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REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION

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Volume I

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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

Tecla Namachanja Wanjala
(Vice Chairperson)

Judge Gertrude Chawatama

Amb. Berhanu Dinka

Maj. Gen (Rtd) Ahmed Sheikh Farah

Prof. Tom Ojienda

Margaret Shava

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

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

CHAPTER ONE

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.

Commissioners and Staff of the Commission with the Deputy Prime Minister, Honourable Musalia Mudavadi.

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 commisioners.

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 homes [14] 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 Ongeri, 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 Humani-tarian 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 Inde-pendent 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***

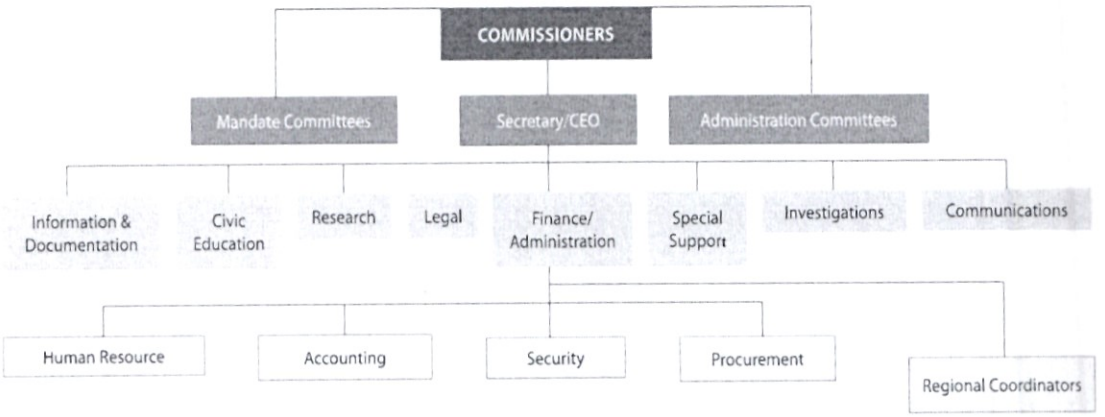
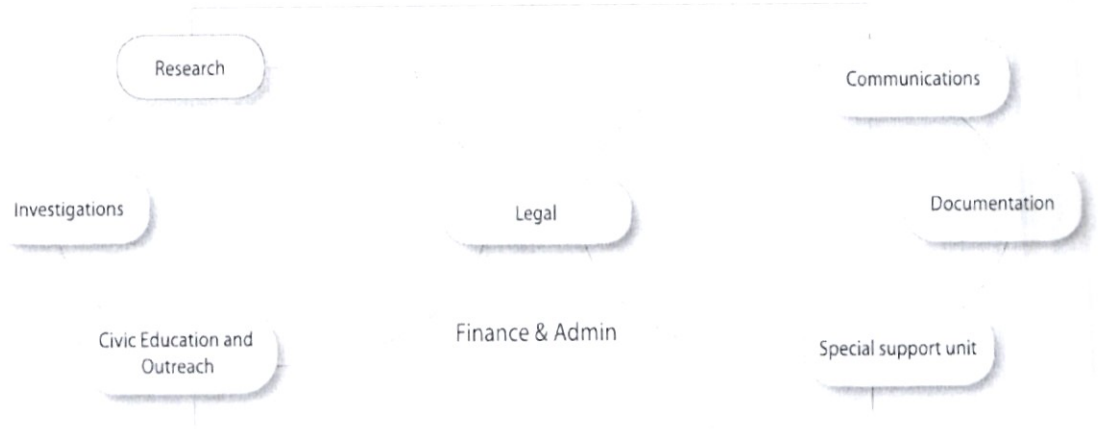


Chart 2: ***Inter-departmental synergies***



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 (directorate 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 Nesiah *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 a 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 a 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.

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

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]

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 December1963 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.

the Commission was 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.

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.

