Pg, 14	Implement recommendation of Akiwumi Report
5	Philip Kipserem Karoney, Chief Miteitei Location	Ethnic Clashes 1991-1992. Nakuru District Involvement in ethnic clashes in Meteitei Farm	Investigation with a view to charges of being an accessory.	No action Taken	Akiwumi Report, Rift Valley Province Pg, 14	Implement recommendation of Akiwumi Report
6	Henry Arap Tuwei, Senior Chief Songhor Location.	Ethnic Clashes 1991-1992. Nandi District Involvement in ethnic clashes in Owiro Farm	Investigation with a view of taking appropriate legal action.	No action taken.	Akiwumi Report Pg9, 14; Kiliku Report Pg 70.	Implement recommendations of Akiwumi and Kiliku Reports
7	Julius Ndegwa, OCS, Songhor Police Station.	Ethnic Clashes 1991-1992. Nandi District	Investigation with a view of taking appropriate legal action.		Kiliku Report Pg	Implement recommendation of Kiliku Report
8	Tolowen Tirop – Chief of Turbo Location	Ethnic Clashes 1992. Involvement in ethnic clashes (openly partisan against non-Kalenjin.)	Investigation with a view of taking appropriate legal action.		Kiliku Report Pg 69.	Implement recommendation of Kiliku Report
9	Simon K. Ng'eny, Assistant Chief Turbo	Ethnic Clashes 1992. Involvement in ethnic clashes (openly partisan against non-Kalenjin.)	Investigation with a view of taking appropriate legal action.		Kiliku Report Pg 69.	Implement recommendation of Kiliku Report
10	Kiprotich Arap Kebenei, Chief of Eldoret Municipality	Ethnic Clashes 1992. Involvement in ethnic clashes	Investigation with a view of taking appropriate legal action.		Kiliku Report Pg 69	Implement recommendation of Kiliku Report

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
11	Laban Sirma Assistant Chief Eldoret Municipality.	Ethnic Clashes 1992. Involvement in ethnic clashes	Investigation with a view of taking appropriate legal action.		Kiliku Report Pg 69	Implement recommendation of Kiliku Report
12	Timothy Sirma, Former PC Coast Province.	Ethnic Clashes 1991 – 1992 Kericho District Involvement/ Condoned ethnic clashes Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations to determine criminal culpability and legal action taken.	No action was taken	Akiwumi Report Pg 32 (Chapter on Introduction) and Pg 28 (Chapter on Rift Valley) Akiwumi Report Coast Province; Pg 38	Implement recommendation of Akiwumi Report
13	Nicholas Mberia, Former DC, Kericho District.	Ethnic Clashes 1991 – 1992 Kericho District Involvement/ Condoned ethnic clashes	Investigations to determine criminal culpability and legal action taken.	No action was taken.	Akiwumi Report Pg 32 (Chapter on Introduction) and Pg 28 (Chapter on Rift Valley)	Implement recommendation of Akiwumi Report
14	Eliud Langat, Deputy Commissioner of Police and former OCPD Kericho.	Ethnic Clashes 1991 – 1992 Kericho District Complicity to avert clashes	Investigation and legal action taken.	No action taken.	Akiwumi Report	Implement recommendation of Akiwumi Report
15	Hon. William Kikwai, Former MP, Kipkelion Constituency.	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement and intimidation of non-Kalenjin.	Investigations to determine criminal culpability and legal action taken.	No action was taken.	Akiwumi Report	Implement recommendation of Akiwumi Report
16	Chumo, Councilor from Kipkelion Division.	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement and intimidation of non-Kalenjin	Investigations to determine criminal culpability and legal action taken.	No action was taken.	Akiwumi Report	Implement recommendation of Akiwumi Report
17	Benjamin Ruto, Councilor from Kipkelion Division.	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement and intimidation of non-Kalenjin	Investigations to determine criminal culpability and legal action taken.	No action was taken.	Akiwumi Report	Implement recommendation of Akiwumi Report
18	Hon. Nicholas Biwott, Former Minister of Energy.	Ethnic Clashes 1991 – 1992 Kericho District Ethnic incitement	Investigations and legal action	No action taken	<ul style="list-style-type: none"> Akiwumi Report Pg 50 (Introduction section) Kiliku Report Pg 9, 10. 	Implement recommendations of Akiwumi and Kiliku Reports
19	Hon. Christopher Lomada, Former Assistant Minister for Culture and Social Services	Ethnic Clashes 1991 – 1992 Kericho District Ethnic incitement	Investigations and legal action	No action taken	<ul style="list-style-type: none"> Akiwumi Report Pg 50 (Introduction section) Kiliku Report Pg 9, 10. 	Implement recommendations of Akiwumi and Kiliku Reports
20	Hon. Paul Chepkok	Ethnic Clashes 1991 – 1992 Kericho District Ethnic incitement	Investigations and legal action to be taken.	No action taken	<ul style="list-style-type: none"> Akiwumi Report Pg 50 (Introduction section) Kiliku Report Pg 9, 10. 	Implement recommendations of Akiwumi and Kiliku Reports

