



**TRUTH, JUSTICE AND RECONCILIATION COMMISSION**

## **PROGRESS REPORT**

**Submitted to the Parliamentary Committee on Justice and  
Legal Affairs**

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## 1 INTRODUCTION

1. The Truth, Justice and Reconciliation Commission is a statutory body established under section 3(1) of the Truth, Justice and Reconciliation Act No. 6 of 2008 with the objective of promoting peace, justice, national unity, healing, reconciliation and dignity among the people of Kenya. It is mandated to inquire into and investigate historical injustices and gross human rights violations, including violations of socio-economic rights that occurred in Kenya between 12 December 1963 and 28 February 2008.
2. The Commission was inaugurated on 3 August 2009 with the swearing in of its nine members, who had been selected through a competitive and consultative process. It had been envisaged that the Commission would operate for a period of two (2) years which would be preceded by a preparatory period of three months during which it would undertake all tasks necessary to ensure that it is able to work effectively when it commences its operations. However, owing to numerous challenges that are discussed in detail in this Progress Report, the Commission was unable to commence its operations as scheduled. Indeed, the Commission began to function substantively and effectively in November 2010, *one year and four months after its inauguration*. The failure to commence operations on time has had adverse effects on the Commission's work plan, prompting the Commission, on two occasions, to request for the extension of its tenure.
3. The Commission first sought an extension of its tenure in June 2011. At the time, the Commission had just commenced its hearings. In particular, it had conducted hearings in North Eastern province and partially in Western Province. With six (6) provinces to go, coupled with a series of other mandate operations that had not been executed, the Commission reached the considered opinion that it would not finalize its work within the two years statutory period. Thus, pursuant to section 20(3) of the TJR Act, the Commission requested the National Assembly to extend its tenure for a period a six months *as was permitted 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.
4. Despite the fact that the Commission had been granted an extension, the outstanding workload was still enormous and demanding. In order to establish an accurate, complete and historical record of gross violations of human rights committed during the 45 year period, the Commission had to traverse across the length and breadth of the country conducting hearings with a view to recording the personal truths of victims and witnesses. Although it adhered to a compact timetable the Commission only concluded hearings in March 2012 having conducted at least 220 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 finalize and submit its Report. This proved to be an impossibly difficult task. The one month period was only sufficient to process transcripts of hearings that the Commission had conducted in January and February 2012.

5. 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, in effect giving the Commission an additional three months to finalize its 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. 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.
6. In essence, the Commission operated in a legal limbo for three months as it awaited 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 (e.g. notifying adversely mentioned persons of their right to respond to allegations leveled 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 if it is borne in mind that the Commission had a lean staff component to begin with.
7. As a result this situation, the Commission is once again requesting for an extension of its tenure to enable it complete four important and related tasks:
  - Complete its report;
  - Afford adversely mentioned persons the opportunity to reply to allegations;
  - Afford individuals with the opportunity to apply for amnesty; and
  - Process applications for reparation and prepare a reparation policy.
8. This progress report presents a detailed account of the operations of the Commission since its inauguration. It also explains why the Commission sought for extensions as it did, and more importantly, why it is seeking a third extension. The report is composed of the following broad sub-sections: an overview of accomplishments, challenges and a detailed account of the Commission's operational activities since its inception.

## **2 OVERVIEW OF ACCOMPLISHMENTS**

9. The Commission has structured its operational work into four key deliverables: statement taking, hearings, reconciliation initiatives and the writing of the Final Report. Since the Commission started to substantively operate in November 2011, it has successfully completed the following operational activities:
  - (a) statement taking exercise, which resulted in the collection of a total of 42,098 statements from across the country. This is the largest number of statements ever collected by a truth commission;
  - (b) a special statement taking exercise for children;

- (c) collection of memoranda from communities and associations. The Commission collected a total of 1529 memoranda from across the country;
- (d) establishment of an electronic database for the storage and retrieval of the vast volume of information it has received. The database will ensure that the information collected through statements and memoranda and other avenues are preserved for posterity and future reference;
- (e) individual hearings in all the regions of the country. The Commission held more than 220 hearing sessions in all regions of the country;
- (f) women's hearings which were held alongside the individual hearings;
- (g) thematic hearings which focused on selected themes falling under the Commission's mandate. The Commission held thematic hearings on the following topical issues:
  - (h) a nation-wide focused group discussions, which were designed to gather information on perceptions of economic marginalization. The Commission held a total of 81 focused group discussion in which 1192 individuals participated; and
  - (i) a total of 10 nation-wide reconciliation meetings in which the Commission fostered intra and inter community dialogue on national healing and reconciliation

### **3 OVERVIEW OF CHALLENGES**

10. The Commission has achieved the above milestones in perhaps the most difficult of situation that a truth commission has ever had to face. Two of these challenges stand out: the loss of time occasioned by the controversy surrounding Ambassador Bethuel Kiplagat's suitability to serve as the Commission's chairperson and financial constraints that the Commission experienced during its first fiscal year. These two challenges are discussed in detail below.

#### **3.1 Loss of time and controversy over Chairperson's suitability**

11. The Commission's constitutive Act provides for a three month establishment period, after which, the Commission is supposed to commence its substantive operations. While this timeline was ambitious in the best of circumstances, the Commission faced additional hurdles soon after its inception when concerns were raised over the suitability of Ambassador Bethuel Kiplagat to serve as the Commission's chairperson. Calls were made for the Chairperson to resign from the Commission and/or for the Commission to be disbanded altogether. These calls were coupled with negative publicity and misconceptions about the mandate and operations of the Commission. At this point in time, however, the Commission did not have the financial resources to counter the misconceptions, nor could it count on civil society or the media to correct prevailing misperceptions.