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


TJRC
KENYA
W.M.A

CHAPTER

THREE

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

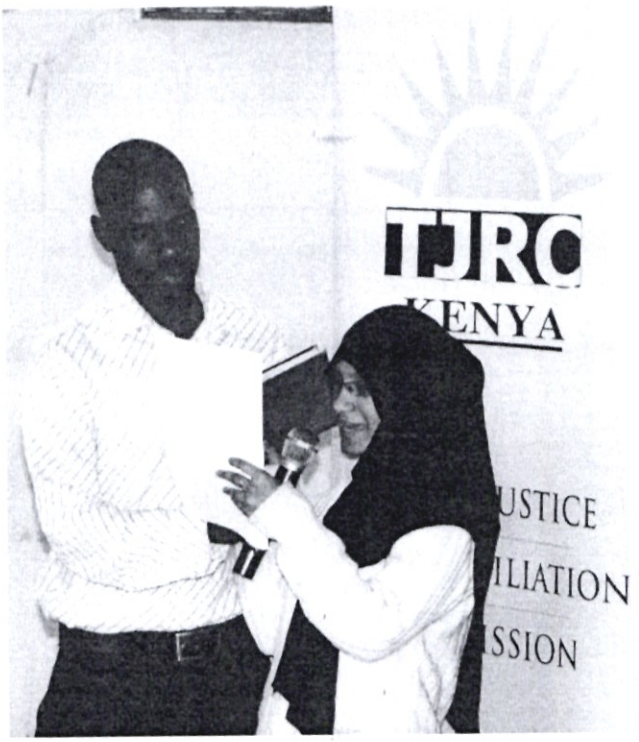
1 TJR Act, sec 7.

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.

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

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

A group submitting a memorandum to the Commission's Vice Chairperson, Commissioner Tecla Namachanja

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

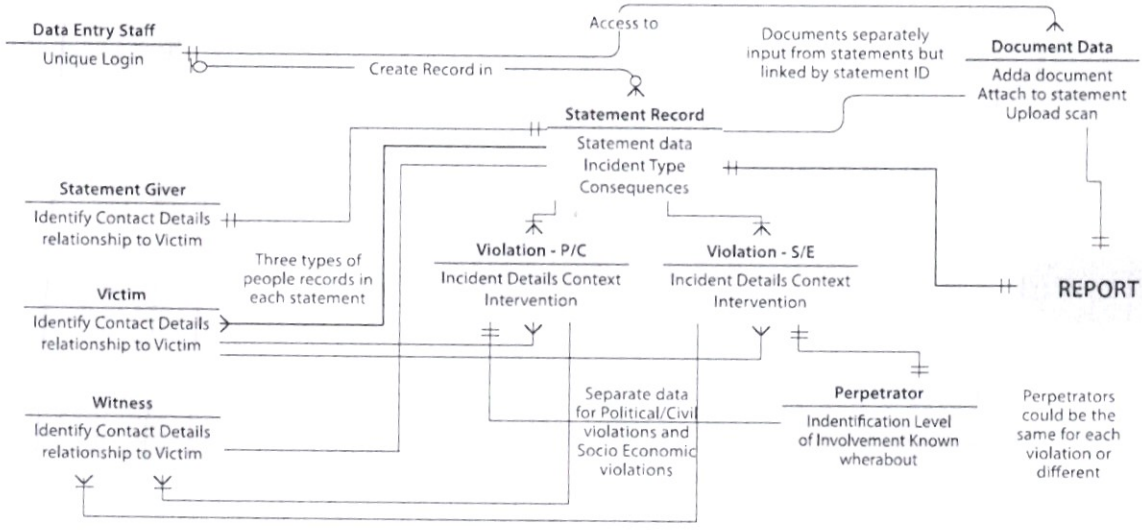
41 The security classification of records determined how records were stored, the confidential and strictly confidential records were secured in disaster proof safes in the office and in a vault at a local commercial bank respectively These security measures also applied to electronic records which were 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)

