

REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION



Volume IIC



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

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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.

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Chairperson

B. A. Kiplagat

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Foreword

This Volume 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. Historically women, children, and members of minority and indigenous groups were not recognized as having the same rights as others. The history of the growing recognition of the rights of women, children, and minorities culminated at the international level only in the last few decades with the adoption of the Convention on Elimination of Racial Discrimination (which prohibits discrimination of minorities whether defined by race, ethnicity, or other characteristics) (1969), the International Covenant on Civil and Political Rights (Article 27 of which protects the rights of minorities) (1977), the Convention on the Elimination of Discrimination Against Women (1981), and the Convention on the Rights of the Child (1990). Reflecting this trend at the international level, the newly promulgated Constitution of Kenya includes specific provisions to protect the rights of women, children, and members of ethnic and other minorities.¹ Finally, international best practice with respect to truth commissions emphasizes the importance of including members of such historically vulnerable groups into such processes.

The drafters of the Truth, Justice and Reconciliation Act clearly had such history in mind, and empowered the Truth, Justice and Reconciliation Commission (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.

In this Volume, the Commission has synthesized some of the materials and experiences it collected with respect to women, gender, and ethnic minorities and indigenous people. In the first chapter, 'Gender and Gross Violation of Human Rights: Focus on Women', the Commission begins by discussing the mechanisms it established for purposes of

¹ See e.g. sec 21(3), ("All State organs and all public officers have the duty to address the needs of vulnerable groups within society including women, children, and members of particular ethnic communities.")

providing a safe and accessible forum for women to share their experiences. Establishing such mechanisms was necessary given that almost all communities in Kenya still have a strong tradition of patriarchy. Firstly, the Commission set a target of equal numbers of male and female statement takers. The Commission was only able to recruit a little over forty percent of its statement takers as women, but it ensured that female statement takers would be available in each community for those women who felt more comfortable sharing their stories with other women. As also recounted in the Chapter, the Commission held special women's hearings at each of the locations where public hearings were held. Based upon the information provided to the Commission by individual women throughout the country, as well as additional research and investigations, this Chapter highlights the different ways that women experienced historical injustices and gross violation of human rights; the special burdens such injustices and violations placed on women, and the resilient, even triumphant, spirit that many women exhibited in the face of such adversity.

The Commission heard stories of women who in the face of enormous adversity retained their dignity and struggled, and often succeeded, in keeping their families, and communities, together. These women and their stories reveal not only some of the most shameful periods in the nation's history, but also the strength, integrity, and resilience of Kenyan women.

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.

While the Commission heard from adults about their own experiences as children, and about the experiences of their own children, the Commission also enacted special measures to elicit the views and experiences of children today. 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. The material in the second Chapter of this Volume, ‘Children and Gross Violation of Human Rights’, 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.

Finally, Chapter Three of this Volume focuses on the experiences of minority groups and indigenous people. While there is an understandable focus on ethnicity in any attempt to understand historical injustices in Kenya, it is also important to understand the violations suffered by members of minority groups and indigenous populations. While there is no question that some Kenyans are discriminated against or suffered gross violations of human rights because of their ethnicity, there are also those who have suffered because they are members of a minority group or indigenous peoples. The rights of minorities and indigenous peoples are protected under international law, and with the promulgation of the new Constitution in 2010, they are entitled to even higher protection under domestic law than was the case previously.

One of the most important issues facing members of such groups is the basic right of citizenship – the right, and recognition, that they are an integral and valued part of the nation. The Commission heard stories throughout the country from individuals who did not have legal documents to prove they were citizens, thus subjecting them to numerous indignities and barriers to accessing the basic necessities of life. Such individuals often harbored resentment at the state and fellow Kenyans, revealing another potential source of future tension and conflict. While the Commission recognizes the complexity of some of the issues raised in this section – for example, how to protect group claims to land – it is clear that such issues must be addressed, both as a matter of justice, but also as a matter of national unity and reconciliation.

List of Abbreviations

ABET	Alternative Basic Education for Turkana	DO	District Officer
ACCORD	Agency for Corporation and Research in Development	ECK	Electoral Commission of Kenya
ACERWC	African Committee of Experts on the Rights and Welfare of Children	ERS	Economic Recovery Strategy
ACHPR	African Commission on Human and Peoples' Rights	ESP	Economic Stimulus Programme
ADC	Agricultural Development Corporation	ESR	Economic and Social Rights
AFC	Agricultural Finance Corporation	EWS	Early Warning Systems
AIDS	Acquired Immunodeficiency Syndrome	FBOs	Faith Based Organization
ANPPCAN	African Network for the Prevention and Protection against Child Abuse and Neglect	FGM/C	Female Genital Mutilation/Cutting
APRM	Africa Peer Review Mechanism	FIDA	Federation of Women Lawyers
ARVs	Antiretroviral Drugs	GDP	Gross Domestic Product
ASALs	Arid and Semi-Arid Lands	GEMA	Gikuyu, Embu and Meru Association
AU	African Union	GLA	Government Land Act
CDF	Constituency Development Fund	GOK	Government of Kenya
CEDAW	Convention on Elimination of all Forms of Discrimination Against Women	GRA	Group Representative Act
CEMIRIDE	Centre for Minority Rights Development	GSU	General Service Unit
CESCR	Committee on Economic, Social and Cultural Rights	HIV	Human Immunodeficiency Virus
CID	Criminal Investigation Department	HMIS	Health Management Information Systems
COVAW	Coalition on Violence against Women	HRW	Human Rights Watch
CRA	Commission on Revenue Allocation	IBEA Co	Imperial British East African Company
CRC	Convention of the Rights of the Child	ICCPR	International Covenant on Civil and Political Rights
CRE	Christian Religious Education	ICDC	Industrial and Commercial Development Corporation
CREAW	Centre for Rights Education and Awareness	ICERD	International Convention on the Elimination of Racial Discrimination
CRIN	Child Rights International Network	ICESCR	International Covenant on Economic, Social and Cultural Rights
CSOs	Civil society Organizations	ICGLR	International Conference on the Great Lakes Region
DC	District Commissioner	ID	Identity Card
DEO	District Education Officer	IDPs	Internally Displaced Persons
DFRD	District Focus for Rural Development	IEBC	Independent Elections and Boundaries Commission
DHS	Demographic and Health Surveys	IEC	Information, Education and Communication

IHRDA	Institute for Human Rights and Development	NCIC	National Cohesion and Integration Commission
IIBRC	Interim Independent Boundaries Review Commission	NCPB	National Cereals and Produce Board
IMF	International Monetary Fund	NDP	National Development Party
IPPG	Inter Parties Parliamentary Group	NEMA	National Environment Management Authority
KADU	Kenya African Democratic Union	NFD	Northern Frontier District
KANU	Kenya African National Union	NGO	Non Governmental Organization
KCPE	Kenya Certificate of Primary Education	NHIF	National Hospital Insurance Fund
KCSE	Kenya Certificate of Secondary Education	NLAAP	National Legal Aid and Awareness Programme
KDHS	Kenya Demographic and Health Survey	NPPPP	Northern Province Peoples' Progressive Party
KDHS	Kenya Domestic and Household Survey	NYS	National Youth Service
KESSP	Kenya Education Sector Support Programme	ODM	Orange Democratic Movement
KEWOPA	Kenya Women Parliamentary Association	OSJI	Open Society Justice Initiative
KHRC	Kenya Human Rights Commission	PEP	Post Exposure Prophylaxis
KIPPRA	Kenya Institute for Public Policy and Research	PEV	Post Election Violence
KLA	Kenya Land Alliance	PMTCT	Prevention of Mother to Child Transmission
KMC	Kenya Meat Commission	PNU	Party of National Unity
KNBS	Kenya National Bureau of Statistics	PRSP	Poverty Reduction Strategy Paper
KNCHR	Kenya National Commission on Human Rights	R2P	Responsibility to Protect
KNDR	Kenya National Dialogue and Reconciliation	RLA	Registered Land Act
KNEC	Kenya National Examination Council	SAPs	Structural Adjustment Programs
KPU	Kenya People's Union	SLDF	Sabaot Land Defence Force
KUPPET	Kenya Union of Post Primary Education Teachers	SMS	Short Message Service
KWS	Kenya Wildlife Service	STDs	Sexually Transmitted Diseases
LAPSSET	Lamu Port Southern Sudan–Ethiopia Transport	STIs	Sexually Transmitted Infections
LBDA	Lake Bain Development Authority	TSC	Teachers Service Commission
MDGs	Millennium Development Goals	UN	United Nations
MoD	Ministry of Defence	UNEP	United Nations Environment Program
MOH	Medical Officer of Health	UNESCO	United Nations Educational, Scientific and Cultural Organization
MP	Member of Parliament	UNHCR	United Nations High Commissioner for Refugees
MTEF	Medium Term Expenditure Framework	UNICEF	United Nations Children's Fund
MWPA	Married Women Property Act	UPE	Universal Primary Education
NARC	National Rainbow Coalition	VCT	Voluntary Counselling and Testing Facilities
NCAPD	National Coordinating Agency for Population	WFP	World Food Programme
NCCK	National Council of Churches of Kenya	WHO	World Health Organization



CHAPTER

ON

Gender and Gross Violation of Human Rights: Focus on Women

Is it a crime to be born a woman? What I have gone through is likely to affect my daughter. Will there be justice for women and the girl child in this country? That is my biggest concern.¹

Introduction

1. Women have always constituted slightly more than half of Kenya's population. Despite their strength in numbers, they have not enjoyed equal status with men. Patriarchal customary norms and practices have relegated women to a subordinate status. These norms and practices, many of which still remain pervasive today, include disinheritance, preference for boys, polygamy, payment of dowry, cultural traditions relating to burial, early and forced marriages, chastisement of wives, female genital mutilation and widow inheritance. For the larger part of the Commission's temporal mandate (1963-2008), these norms and practices were not only normalised in society but were also permissible under the law and sanctioned by the state itself. The impact was historical oppression and marginalisation of women resulting in the systematic and widespread violation of their rights.

¹ TJRC/Hansard/Women's Hearing/Kitui/2 Dec 2011/p.8.

- 2 With recent constitutional, legislative and institutional reforms aimed at tackling gender discrimination in the country, women have made gradual advancement in several spheres. However, they continue to be the subject of deeply rooted discriminatory norms and practices. Violence against women is prevalent both during peacetime and episodes of generalised violence. During ethnic clashes and electoral violence, women have been specific targets of heinous crimes and violence including rape and sexual violence. Security operations conducted by state security agencies have more often than not left behind women who have been humiliated, tortured, maimed, raped, forcefully displaced and even killed. Indeed, the incidence of violence against women during security operations has been both endemic and systematic. Even when they have not been specifically targeted, women have all the same suffered the greatest brunt and impact of ethnic clashes and security operations.
- 3 The prevalence of women as victims of gross violations of human rights in Kenya has not only been cultivated by cultural traditions, but also by the intersection of gender with other multiple identities of women, including ethnicity, religion, social status and political affiliation. Thus, for example, during ethnic and political violence in the country in 1992, 1997 and 2007/2008, many women were invariably and violently attacked not only because of their gender but also because of their ethnicity and perceived political affiliation.
- 4 Violations of human rights have had even greater consequences for the most vulnerable amongst women. These include women with disabilities, women living with HIV/Aids, women in the rural areas and women from minority and indigenous communities.² Moreover, economic marginalisation of specific provinces in the country,³ especially Coast, North Eastern, upper Eastern, Nyanza, North Rift and Western, has further marginalised women living in these regions who are undoubtedly amongst the poorest of the poor.
5. In sum, the story of the Kenyan woman is sad, shameful and heartbreaking. This chapter tells that story as it was presented to the Commission in its hearings. The chapter is about the historical plight of the Kenyan woman. It draws from and is based on the experiences of women who, with courage and confidence, told their stories to the Commission, often with great emotional pain and at the risk of being re-traumatised.
6. It also tells a triumphant story. Women across the country, despite injustices and atrocities committed against them, are bringing change into their lives, families,

² See Chapter on Minority Groups, Indigenous People and Gross Violation of Human Rights in this Volume of the Report.

³ See Chapter on Economic Marginalisation and Violation of Socio-Economic Rights in 2B of the Report.

communities and the nation at large. Many are involved in bringing peace and reconciliation in their communities. They are reconstructing lives through their own self-initiatives, they are rebuilding trusts. Many have been part of the struggle for justice in this country, risking their lives in the process. They told their inspiring stories to the Commission which are documented in this chapter.

- 7 The organising concept of this part of the report is gender, for it seeks to document the gendered dimensions of injustices and violations. It deliberately focuses and puts emphasis on the experiences of the female gender for at least two reasons. Firstly, as will be demonstrated, historically, Kenyan women have been the subject of systematic discrimination and marginalisation. Secondly, when compared to men, women are disproportionately susceptible to violations simply on the basis of their gender.
- 8 In addressing the experiences of women both in its work and this report, the Commission took into account the obligations that Kenya has undertaken under international law and in particular under the following three human rights treaties that specifically and comprehensively address the plight of women, and to which Kenya is a party:
 - United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),
 - Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol); and
 - International Conference on the Great Lakes Region (ICGLR) Protocol on the Prevention and Suppression of Sexual Violence against Women and Children (2006)
- 9 Other instruments to which Kenya is a party and are relevant in analysing the state's obligations in relation to women and girls include the following: International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, African Charter on the Rights of Human and Peoples' Rights, and the African Charter on the Rights and Welfare of the Child. Soft law instruments which constituted the Commission's reference materials include: general comments and resolutions of human rights treaty bodies particularly those of the CEDAW Committee, Beijing Declaration and Platform for Action, UN Security Council Resolution 1325 and other resolutions relevant to women, and the African Union (AU) Solemn Declaration on Gender Equality in Africa (2004).