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
21	Hon. Timothy Mibei, Former Minister of Road and Public Works.	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement	Investigations and legal action to be taken.	No action taken	<ul style="list-style-type: none"> • Kiliku Report Pg 9, 10. • Akiwumi Report Pg 50. 	Implement recommendations of Akiwumi and Kiliku Reports
22	William Kikwai	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement	Investigations and legal action to be taken.	No action taken	<ul style="list-style-type: none"> • Kiliku Report Pg 9, 10. • Akiwumi Report Pg 50. 	Implement recommendations of Akiwumi and Kiliku Reports
23	John Terer	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement	Investigations and legal action to be taken.	No action taken	<ul style="list-style-type: none"> • Kiliku Report Pg 9, 10. • Akiwumi Report Pg 50. 	Implement recommendation of Kiliku and Akiwumi Reports
24	Lawi Kiplagat	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement	Investigations and legal action to be taken.	No action taken	<ul style="list-style-type: none"> • Kiliku Report Pg 9, 10. • Akiwumi Report Pg 50. 	Implement recommendations of Kiliku and Akiwumi Reports
25	Peter Nangole	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement	Investigations and legal action to be taken.	No action taken	<ul style="list-style-type: none"> • Kiliku Report Pg 9, 10. • Akiwumi Report Pg 50. 	Implement recommendation of Kiliku and Akiwumi Reports
26	Ayub Chepkwony	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement	Investigations and legal action to be taken.	No action taken	<ul style="list-style-type: none"> • Kiliku Report Pg 9, 10. • Akiwumi Report Pg 50. 	Implement recommendations of Kiliku and Akiwumi Reports
27	Robert Kipkorir	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement	Investigations and legal action to be taken.	No action taken	<ul style="list-style-type: none"> • Kiliku Report Pg 9, 10. • Akiwumi Report Pg 50. 	Implement recommendations of Kiliku and Akiwumi Reports
28	Samson Ole Tuya.	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement	Investigations and legal action to be taken.	No action taken	<ul style="list-style-type: none"> • Kiliku Report Pg 9, 10. • Akiwumi Report Pg 50. 	Implement recommendations of Akiwumi and Kiliku and Reports
29	Hon. Kipkalia Kones	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement	Investigations and appropriate legal action to be taken.	No action taken	<ul style="list-style-type: none"> • Kiliku Report Pg 9, 10. • Akiwumi Report Pg 50. 	(Deceased)
30	Joseph Saina; Assistant Chief of Koguta in Belgut Division	Ethnic Clashes 1991 – 1992 Kericho District Ethnic killings	Investigations with a view of taking appropriate legal action	No action was taken.	Kiliku Report Pg 69.	Implement recommendation of Kiliku Report
31	Moses Kiptere; Chief of Kunyak location	Ethnic Clashes 1991 – 1992 Kericho District Ethnic incitement and killings	Investigations with a view of taking appropriate legal action	No action was taken.	Kiliku Report Pg 69.	Implement recommendation of Kiliku Report
32	Joseph Kipchumba; Assistant Chief	Ethnic Clashes 1991 – 1992 Kericho District Ethnic incitement and killings	Investigations with a view of taking appropriate legal action	No action was taken.	Kiliku Report Pg 69.	Implement recommendation of Kiliku Report
33	Wilson Koros	Ethnic Clashes 1991 – 1992 Kericho District Ethnic incitement and killings	Investigations with a view of taking appropriate legal action	No action was taken.	Kiliku Report Pg 69.	Implement recommendation of Kiliku Report