12. The controversy surrounding the suitability of the Commission's Chairperson adversely affected and paralyzed the operations of the Commission for more than a year following its establishment. It diverted and distracted the attention and energy of the Commission from executing its core mandate.

13. In effect, the Commission began to operate substantively in November 2010 after the Chairperson stepped aside to allow for a tribunal established by the Chief Justice to determine his suitability to serve as the Commission's chairperson. The High Court later made a ruling that reinstated Ambassador Kiplagat as the Commission's chairperson.

### **3.2 Financial constraints in the first fiscal year**

14. Perhaps the single greatest challenge that the Commission faced during its first fiscal year was the lack of sufficient finances and resources to run its operations. The preliminary cost of fulfilling the Commission's mandate effectively and efficiently was estimated to be approximately \$27 million for the two-year operational period. This amount was less than the cost of the Peruvian truth commission and approximately half the cost of the South African commission.
15. The Commission was inaugurated in August, two months after the government's budget had been determined. As a result, the cost of running the Commission had not been factored in government's budget. The upshot was that the Commission operated on a meager budget, suffering as it did, recurrent delays and limitations in executing its operations.
16. Initially, donors generally refused the Commission's appeal for funding. Potential donors conditioned their support for the Commission 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. The donor community was also reluctant to support the Commission in view of the controversy that surrounded the suitability of the Chairperson.
17. During the Commission's first fiscal year, its finances were controlled and administered by MOJNCCA. The Commission could not control its finances as a matter of law until the hiring of the Secretary who is also the accounting authority. The Secretary was not hired until February 2010.
18. For 2010-2011 fiscal year, the Commission submitted to the Treasury a budget of Ksh 1.2bn but it was only allocated Ksh 190 million, or just under sixteen percent (16%) of its requested budget. As with most such allocations, the Ksh 190 million was transferred to the Commission in three quarterly installments, 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 to August 2011 and froze all but the most essential mandate-related operations.
19. By the end of October 2010, the Commission had no finances at all to sustain its operations and had to seek monthly advances amounting to 44.2m from the Treasury for the months of November and December to pay staff salaries and continue statement taking. Similarly, in order to run its mandate operations, the Commission sought and received an advance of Ksh 80m from MOJNCCA. Although these advances kept the



Commission going, they were temporary solutions to a chronic financial problem. The uncertain and ad hoc nature of these advances also meant that the Commission could not properly plan its activities, resulting in, among other things, inadequate civic education and other preparation for the Commission's statement taking and public hearings.

20. In December 2010 the Commission submitted a request to the Treasury for supplementary funding. Without the supplemental funding the Commission was unable to launch its public hearings in February 2011 as was initially planned. In April 2011, the Commission received Ksh 460m in response to its request. The Commission was thus able to launch and conduct hearings beginning of April 2011 in North Eastern, Upper Eastern and Mt. Elgon.
21. Thus, for the fiscal year 2010-2011, the Commission was eventually allocated a total of Ksh 650m against a proposed budget of Ksh 1.2bn. Both the lack of adequate funds in its first fiscal year, and the late allocation in its second fiscal year, placed enormous strains on the Commission's operations. In particular:
  - (a) The Commission's was unable to start its operations after the statutorily stipulated three month establishment. 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 organizational work with the assistance of a 17 member support staff deployed to the Commission by MOJNCCA.
  - (b) Although the Commission finally hired its Secretary in February 2010, it was unable to undertake any substantial hiring until the 2010-2011 fiscal year, which is when the Government indicated sufficient funds would be made available to the Commission. The operational Units of the Commission thus became functional only in September 2010 after directors and staff of the various Units were hired.
  - (c) The Commission did not have adequate and appropriate office space until January 2011. The Commission had to delay hiring of needed staff near the end of 2011 as there was no place for them to work. As a result some who had applied for jobs with the Commission withdrew after receiving other employment.
  - (d) The Commission had recurrent delays in paying bills and salaries.
  - (e) The Commission had to cut short its provincial outreach and familiarization meetings after conducting such meetings in only two provinces.
  - (f) The Commission was unable to have intensive training sessions for statement takers, especially in relation to trauma management and identification. Following the statement taking process, many statements takers were subject to trauma but the Commission could only organize two debriefing sessions for them; during the review meetings and at the end of the official statement taking period. Moreover, during the statement taking process, many victims and witnesses were identified as been in need of counseling, but with limited financial and resource capacity, the Commission was limited in counseling it could provide.
  - (g) The Commission's launch of public hearings was delayed, first for one year, then for additional two months. In accordance with its Work Plan, the Commission had

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intended to hold hearings beginning in April 2010. This Work Plan was revised to provide for a hearing period of 7 months beginning from February 2011 to August 2011. Due to lack of funds, the launch of the hearings was delayed until April 2011 when the Commission received an advance of Ksh 80m from MOJNCCA.

- (h) The delay in commencing hearings and other operations in turn had adverse 'ripple effects' on the general Work Plan of the Commission, a factor that has contributed to the Commission's previous and current request for extension.