Methodology

Context and legislative framework

- 10 Men and women experience violations of human rights and injustices differently. While this is a widely acknowledged fact, it is only recently that truth commissions have begun to appropriately and comprehensively inquire into and record the experiences of women. In Africa, truth commissions such as those in Sierra Leone and Liberia took deliberate measures to ensure that the experiences of women were well investigated and captured in their reports. In Kenya, efforts to ensure that a truth telling process, such as was undertaken by the Commission, would be 'gender sensitive' date back to the work of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission. Within two weeks of its inauguration, members of the Task Force attended a one-day meeting on 'women and truth commissions' hosted by the Federation of Women Lawyers (FIDA) Kenya Chapter.⁴ From a comparative perspective, the meeting discussed how truth commissions have addressed the question of gender in their work.⁵ The same question was discussed at length during an international conference organised by the Task Force. According to the report of the conference

It was observed that across the world it has been reported that it has been difficult for women and children to access truth commission processes in a meaningful way. Where women do indeed participate, they merely go through the motions and may not express their hurt. They will most probably talk about the suffering of their loved ones but not themselves. Truth commissions work in cultures that muffle women's voices most of the time and may, if not conscious of this limitation, alienate women from their processes. The truth commission should therefore go out of its way to design procedures and methods that make sure that women are heard.⁶

- 11 Although the Task Force encouraged women's participation in its public hearings, it is recorded that low numbers of women turned up.⁷ Concerned with the low turn-out of women in its hearings the Task Force observed in its report that unless a truth commission 'pay[s] particular attention to the participation of women and the abuses perpetrated against them' it will have 'little or no beneficial value

⁴ J Ojiambo 'The key gender concerns of a truth justice and reconciliation commission' in Heinrich Boll Foundation *Transitional justice in Kenya: The gender question* (2004) 73

⁵ For writings on this subject see S Meintjes 'Gender and truth and reconciliation commissions' in C LSriram & S Pillay (eds) *Peace versus justice: The dilemma of transitional justice in Africa* (2009) 96. V Nesiiah et al *Truth commissions and gender: Principles, policies and procedures* (2006)

⁶ Government of Kenya *Report on the Establishment of a Truth, Justice and Reconciliation Commission* (2003) Annex 4 (Hereinafter *Makau Mutua Report*)

⁷ *Makau Mutua Report* (n 6 above) 15

in addressing the plight of women” Elsewhere in the report, the Task Force highlighted the fact that violations of socio-economic rights disproportionately affect women, and as such, ‘this is a matter to which the truth commission ought to pay special attention’”

- 12 Following the publication of the Task Force Report, civil society organisations and development partners continued to advocate for a gender sensitive commission. In particular, Heinrich Boll Foundation held a series of meetings during the second half of the year 2003 on the gender implications of a truth, justice and reconciliation commission. The outcome of the meetings was a compilation of presentations and discussions in a book format that was published in 2004. The underlying message of the book was well summarised in its preface

Any TJRC established must ensure the relevant protection is put in place to ensure that women give their views, these are some of the issues the participants in the gender forums highlighted during the discussions. Another notable issue that Kenyans and especially women would want to see brought to justice is corruption and economic sabotage that had direct bearing on human rights violations, such a basic right to health, education and life and so to the women of Kenya the TJRC should be able to cover the issue of rights in totality not just violence against women.⁸

- 13 Against this backdrop, the Kenyan parliament inserted into the TJR Act safeguards to ensure that the Commission’s composition and processes were gender inclusive. Firstly, the Act provided that the selection panel responsible for nominating Kenyan citizens into the Commission shall include ‘one person nominated by Federation of Kenya Women Lawyers’ and that the chairperson and vice-chairperson of the selection panel shall be ‘persons of opposite gender’. Secondly, on the composition of the Commission, the Act provided that it shall be composed of three non-Kenya citizens ‘one of whom shall be of opposite gender’¹¹. In regard to Kenyan citizens, the Act provided that ‘in selecting persons for appointment as commissioners, the selection panel shall have regard to principle of *gender equality* and regional balance’¹². Pursuant to these requirements, out of the nine individuals appointed to serve in the Commission, four (or 44%) were women.

- 14 The Act also provided that appointments of staff by the Commission ‘shall be made with regard to the principle of gender equality’¹³. In this regard, it is noteworthy

8 Herein after Makau Mutua Report (n 6 above) 15

9 Makau Mutua Report (n 6 above) 33

10 Heinrich Boll Foundation Transitional justice in Kenya: The gender question (2004) 1

11 TJR Act sec 10(1)(a)

12 TJR Act sec 10(4)

13 TJR Act sec 30(2)

that throughout its life, the representation of women in the Commission's staff remained above 40 per cent. Indeed, at the decision making level, not only was the Commission led by a female Chief Executive Officer from February 2010 to September 2012, but the ratio of female decision makers (director level), stood at 50 per cent during the same period.

15. Thirdly, in at least one instance, the Act expressly mandated the Commission to address gender-based crimes of which women are the predominant victims. Section 6(h) of the Act provides that the Commission shall 'investigate and provide redress in respect of a sexual nature against female victims'. Fourthly, the Act required the Commission in its hearings not to discriminate against any victim on, amongst other grounds, sex.¹⁴
16. Finally, the TJR Act gave the Commission the leeway to put in place special arrangements and adopt specific mechanisms and procedures to address the experiences of, amongst others, women.¹⁵ In this regard, the Commission established in its organisational structure a department entirely dedicated to addressing the needs of women and other vulnerable groups such as children and persons with disabilities.
17. 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 are 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.

Gender Policies and Measures

18. One of the policies that guided the operations and functioning of the Commission is the Gender Policy. The Policy was developed in recognition of the different roles of women and men in the Kenyan context and how these differences impact on their experience of conflict as well as their perspectives on truth, peace, justice and reconciliation. As such the Policy enjoined the Commissioners and staff to mainstream gender in all operational undertakings including in statement taking, investigations, civic education and hearings. Gender policies and measures relating to each of these activities are described below.

¹⁴ TJR Act sec 25(7)(a);(ii)

¹⁵ TJR Act sec 27(1)(a)



Women following proceedings at a public TJRC hearing in Mt. Elgon.

■ **Statement-taking**

19. Statements are the entry point for women to have their experiences documented by a truth commission. In relation to statement taking, the Commission adopted the following policies:
- the Commission sought to achieve gender parity in the recruitment of statement takers. Although it narrowly missed this target, over one third (43%) of the statement takers were women (132 out of 304);
 - all statement takers were trained on gender sensitivity including how to take statements from women with respect to all the areas under investigation by the Commission, as well as how to identify and manage stress and trauma;
 - the Commission actively encouraged women to speak about violations that were specifically perpetrated against them as individuals. This policy was informed by the experience of previous truth commissions which had shown that even when they had suffered violations themselves, women tended to speak about abuses faced by their loved ones such as their husbands or children. In this regard, the Statement Taking Form, under an introductory section titled 'important things to note' contained the following guideline:

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 [sic] yourself if you were the victim of a gross human rights abuse

- As far as it was possible, statements from women were taken by female statement takers
20. These measures notwithstanding, preliminary analysis of statements received by the Commission by the end of the formal statement taking exercise showed that only a third of the statements had been given by women. By the end of January 2011, the Commission had received a total of 27 statements. Only 42% of these had been recorded by women.
 21. Concerned about this outcome, the Commission held consultation meetings with key stakeholders, including members of the Kenya Women Parliamentary Association (KEWOPA), with a view to exploring ways of further improving women's participation in the Commission's processes. The result of these consultative meetings was the adoption of a two-pronged strategy.
 22. Firstly, during its pre-hearing civic education drives across the country, the Commission conducted targeted statement taking that involved a door-to-door approach. Secondly, in addition to encouraging and ensuring women's participation in the public hearings, the Commission conducted 'women's hearings' alongside the public hearings.
 23. In the end, the Commission recorded a total of 16,377 statements from women. This represented 38% of the total statements received. The table below shows the number of statements recorded both in terms of gender and region. [Insert Table here]
- ***Civic education and outreach***
24. The Commission approached its work acutely aware of the cultural, social and economic hurdles that have traditionally hindered women from attending and participating in public processes. As already stated above, one of the challenges faced by the Makau Mutua Task Force was the low numbers of women in its hearings. The Commission, therefore, took deliberate measures to mobilise women to attend its hearings.
 25. Firstly, the Commission actively reached out to women in its civic education and outreach activities. Secondly, and perhaps more importantly, and with the financial assistance of UN Women, the Commission catered for the cost of travel to and

from its hearing venues for a limited number of women. Thirdly, the Commission partnered with local or community-based women's organisations and their leaders in its mobilisation initiatives. Fourthly, the Commission developed information, education and communication (IEC) messages and materials specifically targeting and suited for women. The Commission particularly rallied women to attend the hearings through announcements in local markets and vernacular radio stations. As the testimony of Rose Chepkemai reveals, these announcements often reached women and they responded positively.

I have a small shop at Sotik and when I heard the announcement through the media, I closed my shop in the morning and decided to come. I said the God we call upon has revealed Himself through you. I asked others if they had heard the announcement over the radio. I took my identity card and came. I called the other women and told them we should come.¹⁶

- **Investigating sexual violence**

26 Although both men and women may be targets of sexual violence, it is an acknowledged fact that women are the predominant victims of this form of violence. As such, the Commission put in place mechanisms to ensure that sexual violence was appropriately investigated and victims or survivors were treated with respect.

27 Firstly, the Commission recruited investigators who had previous experience in investigating sexual offences and who had undergone training on the same, including on the Sexual Offences Act.¹⁷ Secondly, the Commission prepared a set of guidelines that outlined the approach to be taken in investigating sexual violence. These guidelines are discussed in detail in the chapter dealing with sexual violence.¹⁸

Specific activities

- **Women's Hearings**

28 Comparative experience has shown that framing the work of a truth commission in gendered terms ensures that violations and injustices are seen in both male and female perspectives. As primary care givers women tend to speak more about the violations suffered by others than about their own experiences. Thus, to encourage women to speak about their own experiences, and in addition to encouraging them to speak in public hearings, the Commission held separate hearings for women only. 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

16 TJRC/Hansard/Women's Hearing/Narok/30 September 2011/p. 3

17 Act No. 3 of 2006

18 See Volume 2A of this Report

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

- 29 The decision to hold these hearings was informed by experience of previous truth commissions. The Commission also drew lessons from the experience of the Makau Mutua Task Force. Anecdotal evidence suggests that women spoke freely during the hearings conducted by the Task Force when fewer or no men were in attendance. According to a member of the Task Force

In some cases, it was clear that men prevent women from engaging in active politics or from speaking out in large gatherings. In North Eastern Kenya, the male members of the community turned out to testify before the Task Force in the morning session leaving the women to appear before the Task Force in the afternoon. Although they were present, no woman spoke in the morning session. During the afternoon session, which was comparatively shorter as time in the afternoon was dedicated to field visits, the women spoke freely.¹⁹

30. Across the country, women who attended the Commission's women's hearings 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

There are many issues about us that are violated and we do not have space and time to talk about them. We appreciate this moment because we are all women and it is good for us to speak out our issues. It is one way of getting healed. We appreciate the work being done by the TJRC because we can now speak openly.²⁰

- 31 In Kapsokwony, a witness explained why the women found the women's hearing an appropriate forum for them to speak about their experiences

We are grateful that you have separated us from men because yesterday we listened to what the men were saying and we could not talk. This is because you would say one thing and leave the rest as we were oppressed in very many things. We could be punished in many aspects. Thank you for the knowledge and the wisdom you used to decide that women should be separated in order for them to say their own things.²¹

- 32 In essence, the hearings were a rare opportunity for Kenyan women to narrate their stories. Historically, public spaces in Kenya have been dominated by men. Women's voices have too often been silenced in these spaces. They have thus

19 J Ojamba, 'The key gender concerns of a truth, justice and reconciliation commission' in Heinrich Böll Foundation (n 10 above) 73-78.

20 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2012/p. 13.

21 TJRC/Hansard/Women's Hearing/Kapsokwony/24 May 2011/p. 7.

remained invisible and without a chance to make contributions even in matters that touch on their own situation. Some women had lost hope that these spaces would one day be opened to them. They, therefore, saw the women's hearings as a starting point. As one woman commented in Kabarnet

I am happy to see that all women are here. I did not imagine that a day will come when we will talk freely about issues affecting us.²²

- 33 Speaking during a public hearing in Mandera, in the context of a community in which women have rarely been afforded an opportunity to voice their concerns in public, or even at all, one woman had this to say:

All the witnesses have indicated that women rights have been seriously violated in Mandera County but that brutality has been under-estimated in its depth and scope since women were unable to voice their concerns during that time and even today in this forum. I am happy that tomorrow we are going to have a forum for women alone. I intend to talk during that forum. Whatever they want to say, it will be highlighted there.²³

- 34 During the women's hearings, older or more courageous women would often encourage other women to open up and speak about their experiences. In the Nairobi Women's Hearing, 64 year old Rosemary Wanjiru narrated the gruesome abuses against women that she had witnessed during the colonial period. In concluding, she encouraged other women to stand up and speak out

Do not be afraid. Stand up and talk. Speak of how you have been oppressed. Speak of how we have been deserted by our husbands. Speak of how the Government has also deserted us, so that we can see if someone will think of us.²⁴

- 35 In Kabarnet, Mariam Lesirma, made a similar call

Today is our day my fellow women. Let us present and address all our issues. We have cried for a very long time that we have been oppressed. We would like to say we have been oppressed by who and how. That is why we say let us open our hearts today so that we can address all our issues that we have in our homes. Not only in our homes but elsewhere, even on the roads. Let us tell this Commission all what we have undergone in terms of oppression. We believe the TJRC will help us today so that our issues can be understood.²⁵

- 36 This chapter is partly a response to the rallying cry of Rosemary Wanjiru, Mariam Lesirma and of millions of other women across the country whose most fervent wish is that their issues be understood and addressed

22 TJRC/Hansard/Women's Hearing/Kabarnet/25 Oct 2011/p. 4

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

24 TJRC/Hansard/Women's Hearing/Nairobi/p. 12

25 TJRC/Hansard/Women's Hearing/Kabarnet/25 Oct 2011/p. 3

37 Although the women's hearing were a huge success in the Commission's estimation, the Commission remained concerned that while the hearings provided a safe space for women to tell their stories, the stories were therefore not heard by men or by the general public. The writing of this chapter was, therefore, done in an effort to ensure that men are given the opportunity to read what women said in the women's hearings. The Commission hopes that by including a detailed discussion of the experiences of women as narrated by them during the women's hearings, men's awareness of such experiences will increase and ultimately this will counter the consequence of excluding men from these hearings.