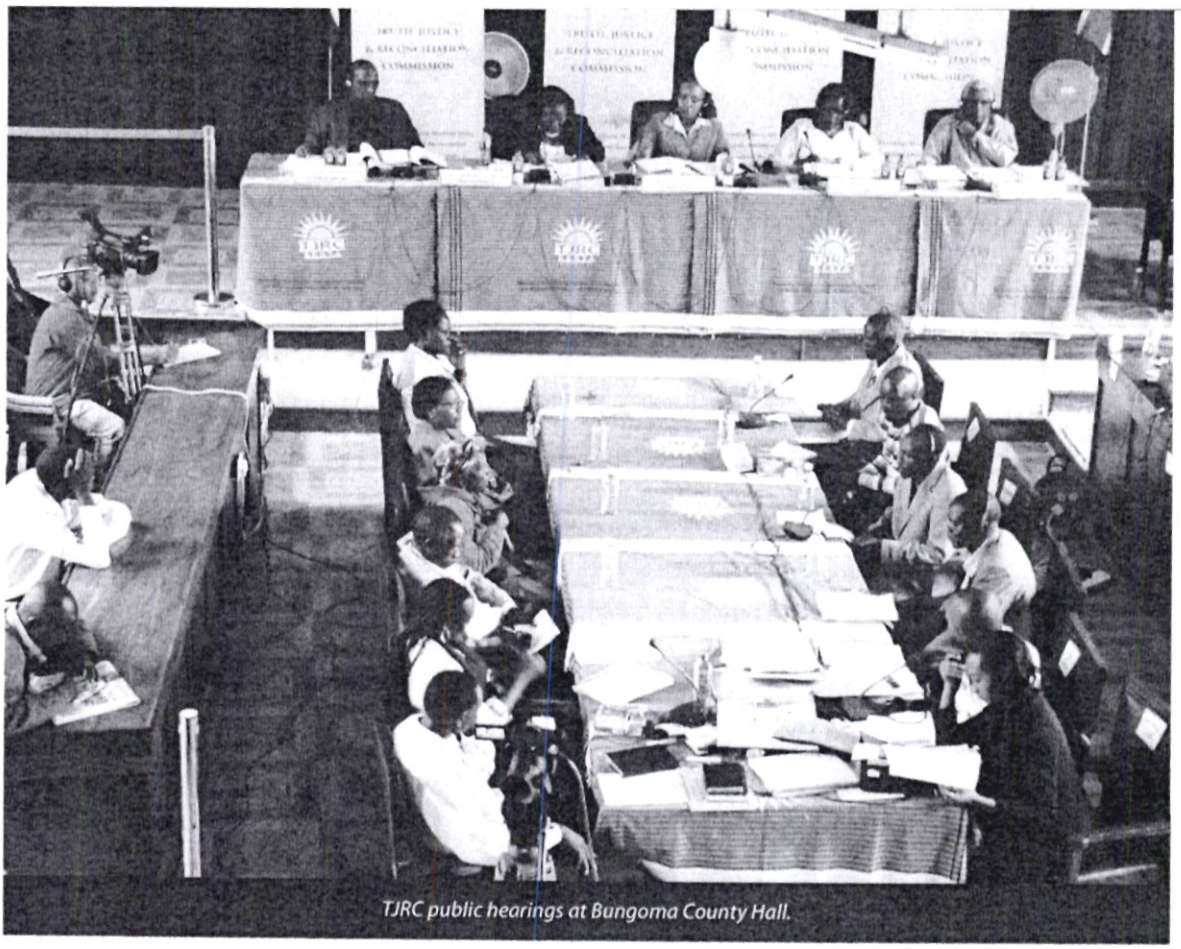
76 Often, public hearings began with the testimonies of community leaders who did not necessarily testify about specific violations but rather about the general issues affecting their particular community, area or region and the broader context of violations within that particular area or region