#### **4 DETAILED ACCOUNT OF OPERATIONAL ACTIVITIES**

- 22. This section of the Report presents an account of the activities that the Commission has undertaken since its inception. The account is organized in three phases: activities conducted during the preparatory period; activities conducted during the initial operational period (August 2009 to November 2011); activities during the first extension (November 2011 to May 2012); and activities during the second extension (May to August 2012).

##### **4.1 Activities during the preparatory period (August to November 2009)**

- 23. The TJR Act accorded the Commission a three month preparatory period during which it was meant to undertake all tasks necessary to ensure that it is able to work effectively when it commences its operations. These tasks included: establishing the Commission's secretariat; developing internal policy and procedural documents to guide the work of the Commission; conceptualizing and interpreting the Commission's mandate; and informing the public about the Commission's existence and the purpose of its work.
- 24. Due to the controversy that surrounded the Chairperson's suitability coupled with financial constraints, only two of these activities were carried out. Firstly, the Commission designed an organizational structure for its Secretariat. This was done with the assistance of, initially, an independent consultant, and later, a five member team comprising of officers from the Ministry of Justice, National Cohesion and Constitutional Affairs (MOJNCCA) and Ministry of State for Public Service.
- 25. Secondly, the Commission prepared internal policy and procedural documents including the following: staff manual; Commissioner's Code of Conduct; staff oath of confidentiality and code of conduct; gender policy; and Security Policy.

##### **4.2 Activities during initial operational period (November 2009 to November 2011)**

- 26. For reasons outlined above, two of the activities that were meant to be carried out during the preparatory period were pushed to the operational period. These were: the setting up of the secretariat and the conceptualization of the Commission's mandate.

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#### **4.2.1 Setting up the secretariat**

27. The Commission's Secretary was hired in February 2010 but it was until August of the same year that seven of the eight operational departments of the secretariat were established. The Commission could not establish these departments earlier than this because it lacked funds to do so. Moreover, the Commission did not have office space and it had to stall its recruitment process until it acquired sufficient and conducive office space. The seven departments that were established in August 2010 were:

- Civic Education and Outreach;
- Research;
- Investigations;
- Legal Affairs;
- Special Support Services;
- Communications; and
- Finance and Administration;

28. The eighth department, Documentation and Information Management, was established much later in April 2011.

29. Soon after the Commission established its operational departments it commenced its substantive activities. The first process to be undertaken was statement taking, followed by civic education, investigations, and hearings.

#### **4.2.2 Statement taking**

30. Statement taking has been one of the primary sources of information for truth commissions worldwide. It is the major vehicle 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 42,098 statements. This is almost twice as many as the number of statements ever collected by a truth commission. This large level of participation provided confirmation of the findings of the Makau Mutua Task Force of the overwhelming desire for a truth-seeking process in Kenya.

31. The statement taking process sought statements from victims and witnesses of various forms of violations. It provided victims of gross violations of human rights, their families and witnesses of these violations the opportunity to share their stories. The process gave voice to a multitude of stories and perspectives about violations that have occurred in Kenya's history.

32. The Commission understood that the process of sharing an experience of violation can be traumatic for victims and their relatives. It can also expose them to danger. The Commission also

recognised that a truth seeking process must be inclusive and participatory. The Commission, therefore, put into place a number of policies and processes to ensure 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 permitted 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 would not normally access a statement taker. The Commission deployed 16 Statement Takers to prisons across the country to take statements from prisoners.

#### **4.2.2.1 Statement Form**

33. The Commission designed a *Statement Form* that was used to capture information from those with knowledge of gross human rights violations. The *Statement Form* was designed to ensure that as much information as possible about gross human rights violations was gathered. Although the Form was designed to capture information about violation of human rights from both victims and perpetrators, no perpetrator volunteered information through this avenue. Individuals who were adversely mentioned in statement forms or during the hearings were requested by the commission to file a statement.

34. The *Statement Form* was reviewed by a team from HURIDOCS an internationally recognised organisation in human rights data gathering and analysis. The review found that the *Statement Form* 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".

#### **4.2.2.2 Pilot statement taking exercise**

35. The Commission undertook a pilot statement taking exercise in Mt. Elgon in May and June 2010. The pilot project was conducted for two reasons. Firstly, the Commission wanted to use the pilot to get feedback from victims and other witnesses about the statement taking methodology, including the *Statement Form*. Secondly, the pilot

exercise allowed the Commission to begin its main operational activities immediately, despite the fact that resources to hire staff were yet to be received; inadequate resources through the first year following its establishment meant the Commission did not have the financial or human resources to begin a national statement-taking exercise until July 2010. Rather than wait until adequate resources were available, the Commission took the opportunity of the pilot 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.

36. The Commission found the pilot 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;
- it allowed 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 – including resource constraints and the unresolved credibility issues around the Chairperson – that up until that point had primarily limited the Commission’s activities to Nairobi

#### **4.2.2.3 Statement takers**

37. The Commission recruited 304 Statement Takers. Of these 113 were male and 191 female. On diverse dates between 23 August 2010 and 9 September 2010 Statement Takers underwent training 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 independent consultants.

#### **4.2.2.4 Statement taking period**

38. The Commission officially launched the nation-wide statement taking exercise on 9 September 2010. The exercise lasted five months. There was appreciation that some individuals would be unwilling or unable to record statements during the formal statement taking exercise. In response to this the Commission, continued to record and receive statements and memoranda at its offices and during individual and thematic

hearings.