38 Nevertheless, to mitigate the impact of men's absence during the women's hearings, the Commission took two important measures. Firstly, the Commission ensured that in most cases, the women's hearings were held only after both men and women had had the opportunity to attend a significant portion of the public hearings. Secondly, as already indicated above, the Commission encouraged women to testify in public. This ensured that the voice and concerns of women were also heard by the general public. As Commissioner Ron Slye explained to a woman who testified in public:

Thank you [] for bringing this statement to this Commission and for appearing here before the Commission and the public. As you have said in your testimony, part of the problems facing women in this community and also throughout the country and even throughout the world, is that many times the abuses and the problems are not known. So, it is particularly useful for me and the other male members on this panel and the men here in this audience, from this community, to hear your testimony. Although it is not a complete solution, making us more and more aware of these problems, it is necessary for starting to come up with better solutions.²⁶

39 Or as Commissioner Gertrude Chawatama explained to another woman who testified in public:

I would like to thank you most sincerely for having given your testimony to us in public. You are the second woman here in Mandera to do so. What is important about what you have done is that you have been able to share with the public some of the problems and challenges that women go through. If these things are not spoken about in public, men will never understand some of the problems that women go through. They will never understand the pain that women go through. But you have taken a very courageous step and you have spoken in public. Your testimony will, not only help other women, but also a different generation of women. I salute you for your courage.²⁷

40 The Commission particularly encouraged women to speak about the whole gamut of issues and violations that affect them in order to bring out the gendered perspectives of human rights violations. This was done deliberately to ensure that

26 TJRC/Hansard/Public Hearing/Nyeri/7 Nov 2011/p. 18

27 TJRC/Hansard/Public Hearing/Mandera/26 April 2011/p. 55

the testimonies of women in public were expanded beyond testimonies restricted to rape and sexual violence. The Commission was concerned that if women's testimonies in public were to be restricted to this narrow category of violations, as has been the case in previous similar processes, then the impression would be created that sexual violence is the only or main kind of violation that women have historically experienced.

- 41 A total of 161 women testified during the public hearings. Admittedly, this number was significantly low compared to the number of male speakers who testified before the Commission in public. However, the deliberate effort by the Commission to ensure that women spoke in public about a range of issues affecting them is in itself a reflection of the increasing visibility and participation of women in public spaces and processes in Kenya, a trend that the Commission hopes will improve over the years.

■ ***Thematic Hearing on Women's Rights***

- 42 The Commission also organised a thematic hearing on women's rights on 8 February 2012 in Nairobi. This was a special forum for experts, academics and women's rights organisations to engage with the Commission in an analytical discussion on gender issues. The thematic hearing was also attended by relevant government departments that had been invited to respond to and offer their insights on some of the issues that the Commission had heard during the country-wide women's hearings.

- 43 Amongst the organisations and institutions whose representatives spoke during the thematic hearing include: Maendeleo Ya Wanawake, FIDA Kenya, and the Agency for Corporation and Research in Development (ACCORD). Government institutions that participated in the hearing include Kenyatta National Hospital, National Legal Aid and Awareness Programme (NLAAP) of the Ministry of Justice and the Women Enterprise Fund.

■ ***Consultations with stakeholders***

- 44 In order to ensure that the Commission's processes relating to women in particular were participatory and inclusive, the Commission held both formal and informal consultations with women's organisations. On March 2011, shortly before the Commission officially launched its hearings, the Commission held a consultative breakfast meeting with Kenya Women Parliamentary Association (KEWOPA). Representatives of development partners (such as UN Women and GIZ), governmental bodies (such as Kenya National Commission on Human Rights) and women's organisations (including Foundation for Kenya Pastoralist Women, Women's Empowerment Link, COVAW and Gender Violence Recovery Centre) participated in the meeting. The meeting interrogated the Commission's



engagement with women up to that point and made proposals for addressing challenges and gaps that had been identified.

45. On 19 May 2011, after undertaking hearings in North Eastern, upper parts of Eastern and Western regions, the Commission held another consultative meeting that brought together a wide range of relevant stakeholders include those popularly referred to as 'grassroot organisations' such as Women for Peace in Wajir and Hurricane Nakuru Women Rights Centre. This meeting reviewed the participation of women in the Commission's hearings held in the afore-mentioned regions. Using insights drawn from this meeting, the Commission strengthened measures to encourage the participation of women in its processes.
46. In general the Commission enjoyed a cordial relationship with women's organisations and benefited immensely from their support, expertise and encouragement. However, it is regrettable that some women's organisations (such as FIDA Kenya) which were at the forefront of lobbying for a truth commission in Kenya and spent resources in research and publications relating to the work of the Commission declined to engage with the Commission for the most part of the Commission's life span. This decision was made in solidarity with other civil society organisations which boycotted the work of the Commission or severed all forms of engagement altogether. Some of these organisations had a change of heart in the final phase of the Commission's work plan but by this time most of the activities in which they could engage had been concluded.

Definitions and Conceptual Approach

- 47 This section provides definitions of key terms used in this chapter and the Commission's conceptual understanding and approach to dealing with and addressing violations and injustices committed against women

Key terms

- 48 It is important to define the key terms used in this chapter and create common understanding of the manner in which the Commission uses them. This includes terms such as 'sex', 'gender', 'discrimination against women' and 'gender equality' which may convey different meaning when used in common parlance. Other terms are 'traditional harmful practices' and 'violence against women'

Sex and gender The term 'sex' refers to the physical biological characteristics that differentiate and define females and males. Sex is natural, is not different from one community to another, is not learnt and does not change. Therefore, sex is attributable wholly to nature. That is not true of 'gender' which is a construct of society. Every society has its own conception of how males and females should behave, what they are entitled to and their worth and status. Indeed, all societies have a gender system which includes a division of labour, power differentials between genders, cultural concepts of masculine and feminine and other gendered social definitions.²⁸

- 49 These societal expectations may not always be natural or rational. Being socially constructed, these relations are neither necessarily nor obviously harmonious nor non-conflicting.²⁹ One's ascribed gender may therefore be the basis for liberty or marginalisation. In this regard, 'gender' refers to 'relations in the society that connote the socially constructed designation of women and men, their roles in the culture-specific context and the relationship between the two sexes'.³⁰

Gender equality The term 'gender equality' refers to women and men enjoying the same status. It is attained when women and men have equal conditions for realising their full human rights and potential to contribute to the national, political, economic, social and cultural development and to benefit from the results. It encompasses the following: equality under law,

28 A Sigot, 'Discourse on gender and natural resource management' in A Sigot et al (eds) *Towards common ground: Gender and natural resource management in Africa* (1995) 2

29 Sigot et al (n 28 above)

30 FIDA Kenya *A gender guide on statement taking during the truth, justice and reconciliation process* (2009) 2

equality of opportunities, rewards, control and access to resources, and equality of voice, as well as the ability to influence and contribute towards development processes

There are two types of equality procedural and substantive Procedural equality ensures that different groups of people are given equal opportunities However, this approach may lead to inequalities because there is often no guarantee that the differing groups are equally placed A certain race, sex, or ethnic group may be better stationed/positioned than the other Thus, sometimes there is need to afford certain historically disadvantaged groups special protection in order to enable such groups to compete favourably and on equal terms with the other groups This is what is known as substantive equality, and it is the justification for affirmative action measures These useful principles require the law to be effected It is mostly human rights law that has secured these principles.

Discrimination against women This refers to any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life ³¹

Traditional harmful practices Traditional harmful practices refers to all behaviour, attitudes, and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity ³²

- **Violence against women** Violence against women means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war ³³

Gender and the Commission's mandate

50. As is discussed elsewhere in this Report,³⁴ the Commission interpreted its mandate to include three broad areas gross violations of human rights, historical injustices, and other relevant mandate areas However, in setting out and defining these mandate areas, the TJR Act adopted gender neutral language The Commission adopted a more nuanced and dynamic approach to interpreting its mandate so

31 African Women's Protocol art 1(f)

32 African Women's Protocol art 1(g)

33 African Women's Protocol art 1(j)

34 Chapter Two Volume 1

that it could appropriately and comprehensively cover the violations and injustices experienced by especially women

- 51 The TJR Act's definition of gross violations of human rights focuses almost entirely on violations that relate to one's bodily integrity. For clarity, section 2 of the TJR Act defined gross violation of human rights to mean
- 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 liberty;
 - 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 12th December, 1963 and 28th 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
- 52 There is no doubt that women and men alike suffer all the forms of violations listed in the definition of gross violation of human rights provided by the Act. The definition, however, provided two express entry points for specifically dealing with the plight of women. Firstly, the definition includes 'rape or any other form of sexual violence' as a form of gross violation of human rights. While both men and women may be victims of rape and sexual violence, in practice, women are the predominant victims of this kind of crime.
- 53 Secondly, the definition recognizes persecution of an identifiable group or collectivity on the basis of gender. The Act also lists persecution on the basis of gender as an act that constitutes a crime against humanity when it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Persecution on the basis of gender has long been recognised in international refugee law. The United Nations High Commissioner for Refugees' (UNHCR) 2002 Guidelines on International Protection: Gender- Related

Persecution provides that the following qualify as gender-based persecution: rape and other forms of gender-related violence, including dowry-related violence, female genital mutilation, domestic violence, and trafficking³⁵

- 54 The Statute of the International Criminal Court (Rome Statute) recognises persecution on the basis of gender. Persecution is defined in the Statute as the 'intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'³⁶ According to the International Criminal Tribunal for the Former Yugoslavia (ICTY) the crime of persecution consists of an act or omission which does the following: firstly, it discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law, and secondly it is carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics³⁷
- 55 For its work, the Commission considered persecution on the basis of gender together with the notion of systematic or systemic discrimination. Systematic discrimination is recognised as constituting a gross violation of human rights. According to the Final Document of the Seminar on the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, 'the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention and *systematic discrimination*'³⁸ This definition was later endorsed by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Indeed, the Sub-Commission proceeded to put emphasis on 'systematic discrimination, in particular based on race and gender'³⁹

35 United Nations High Commissioner for Human Rights *Guidelines on International Protection: Gender Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* U N Doc HCR/GIP/02/01 (May 7 2002)

36 Rome Statute art 7(2)(g)

37 Prosecutor v Krnojelac Case No IT-97-25-T Judgment para 431 (Mar 15 2002)

38 Final Document of the Maastricht Seminar the Right to Restitution Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms para 11-15

39 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Study concerning the right to restitution compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms Final report submitted by Mr Theo van Boven Special Rapporteur E/CN.4/Sub.2/1993/8 para 13

Gender-Based Persecution/Systematic Discrimination Against Women

Social-cultural context

56. The testimony of Florence Nabwala Wanambole regarding the preference for the boy child amongst the Bukusu ethnic community provides a good starting point for understanding systematic discrimination against women in Kenya

The Bukusu girl child is marginalised from the time she is born. When the mother goes to deliver in hospital or at home and the family hears that it is a baby girl, they fold their faces and start saying they wish she had been a boy. If this woman continues getting female children up to the third or fourth born, the husband will not discharge her from hospital. Even her mother-in-law will not go for her. They will leave her there because she only bears girls and she is bringing shame to the community. A female child in the Bukusu community starts being discriminated right from birth.⁴⁰

57. The preference for boys as opposed to girls is a practice that cuts across all ethnic communities in Kenya. But Wanambole's testimony reveals something much deeper: a Kenyan female child is born into a society that is socially and culturally structured to discriminate against her, from cradle to grave. In other words, systematic discrimination of women in Kenya is a phenomenon that finds justification and breeding ground in communities' cultural practices. In this respect, it is noteworthy that all communities in Kenya are patriarchal in nature, and as such, they share a common attribute of patriarchy: the domination, control and objectification of women by their male counterparts. According to an analyst

Kenya is typically a patriarchal society and the element of masculinity is deeply entrenched in the cultural practices of Kenyan communities. For example, a quick comparison of the vocabularies on gender in the Kikuyu language reveals that the word for man, *mundu-murume*, comes from the word *urume*, which means extremely courageous. In contrast, the word *mutumia* (woman) comes from the word *tumia*, which means to 'shut up' or condone. Thus men from the Kikuyu ethnic community not only define themselves as the dominant sex, but also in terms of the norm of seeing that women merely exist for their use.⁴¹

58. The adverse consequences of patriarchy are manifested through a number of cultural practices that objectify and ultimately subject the woman to multiple violations of her rights. These include payment of dowry or bride price, widow

⁴⁰ TJRC/Hansard/Women's Hearing/Bungoma-9 July 2011/p. 3

⁴¹ CW Kariuki, *Masculinity and adolescent male violence: The case of three secondary schools in Kenya (2004)* cited in FIDA Kenya, *Protection against female genital mutilation: A review of the Children's Act lessons from Samburu and Garissa districts (2009)* 6

inheritance, and female genital mutilation or cutting (FGM/C). All these practices are founded on a culturally sanctioned notion that the woman is a man's property. This notion is more pronounced in respect to payment of dowry or bride price.