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
34	Paul Cheruiyot, Former DO, Olenguruone Division.	Ethnic Clashes 1991 – 1992 Nakuru District Complicity to avert clashes	Investigations with a view of taking appropriate legal action	No action taken	Akiwumi Report Pg 50,	Implement recommendation of Akiwumi Report
35	Jonathan Mutai, Chief of Amalo Location, Olenguruone Division.	Ethnic Clashes 1991 – 1992 Nakuru District Involvement in the ethnic clashes.	Investigation and legal action taken. .	No action taken	<ul style="list-style-type: none"> Akiwumi Report Pg 49 and 50. Kiliku Report Pg. 19 & 20. 	Implement recommendations of Kiliku and Akiwumi Reports
36	Wilson Maritim, Former Assistant Chief Molo South Sub-location	Ethnic Clashes 1991 – 1992 Nakuru District Complicity to avert the clashes	Investigation and legal action taken. .	No further action was taken.	<ul style="list-style-type: none"> Akiwumi Report Pg 56. Kiliku report Pg. 19 	Implement recommendations of Kiliku and Akiwumi Reports
37	Shem Petkay Miriti, Former PSIO Rift Valley Province	Ethnic Clashes 1997 – 1998 Nakuru District Complicity to avert the clashes	Investigations with a view of taking appropriate legal action	No action was taken.	Akiwumi report Pg 72, 74, 75, 76, 77, 78, 82.	Implement recommendation of Akiwumi Report
38	Kipkorir Siele, Former DSIO Nakuru District	Ethnic Clashes 1997 – 1998 Nakuru District Complicity to avert the clashes	Investigations with a view of taking appropriate legal action	No action was taken.	Akiwumi report Pg 72, 74, 75, 76, 77, 78, 82.	Implement recommendation of Akiwumi Report
39	All Other Provincial Security Committee Members, Rift Valley Province, and all District Security Members, Nakuru District, During 1998 Njoro Clashes.	Ethnic Clashes 1997 – 1998 Nakuru District Involvement in the ethnic clashes.	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission (recommendation Section.)	Implement recommendation of Akiwumi Report
40	Hon. John Njenga Mungai	Ethnic Clashes 1991 – 1992 Nakuru District Ethnic incitement	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku Report Pg, 15.	Implement recommendation of Kiliku Report
41	Kiplangat Arap Cherubo Assistant Chief of Bochege Farm.	Ethnic Clashes 1991 – 1992 Nakuru District Ethnic incitement	Investigations with a view of taking appropriate legal action.	No action taken.	Kiliku Report Pg 15, 16	Implement recommendation of Kiliku Report
42	Elijah Tanui, Local Assistant Chief	Ethnic Clashes 1991 – 1992 Nakuru District Ethnic incitement	Investigations with a view of taking appropriate legal action.	No action was taken.	Kiliku Report Pg. 16	Implement recommendation of Kiliku Report
43	Hon. Wilson leitich	Ethnic Clashes 1991 – 1992 Nakuru District Ethnic incitement	Investigations with a view of taking appropriate legal action.	No action was taken	Kiliku Report Pg. 16	Implement recommendation of Kiliku Report
44	Mary Leitich. Wife of Hon. Wilson Leitich.	Ethnic Clashes 1991 – 1992 Nakuru District Involvement in ethnic violence	-	N/A	Kiliku Report Pg. 17	Investigation with a view to prosecute

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
45	Richard Rono, A former Kenya Air Force personnel and “Teacher at Kaptambui Primary School”	Ethnic Clashes 1991 – 1992 Nakuru District Involvement in ethnic violence – Murder.	Investigation with a view to prosecute in connection with perpetration of crime.	No action was taken.	Kiliku Report Pg. 17.	Implement recommendation of Kiliku Report
46	Benjamin Ndegwa, Chief Olenguruone, Molo South	Ethnic Clashes 1991 – 1992 Nakuru District Ethnic incitement	Investigation and appropriate action taken	No action taken	Kiliku report Pg. 19 & 20.	Implement recommendation of Kiliku Report
47	Father Moses Mahuho of St. Kizito Church Olenguruone	Ethnic Clashes 1991 – 1992 Nakuru District Ethnic incitement	Investigation and appropriate action taken	No action taken	Kiliku report Pg. 19 & 20.	Implement recommendation of Kiliku Report
48	Josphat Kigo, Headmaster of Olenguruone Secondary School.	Ethnic Clashes 1991 – 1992 Nakuru District Ethnic incitement	Investigation and appropriate action taken	No action taken	Kiliku report Pg. 19 & 20.	Implement recommendation of Kiliku Report
49	Jonathan Kiprop Soi, Former DO Mau Division	Ethnic Clashes 1991 – 1992 Narok District Complicity to avert clashes	Investigation and appropriate action taken	No action was taken	Akiwumi report Pg 68	Implement recommendation of Akiwumi Report
50	Moses Ole Naimadu, former Councillor	Ethnic Clashes 1991 – 1992 Narok District Ethnic incitement.	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku Report Pg. 61	Implement recommendation of Kiliku Report
51	Moses Ole Sarumi, Former Councillor	Ethnic Clashes 1991 – 1992 Narok District Ethnic incitement.	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku Report Pg. 61	Implement recommendation of Kiliku Report
52	Ole Sano, a teacher at Kilgoris Secondary School	Ethnic Clashes 1991 – 1992 Narok District Ethnic incitement.	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku Report Pg. 61	Implement recommendation of Kiliku Report
53	Ole Nasa, Assistant Chief. He was once arrested for inciting the public.	Ethnic Clashes 1991 – 1992 Narok District Ethnic incitement.	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku Report Pg. 61	Implement recommendation of Kiliku Report
54	Hon. Julius Ole Sunkuli, a Magistrate at Sotik	Ethnic Clashes 1991 – 1992 Narok District Ethnic incitement.	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku Report Pg. 61	Implement recommendation of Kiliku Report
55	Zephania M. Anyieni former Mp for Majoge Bassi	Ethnic Clashes 1991 – 1992 Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg. 61	Implement recommendation of Kiliku Report
56	Chief Ongaro	Ethnic Clashes 1991 – 1992 Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action was taken	Kiliku Report Pg. 61	Implement recommendation of Kiliku Report
57	Hon. Chris Obure					