39. As the Commission travelled around the country conducting civic education and individual hearings, its visibility increased significantly and resulted in many more people coming forward to record statements. Indeed, during its pre-hearing civic education drives, the Commission re-engaged a limited number of Statement Takers who would record statements for a period of two weeks in each specific area.
40. 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 Coast while Kituo cha Sheria focused 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 to record statements. They would then forward the statements to the Commission.
41. 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 underscores 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.

#### **4.2.2.5 Review of statement taking process**

42. In November 2010, the Commission organised a review of the statement taking process in consultative meetings with CSOs based in all eight provinces. Through these meetings, the Commission established working arrangements with local organisations some of whom 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. Debriefing included psychosocial support for Statement Takers. This support was designed to help Statement Takers cope with the stress of having to hear traumatic accounts from victims.

#### **4.2.2.6 Statements by children**

43. 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 Kenyan law and international practice, the Commission defined a child as any individual under the age of 18 years.
44. 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.



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45. Taking statements from children requires special skills and considerations. A distinct training programme was designed for statement takers who would engage 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 necessity of obtaining 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 - underwent the training program
46. A special *Children's Statement Form* for gathering information from children was also prepared with consultations with child protection agencies. A draft of the Children's Statement Form was pre-tested in October 2011 to assess its suitability for and efficiency in taking statements from children. The draft was subsequently revised to incorporate insights from the pre-testing exercise.
47. The 40 statement takers were then trained 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.
48. 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 report.

### **4.2.3 Memoranda**

49. Although statements recorded by individual victims or witnesses provided the bulk of raw information for the Commission, 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. The submission of memoranda presented a means of providing information beyond the limits of the *Statement Form*. With the option of memoranda, it was possible for groups and individuals to include longer narrations of the history, context and causes of violations.
50. 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 concerning the expectations and recommendations of the affected groups or individuals.
51. The Commission continued receiving memoranda beyond the statement taking exercise and throughout the hearings phase.
52. In total, the Commission received 1529 memoranda from individuals, groups, associations and communities.

#### 4.2.4 Civic education and outreach

53. Pursuant to its statutory mandate, the Civic Education and Outreach Department conducted a number of activities including training of stakeholders, hosting workshops and meetings, and participation in *barazas* and ASK shows. The strategy was to reach as many people as possible within critical sectors of society.
54. The Department's major activity, however, involved conducting pre-hearing civic education drives around the country. These drives served a three-fold objective: to inform the public about the Commission's work and processes; manage public expectations and create a receptive environment for the hearings that followed soon after. The drives were conducted using an interactive and participatory approach that allowed participants to ask for clarifications and engage in discussions. The majority of the drives were held in town halls. In some places the meetings were conducted in the format of open-air gatherings or *barazas*. In addition to the general public, the drives were attended by 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.
55. In conformity with statutory requirements, and to ensure inclusiveness in its civic education and outreach activities, the Commission organised special workshops and meetings that created space and consideration of the experiences of specific vulnerable groups. Such forums were organised for women, youth, children, persons with disabilities, IDPs, slum dwellers, squatters, evictees and survivors of particular episodes of human rights violations.
56. As part of its civic education and outreach strategy of 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 *kangas*.

#### 4.2.5 Investigations

57. The investigative functions of the Commission are 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 recruited.

58. The primary role of the Investigation Department was to identify and interview witnesses whose individual stories would contribute to the historical narrative of gross human rights violations 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.
59. Investigations were conducted in three main phases: in advance of, during and after the hearings.

#### **4.2.5.1 Pre-hearing investigations**

60. Pre-hearing investigations were conducted ahead of the hearings in each of the eight provinces of the country. A senior investigator was appointed as the Investigations Manager for each region and 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 consisted of 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 significant cases to be investigated in a specific region as well as a timetable for conducting the investigations.
61. An investigation team was then deployed to the regions to conduct inquiries and investigations. With the help of the Regional Office, they located witnesses and obtained detailed statements from them, which were then verified and corroborated by other evidence. Visible evidence of injuries sustained by witnesses were 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.
62. 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 of the regional pre-hearing investigation.

#### **4.2.5.2 Investigations during hearings**

63. At least one investigator was assigned to each hearing. The role of such an investigator was to assess, with the help of the Regional Coordinator, new witnesses and take further detailed statements when appropriate. In addition, the investigator conducted immediate investigative follow-up of issues emanating from the hearings.

### **4.2.5.3 Post-hearing investigations**

64. Although each regional hearing was conducted and concluded in a short span of time ranging from two to six weeks, Regional Coordinators continued to conduct field inquiries and were approached by witnesses wishing to provide information. As a result, further issues for investigation were identified 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.
65. 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.

### **4.2.6 Hearings**

66. In accordance with section 5(a) and (b) of the TJR Act, the Commission sought 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. This was to be done by primarily through the holding of hearings among other strategies.
67. 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.

#### **4.2.6.1 Individual hearings**

68. Individual hearings focused on the experience of individuals in relation to gross human rights violations. Testimony was heard from individuals whose rights had been violated, as well as from those who either had knowledge of, or participated in acts that resulted in violations. The individual hearings were designed to achieve three goals, namely:
  - (a) To provide victims, adversely mentioned persons and the general public with a platform for non-retributive truth telling;
  - (b) To provide victims with a forum to be heard and restore their dignity; and
  - (c) To provide repentant adversely mentioned persons with a forum to confess their actions as a way of bringing reconciliation.
69. To a large extent the first two objectives, specifically as they related to victims, were achieved. 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.