■ **Payment of bride price**

- 59 The payment of bride price is an age old African customary practice. Traditionally, it is the means through which a groom expresses his appreciation to the parents of a bride. It also symbolises the bond or union between the families (and clans) of the groom and the bride. Although its intentions are presumably good, payment of bride price objectifies the woman. It opens the door for men to treat women as their property. In recent years, the concept of bride price has become commercialised and is increasingly viewed as a wealth generating venture. According to a recent study

Although bride wealth serves a definite role in the institution of marriage and its payment is accompanied by very elaborate ceremonies, it would appear that it is very much commercialised today where parents to a bride-to-be seize the opportunity to enrich themselves. The argument is usually that such parents are recovering the expenses of bringing her up, educating and providing for her, all of which are part of their parental duties. The haggling and bargaining that characterise present day bride price negotiations totally denigrates women as human beings deserving being treated with dignity⁴².

- 60 Moreover, the payment of bride price contributes to violence that women experience, particularly in the home. According to a woman who testified before the Commission in Wundanyi:

Dowry payment has contributed to the abuse [of women]. Some have commercialised it by saying, 'my daughter is a university graduate, so bring Ksh 400,000 as dowry', and you can see people discussing as if they are selling something and the men are the ones who discuss, not even the women []. When it comes to the dowry of our daughters, we should be the ones to talk, not them and it should be minimal, just to seek blessings and not for somebody to think that they own you. Because they paid that dowry, now you are his property. No, we do not want to be the property of somebody⁴³.

- 61 In fact, empirical evidence has shown that there is a causal nexus between the payment of bride price and incidents of violence against women. A survey conducted by CREAM in selected communities living in North Meru and Kisii districts reveals that payment of bride price has a predominantly negative effect on marital relationships.

⁴² CREAM *Bride price: Is it modern day slavery?* (2009): 1

⁴³ Public Hearing/Wundanyi/Women's Hearing/24 Jan 2012/ p. 25

*Dowry payment has contributed to the abuse of women⁴⁴
Some have commercialised it by saying, 'my daughter is a university graduate, so bring Ksh 100,000 as dowry', and you can see people discussing as if they are selling something and the men are the ones who discuss, not even the women*

Majority of the respondents were affirmative that bride price affected marital relationships negatively. They indicated that husbands who had paid bride price perceived it as having acquired the right to mistreat women (30%), that wives were their property (38.3%), it was some form of control (18.3%) and the women should not have a say in the home (13.3%). Indeed, most respondents (71.7%) observed that this was because most parents cannot afford to pay back bride price in spite of being unhappy when their daughters are abused. They would thus helplessly sit back when their sons in law meted domestic violence on their daughters.⁴⁵

62 The study proceeded to add that the above findings

it emerged that in Kisii for example, men had the tendency to "discipline" their wives whenever the wives were "disobedient". The forms of disobedience ranged from talking back to the husband to even attending women's group meeting without the authority of the husbands. The right to discipline of course is acquired through payment of bride price as the husband is entitled to absolute control of his wife by virtue of such payment. In the Meru communities the views from FGD's [Focus Group Discussions] also tied with the survey findings with the participants on this question and it emerged that once dowry was paid the men were of the impression that their wives should remain submissive to them and should not own any property of their own apart from that which the husband had authorised. In all these instances it was evident that the denial of rights in the relationships stemmed from payment of bride price.⁴⁶

63 The payment of bride price is also linked to the phenomenon of child marriage and its prevalence

■ **Early and forced marriage**

64 In Lodwar, the Commission heard the story of Seline Locham who was lucky not be married off after an attempt to do so aborted

Our people want them to get married at that age [below 18 years] in order to get bride price []. For example, when I was in Standard Eight, my grandmother was still alive but my mother had died when I was still young. My grandmother told my father that she wanted me to get married, so that she could get bride price. I refused. My father said that if the government had refused then it was okay."

44 CREAW (n 42 above), 16

45 CREAW (n 42 above), 16

46 TJRC/Hansard Lodwar/Women's Hearing 15 October 2011, p. 9

- 65 In a similar fashion, an attempt to marry off Anne Kwawi's daughter failed. She spoke to the Commission in Lodwar

I am a mother of seven children. There was a time when my husband wanted to marry off one of my daughters who was in Standard Eight. I was in a very difficult situation because I was not happy with what my husband wanted to do [] She was in second term in Standard Eight. We had a discussion and I talked to the daughter. He was boasting that when the old men come they should be given water. She was supposed to talk to the old men. I tried my level best, and I stood firm. I did not want my daughter to be married off, because she was still young. She was only 13 years old by then. I struggled with my husband to make him abandon the idea of marrying off our daughter at that tender age. I talked to the headmaster until we came to a conclusion. One day, the teachers came to talk to him. They even threatened him that if he was to marry off his daughter at that age, they would report him to authorities and make sure that he would be arrested and jailed. They were against the idea of this young girl being married off at that age and by an old man. So, that is what assisted me. It is sad that my husband passed on. Currently, my daughter is the sole breadwinner in our family. This is because she is the one who is educated. She finished her secondary school and joined teachers training college. Right now, she is a teacher in Laikipia County.⁴⁷

- 66 However, in almost all parts of the country, the Commission heard painful stories of women who were robbed of their childhood after been married off at a tender age. For instance, Paulina Nyanguo was married off to a polygamous man at the age of 13 years. She spoke about her experience during the Commission's Women's Hearing in Narok

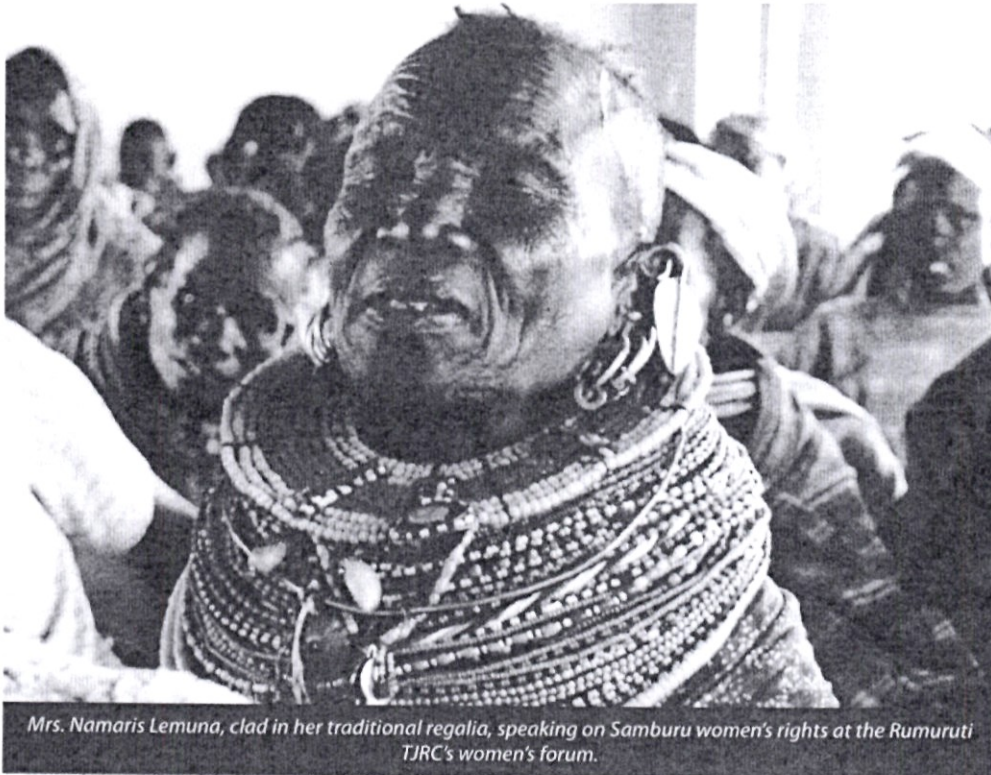
I was a young girl, 13 years old, I was married to somebody. When I got married, I got into very many problems. I gave birth to five children. I did not even have a pair of shoes. I did not have education and my husband had many wives. He was old but he had many wives. At one time, he chased me away without anything. I only had two lessos. I came to Narok in 1993. I used to stay in a house made of cartons. I started selling maize in the town. I went through very many problems. I was called all names. I suffered for over 17 years. I thought about looking ahead and being focused. A famine came and wiped out the livestock. In Maasai, women and children do not have a say in anything. We cannot inherit anything.⁴⁸

- 67 Another victim of forced marriage spoke about her experience during the Commission sitting in Kiryandongo, Uganda

In 1991, I was a young girl and not ready for marriage. I am now 34 years old but I remember my father telling me that people from Mt. Elgon evicted people. So, one day, as I was coming from school, I heard some Kalenjins saying that they wanted to do their issues. I was in Standard Six and when I arrived at home my father said that there were people

⁴⁷ TJRC/Hansard/Women's Hearing/Lodwar/11 October 2011/p. 10

⁴⁸ TJRC/Hansard/Women's Hearing/Narok/30 September 2011/p. 11



Mrs. Namaris Lemuna, clad in her traditional regalia, speaking on Samburu women's rights at the Rumuruti TJRC's women's forum.

coming from the mountain with their properties. They came to our house – my father was polygamous – and opened our house and took me. They asked me whether I wanted to die or marry and so, I accepted because there were gun shots. I went with two men that I could not see because they were in black. They took me to Typhus Morei and told me that he was to be my husband. I stayed and got two children.⁴⁹

68. The legislative framework governing the age of marriage in Kenya is discussed further below. But it is important to mention here that despite the prohibition of child marriages, the practice remains relatively high especially in rural areas.

■ ***Female genital mutilation or cutting***

69. In many cases, girls enter into marriage or are married off soon after they have undergone FGM/C. FGM/C is broadly defined as the 'surgical removal of parts or all of the most sensitive female genital organs, [for non-medical reasons]';⁵⁰

A more comprehensive definition is now used in Kenya. In terms of this definition, FGM/C

comprises all procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non- medical reasons, and includes:

49 TJRC/Hansard/Women's Hearing/Kiryandogo/1 November 2011/p. 7.

50 OHCHR Fact sheet No. 23: Harmful traditional practices affecting the health of women and children.

- (a) clitoridectomy, which is the partial or total removal of the clitoris or the prepuce,
- (b) excision, which is the partial or total removal of the clitoris and the *labia minora*, with or without excision of the *labia majora*;
- (c) infibulation, which is the narrowing of the vaginal orifice with the creation of a covering seal by cutting and appositioning the *labia minora* or the *labia majora*, with or without excision of the clitoris, but does not include a sexual reassignment procedure or a medical procedure that has a genuine therapeutic purpose

70. In Kenya, FGM/C has been practiced for generations. It is prevalent among the Somali, Kisii, Kuria, and Maasai.⁵¹ It is least prevalent among the Luo and Luhya. Proponents of FGM argue that the practice marks an important stage in the life of the concerned girls. In the book 'Facing Mount Kenya', Jomo Kenya, the first president of independent Kenya, dedicated an entire chapter to defending FGM. He summarised his arguments thus:

The real argument lies not in the defence of the surgical operation or its details, but in the understanding of a very important fact in the tribal psychology of the Gikuyu – namely, that this operation is still regarded as the very essence of an institution which has enormous educational, social, moral, and religious implications, quite apart from the operation itself. For the present it is impossible for a member of the tribe to imagine an initiation without clitoridectomy. Therefore the abolition of the surgical element in this custom means to the Gikuyu the abolition of the whole institution.⁵²

71. Without doubt, girls (and boys) are given useful life lessons during rites of passage or initiation ceremonies. But it is also during such ceremonies that girls are socialised to be subordinate to men. During the parallel rites of passage for boys, they are equally socialised to think of women as their subordinates, and they, as the superior of the sexes. In the initiation ceremonies, both boys and girls are often introduced to the notion of the 'other', referring in this particular context to those communities that do not practice circumcision. They are cautioned against getting married to individuals from these other communities. According to Jomo Kenyatta, for instance:

No proper Gikuyu would dream of marrying a girl who has not been circumcised, and vice versa. It is a taboo for a Gikuyu man or woman to have sexual relations with someone who has not undergone this operation [FGM]. If it happens, a man or woman must go through a ceremonial purification, *korutwo thahu* or *gotahikio imegiro* – namely, ritual vomiting of the evil deeds.⁵³

51 KNBS Kenya Demographic and Health Survey 2008-09 (2010) 264

52 J Kenyatta Facing Mount Kenya (1965)

53 Kenyatta (n 52 above)

72 The implications of the nexus between the cultural practice of circumcision (both for male and female) and inter-ethnic relations in Kenya are diverse

73 In the final analysis, it remains indisputable that FGM/C is one of the traditional harmful practices affecting the health of women and children. Potential health complications and risks resulting from FGM include physical and psychological trauma, sterility, obstetric fistulae, tetanus, and HIV/Aids⁵⁴. Some of the negative consequences of FGM/C are well captured in a moving speech made by a Kenyan member of parliament, Sophia Abdi Noor, during the parliamentary debate on the Prohibition of Female Genital Mutilation Bill.

I am a living example of women who have undergone the FGM. I went through the FGM at a tender age of five years. I was circumcised by an old mother who had eyes problems. She mutilated me and I bled for three days. Fortunately, I was near a hospital and that is how I was saved, but many of my age mates who went through that practice are not with us today. During my wedding night, it was not something that I enjoyed. I cried. I was in tears because it was very painful. That gave me a psychological problem, and I was not comfortable in whatsoever I was doing. Then during my first delivery, I had a problem. It was complicated and I was in labour for five days. They had to remove the child with a vacuum. That is why immediately I graduated from college. I started talking about the FGM because that gave me a problem⁵⁵.