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
58	Peter Ondimu – Former member of Armed Forces Medical Corps	Ethnic Clashes 1991 – 1992 Involvement in ethnic clashes	No action was recommended against Mr. Ondimu.	N/A	Kiliku Report, Pg 61.	Implement recommendation of Kiliku Report
59	Moses Nyaigoti of Chebilat	Ethnic Clashes 1991 – 1992 Kisii/Nyamira Districts Involvement in ethnic clashes	The Committee did not recommend any action against Mr. Nyaigoti.	No action taken	Kiliku Report Pg 61.	Implement recommendation of Kiliku Report
60	Arap Rono – A KANU sub-locational Chairman.	Ethnic Clashes 1991 – 1992 Kisii/Nyamira Districts Ethnic Incitement	Investigations with a view of taking appropriate legal action.	No action was taken	Kiliku Report Pg 61.	Implement recommendation of Kiliku Report
61	Councillor Richard Chepkibet Mibei, Chairman of Kipsigis County Council.	Ethnic Clashes 1991 – 1992 Kisii/Nyamira Districts Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action .	No action was taken	Kiliku Report Pg. 61.	Implement recommendation of Kiliku Report
62	Andrew Saikwa	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action was taken	Kiliku Report Pg 68	(Deceased)
63	John Ndiema Choito	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action was taken	Kiliku Report Pg 68	Implement recommendation of Kiliku Report
64	Christopher Kiraro Saikwa – Area Chief.	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action was taken	Kiliku Report Pg 68	Implement recommendation of Kiliku Report
65	William Changole – Bungoma District Commissioner	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Ethnic incitement	Investigations with a view of taking appropriate legal action	No action was taken	Kiliku report Pg 69	Implement recommendation of Kiliku Report
66	Aramisi King'a	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action was taken	Kiliku Report Pg 27	Implement recommendation of Kiliku Report
67	Andrew Rotich; Chief of Chepsiro	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Complicity to avert ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku Report Pg 28.	Implement recommendation of Kiliku Report
68	Simeon; A Councillor of Kapsikilai Ward	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Ethnic incitement	Investigations with a view of taking appropriate legal action.	No action was taken.	Kiliku Report, Pg. 28.	Implement recommendation of Kiliku Report

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
69	Sitati Maboni	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku R eport Pg 30.	Implement recommendation of Kiliku Report
70	Hon. Wilberforce Kisiero MP – Mt. Elgon	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Ethnic incitement	Investigations with a view of taking appropriate legal action.	No action was taken	Kiliku Report Pg. 32.	Implement recommendation of Kiliku Report
71	Mark Too; KANU chairman in Nandi District.	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Ethnic incitement	Investigations with a view of taking appropriate legal action.	No action was taken	Kiliku Report Pg. 36.	Implement recommendation of Kiliku Report
72	Wilson Chemosat	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Murder and involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku Report Pg 32.	Implement recommendation of Kiliku Report
73	Solomon Kirui; Assistant Chief Saboti Location	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku Report Pg 32.	Implement recommendation of Kiliku Report
74	Councilor Opindu of Nzoia County Council	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Ethnic incitement	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku Report Pg 34	Implement recommendation of Kiliku Report
75	Reuben Samoei Dara; Chairman Kapsakwony Town Council	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 35.	Implement recommendation of Kiliku Report
76	Andrew Muneria; Vice Chairman Trans Nzoia County Council	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 35.	Implement recommendation of Kiliku Report
77	Masai Masaranja; Vice Chairman Kapsakwony Town Council	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 35.	Implement recommendation of Kiliku Report
78	Andrew Chamayeik; Member, C.P.K synod, Nambale	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 35.	Implement recommendation of Kiliku Report
79	Reuben Sabet Assistant Chief of Kibuku	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 35.	Implement recommendation of Kiliku Report