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

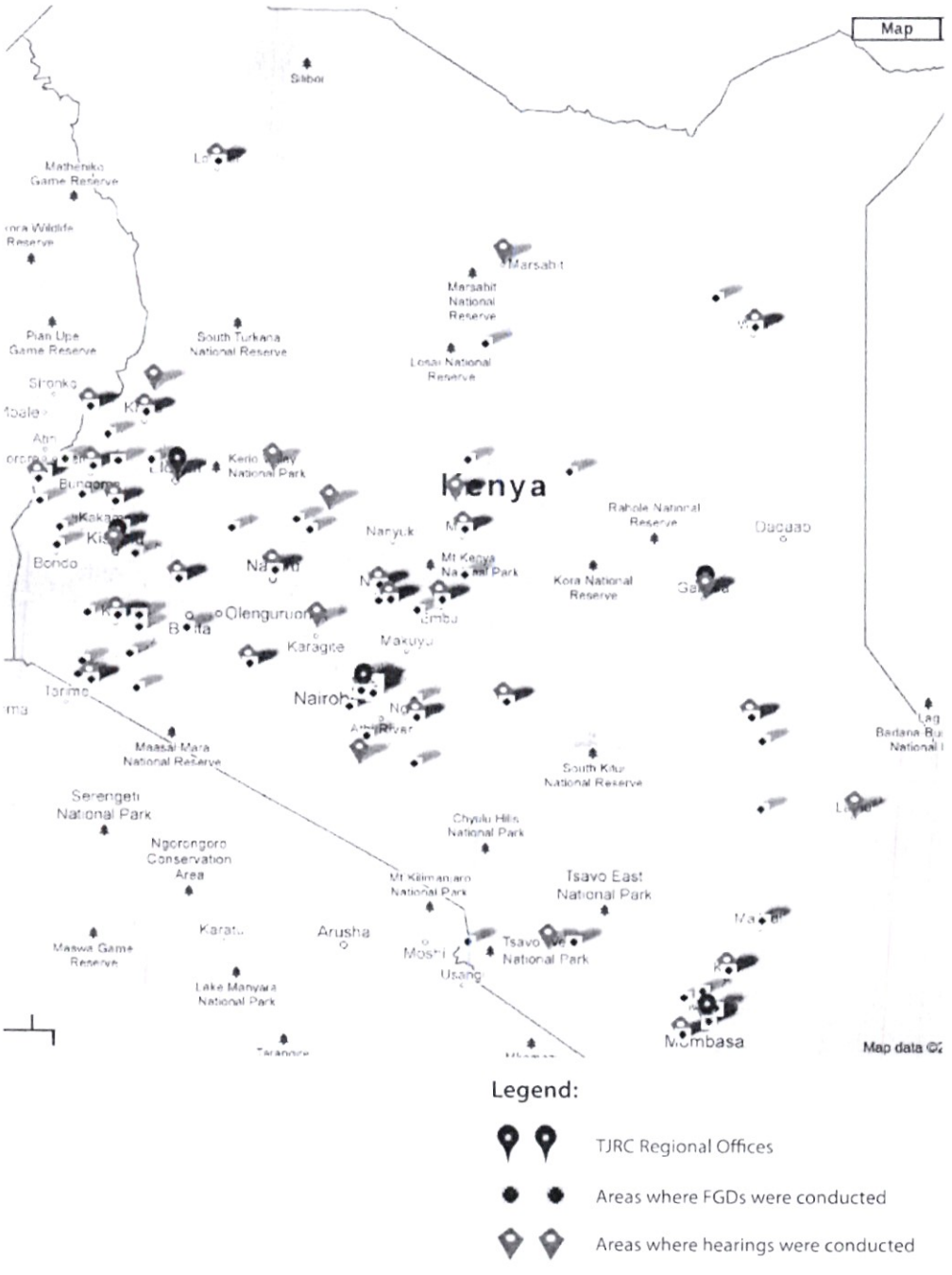
111 Since it could not afford to pay for live coverage of its hearings, the Commission opted to carry weekly roundups of its hearings in a documentary format Even so, finding a suitable television channel to carry the weekly round-up was not easy Citizen TV could not slot the Commission's round-up at 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	Ol 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: asses 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.