74 Abdi Noor's experience is not uncommon. The Commission heard a similar story in Kapenguria

There are so many women who get complications but they fear to talk about it. Many never even turned up today. One such woman is my mother. She gave birth at home and the child got complications in the brain because she [my mother] was circumcised. When she was giving birth, she struggled so much. Another woman assisted her. She was about to die but she was assisted⁵⁶.

75 In Hola, yet another woman spoke of a similar experience

I am one of the people who had to undergo the FGM when I was young and experienced many problems due to that. I bled profusely when I was circumcised and until today it is a problem when it comes to delivering. I did not have a good relationship with my husband because we could not agree in the house. So, I am now single. I want the Government to intervene in the issue of the FGM [] During delivery, one has many problems. Women also lack the sexual urge. I am only appealing to the Government to intervene and stop the FGM⁵⁷.

54 See e.g. A Browning *et al*, 'The relationship between female genital mutilation and obstetric fistulae' (2010) 115(3) *Obstetrics and Gynecology* 578.

55 Kenya National Assembly Official Report 12 April 2011 p. 50.

56 TJRC/Hansard/Women's Hearing 'Kapenguria' 15 October 2011 p. 2.

57 TJRC/Hansard/Women's Hearing 'Hola' 13 January 2012 p. 3.

- 76 Another victim of FGM/C recalled her experience during the Commission's hearing in Kitale

As a Sabaot, I was circumcised when I was thirteen years and my teeth were also removed when I was around seven or eight years. It was done forcefully. I tried to run away but they held me, took a stick and removed the teeth. That was a violation because I did not want that. I was circumcised when I was thirteen years and I was told that I had to be circumcised because my fellow people were being circumcised at twenty years. They said that I had to be circumcised because I was the first born of the second wife and my mother wanted to wear skin clothes so that she can say that she has a daughter who has been circumcised. I was circumcised by force [] One time, I went for a journey and my children told me that Cherop wants to go and be circumcised at the neighbour's place. I told her that the government has outlawed circumcision and asked her who would pay. I refused and my daughters are not circumcised.⁵⁸

- 77 Undoubtedly, FGM as a traditional practice is performed exclusively by women. For instance

In the Pokot community, circumcision is done by women who want to get income. Those women are very old. Right now, they get Kshs1 000 for circumcising one girl. When they circumcised the girls, there would be some little money but now the amount has been increased. Previously, they used to be paid Kshs500 per circumcised girl but the amount has since increased to Kshs1 000.⁵⁹

- 78 This is true in all communities that practice FGM/C. In Narok, for instance, it was asserted that

FGM is practiced by women. That is our culture. It is the mothers who do it. We practise it. It is a culture which has been there from time immemorial. It is difficult to eradicate that culture.⁶⁰

- 79 Therefore, it has been argued that it is women who perpetuate FGM/C.⁶¹ However, while women's role in performing FGM/C cannot be diminished, it is also the case that men are to a significant extent responsible for the entrenchment of the practice. Indeed, proponents of the practice – and men in particular – argue that FGM/C, and especially the removal of the clitoral hood, 'helps' a woman to maintain fidelity in marriage. The role of men in perpetuating FGM was well illustrated by a witness in Wundanyi:

The man is the head of the house in Islamic laws. The women take directions from the men. I would like that we organise workshops or meetings for men so that they

58 TJRC/Women's Hearing/Kitale/22 October 2011/p. 12-13

59 TJRC/Hansard/Women's Hearing/Kapenguria/15 October 2011/p. 3

60 TJRC/Hansard/Women's Hearing/Narok/30 September 2011/p. 13

61 FIDA Kenya (n 41 above) 6

can be shown videos to see how painful it is for a woman to be circumcised. They are circumcised at the age of between four years and six years. They should also be shown the effects of circumcision on delivery of children. If Somali or Islamic women are not circumcised, they are told they are prostitutes. There is a lot to be learnt about this issue.⁶²

- 80 As the example below shows, in certain cases men have aggressively resisted attempts to sensitise communities about the negative effects of FGM

At the moment, there are some parts in Mt Elgon where FGM is being done because there are elders who still hold onto that culture. I remember there is a time we went to Cheptais to conduct sensitisation about FGM. My colleagues and I were almost being beaten by men. They were saying, 'you women want to mislead the community, your mothers were circumcised and yet you are here to cheat our children'. In the interior parts of Mt Elgon, FGM is still being practiced. If you want to know that that really happens, if you come over in the months of November and December, you will witness girls being circumcised. We, women leaders are trying our best although we have not managed to eradicate it completely.⁶³

- 81 In Bungoma, the Commission heard that for Sabaot women it is double jeopardy. They undergo FGM, ostensibly to reduce their sexual urge. That having been achieved, their husbands then opt to have sexual relations with Bukusu women who are uncircumcised.

The Sabaot woman has been sexually violated. Even when one's sexual urge is reduced, she is just there. Our men knew that circumcision is bad and they now go to look for Bukusu ladies. They will tell you that you cannot satisfy them and so they had better go and look for a person who knows issues about sex. So, we are just there and other women are brought to us.⁶⁴

- 82 Under CEDAW, state parties have agreed to 'take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'. The African Women's Protocol specifically addresses the question of FGM in particular and traditional harmful practices in general. Article 5(b) of the African Women's Protocol provides that state parties shall take all necessary legislative and other measures to eliminate harmful cultural practices, including 'prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them'.

62 TJRC/Hansard/Women's Hearing/Windanyii/24 January 2012/p. 4

63 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 13

64 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 14-14

- 83 Over the years, there have been many initiatives to eliminate FGM. During the colonial period, the fight against FGM was spearheaded by Christian missionaries. Their efforts were resisted and viewed as part of European cultural imperialism. Indeed, resistance against FGM dovetailed into the broader struggle for independence. In this regard, it has been noted, for instance, that 'FGM became an instrument of war to the ethnic independence movement among the Kikuyu reacting against what they perceived as cultural imperialistic attacks by Europeans'⁶⁵. Moreover, '[o]ther ethnic groups (Meru, Kisi, Kuria & Kalenjin etc) affected by the British prohibition of the procedure drummed help to strengthen Mau Mau movement against British colonial rule in the 1950s'. In this regard, Jomo Kenyatta, a key figure in Kenya's struggle for independence, wrote that '[t]he missionaries who attack the *irua* [circumcision] of girls are more to be pitied than condemned, for most of their information is derived from Gikuyu converts who have been taught by these same Christians to regard the custom of female circumcision as something savage and barbaric, worthy only of heathens who live in perpetual sin under the influence of the Devil'⁶⁶.
- 84 Against this background, it is not odd that there were little to no official efforts to curb FGM in the early years following independence. In the 1970s, especially after the declaration of the Women's Decade in 1975, a number of Kenyan women's organisations joined the church in advocating for the abolition of FGM⁶⁷. These efforts galvanised in the 1990s when President Moi joined calls for the abandonment of FGM. He issued two presidential decrees banning and prohibiting public hospitals and clinics from performing FGM/C.
- 85 In 2001, the Kenyan parliament enacted into law the Children's Act which prohibited FGM/C and a range of other cultural harmful practices. Section 24 of the Act provides that 'no person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or psychological development'. Under section 119(1)(h) of the Act, a female child who has been subjected or is likely to be subjected to female circumcision is 'a child in need of care and protection'. In essence, the Act contains a protection mechanism for children identified as being in need of care and protection.
- 86 A study conducted in 2008 on the impact of the Children's Act in relation to FGM/C found that although many were aware of the provisions of the

65 FIDA Kenya *Protection against female genital mutilation: A review of the Children's Act lessons from Samburu and Garissa districts* (2009) 6.

66 Kenyatta (n 52 above) 147.

67 FIDA Kenya (n 65 above) 6.

Children's Act, this awareness had not translated into 'definitive, action oriented mechanisms'⁶⁸ The study also found that Provincial Administration had not been cooperative in assisting in the implementation of the Children's Act to curb against FGM'⁶⁹ In the intervening period, more and concerted efforts have been taken to curb FGM/C. Statistical data shows that the practice of FGM/C is gradually reducing. Many communities across the country are resorting to alternative rites of passage that do not involve FGM/C. Every year for some time now, hundreds of Kikuyu girls (and from around the country) undergo educational rites of passage without at the same time been subjected to FGM. This has contributed to the reducing prevalence of FGM. In 1998, it was estimated that 38% of Kenyan women were circumcised. This reduced to 32% in 2003 and further down to 27% in 2008.⁷⁰

- 87 Despite the encouraging strides made in curbing FGM/C, the Commission received testimony pointing to the fact that the practice remains prevalent. That the practice has endured for generations is mainly a function of cultural beliefs and attitudes. As it was explained to the Commission in a Women's Hearing in Kuria

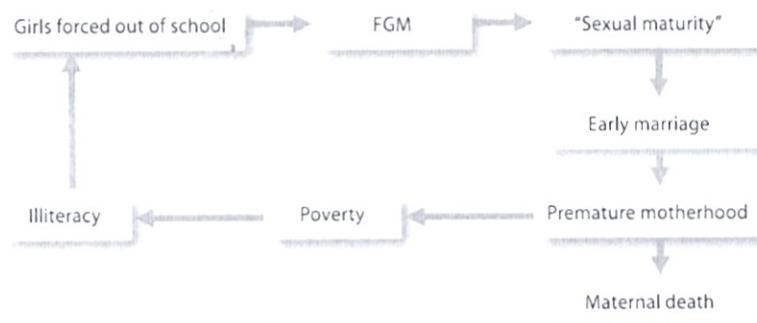
The first thing that I want to say concerns our girl child and how she is affected by circumcision. When they are circumcised, many of them discontinue school. When they stop going to school, the first thing that will happen is that they will get married. They get pregnant immediately after circumcision because they feel that they are grown up and yet, they could only be 14 years old. So the teaching they get during the FGM does not allow them to go to school anymore. They just feel like they are grown up and they can get married to the point that she cannot support herself in her own house in marriage. There are those who decided to go for FGM for marriage purposes. They are told that if they are not circumcised, they will not get married. The other thing is that if she goes to a home where they circumcise and has not gone through it, she will be despised. She will be humiliated and not respected because she is uncircumcised. Earlier on, if you got married and you were not circumcised, they would forcefully do it during childbirth. Imagine the kind of pain when in labour and circumcision. Much earlier on, they would say that if you were not circumcised, you would not get a child and bring it up, they would strangle it. If these traditions are not performed, a girl would not be respected in the community.⁷¹

68 FIDA Kenya *Protection against female genital mutilation: A review of the Children's Act lessons from Samburu and Ganssa districts* (2009) 19

69 FIDA Kenya (n 65 above) 19

70 KNBS *Kenya demographic and health survey 2008-09* (2010) 264

71 TJRC/Hansard/Women's Hearing/Kuria/26 July 2011/p. 5

Chart: *The Vicious Cycle of FGM*⁷²

88. In Nyeri, the Commission heard the account of two children who had been forced to flee their home for fear of being forcefully circumcised by their grandmother:

my brother-in-law's children came to stay with us because they feared their grandmother would have them circumcised by force. They even told me that their elder sister was circumcised by force. She had no choice. So, that is why they decided to stay with us. One of them was a Standard Six girl. She had been told that she would be circumcised by force. So, they ran away and came to my place. When I told their parents that these children were staying with us, they told me not to feed them and that I should chase them away. They had come all the way from Murang'a. So, I did not send them away [...] Today as I speak the two children are staying with me.⁷³

89. It is important to note that in July 2011, the Kenyan parliament enacted into law the Prohibition of Female Genital Mutilation Act (FGM Act).⁷⁴ Firstly, the FGM Act establishes a board that is responsible for, amongst other functions, the designing, supervising and coordinating public awareness programmes against the practice of FGM.⁷⁵ It is also mandated to design programmes and activities aimed at eradicating FGM.⁷⁶ Secondly, the FGM Act strengthens the relevant provisions relating to FGM in the Children's Act. In particular, it expressly makes performing FGM on anyone a punishable offence. Other offences under the FGM Act include aiding and abetting FGM, procuring a person to perform FGM in another country, use of premises to perform FGM, possession of tools or equipment for performing FGM, failure to report commission of offence under the Act and use of derogatory or abusive language.⁷⁷ On the last offence, the Act provides that:

⁷² Chart borrowed from CREAM Status of women and girls in Kenya.

⁷³ TJRC/Hansard/Women's Hearing/Nyeri/8 November 2011/p. 23.

⁷⁴ Act No. 32 of 2011.

⁷⁵ FGM Act, sec 5(a).

⁷⁶ FGM Act, sec 5(e).

⁷⁷ FGM Act, sec 19-25.

Any person who uses derogatory or abusive language that is intended to ridicule, embarrass or otherwise harm a woman for having not undergone female genital mutilation, or a man for marrying or otherwise supporting a woman who has not undergone female genital mutilation, commits an offence and shall be liable, upon conviction, to imprisonment for a term not less than six months, or to a fine of not less than fifty thousand shillings, or both.”