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
80	Ben Jipcho; Assistant Inspector of Primary Schools, in Trans-Nzoia.	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 35.	Implement recommendation of Kiliku Report
81	Hon. Elijah Mwangale, M.P. Kimilili	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	(Deceased)
82	Hon. Joash wa Mang'oli M.P. Webuye	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	Implement recommendation of Kiliku Report
83	Hon. Noah Wekesa, M.P. Kwanza	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	Implement recommendation of Kiliku Report
84	Stephen Sisimo – Resident of Kiborwa Location	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	Implement recommendation of Kiliku Report
85	Joseph Cherogony – KANU Chairman – Saboti Location	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	Implement recommendation of Kiliku Report
86	Geoffrey Kipkut –Chief, Endeless Location	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	Implement recommendation of Kiliku Report
87	Samwel K. Moiben – Kaa Farm	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	Implement recommendation of Kiliku Report
88	Charles Cheptais – KANU Chairman – Kiborwa location	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	Implement recommendation of Kiliku Report
89	Councilor J. Toili – Nzoia County Council	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	Implement recommendation of Kiliku Report

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
90	Michael Kitio	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	Implement recommendation of Kiliku Report
91	Wafula Buke – Former Student Leader: The University of Nairobi	Ethnic Clashes 1991 – 1992 Trans Nzoia and Bungoma District. Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Kiliku report Pg 39.	Implement recommendation of Kiliku Report
92	Athuman Zuberi Mwakunyapa: Assistant Chief Pungu Sub-Location, Kwale District	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province Pg 18	Implement recommendation of Akiwumi Report
93	Ramadhani Mwalimu Mwaonu: Assistant Chief Kiteje Sub-Location, Kwale District	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province Pg 18	Implement recommendation of Akiwumi Report
94	Nyaume Mohamed: Assistant Chief Ngombeni Sub-Location, Kwale District.	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province Pg 18	Implement recommendation of Akiwumi Report
95	Samuel Kipchumba Limo Provincial Commissioner of Coast Province	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province Pg 18	Implement recommendation of Akiwumi Report
96	AP Inspector Mohamed Juma Kutsola Former Sergeant attached to DC Kwale District.	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province Pg 18	Implement recommendation of Akiwumi Report
97	David Opala Former DO Matuga Division, Kwale District	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province	Implement recommendation of Akiwumi Report
98	Paul Olando Former DC Mombasa	Ethnic Clashes 1997 – 1998 Mombasa	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province	Implement recommendation of Akiwumi Report
99	Wilfred Kimalat: Former Permanent Secretary, Provincial Administration and Internal Security.	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province; Pg 38	Implement recommendation of Akiwumi Report
100	Mohamed Hassan Haji: Former PC Coast Province	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province; Pg 38	Implement recommendation of Akiwumi Report
101	Wilson Boinett: Former Director of the Directorate of Security Intelligence	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province; Pg 38	Implement recommendation of Akiwumi Report

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
102	Joseph Jakaiti	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province; Pg 38	Implement recommendation of Akiwumi Report
103	Japheth Mwania: Provincial Police Officer	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province; Pg 38	Implement recommendation of Akiwumi Report
104	Omar Raisi: Former Chief Inspector of Police, Mombasa	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province; Pg17,	Implement recommendation of Akiwumi Report
105	Peter Wilson: Former DSIO, Mombasa	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province; Pg17,	Implement recommendation of Akiwumi Report
106	Shukri Baramadi: Former PSIO, Mombasa	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Report Coast Province; Pg17,	Implement recommendation of Akiwumi Report
107	Francis Gichuki Former PPO, Coast province	Ethnic Clashes 1997 – 1998 Mombasa Complicity to avert ethnic clashes. (Connivance)	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi commission, Coast Province Pg 26	Implement recommendation of Akiwumi Report
108	Karisa Maitha	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi commission, Coast Province	(Deceased)
109	Rashid Sajjad	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission, Coast province Pg. 39	Implement recommendation of Akiwumi Report
110	Rashid Shakombo	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission, Coast province Pg. 39	Implement recommendation of Akiwumi Report
111	Suleiman Kamolle	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission, Coast province Pg. 39	Implement recommendation of Akiwumi Report
112	Kassim Wamzandi	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission, Coast province Pg. 39	Implement recommendation of Akiwumi Report
113	Juma Hamisi Mwansele	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission, Coast province Pg. 19	Implement recommendation of Akiwumi Report