CHAPTER

FOUR

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 TJR 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 Could 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' 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 NG0s 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 eminent 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 Murithi	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 Godrey 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 Nyambo	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
Irene Mwangi	Communications	Communications Intern
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
Rebecca Cook	Research	Intern
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
Ignatius Walubuka Wanyonyi	Documentation and ICT	Data Clerk
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 Mweyena 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 Otina 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
2 Amriptal Kalsi
3 Center for Minority Rights Development (CEMIRIDE)
4 Chacha Berata
5 Connie Mumma
6 Emmanuel Sayiorn
7 Evelyne Asaala
8 George Mukundi
9 Godfrey Musila
10 Grace Katasi
11 Horace Awuori
12 Jane Dwasi
13 Jane Kiragu
14 Jarso Forole
15 John Ambani
16 Joseph Kioi
17 Korir Sing'Oei
18 Lenny Otieno
19 Lilian Bogonko
20. Mercy Kaburu
21 Morris Mbondenyi
22 Onesmus Masinde
23 Patrick Musembi
24 Peter Mageto
25 Rasna Warah
26 Rose Lukalo
27 Rosemary Orlale
28 Sarah Kinyanjui
29 Syagga & Associates Ltd
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 Mulimani 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, Mfawatu 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 Mutfu OC S 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 Mwenyenguwa 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 filth and congested camps and were denied treatment because we don't have money*)

Reason for violation? (*eg Mpenda Utu 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? LTC 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

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 Airstrip expansion Burnt Forest violence (1993) Mt Elgon violence (police operation, SLDF attack etc), floods Kikambala evictions (199?), elections (1992) natural disaster)

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,*

How do you know he was/who they were? (*for example I saw them, my neighbour told me, there was a court casein which he was named)*

Do you think they were state agents officials or private citizens? **State Agents / Private Citizens** [*circle*]

Can you specify who did what? Who was in charge? Who gave orders, if any? Who was with him her/them? *(for example Mr Mwenyenguu led the eviction exercise a band of youths burnt our houses and destroyed our crops Mrs Mlakitu Chief of Kata Ndogo was present)*

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)

Please describe how violation occurred (*eg were forcibly evicted removed by armed youth, Mr Mkonomefu 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

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, YX 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)

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,*

How do you know he was/who they were? *(for example I saw them, my neighbour told me, there was a court casein which he was named)*

Do you think they were state agents officials or private citizens? **State Agents / Private Citizens** [*circle*]

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 Mlakitu, Chief or Kata Ndogo was present)*

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?.....

.....

.....

.....

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)*

.....

.....

.....

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?

.....

.....

.....

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)*

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*)

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?)*

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)*

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)*

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)*

6 9 3 Accommodation *(for example since my son died, we are living in this shack, we are still squatters, some have been resettled)*

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)

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)*

7.2.1 or 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.)*

7.3 For the Nation *(for example, monuments recovery of stolen funds, prosecution, apology, legal and institutional reforms, national day of remembrance, etc.)*

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? *(for example police, NGO, church, elders)*	**WHEN?** *(for example 1993)*	**CONTACT details / person** *(for example, the Chief DO, Mrs Hakitel*	**Action taken** *(for example court case filed)*

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?)*

What was the result?

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*)

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:

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

	S/No

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 Status

a 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? _____

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?_____

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

hat do you think should/could the Commission do for you in respect to the violation?

b) I

s 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 transparency

(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

I 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 Gazzette

In short, the Applicants were questioning the recommendation by the Selection Panel and nomination of Amb Bethwel 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 grand the order of Certiorari by holding that "there was nothing wrong with the publication of the notice of appointment after administrating 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 Bethwel 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, insofaras 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 14thMarch 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 Warsame 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 Warsame
- 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