- 90 Although the FGM Act is a progressive piece of legislation and represents a leap forward towards eradicating FGM in Kenya, it is too soon after its enactment to calculate the impact or benefits thereof

■ **Widow inheritance**

- 91 Another harmful cultural practice that objectifies women, keeps them in perpetual subordinate status and exposes them to a variety of human rights violations, is widow inheritance. The negative effects of wife inheritance in Kenya have been summarised as follows

Wife inheritance denies women their fundamental human rights, particularly the right to sexual autonomy, the right to the enjoyment of the highest standard of sexual health, the right to property and the right to equitable inheritance. The rituals involve some form of sexual encounter and a degree of exposure to STDs, including HIV/Aids. In some communities the widow is expected to continue reproducing in order to maintain the legacy of her deceased husband. This requires unprotected sex – for conception to take place. Protected sex or the use of a condom is not considered a fulfilment of the cultural requirement of inheritance. The practice can therefore be said to have severe consequences with regard to HIV/Aids. In most situations, the widow who refuses to be inherited is considered an outcast and a bad omen and is sent away from the community. Where a widow declares that she does not wish to be inherited, she is blamed for the death of her husband and accused of being disloyal and disrespectful to customs and to her in-laws. Such grounds are used to deny widows their property rights, and most of them are therefore disinherited and thrown out of their matrimonial homes.

- 92 Despite years of efforts to discourage the practice, widow inheritance remains widespread in Kenya. Proponents of widow inheritance – predominantly men – claim that the practice serves as a social security mechanism for widows and children. The Commission heard about this explanation from a male witness in Kisumu

In the Kenyan scenario, only a visitor would not be aware of the very many negative propaganda and innuendos that have been peddled against the Luo as being responsible for the poverty or relative backwardness. Cases of attack include, and are not limited to, the Luo widow support systems. It is not uncommon to find the general

78 FGM Act sec 25

media and people who come from outside the Luo culture talking in derogatory terms about the Luo practice of widow support to a point that it is what is blamed for the prevalence of HIV/Aids in this region⁷⁹

- 93 When Commissioner Ronald Slye inquired as to whether this witness was aware of the opinions of Luo women on the practice of widow inheritance he responded that:

I have a lot of knowledge of that since I have been born in the Luo sector and I understand Luo widows very much. Those agitating over this matter are non-Luos and Luo women understand the practice. It does not dehumanise them, it does not turn them into chattels, but it is one way of ensuring that they are supported within the family set-up. In certain cases, it is not conjugal. It is support as the word reads so that there is a father figure.⁸⁰ To give the virtues of that system, you will find that most of us, even in this hall, have benefited from support and education from uncles and relatives. When you look around, you will find that the number of Luo street urchins as compared to those of other communities is very small. Further to those support systems, we had the post-election violence, but you cannot locate the IDPs from Luo land because of those family support structures. In areas where there are no such structures, then you will find them having tents all over the country. We are talking about a rich culture and people need to study it and understand it and not pass value judgment without deep knowledge of the Luo structure.⁸¹

- 94 However, the testimonies received by the Commission at the women's hearings are starkly in contrast with the above views. In Kisumu, where these views were expressed, the Commission heard that widows whose husbands were killed in the 2007/08 Post Election had been forced to abandon their homes after they refused to be inherited. Some of them had been forced into prostitution.

So, most women have come to towns and urban centres to avoid being inherited and some have been told to move out by their extended families. For a number of them, it is easier to get money in the town. They do some little laundry work for as little as Kshs30 or Kshs50. Sometimes after working for a whole day and because they were given a meal, the cost of that meal is deducted. The most vulnerable have gone into prostitution to survive although that puts their lives and those of their children at risk. For them, that is the only way they can survive. Most of them are usually arrested for stealing.⁸²

- 95 Regardless of the perceived or even actual advantages of widow inheritance, women who testified on this practice strongly condemned it, almost without exception. Indeed, for many women the very idea of inheritance is dehumanising. For Esther Kesı, for example, it was completely incomprehensible to her that she could be inherited by a person whom she had cared for as a little boy (See Box

79 TJRC/Public Hearing/Kisumu/19 July 2011/p. 14

80 TJRC/Public Hearing/Kisumu/19 July 2011/p. 19

81 TJRC/Public Hearing/Kisumu/19 July 2011/p. 19

82 TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 7



Women dancing at a TJRC forum.

below). Her story reveals the multiple challenges, injustices and violations that widows face upon eviction from their matrimonial home. More often than not, as the testimony below reveals, their pursuit for justice is an agonising experience.

I am also a widow but I have also undergone many challenges as a widow. I was evicted from my husband's home because I was married in Western. We had lived together and we helped each other and in 1996, my husband died and I saw things that I had never seen in that family. I was told to move out of that home and I left everything. I had two children but I thank God because when I came back to my home, I joined a group of people working with the health services. We counsel people in the villages and it is assisting me. Before my husband died, my child was involved in an accident in Malindi Bus and my husband was the one following up the case. Unfortunately, when he died I did not get the compensation and the case was already with an advocate. When I tried to follow up with the advocate in Eldoret, they told me that I should take the documents that I had forgotten in Malindi. When I came, I did not get fare to take me back to Eldoret and my husband's family could have assisted me but they took everything from me. I went back to my home and started life with my children. I struggled and went back to the lawyer's office but by bad luck, I found that he had moved and I do not know where he is. Up to now, I have not got any compensation for my child. Lack of education, like the previous women had said, is like darkness to us. I do not know where to go so that I can get my child's compensation. That is all I had and may God bless you. I have the documents at home but I did not know that such issues can arise. The company of the bus no longer exists but when I followed up, it is as if the money had already been given out.⁸³

83 TJRC/Hansard/Women's Hearing/Kilifi/p. 35.

'I used to wash him when he was young': The story of Esther Kesi

(TJRC/Hansard/Women's Hearing/Kilifi/17 January 2011/p 12-13)

My name is Esther Kesi. I come from Malindi in the side of Ganda and I am a widow. My husband died in February 2008 out of an accident. After he died [it became] a conflict. The father said that he will bury him at their place and I accepted and we went and buried him. Then I wanted to go back to my home where we had rented, but my father-in-law said that I will not move away, but stay there. I persevered and stayed.

The problem is that they were forcing me to be inherited by the younger brother. I used to wash him when he was young and now he is a big person. My heart could not allow me to be married to such a young person, because to me, he was a child. He could be my husband but he was too young then. So, my father-in-law said that I could not stay there if I could not accept that. He said that a person who does not have a husband cannot stay there. If that was the case, I should go back to my maternal home.

I wanted to be free so that I could look for employment because I was used to working when my husband was alive. I was doing casual jobs and we could help each other. Now, my father-in-law said that at his home a woman cannot do work. I said I have to work because I used to work to bring up my children. Why now that my husband has died I should not look for a job?

It was now a conflict, I wanted to go and look for a job, my father-in-law did not want it. I stayed there from the time my husband died in February until June. It was now too extreme and I could not manage it. My eldest brother-in-law who had four wives wanted me to be the fifth wife, he had his children and I had mine. I said I could not manage it because he had his wives and my husband had died.

My husband had said that if he died, I should not be inherited. It was better for me to go back to my maternal home. It was 4 p.m. when my children were at school, the elders came and I was being asked to name the husband who will marry me. I said that I will not be married and one grandfather said, in their tradition, when the husband dies the widow is married. If I do not want to be married then I should move out. I accepted to move out but I wanted to know what I was supposed to do and what was good before the eyes of God. I told them that I should not make them happy and mess up my relationship with God.

They chased me away and it was 4 p.m., approaching 5.00 p.m. they sent me away. They abused me with words that I cannot even mention. They really abused me and my father-in-law said that I was the one who killed their son, my husband. That I am the one who made him to die as if I was the one who caused the accident. It was just bad luck, but it turned out to be wrangles and abuses. My father-in-law abused me until he got satisfied.

I took all my luggage, beds etcetera, and I put everything in a good position at home. From Msuloni to Ganda is not far. You could even board a motorbike because it is not far. I took my young child who was still crawling and others were crying as I was being assaulted. I left the elder children back, so that I could go home. When I arrived at my maternal home and explained what had happened to my parents, they asked me where I had left the property. I told them that I had left everything there, my father gave me Kshs500 and told me to take a vehicle the following morning and go take my property home.

When I reached there the following morning, I greeted them in good faith, carried my property and went back to my home. Now, since that time, I am suffering with the children. Their grandfather does not come to even just look at his grandchildren see how they are fairing on. I am the one who has to look for food to feed them, I have to buy a book and a pen, I have to ensure that they dress properly, groom them and ensure they eat well, all that depends on me. I am the one who is responsible for everything. There is nobody on the side of their grandfather, the home of their father to even bring a kilogram of flour to come and say that they have come to find out how their grandchildren are doing.

It was really painful, the elder child was in Standard Six when my husband died. The same year he dropped in marks and he could not go to Standard Seven because of the shock after the death of his father. The following year he went to Standard Seven and he is now in Standard Eight. The question I am asking is: If my child passes in Standard Eight, what will I do?

I do not have a good job that would generate a good income, it is just casual labour that I do just to put food and other small items on the table for my children. I do not have money that can enable me take my children to school! That is why I am praying for assistance for my child.

- 96 Even when widows are not evicted from their matrimonial homes or forced into another marital relationship, they still face other challenges and violations. They may be forced to undergo certain customary rituals. They may also be denied the opportunity to properly mourn their departed husbands. In Embu, the Commission heard the story of a widow who was not allowed to see the body of her dead husband because at the time of his death she was pregnant and it was believed that she would miscarry if she were to be allowed to see the body. The result was a traumatic experience.

I used to stay with my husband before he was killed in 1967. I remained a widow with five children. The first born child was six years old when his father was killed. The police never found the body. I have two sisters, but they could not assist me. I was told to go and report the matter to the elders, so that the clan members could go and search for the body. They looked for the body and they found it after 14 days. That was in July 1967. The body that was brought to us was not that of my husband. Since I was expectant, I was not allowed to see the body because I could miscarry. I did not see the body of my husband. The person that they buried was not my husband. I believe that they buried the wrong person. During the day of the burial, I wondered why they did not allow me to see the body of my husband. On the day of the burial, I was told that someone had seen a body in the river at Rukingasi. Somebody told us that the body we collected from the mortuary was not my husband's. The person who had denied me a chance to go to the mortuary started fighting me. Those who went to the mortuary collected the wrong body.⁸⁴

84 TJRC/Women's Hearing/Embu/22 November 2011/p. 11-12

- 97 Even though this event occurred more than four decades ago, and indeed her husband's body was eventually found, the experience left the widow traumatised and she has carried a heavy emotional burden for all these decades. Indeed, from Mandera to Busia, from Nairobi to Mombasa, the Commission's hearings were attended by women who had been wounded, brutalised and violated in one way or the other in the name of culture. The Kenyan woman carries a heavy emotional burden.

State sanction of systematic discrimination against women

- 98 Although many gender discriminatory practices are embedded in culture, the state can play an important role in eliminating these practices and ultimately in empowering women. During the mandate period, the state acquiesced to or sanctioned most of the harmful practices described above. The Kenyan state has been patriarchal in nature since its inception.⁸⁵ The colonial state was founded on a Victorian worldview, one in which gender roles were clearly defined with the result that public space (political) was understood to be the male's domain while the domestic sphere (apolitical) belonged to the female. State structures were thus designed to reflect and serve this worldview. Upon attaining independence, these structures were never dismantled. Instead, the independent state was 'further masculinized and ethnicized'.⁸⁶
- 99 The result was structural and systematic discrimination against women by the state itself. That this was the case is evident from laws that governed the country during the mandate period. Some of these laws were manifestly discriminatory whereas others were discriminatory in their effects. Other laws such as the Judicature Act sanctioned customary practices which, as has been described above are manifestly discriminatory.
- **Constitution of Kenya (1963)** The Independence Constitution adopted in 1963 was Kenya's supreme law throughout the Commission's mandate period. Like many constitutions adopted in the 1960s, the Independence Constitution contained a bill of rights which guaranteed mainly civil and political rights. The rights were guaranteed to every person in Kenya regardless of race, tribe, place of origin, residence or other local connection, political opinions, colour, creed, or sex.⁸⁷ In essence, the Constitution prohibited discrimination including on the basis of sex. However, the prohibition of discrimination on the basis of sex did not extend to matters of adoption, marriage, divorce, burial and dissolution of property on death.⁸⁸ This had a particularly negative effect of women's freedom and enjoyment of rights.

85 N. Kamau *Women and political leadership in Kenya: Ten case studies* (2010) 11.

86 Kamau (n 86 above) 12.

87 Constitution of Kenya 1963, sec 82.

88 Constitution of Kenya 1963, sec 82(4).

Section 82(4) represents substantial and dangerous retrogression for women because the exemption applies to areas that affect relationships in the private sphere, where women are subject to private power with little say – a sphere that has historically been defined by inadequate or non-existent enforcement of women’s human rights. Section 82(4) leaves intact traditional male privileges in the crucial areas of marriage, divorce and succession.”⁸⁹

- 100 Moreover, section 90 and 91 of the Independence Constitution discriminated against women in relation to passing on citizenship. Section 90 provided that ‘a person born outside Kenya after 11 December 1963 shall become a citizen of Kenya at the date of his birth if at that date his father is a citizen of Kenya’. Section 91 provided that ‘a woman who has been married to a citizen of Kenya shall be entitled, upon making application in such manner as may be prescribed by or under an act of parliament, to be registered as a citizen of Kenya’. The effect of these twin provisions was that Kenyan women lacked the capacity to pass on citizenship both to their foreign spouses and to children whose fathers were not Kenyan.
- 101 The Independence Constitution was repealed on 27 August 2010 following the promulgation of a new Constitution.
- **Judicature Act and the Magistrate Courts Act:**⁹⁰ The Judicature Act recognises African customary law as a source of law in Kenya. On its part, the Magistrate Courts Act provides for a judicial mechanism whereby customary claims such as those relating to dowry and pregnancy compensation can be claimed.⁹¹
 - **Marriage Act and the African Christian Marriage and Divorce Act:** These two Acts of Parliament provide for the marriage of girls of between the ages of 16 and 18 as long as their parents consent.⁹² These provisions were rendered inoperative by the Children’s Act of 2001 as well as the Sexual Offences Act of 2006.
- Law of Succession**⁹³ This Act of Parliament was enacted with the intention of merging and consolidating all the systems of law of succession and their support legislation into one comprehensive statute in order to give the country a uniform law of succession applicable to all sections of the Kenyan population.⁹⁴ It governs the division of property after one’s death either through a will (testate) or without (intestate). The Act provides for the equal inheritance of property between men and women.