70. 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.

#### **4.2.6.2 Selection of window cases**

71. 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. Therefore, only a small percentage of those who wished to testify were given the opportunity.
72. To ensure that a representative sample of cases was selected in each region, the selection process considered the following factors:
  - a) regional trends and patterns of gross violation of human rights;
  - b) issues and injustices specific to the region;
  - c) issues and injustices specific to vulnerable and minority groups resident in the region;
  - d) significant events that occurred in the region during the mandate period, such as security operations
73. Three departments – Legal, Investigations and Research departments – were involved in the selection of cases. 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.
74. For each region, the Research Department prepared a general background report describing the regional trends and patterns of human rights violations. Using the regional background report, the Investigations Department searched through statements and memoranda for potential window cases. The Investigations Department then proceeded to the field with the objective of interviewing potential witnesses. From these interviews, the number of potential witnesses was narrowed down and the findings submitted to the Legal Department. The Legal Department assessed the cases further and prepared a final list of window cases.

#### **4.2.6.3 Preparation of witnesses**

75. The Special Support Services Department was responsible for preparing witnesses for

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hearings. Preparation involved counseling witnesses and managing their expectations. Counseling services were provided in partnership with a number of organisations including Kenya Red Cross Society, Kenyatta National Hospital and the Gender Violence Recovery Centre. The Commission worked with the Kenya Counseling Association and the Kenya Institute of Professional Counselors to identify locally based counselors who would continue to offer counseling services to witnesses and victims long after the Commission had concluded its hearings in a specific area or region.

76. 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 covered, 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 to the hearings with someone to look after their infants at the expense of the Commission.
77. At least a day before the hearing, witnesses were shown the hearing venue to give them a chance to familiarize themselves with the hearing setting and ask any questions they had about the process. On the day of the hearing, the Commission explained the hearing procedures and the role of the various actors during the hearing to witnesses.
78. The conduct of the hearings was governed by the Hearing Procedure Rules which were published in the *Kenya Gazette* on 8 April 2011. The hearing rules were produced after extensive consultations with law-oriented stakeholders, including the Law Society of Kenya, the International Federation of Women Lawyers (FIDA-Kenya) and the International Commission of Jurists (ICJ-Kenya).
79. 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 of the other two. As a general policy, the Commission endeavored to make sure that at least one international commissioner was present at all formal procedures of the Commission.
80. The Commission selected venues for the hearings taking into account the following considerations:
  - (a) capacity of the venue to accommodate large audiences;
  - (b) accessibility of the venue to witnesses and the general public including by persons with disabilities;
  - (c) neutrality of the venue, especially in regions or areas where two or more groups or communities with a history of conflict or tension reside;
  - (d) availability of sanitary services and other social amenities; and
  - (e) security.



81. In each region, the Commission held hearings in several locations, in order to facilitate public access and participation and to ensure that a diversity of voices were heard.

82. 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.

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

#### 4.2.6.4 Women's hearings

83. 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 general public hearings would have resulted in many women refusing to testify. Moreover, the decision to conduct women specific hearings was particularly reinforced when a preliminary review at the conclusion of the statement taking process revealed 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.

84. The hearings were framed as 'conversations with women'. They were designed to be safe spaces where women could freely talk about violations that were specific to them. As expected, the hearings did in fact provide such safe spaces. The majority of women who attended the hearings felt comfortable sharing some of 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 also provided the Commission with insights on women's views as to how they wanted their suffering and pain to be redressed.

85. 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 by more of the more general public. This was unfortunate as many men are ignorant of the experiences of women, including the impact of historical injustices on women.
86. On 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 of what was learned from those hearings will increase the awareness of men about the impact of injustices on women, and thus counter the impacts of exclusion of men from these hearings.
87. Women's Hearings were presided over by female Commissioners and staff. 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 encourage their participation. Women were encouraged to attend and participate in the hearings through announcements in local markets, local radio stations and through leaders of community based organisations.
88. Counselors prepared women to give their testimony using participation in group sessions prior to the start of hearings. The preparation included informing them of what to expect during the hearing and reassuring them 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 often joined in the singing and dancing, a gesture that created an atmosphere conducive for the candid and open conversations that ensued thereafter.
89. The hearings were conducted in all regions of the country. In total, over 1000 women attended the hearings across the country, with an average of 60 women in each hearing. The majority of the women expressed gratitude 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.

#### **4.2.6.5 Referral mechanisms**

90. In cases where women raised issues which could be redressed immediately by a specific government department or ministry or organisation, they were referred to and advised on how to access such bodies. 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.

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91. Women seeking to access credit were informed of 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. In a few instances, the Commission in collaboration with organisations such as the Jaipur Foot Project provided direct support including wheelchairs and white canes for witnesses with disability. Similarly, women who were found to be suffering from prolonged Post Traumatic Stress Syndrome 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.

#### **4.2.6.6 Monitoring and evaluation of hearings**

92. The hearings were evaluated by independent monitors who submitted periodic evaluations to the Commission pointing out both merits and demerits of the exercise. Amongst the organisations that engaged in the monitoring exercise included ICJ-Kenya, KNCHR, and Constitution Reform and Education Consortium (CRECO). Their evaluations were based on their observations of the hearings and interviews of relevant stakeholders including Commissioners and staff of the Commission.