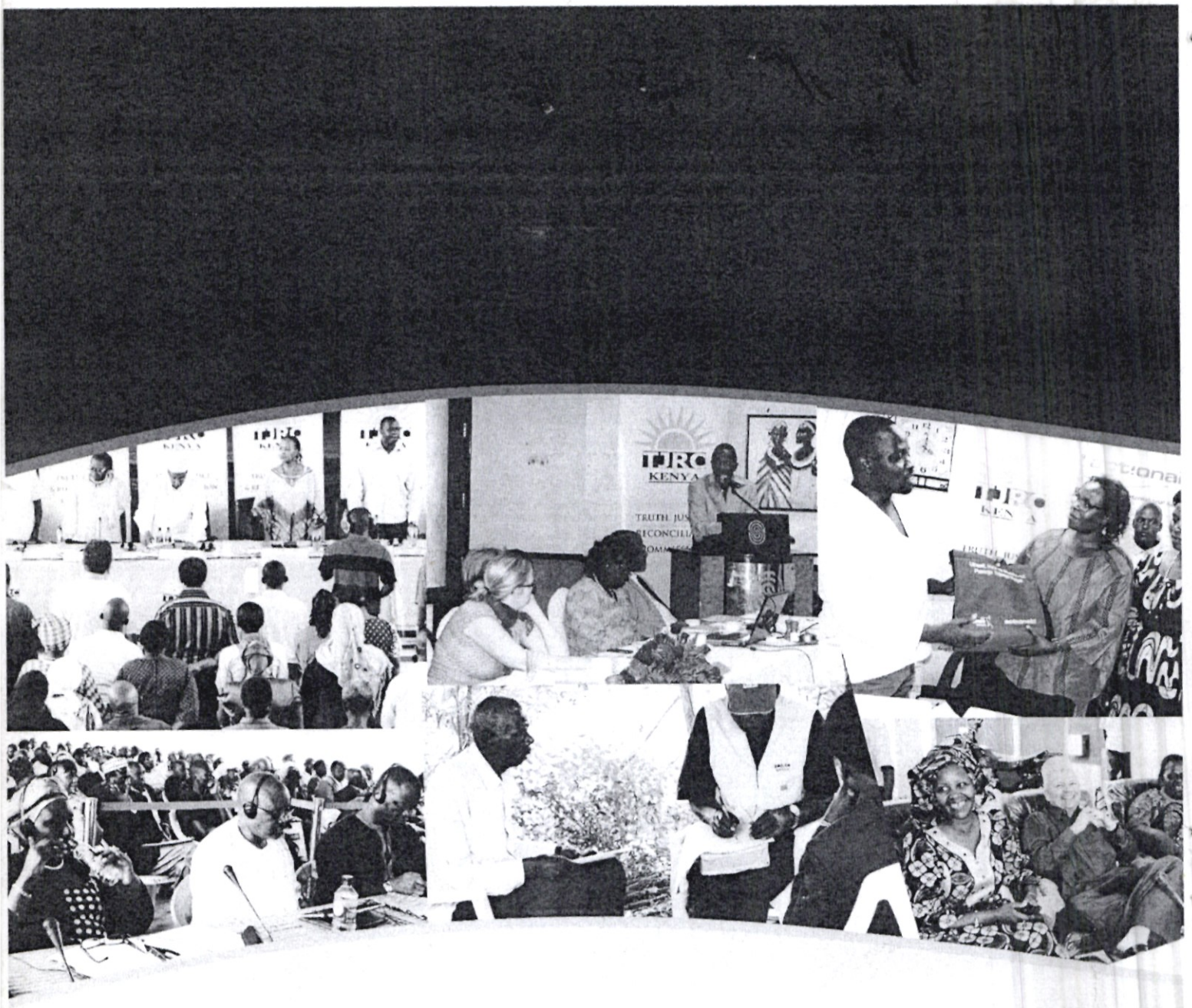
- The Commissioners expressed disappointment that the conflicts of interest raised by Ambassador Kiplagat had yet to be addressed, and asked Ambassador Kiplagat to honor the pledge he made to the Commission and the people of Kenya in November 2010 – viz , that he would graciously stand aside while his 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



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