89 UNIFEM *Promoting the human rights of women in Kenya: A comparative review of domestic laws* (2010).

90 Chapters 3 and Laws of Kenya respectively.

91 Magistrate Courts Act, sec 9(a).

92 Marriage Act, sec 19 & 21 African Christian Marriage and Divorce Act, sec 8.

93 Chapter 160 Laws of Kenya.

94 Sections 2(1) and (2) of the Succession Act provide thus: ‘Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.’

- 102 However, section 32 thereof stipulates that the Act does not apply to inheritance of agricultural land and livestock within areas which the Minister may in the Kenya Gazette specify. Under section 33, such land is to be governed by the customary law of the community of the deceased. The effect of section 32 and 33 is to sanction or legitimise discrimination in succession matters considering that in many traditional customs women and girls are prohibited from inheriting property upon the death of their parents or spouses.
- 103 Moreover, under the Succession Act, upon remarriage the interest of a widow in the matrimonial property terminates notwithstanding the fact that she might have contributed to the acquisition of the property during the lifetime of the deceased partner⁹⁵.
- 104 In 1990, the Succession Act was amended to exclude Muslim women from its purview. In effect, therefore, the amendment denies Muslim women the right to write wills or have their estates administered under the general rules of intestacy.
- **Evidence Act.**⁹⁶ Section 124 of the Evidence Act (repealed by the Children's Act of 2001) required that evidence of women (like that of children) be corroborated in regard to sexual offences. This provision not only reinforced the subordinate status of women in society, but it also posed an impediment to prosecution of sexual offences as it created an exceptionally high threshold for conviction of accused persons. As such, and for the larger part of the mandate period, the precedent set in the case of *Maina v Republic*⁹⁷ rigidly applied to cases of sexual offences.

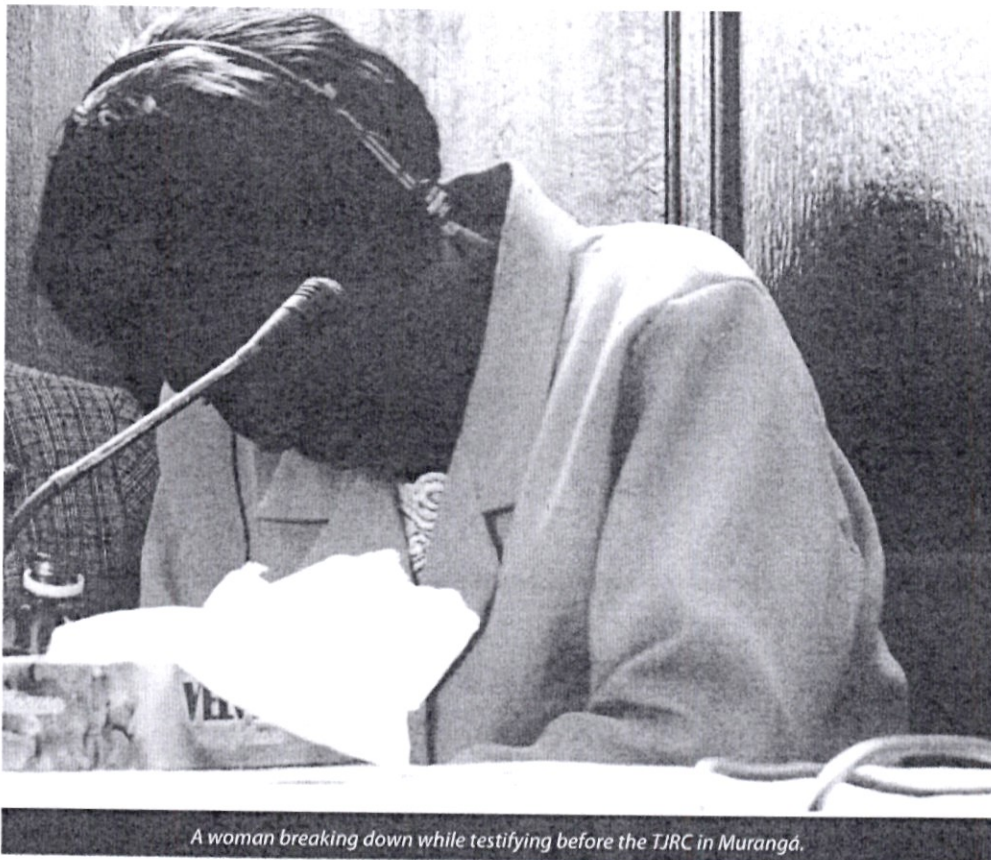
It has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence the magistrate should warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth then the fact that there is no corroboration need not stop convicting.

⁹⁵ Succession Act, sec 40

⁹⁶ Chapter 80 Laws of Kenya

⁹⁷ (1970) EA 370

105. Another provision in the Evidence Act, section 163, equally discriminated against women. Section 163(d) provided that in cases where a man was prosecuted for rape or an attempt to commit rape, it could be shown that the prosecutrix was of generally immoral character. In essence, section 163 enabled a male accused person to question the credibility of a female victim of a sexual violation by showing that she was of 'generally immoral character. There was no corresponding provision in regard to a male victim of sexual violation. The presumption was that male victims of sexual violence were more credible than women victims.
106. There were many more laws in force during the Commission's mandate period that overtly or covertly discriminated against women. The Constitution of Kenya 2010 has ushered a new era in terms of promoting gender equality in Kenya. The challenge remains societal transformation insofar as gender equality concerned.



Socio-Economic Status of Women

Feminisation of poverty

107. It is now widely agreed that across the world poverty has become feminized and that there at least are three dimensions to this issue: the expansion of female-headed households, the persistence and consequences of intra-household inequalities and bias against women and girls, and the implementation of neoliberal economic policies around the world.⁹⁸ In Kenya, women constitute the majority of the poor. They are disadvantaged in their access to productive resources and labour markets and disempowered at the household, community and national levels. They face obstacles in business, they have fewer skills, tend to be located more in the home and their activities are less remunerative than those of men. In fact, women's work is traditionally restricted within the domestic sphere where they perform household chores like cooking, fetching water, washing utensils and tilling the garden. These chores do not fetch wages and many times women do them in their capacities as mothers, grandmothers or sisters. This labour, though productive economically, is hardly ever included in national statistics relating to the economy. On the other hand, men dominate the public sphere where their labour is not only paid for but is also taken into consideration in national tallies of productivity. These distinctions in labour, and in remuneration has accounted for the marginalisation of women in Kenya and indeed in most parts of the world.
108. Generally, the poverty headcount is higher among women. According to the most recent poverty statistics, within rural areas the headcount ratio of households below the absolute poverty line stood at 49.1 per cent. The ratio for male-headed households (48.8 per cent) is slightly lower than that of female-headed households (50.0 per cent). In urban areas where the poverty prevalence is 33.7 per cent, the poverty ratio for male-headed households is 30.0 per cent while for female-headed households is 46.2 per cent.
109. Ironically, while they have limited access to productive resources and labour markets, women are increasingly the primary providers in many households around the country, especially in rural areas where 80% of women live. The market economy has led men to the urban areas leaving women-headed homesteads in the rural areas. As a result, women have taken up more roles on the domestic front. Across the country, women testified to the Commission about the heavy burden that they have to carry to sustain their families. In Kilifi, the day to day life of a woman was summarised as follows:

⁹⁸ V. Moghadam, *The feminization of poverty and women's human rights* (2005).

When women get the rare opportunity to be engaged in employment, whether formal or informal, they are still faced with many challenges, including discrimination and sexual violence. Both in the formal and informal sectors, men earn higher incomes compared to women.

I want to talk about the women livelihood in the village. A village woman wakes up at 5 am, prepares breakfast for her children and the same woman will go and do some farming or go and sell mangoes or pawpaws or anything that she has to sell after the children have left for school. Once she has finished selling her products, she will buy a packet of flour and then she will go back home. The husband just stays at home and does not go and look for a job. The tired woman will come back and cook for her children while the husband is just looking at her. She will ensure there is firewood and she eventually goes to bed after 11 pm to find the husband waiting. That is the fate of the village woman.⁹⁹

110 A similar story was recounted to the Commission in Kuria

We are oppressed as Kuria women. We work more than donkeys. We have more than one hundred hands. When we wake up at 5:00 a.m., we go to the farm and the husband will want water for bathing so that he can go for a walk. Then you as a woman, you look after the cattle, you bring water, you wash, iron for him and look for firewood in just a day. You then must know what people will eat for lunch and supper. That is why we are all slender. There is no fat woman in Kuria because they are overburdened. There is even no time to eat. So, we have too much work and we do not know how to cope.¹⁰⁰

111 The high level of poverty among women is closely linked to their inability to access gainful employment, a subject that follows immediately hereunder

Women and employment

112 When women get the rare opportunity to be engaged in employment, whether formal or informal, they are still faced with many challenges, including discrimination and sexual violence. Both in the formal and informal sectors, men earn higher incomes compared to women. They occupy top positions while women dominate positions at the bottom of the hierarchy. In the public sector, as shown in Table 1 below, employment is skewed in favour of men.

⁹⁹ TJRC Hansard/Women's Hearing/Kilifi p. 32

¹⁰⁰ TJRC Hansard/Women's Hearing/Kejonga 26 July 2011, p. 5

Table:1 Gender disparities in employment opportunities

Employment	Units	Female	Male
Mean monthly earnings from paid employment (1999)	Ksh	5,752	8,440
Labour force participation rates (1999)	Percent	72.6	74.7
Informal sector employment	"	45.0	55.0
Formal sector employment	"	28.0	71.9
Unemployment rates (15-64 years)	"	19.3	9.8
Wage employment by grades (public-2002)	Percent		
Bottom 5	"		
A	"	70	30
B	"	65	35
C	"	67	33
E	"	77	33
F	"	89	23
Top 5	"		
Q	"	19	81
R	"	15	85
S	"	10	90
T	"	6	94
U	"	30	70
Occupation of employed person (15-64)	Percent		
Legislators, senior officials and managers	"	12.6	87.4
Professionals	"	13.3	86.7
Technical and associate professionals	"	37.1	62.9
Clerks	"	39.7	60.3
Services workers, shop/market sales workers	"	50.3	49.7
Skilled agricultural and fishery workers	"	58.0	42.0
Craft & related activities	"	20.4	79.6
Plant and machinery operators & assemblers	"	4.0	96.0
Elementary occupation	"	52.0	48.0
Others	"	59.1	40.9

113 Discrimination against women in the workplace remains rife despite years of concerted efforts to ensure that men and women are treated equally in the workplace. In Bungoma, for instance, the Commission heard about discrimination in the teaching profession.

The first thing I would like to speak about is discrimination. In this line of work I am in, every now and then, you find that if there is an opportunity for promotion, the person who will be considered first for promotion is a man because they have met somewhere when we are just in the kitchen, as my fellow woman has said, discussing this promotion and making plans for it. When there is a chance for a promotion that man will get it and by the time you will have gone there, the man would have already have taken the

position. I believe that as women teachers in primary schools, you cannot be given a big school. For example, here in Bungoma Town, we have big schools like Moi Primary School, Bungoma DEB and others, but you cannot head such schools because they believe that you, the woman, cannot lead such a big school. Therefore, you will be given small schools like Murayu and Railways.¹⁰¹

114. The Commission also heard that female teachers are always discriminated against in so far as allocating subjects to teachers is concerned. It is often believed that female teachers cannot or are incompetent to teach mathematics and science subjects. On this issue, a female teacher lamented that:

Most of the time, let me say that in primary schools, the classes that are being looked into seriously are from Std. VI, VIII and VIII because these pupils are heading to their final exams. So, if you want to teach Mathematics, may be in Std. VI, VII and VIII, the head teacher of that school can refuse to allow you to teach that subject because he believes that women are not capable of teaching Sciences and Mathematics. They believe that we can just teach subjects like English, Kiswahili, Social Studies and CRE. But I believe that when I went to college and I know that the pupils I am teaching are boys and girls. When I go to class, I am not going to say: "You, girl, go out" or "You, boy, go out." We teach all of them. So, the solution is this; we have gone to school, we have taught and we should be given our time and our opportunity to teach all these subjects that we feel we are capable of teaching. Because when we are in teacher training colleges, we are being taught every subject and by graduating from there, you must have attained good grades and must have passed your exams. But they say that men are the best and that they are well placed to teach Mathematics, but we are also able to do that.¹⁰²

115. She proceeded to explain that female teachers are also always discriminated against on the basis of pregnancy:

You can deliver a baby and then fall sick. When you request for additional off days or for an extension of the leave so that you can stay at home for medical attention, you are told that it is too much. So, when you go back to school after the maternity leave and after recuperation, you are transferred to the next station because it is too much for the men. They say that you are always going home for maternity leave followed by sick leave. Those are the problems we are undergoing.¹⁰³

116. Another witness who testified before the Commission on the plight of female teachers corroborated the above testimony. She said:

Many times when you are posted to a certain school, especially in boys schools [...] they just see you in terms of maternity leave. But I remember when we were being taught in college, there was no lecturer who told us that it is a mistake for a woman to get children. They should have told us if it is and, maybe, we would have thought twice on

101 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 5-6.
 102 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 7-8.
 103 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 6.

the choice of being teachers. But even the society knows that even a female teacher is permitted to get married and get children. So, why are we suffering because of our natural right to have children? People do not want us women to teach in their schools. You would think that they will live there forever, but the schools are not theirs. It would have been fine if we agreed that the brothers and sisters work together.¹⁰⁴

- 117 Women with disabilities face more challenges in accessing employment. They are discriminated against, first, because they are women, and second, because they have a disability. Further, social stigma, coupled with limited access to education, impedes their competitiveness in the job market.