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114	Mwalimu Masoud Mwachima: Former Councilor	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission, Coast province Pg. 32	Implement recommendation of Akiwumi Report
115	Hisham Mwidau	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission, Coast province Pg. 32	Implement recommendation of Akiwumi Report
116	Swaleh Bin Alfani	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission, Coast province Pg. 26 & 40	Implement recommendation of Akiwumi Report
117	Mohamed Mdogo	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission, Coast province Pg. 40	Implement recommendation of Akiwumi Report
118	Omar Masumbuko	Ethnic Clashes 1997 – 1998 Mombasa Involvement in ethnic clashes	Investigations with a view of taking appropriate legal action.	No action taken	Akiwumi Commission, Coast province Pg. 41	Implement recommendation of Akiwumi Report
119.	Hon. William Ole Ntimama - MP, Narok North	Ethnic Clashes 1991 – 1992 Narok District Ethnic Incitement Incitement to violence. In 2007/2008 he Incited Maasai's against Kikuyus and Kisiis	Investigations and appropriate action taken. The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	Akiwumi Report Pg. 50 KNCHR 2008: On the Brink of the Precipice. A Human Rights Account of Kenya's post-2007 Election Violence. Pg 183	Implement recommendations of Akiwumi Report And KNCHR (2008) Report -On the Brink of the Precipice
120.	Hon. Omondi Anyanga - MP, Nyatike	Participating and funding 2007/2008 PEV .	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability	No action has been taken	KNCHR 2008: On the Brink of the Precipice. Pg183	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
121.	Hon. Henry Kosgey - MP Tinderet, Cabinet Minister	Planning, inciting and financing the 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	Accused of crimes against humanity at the International Criminal Court – charges were not confirmed.	KNCHR 2008: On the Brink of the Precipice. Pg 183	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
122.	Hon. Sally Kosgey - MP Aldai Cabinet Minister.	Planning incitement and financing 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 182	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
123.	Hon. Boaz Kaino - Mp Marakwet West	Inciting violence during 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 182	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
124.	Hon. Fred Kapondi - MP Mt. Elgon	Inciting violence during 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 182	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
125.	Hon. William Ruto - MP Eldoret North	Planning incitement and financing violence during 2007/2008	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	Currently standing trial for Crimes Against Humanity before the International Criminal Court	KNCHR 2008: On the Brink of the Precipice. Pg 180	No Action recommended as the AMP is standing trial before the ICC
127.	Hon. David Kimutai Too - MP Ainamoi	<ul style="list-style-type: none"> Planning incitement and financing violence during 2007/2008 PEV 	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 180	(Deceased)
126.	Hon. Kipkalia Kones – Mp Bomet	Ethnic Clashes 1991 – 1992 Kericho District Ethnic Incitement <ul style="list-style-type: none"> Planning incitement and financing violence during 2007/2008 PEV. Hosted raiders during 2007/2008 PEV 	Investigations and appropriate legal action to be taken. The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	<ul style="list-style-type: none"> Kiliku Report Pg 9, 10. Akiwumi Report Pg 50. KNCHR 2008: On the Brink of the Precipice. Pg 180 	(Deceased)

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
128.	Hon. Lorna Laboso - MP Sotik	Planning and incitement to violence during 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 177	(Deceased)
129.	Hon. Franklin Bett - MP Buret	Planning incitement and financing violence during 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 177	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
130.	Hon. John Pesa - MP Migori	Incitement to violence during 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 184	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
131.	Hon. Ramadhan Kajembe - MP Changamwe	Incitement and participation in violence during 2007/2008 PEV KNCHR 2008.	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 184	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
132.	Hon. Peter Mwathi - MP Limuru	Incitement to violence during 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 184	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
133.	Hon. Uhuru Kenyatta – MP Gatundu South	Planning and financing violence during 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	Currently standing trial for crimes against humanity at the International Criminal Court	KNCHR 2008: On the Brink of the Precipice. Pg 184	No action recommended as the AMP is standing trial before ICC