#### **4.2.6.7 Post-hearing feedback sessions in North Eastern**

93. 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. Such hearings were held in Nairobi weeks after the individual hearings had been concluded in the regions. Sadly, therefore, the majority of victims were effectively denied the opportunity to be present at the hearings in which AMPs testified or gave their version of the story.

94. To mitigate the impact of the failure of victims to witness the testimonies of AMPs, the Commission, in partnership with KNCHR and GIZ (German Technical Cooperation), 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.

95. 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.

96. 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.
97. The Commission had intended to organise similar feedback sessions in all regions in the country but this proved impossible due to time and financial constraints.

#### **4.2.6.8 Weekly broadcast of public hearings**

98. To create national awareness and enhance public knowledge of gross human rights violations and historical injustices experienced by victims and communities across the country, the Commission aired a 15 minute weekly summary of individual public hearings on national television stations including Citizen TV, Kenya Broadcasting Corporation (KBC), and Kenya Television Network (KTN).

### **4.3 Activities during the first extended period (November 2011 to May 2012)**

99. Towards the end of its initial statutory period as provided for under the TJR Act, the Commission assessed the progress it had made in executing its mandate and the outstanding workload, *viz à vis* its capacity. At the time the Commission had concluded hearings in North Eastern and Upper Eastern and had just embarked on conducting hearings in Western Province. Therefore, it had yet to conduct not only hearings in six (6) provinces but also thematic hearings. Moreover, the Commission had just also began the process of coding statements and memoranda into an electronic database.
100. The Commission, therefore, came to the considered conclusion that it would be unable to finalise its work within the two years statutory limit. On 24 June 2011, the Commission forwarded a request to the National Assembly; invoking section 20(1) of the TJR Act, the Commission requested extension of its lifetime beyond the two year statutory limit. The National Assembly considered the request on 18 August 2011 and voted to extend the Commission's operational period by six (6) months.
101. During the extended period, the Commission conducted the following activities in execution of its mandate:
  - individual hearings in the remaining six provinces;
  - thematic hearings;
  - coding of statements and memoranda into an electronic database;
  - focus group discussions on economic marginalization; and
  - reconciliation forums

102. A detailed explanation of what these activities entailed follows below. The process of conducting individual hearings has been discussed above and the same will, therefore, not be repeated here.

#### 4.3.1 Thematic hearings

103. In addition to individual hearings, the Commission conducted thematic hearings that focused on specific violations, events or groups of victims. The Commission held a total of 14 thematic hearings focusing on the following subjects:

- Access to justice;
- Economic marginalisation and minorities;
- Armed militia groups;
- Prisons and detention centers;
- Torture;
- Ethnic tensions and violence;
- The 1982 attempted coup;
- Security agencies, extra-judicial killings and massacres;
- Persons with disabilities (PWDs);
- Women;
- Children;
- Historical land injustices
- Internally Displaced Persons (IDPs); and
- Political assassinations

104. 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.

105. 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 that on children, IDPs and PWDs, individual victims of violations were also invited to testify.

	<b>Thematic hearing</b>	<b>Date(s)</b>
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 centers	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

#### **4.3.2 Media workshop**

106. 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, who testified about their experiences of state control and repression of the media during the mandate period.

#### **4.3.3 Thematic hearing on children**

107. The thematic hearing on children was fundamentally different from all other hearings that the Commission conducted. The hearing on children was based on statements recorded by children. More importantly, the hearing 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.

108. Although the hearing was open to the public, the identities of children who testified were concealed from the public. 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 counseling before and after giving testimony.

109. 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 on children. The hearing was held in Nairobi, and as such, the Commission catered for the transport of both the children and their parents or caregivers, to and from Nairobi.





#### 4.3.4 Televised discussions on thematic hearings

110. In January 2012, the Commission partnered with KTN under an arrangement in which the latter produced and televised a 30 minute series of discussion programmes based on the subjects covered during the Commission's thematic hearings. The programme entitled '*Kenya's Unheard Truth*' was launched on 9 February 2012. It was broadcast at 10 p.m. every Thursday.

#### 4.3.5 Design and operationalization of database

111. 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. 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.
112. The development of the database began with a needs assessment to ensure that the database was designed to meet the specific needs of the Commission. Ideally the design of a database should be undertaken either before or simultaneously with the design of the *Statement Taking Form* and procedures. Given the financial and other constraints that have been mentioned, the Commission was only able to develop the database after the *Children's Statement Form* had been developed and in fact near the end of the national statement taking process. So the needs assessment was based heavily on the existing *Statement Taking Form* and a preliminary analysis of the type and quality of information collected by the Statement Takers.
113. A coding sheet served as a uniform template for feeding data into the database. The coding process was guided by a manual with coding and entry protocols to ensure consistency and reliability of the database.
114. 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. A Database Manager oversaw the coding process and the overall functioning of the database.
115. The coding process took a period of five months from August to December 2011.
116. In December 2011, following the conclusion of the coding process, the Commission embarked on evaluation of the 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 in the database were cross-verified and appropriate action taken where it was found that individuals had recorded multiple statements. The evaluation also sought to ensure 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.

117. Secondly, the database was evaluated by an external independent consultant - a former Director of the Information Systems and Data Analysis Unit at the Peruvian Truth and Reconciliation Commission. The evaluation, which was supported by ICTJ was aimed at assessing the reliability of the database through identification of any factors that could affect analysis of the collected data. At the end of the exercise, the independent consultant prepared a memorandum that provided recommendations on how to address identified challenges. The Commission acted on these recommendations as advised.

#### **4.3.6 Focus group discussions on economic marginalization**

118. The Commission undertook a special data collection exercise on regional perceptions relating to violations of socio-economic rights and economic marginalisation. This special exercise was necessitated after preliminary analysis of statements and memoranda received by the Commission showed that reporting on 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.

119. To supplement the data it had collected through statement taking, 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.

120. In preparation, the Commission drafted a questionnaire to guide discussions. The questionnaire was subjected to both internal and external review and was then pre-tested in Kibera, Nairobi, on 14 December 2011 and revised accordingly to incorporate insights gained from the pre-testing exercise.

121. 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).

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	<b>Province</b>	<b>Areas where FGD were conducted</b>	<b>FGDs</b>	<b>Participants</b>
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, Shandabak, 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
		<b>Totals</b>	<b>81</b>	<b>1192</b>

#### **4.3.7 Reconciliation initiatives**

122. Recognizing the fact that reconciliation is a long term process and in light of the time and resource constraints under which it operated, the Commission embarked on developing a National Reconciliation Agenda that would serve as a blue-print for reconciliation activities after the winding up of the Commission in 2012. Towards developing the Agenda, the Commission adopted a two approaches.

123. Firstly, it organized a Reconciliation Consultative Meeting on 6 February 2012 that brought together stakeholders involved in reconciliation work from across the country. The outcome of this meeting 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.

124. Secondly, the Commission undertook countrywide forums on the theme of reconciliation. On the one hand, the forums served as avenues for the Commission 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. On the other hand, the forums gave communities the

opportunity to suggest specific options and solutions to problems and issues affecting them. They were also 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.

125. 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.

#### **4.4 Activities during the second extended period (May to August 2012)**

126. Despite the fact that the Commission had been granted an extension, the outstanding workload was still enormous and demanding. In order to establish an accurate, complete and historical record of gross violations of human rights committed during the 45 year period, the Commission had to traverse across the length and breadth of the country conducting hearings with a view to recording the personal truths of victims and witnesses. Although it adhered to a compact timetable the Commission only concluded hearings in March 2012 having conducted at least 220 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 finalize and submit its Report. This proved to be an impossibly difficult task. The one month period was only sufficient to process transcripts of hearings that the Commission had conducted in January and February 2012.
127. Faced with this challenge, the Commission requested that the three month statutory winding up period (3 May to 3 August 2012) be reallocated to its operational period, in effect giving the Commission an additional three months to finalize its 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.
128. Although the process of amending the TJR Act, upon which the Commission's request was pegged, was set in motion towards the end of April 2012, it was not until four months later that the Commission's request was considered by Parliament. *Indeed, by 7 August 2012 when Parliament considered and approved the Commission's extension, the relevant period (May to August 2012) had already lapsed.* Therefore, the Commission remained in a legal limbo for a period of three months as it awaited Parliament's consideration of its request for extension. During this period, the Commission continued to write its final report but the process was impeded by the uncertainty that surrounded the Commission's legal status.
129. In addition, the Commission faced two challenges that came with its uncertain legal status. Firstly, the Commission could not discharge some of its mandate operations because in the absence of an amendment to the TJR Act, the period May to August 2012 was statutorily a winding down period. For the same reason, the Commission could not incur expenditures related to mandate activities. Thirdly, the Commission suffered huge

turn-over of staff members during this period, a factor that significantly slowed down its operational momentum.

## **5 THE CASE FOR A THIRD EXTENSION**

130. 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. But more importantly, it came to the realization of the Commission that it had significantly under-estimated the outstanding workload in terms of finalizing the report. In essence, despite concerted efforts, including working round the clock, the Commission remains with a huge workload before it can finalize its report.

131. The various challenges discussed above have contributed, directly and indirectly, to the Commission's inability to finish its report as had been envisaged by the TJR Act.

### **5.1 Ripple effects resulting from delay in commencing operations**

132. As has been discussed above in detail, the Commission lost considerable amount of time during its initial stages. Then, it lost time again when it was seeking an amendment of the TJR Act. In total, the Commission has lost at least 15 months. Therefore, although the Commission has been in existence for around 38 months now, it has lost close to half that period. Measures taken to buy back the lost time have only partially paid off.

### **5.2 Huge volume of information for processing**

133. The Commission has collected an enormous volume of information that will need to be processed and incorporated into the Report for it to reflect an accurate and complete record of gross human rights violations in Kenya. As mentioned earlier, the Commission has collected 42,098 statements and 1529 memoranda. Attached to these statements and memoranda are evidentiary documents that run to tens of thousands of pages. Moreover, the Commission held 220 hearing sessions, transcripts of which cover approximately 11,000 pages.

### **5.3 Broad mandate vis-à-vis short operating period**

134. The Commission has the widest substantive and temporal mandate of any truth commission ever formed. In particular, the Commission is mandated to inquire into issues that are traditionally not covered by truth commissions. Truth commissions have traditionally focused on violations of civil and political rights. The Commission, however, is mandated to inquire into the following 'non-traditional issues':

- (a) economic crimes including grand corruption and the exploitation of natural or public resources;

- (b) irregular and illegal acquisition of public land;
- (c) misuse of public institutions for political objectives;
- (d) the reality or otherwise of perceived economic marginalization of communities;  
and
- (e) causes of ethnic tension.

135. These issues have significantly heightened the complexity and sensitivity of the narrative that the Commission is required to document.