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
134.	Hon. Kabando wa Kabando - MP Mukurweini,	Planning and financing violence during 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 184	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
135.	Hon. Stanley Githunguri – MP Kiambaa					
136.	Hon. Elizabeth Ongoro - MP Kasarani	Financing and planning violence during 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 185	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
137.	Hon. Chris Okemo - MP Nambale	Incitement to violence during 2007/2008 PEV	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 185	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
138.	Maj-Gen Hussein Ali Police Commissioner	Police Officers under his command used excessive force during 2007/08 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	Accused of crimes against humanity at the International Criminal Court – charges not confirmed.	KNCHR 2008: On the Brink of the Precipice. Pg 185	
139.	Paul Olando - PC Nyanza	Ordered the use of excessive force by giving shoot-to-kill orders during 2007/2008 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 186	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
140.	Grace Kaindi - PPO Nyanza					
141.	Scaver Mbogo - PCIO Nyanza					
142.	Omwenga – NSIS Officer Nyanza					
143.	Peter Kavila – PPO Western,	Excessive use of force, shooting and killing peaceful demonstrators during 2007/2008 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 187	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
144.	Wainaina - OCS Malava					

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
146.	Ngugi – OCS Langas Police Station and Officers under his command	Excessive use of force during 2007/2008 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 186	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
147	Alfred Chepkwony Assistant Chief Chemamul Sub-location	Participating in the violence during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 186	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
148.	William Sang – Chief Chepkoleil Location	Participating and organizing the violence during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 186	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
149.	Dr Jacob Bitok – Lecturer at Moi University	Organizing, Planning, funding and participation in the violence during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 187	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
150.	Thomas Cheruiyot Sirikwa – Agriculture/ Veterinary Officer Sirikwa	Incitement to violence during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 188	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
151.	Joseph Rotich a.ka Survivor – Assistant Chief Mawingu Sub-location	Incitement to violence, partisanship during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 188	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
152.	Steven Ngetich a.ka Alexander - Chief who lives at Sundu River Kuresoi	Planning and participation in the violence during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 189	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
153.	Osewe – OCS Kuresoi Police Station	Negligence of duty during 2007/2008 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 190	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice

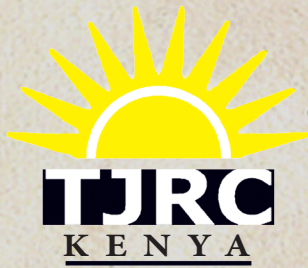
No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
154.	Sammy Ng'etich – Acting Chief Chemaner Location	Incitement, Organizing and Planning the violence during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 191	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
155.	William Ngerech – Chief Temuyota Location	Planning and participating in attacks during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 191	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
156.	David Rugut – Chief Kamasian Location	Eviction of people from their houses during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 191	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
157.	Cheruiyot – Policeman based at Murinduko Shopping Center	Organising Violence during 2007/2008 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	No action taken	KNCHR 2008: On the Brink of the Precipice.	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
158.	Mohamed Ali – DO Olunguruone	Negligence of duty during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 192	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
159.	Benjamin Koech - Policeman	Organizing and participating in violence during 2007/2008 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 193	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
160.	Dennis a.k.a Deno – police officer attached to Kondele Police Station	Excessive use of force during 2007/2008 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 193	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
161.	Ndegwa – police officer attached to Migori Police Station	Excessive use of force during 2007/2008 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 193	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice

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162.	Tanui –AP officer attached to Siaya administration police camp	Excessive use of force during 2007/2008 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 193	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
163.	Edward Kirui – police officer in Kisumu during post election violence.	Shot and killed youth at Kondele, Kisumu during 2007/2008 PEV	Investigation by a team of special investigators and prosecuted by a special prosecutor appointed for that purpose	Acquitted - Republic v Edward Kirui [2010] eKLR; High Court of Kenya At Nairobi Criminal Case 9 of 2008	KNCHR 2008: On the Brink of the Precipice.	No Action recommended
164.	Luseno Lusaba – Assistant Chief Soy Sub-location, Lukuyani	Participation in the 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 194	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
165.	Joshua Arap Sang	Incited violence through Radio broadcasts during 2007/2008 PEV	Facing charges at the International Criminal Court	Accused of crimes against humanity at the International Criminal Court – charges were confirmed.	KNCHR 2008: On the Brink of the Precipice. Pg 205	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
166.	Inooro FM – radio Station which broadcast in Kikuyu language	Disseminated incitement via call-in-programmes during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 195	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
167.	Kameme FM – Radio Station which broadcast in Kikuyu language	Perpetration of hate speech during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 195	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
168.	Kass FM – Radio Station which broadcast in Kalenjin language	Incitement and hate speech in its programmes during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 195	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
169.	Radio Injili	Incitement and hate speech in its programmes during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 195	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice

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170.	Coro FM – radio Station which broadcast in Kikuyu language	Incitement through its programmes during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 195	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
171.	Pastor Karathimo Church , Limuru	Incitement Violence during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 196	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
172.	Rev. Kosgey – sometimes preaches on Kass FM	Incited violence through Radio broadcasts during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 196	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
173.	Mr Benjamin Murei – Seventh Day Adventist Church elder	Aided and abetted violence during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 196	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
174.	Pastor Isaya Nyongesa – Pastor in Likuyani	Incitement to violence during 2007/2008 PEV	Further investigation	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 196	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
175.	Mary Wambui – PNU Activist	Financing the violence during 2007/2008 PEV	Investigation and prosecution if criminal culpability is determined	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 238	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice
176.	Simeon Nyachae, Energy Minister and MP, Nyaribari Chache	Utterances and Incitement contrary to Section 96 of the Penal Code	The KNHCR and KHRC recommend the Investigation and prosecution of the politicians for incitement under Sections 95 & 96 of the Penal Code.	No action taken	Kenya National Commission on Human Rights (2006) “Behaving Badly” referendum Report Pg 30	Implement recommendation of KNCHR (2006) Report “Behaving Badly”
177.	Thirikwa Kamau, former MP, Ndaragwa	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 30	Implement recommendation of KNCHR (2006) Report “Behaving Badly”
178.	Samwel Moroto, MP Kapenguria	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 30	Implement recommendation of KNCHR (2006) Report “Behaving Badly”

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
179.	Daudi Mwanzia, MP Machakos Town	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 30	Implement recommendation of KNCHR (2006) Report "Behaving Badly"
180.	George Khaniri, MP Khamisi	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 30	Implement recommendation of KNCHR (2006) Report "Behaving Badly"
181.	Amos Kimunya, Minister for Lands and MP Kipipiri	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 31	Implement recommendation of KNCHR (2006) Report "Behaving Badly"
182.	Mwangi Kiunjuri, Ass. Minister for Energy and MP Laikipia East	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 31	Implement recommendation of KNCHR (2006) Report "Behaving Badly"
183	William Wambugu, Councillor Mukaru Ward	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 31	Implement recommendation of KNCHR (2006) Report "Behaving Badly"
184.	Peter Munya, MP Tingania East	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 31	Implement recommendation of KNCHR (2006) Report "Behaving Badly"
185.	Chris Murungaru, MP Kieni	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 31	Implement recommendation of KNCHR (2006) Report "Behaving Badly"
186.	SM Wambugu, Councillor, Nyeri	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 32	Implement recommendation of KNCHR 2006 Report "Behaving Badly"
187.	Hon. Najib Balala – MP Mvita	Inciting and funding violence Utterances and Incitement contrary to Section 96 of the Penal Code	The Attorney General or the Kenya Police Force should undertake investigations in terms of Section 26 of the constitution to determine criminal culpability. Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR 2008: On the Brink of the Precipice. Pg 185	Implement recommendation of KNCHR (2008) Report -On the Brink of the Precipice

No.	Name of the Adversely Mentioned Person/ status at the Time of Alleged Violation.	Alleged Crime/ Violation	Recommendation by Official Body	Action Taken	Reference	Recommendation by TJRC
188.	Gideon Moi, MP Baringo Central	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 32, 33	Implement recommendation of KNCHR 2006 Report "Behaving Badly" Report
189.	Joe Khamisi, MP Bahari	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 34	Implement recommendation of KNCHR 2006 Report "Behaving Badly" Report
190.	Joseph Kamotho, MP Mathioya	Utterances and Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 34	Implement recommendation of KNCHR 2006 Report "Behaving Badly"
191.	Fred Gumo, MP Westlands	Utterances & Incitement contrary to Section 96 of the Penal Code	Investigation and prosecution for incitement under Sections 95 & 96 of the Penal Code.	No action taken	KNCHR (2006): Behaving Badly. Pg 34	Implement recommendation of KNCHR 2006 Report "Behaving Badly"



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