136. The Commission's temporal mandate is similarly wide. It spans from 12 December 1963 to 28 February 2008, a period of approximately 45 years. The TJR Act also allows the Commission to look at historical antecedents in order to understand violations during the mandate period. As a result, the Commission has to extrapolate its temporal mandate to as far back as 1895 when the creation of the Kenyan state began. Very few truth commissions have had to go as far back in their inquiry and search for truth as the TJRC.

137. Experience around the world has shown that, owing to the nature of their work, truth commissions require an average of between three to five years to successfully complete their work. It should come as no surprise, therefore, that the Kenyan truth commission with one of the broadest mandates ever created, would require more than the initial two year period to complete its work.

138. The Truth and Reconciliation Commission of South Africa, for instance, was established in 1995 to operate for a period of two years, which period was extended, initially to 1998 and then later to 2000. Yet the South African Commission had a narrower mandate that focused only on investigations of 'gross violations of human rights defined as killing, abduction, torture or severe ill-treatment and the attempt, conspiracy, incitement, instigation, command or procurement of such acts. Thus, in its Final Report, the South African Commission acknowledged its limited mandate observing that 'the Commission was restricted to examining only a fraction of the totality of human rights violations that emanated from the policy of apartheid ....' The South African Commission had an equally narrower temporal mandate compared to that of the TJRC. It focused on violations that occurred between 1960 to 1994, a period of 34 years, approximately 10 years less than that of TJRC. Yet, in terms of capacity it had a total of 17 commissioners and a staff of 300.

139. The Guatemalan Historical Clarification Commission, with a staff of about 200, took five years to complete its work after it received an extension of its time-frame. The few truth commissions that have completed their work within three years or less had the narrowest mandates both in terms of substance and time. The National Commission for Truth and Reconciliation in Chile completed its operations in one year but it focused only on violations that resulted in death or in disappearance that had occurred over a 17 year period. The Sierra Leonean Truth and Reconciliation Commission completed its work in two years. It was initially scheduled to complete its work within one year but its

time-frame was extended. The mandate of the Sierra Leonean Commission was restricted to investigating ‘violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone’ which lasted for a period of about 9 years, from 1991 to 1999 when the Lome Peace Agreement was signed.

140. Although the examples of truth commissions mentioned above operated in different socio-political settings, they serve to demonstrate that even truth commissions with narrower mandates – yet with larger capacities – had operating time-frames that were longer than that of the TJRC.

#### **5.4 Outstanding workload**

141. As at the time of writing this Report, the Commission remains with a substantive outstanding workload hence the request for a third extension. In particular, the Commission is yet to complete four important tasks: completion of the report; according adversely mentioned persons the opportunity to respond to allegations; providing individuals with the opportunity to apply for amnesty as required by the TJR Act; processing reparation applications

##### **5.4.1 Completion of report**

142. The major task that remains to be done is the completion of the Commission’s report. Drawing from the TJR Act, the Commission has structured its report into four volumes that address the following intricately interwoven thematic issues:

- i. Background to the Commission
- ii. Interpretation of mandate
- iii. Methodology and process
- iv. Challenges
- v. Historical context
- vi. Unlawful killings and enforced disappearances
  - a) Extra-judicial killings
  - b) Political assassinations
  - c) Massacres
- vii. Detention, torture and ill-treatment
- viii. Organized violence
- ix. Economic marginalization and violations of socio-economic rights
- x. Economic crimes and grand corruption
- xi. Women
- xii. Children
- xiii. Minority and indigenous people
- xiv. Ethnic tension and violence
- xv. Reconciliation
- xvi. Findings
- xvii. recommendations



143. Of these chapters, only the first four are at the final stages of completion. The rest are at various writing stages and their final quality is partly dependent on completion of the other three outstanding tasks. Since they still at various writing stages, the Commission has not yet concluded findings and recommendations in respect to these chapters.

#### **5.4.2 Adversely mentioned persons**

144. The TJR Act requires the Commission to provide to both victims and adversely mentioned persons with a platform for non-retributive truth telling. Moreover, as a statutory body, and one in which the concept of justice is one of its key pillars, the Commission is constitutionally bound to accord individuals who have been adversely mentioned in its hearings and statements the opportunity to reply to allegations leveled against them. Although the Commission made efforts to ensure adversely mentioned persons were notified of allegations against them, only a limited number of them were notified due to time constraints. Moreover, many victims who testified before the Commission expressed willingness to reconcile with perpetrators on condition that the Commission facilitated such reconciliation meetings.

145. Thus the Commission proposes to use the requested time to, firstly, notify individuals who have been adversely mentioned of their right to respond, and secondly, to arrange meetings between victims and perpetrators where the former requested for such meetings. This will not only foreclose the possibility of the Commission's report been challenged, but the Commission would, in doing so, satisfy the requirements of the both the TJR Act and the Constitution.

#### **5.4.3 Consideration of amnesty and reparation applications**

146. The TJR Act requires the Commission to invite individuals to apply for amnesty for any act or omission which constitutes a matter that falls under the Commission's mandate. Due to time constraints, the Commission gave priority to victims and witnesses of gross violations of human rights. Thus, the Commission will allocate part of the requested period to advertising for amnesty applications and processing the same in accordance with the criteria laid out under the TJR Act.

147. The Commission is also required to recommend a reparation policy. This will require the Commission to analyse its statements and memoranda with a view to developing a policy that is informed by the views and opinions of victims and witnesses.