There are very many deaf women who are looking for jobs but they are ignored. Nobody is ready to employ a deaf woman. We know that there is free education in this country but that is not the case for deaf people. When deaf children go to school, they must pay for boarding fees. Disability goes together with poverty and most of them come from poor families. So, their parents cannot afford to pay for them fees. While everybody else is developing, nobody ever thinks about deaf people. We are sisters, mothers and aunties, so it is important that we remember that there are deaf people we need to move together with. We should not think that the deaf do not know anything or cannot do anything.¹⁰⁵

- 118 The Commission received more examples of discrimination against women with disabilities in Kakamega:

We are discriminated against when looking for employment. I have got a few examples here. In 1992, Naomi Esiaba who is physically disabled applied and qualified for a job as a Returning Officer in Ebusakami, in Emuhaya District. Her name appeared on the list but when she went for training, she was disqualified by the officer in charge, claiming that she would not be able to carry the ballot boxes. She was instead given a job as a clerk, which was less paying. Also, during census in 2009, Rita Enaki and Margaret Nigalusia from Hamisi were trained and they participated in the census activity, but they were paid Kshs8,000 instead of Kshs25,000 that other people got. The last example is Naomi Mandela who was interviewed for a copy typist job at a school in Emuhaya. She passed the interview but was not offered the job. The boss said that they wanted a person who could combine the typist job with messengerial duties which they claimed she would not manage.¹⁰⁶

- 119 In many sectors of the economy, women are employed as casual labourers, a status that denies them a range of privileges and rights which accrue to permanent employees. For instance, in the Coast region, women employed by salt mining companies are not only perpetual casual labourers but they also work under harsh and hazardous conditions. They earn meagre wages and are often dismissed at the whim of their employers. Their general plight was recounted to the Commission in Kilifi and is captured in the Table below.

104 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 10

105 TJRC/Hansard/Women's Hearing/Nairobi/21 February 2012/p. 19

106 TJRC/Hansard/Women's Hearing/Kakamega/28 June 2011/p. 15

'He gave us condoms instead of salary increment': The plight of women working in salt mining companies in Kilifi

(TJRC/Hansard/Women's Hearing/Kilifi/17 January 2012/p 22-24)

I want you to know that in Kenya let us not cheat ourselves that slavery is over. There is still slavery [] Women of Magirini or women of Fungishi Location are like slaves. Most of these women have skin diseases such as rashes and scabies because of the salty water.

I work with the Marereni Salt Forum that is looking into the violations of the people on the side of the salt mines whereby firms were taken in illegally. That is when we formed that organisation.

Salt [mining] in Magirini started in 1964 when I was born. I cannot say much about the past, but I joined this work in 1998. The problem of the salty factory is that, yes, the work is done by men and women but we witnessed oppression against women.

At the factory, women carry goods and do packaging. When I started working at the factory in 1998, I was paid 70 cents for packing 40 bundles in one sack. You have to work for 24 hours to get Ksh 200 or Ksh 300. This payment will depend on your speed so that you can get that money. When you come from there, there is nothing else that you can do. You cannot even do the household chores because you are too tired. We complained about 70 cents to the company Manager called Kay. He said there was no problem and every year, you would be added one cent. We continued up to the time where we were being paid Ksh 1 in 2004.

[] There was an Indian who was the director of the company. I cannot fear to mention him, he was called Benji. He said there is no single day a woman would be added money. We did not know the law or where to go and report. We used to work day and night shifts. Women appealed for salary increment. We were told there would be no salary increment for women. We were told if we were tired, we could resign and go home.

We asked ourselves what to do and decided to see the owner of the company. Husbands of the women workers were told to ensure their wives reported to work. We went to the Labour office to complain in 2004. We saw an officer called Mr. Jack. We identified five women to advocate for our rights. Most women worked as casual labourers.

We saw Mr. Jack. He said salary increment depended on profits made by the company. He threw the letter we gave to him into the dustbin. This salt company should be investigated. We also complained to the KNHCR. We appeal to the TJRC to assist us. Mr. Jack abused us. He said our work was worthless. He told us that as casual labourers, we had no rights. He gave us condoms. I told my fellow women I would not take it. He gave us condoms instead of salary increments. Which Kenya is this where a woman is enslaved year in, year out? I do not know anything about law, but our people understand law. Where is the law that protects casual labourers in this country?

If you go to Gongoni, which is a crystalline salt company, no single woman has been taken as a permanent worker. I am not cheating you, this is a true story. I have tried. My first born is in secondary [school], though I am single. Women here cannot take their children to school. This woman is a good example. But her first born was married because she cannot take her to a tailoring course.

The issue of salt mines contributes to early marriages. There has been oppression in salt companies. There is poverty, but Kenyans are watching us. At times if a person gets pregnant, it is better for her to abort because where would she take the baby? I appeal to the TJRC to assist these women to get decent salaries.

If the child goes up to Standard VIII, there is no place that you can go to seek [for] assistance. The leaders are all the same. They ask you to vote for them because you are not educated. They will tell you that after voting for them you can go and look for them in Nairobi but if you go, you cannot see them. What will the women of Kilifi or Magarini do? Let me end there because if I continue, I will cry.

120. An inquiry conducted in 2005 by the Kenya National Commission on Human Rights into allegations of violations of human rights by salt mining companies in Magarini, Malindi, found that workers were working under inhuman and degrading conditions, were exposed to danger of injuries and that salt companies 'retained workers on perpetual casual terms with no benefits, irrespective of how long one had worked'.¹⁰⁷ Their plight is similar to that of women working in flower and tea companies. On the situation of workers retained by flower farms, the majority of whom are women, a witness narrated to the Commission that

These workers face issues of health and safety. As I said, there are 60 farms here. Most of them are profit-oriented, they are not concerned with the welfare of workers. A few of them are doing well. However, a number of them have problems. Workers normally complain of health and safety diseases because these flowers are sprayed every day. I would like to tell the Commission that these chemicals are harmful to our health. If you want to kill *potraitis* in the flower, you have to spray a stronger chemical. Due to market demand, when an order is floated from Europe that they want eight million stems tomorrow at 8.00, workers are forced to work over time because if the order goes then the market will not be found again. So, these are the challenges that workers face. You find that when they are forced to harvest, they go back to a green house and harvest. As I said, that chemical is systematic and people get sick as they inhale it. I would like to tell this Commission when people are employed they are very smart and energetic. They are very healthy. However, when you look at them leaving employment, they are sickly. They have nothing to account for all the years they have worked. When you are sickly, because this is an intensive work, you cannot be allowed to continue.¹⁰⁸

121. On the question of wages and the status of workers, it was explained to the Commission that

¹⁰⁷ KNCHR *Report of a public inquiry into allegations of human rights violations in Magarini, Malindi* (2006) 103-105

¹⁰⁸ TJRC/Hansard/Public Hearing/Naivasha/26 September 2011/p. 35

People work for more than five years as casual labourers. Our law says a person can be employed on contract basis. It also says that you can renew your contract after three months. It is sad that you find somebody who has worked for ten years as a casual. The law is very clear in Kenya, that if you are not a permanent worker, when you leave employment, there are no final dues. You do not have leave days. You do not get any benefits when leaving employment because there is no service accrued to you. Let me put it clearly that, for example, a grader who grades flowers is required to grade 3,600 stems. These are later sold in Europe in Tesco's, White Ross, Marks and Spencer. Every stem fetches about Ksh 100 when the market is not good. However, the grader is only paid Ksh 150 per day¹⁰⁹

- 122 In addition to facing discrimination and working under harsh conditions, women are often victims of sexual harassment and violence

Similarly, at times, we have the problem of sexual harassment and this is violating us, as women. For example, I am going to an office and, as you know, many offices are managed by men. When you start explaining your problem, the man then tells you "Let us go and meet at the coffee garden, you cannot address your issues in that office." So when you go to the coffee garden, you buy lunch and additional love. That is the violations we are exposed to in the offices. A person does not care whether you are married or not. Those are some of the violations that we are undergoing. I know that the issues concerning teachers are in primary and secondary schools. My fellow from the secondary section will raise them because they are one and the same thing¹¹⁰

- 123 Another witness made similar observations

At the district level, there are panellists, people who sit on the panel that interviews and employs teachers. Many of them are men. You are expected to befriend them so that you exchange love with employment. If you refuse to do that, there is no job for you. If you accept, you will get a job immediately. But you have no surety over your life. This comes out clearly if you look at the records of teachers who have been employed through the decentralised teacher recruitment system. You will find that many teachers who graduated in 2004 or 2007 have been employed. You will see another one who finished in 2001 still at home. She has been employed by the board of governors on contract. May be in primary, she is paid Ksh 10,000 per month, which is not enough to cater for her needs. This is so just because she did not accept to engage sexually with the panellists so that she could be employed¹¹¹

- 124 She also informed the Commission that

In secondary schools, this has come out more clearly, especially on the female teachers on teaching practice. We sympathise with the girls who come to our schools because you can see men sitting together trying to choose them, as if they are goods in the markets. They do booking, saying "This one is mine and this one is mine." These

109 TJRC/Hansard/Public Hearing/Naivasha/26 September 2011/p. 36

110 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 6

111 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 10-11

children are assaulted, not just by teachers, but even by the university lecturers who supervise them. When he comes to see a student in class, then he will tell her "Let us meet at Westgate so that we talk about the report that I will write." Because the girl is desperate and because her parents have paid school fees and she wants to finish her studies and graduate, she has no option but to follow the male lecturer to the hotel. We see this every day and we sympathise with them. Kenya is spoilt.¹¹²

125. As is reflected in the story below, sexual harassment and violations are worse for women and girls working in the informal sector where there are few witnesses.

I got her employment as a domestic worker. However, she was raped by the owner of that homestead where I took her to work. I felt very bitter about it because this child was threatened by the mother of that homestead not to reveal anything. So, she never told me immediately after the incident. She only informed me one week later when they chased her away. I went to collect her clothes from her employer. I took her to the general hospital. I was told that they could not assist us because she had already taken a bath after she was raped. The clothes she had, she had already washed them. So, they said they could not give us much assistance.¹¹³

Women and land

126. Land is a critical resource for economic development. However, cultural norms and gendered practices have made women's access to land tenuous. Women own approximately one to five per cent of registered and titled land.¹¹⁴ Registration of land acquisition of titles has predominantly been a male preserve thereby increasing women's dependency on men. Furthermore women's exclusion from registration of land titles has also curtailed their rights to resources found on land.¹¹⁵ Moreover, although statistics shows that women in Africa are responsible for an estimated 70% of total food production throughout the continent, such farming lands are not owned by them. Indeed, more often than not, proceeds flowing from the sale of farm products belong to men.

In Mt. Elgon, we are farmers. We farm onions, Irish potatoes and other crops. A woman does a lot of work. However, after that, it is the husband who will go to sell the farm produce in the market. They would go to Chwele Market and stay there for, say, one week. When he is done with spending the money, he comes back home with bare hands. Since as a mother you do not have any powers, when you probe how the money was used, you are subjected to beating. A woman has no voice here.¹¹⁶

112. TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 9

113. TJRC/Hansard/Women's Hearing/Nyeri/p. 24

114. SID Kenya Vision 2030: *An audit from Income and Gender Inequalities Perspectives* (2010) 118

115. UN Women *Promoting the Human Rights of Women in Kenya: A comparative review of the domestic laws* (2010) 93

116. TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 13

127 The Commission heard a comparable story in Busia:

The Teso are basically farmers but women and children are the ones who work mostly on the farms. The only cash crop we have is tobacco, but by the way, tobacco is a drug. Women plant tobacco and harvest it. Then they take it to the buying station, but after the sales, men are the ones who benefit because their names are recorded in the factories. Once they get this money, they never come back home. They go away with the cheque. They stay and come back after two weeks or when they have married a new wife and put her in a rental house. So, what they bring back home is meat; maybe two kilograms, sugar and maybe a dress of Ksh 800 for the wife. That is over and the woman starts again.¹¹⁷

128 Amongst the reasons that account for the situation described above is culture. Women's access to and ownership of land is governed by patriarchal cultural practices. Traditionally, decisions concerning land are made by men to the exclusion of women. This point was poignantly pointed out by a witness in Busia:

Women have no decision to make regarding land. When the man wants to sell his land, she will be informed after the land has been sold. Even when she is informed, she is not supposed to raise a voice because she did not bring land from her parents. When the children are left with her, she suffers because the land will go back to the family. Regarding ownership, the woman has no saying on anything that belongs to the household. If the man dies, the brothers are there and she can only be a caretaker. When it comes to property, they are the main producers but no allocation is given to them. They may build on a plot but the title deed bears the name of the man. When there is an extramarital affair, she can easily lose what she worked for and the new lady takes it all. If ever there is some to be returned, it will be very minimal. She cannot choose a site to put up a structure. Even if the man lives in Uganda, she has to look for him to come and show her where she will build. He will be an absentee husband but the owner of every property.¹¹⁸

129 More importantly, women have no right to own land in most African traditional cultures. For instance, and as narrated to the Commission:

A Sabaot woman has no right to inherit property. We are one of the properties of the man. So we do not have an opportunity to inherit property. A woman is told that she came from her home bare handed and she belongs to the man. Even when a woman goes to the merry-go-round and buys a sheep, or a cow, they all belong to the man who has power to sell the animals.¹¹⁹

117 TJRC/Hansard/Women's Hearing/Busia/4 July 2011/p. 8

118 TJRC/Hansard/Public Hearing/Busia/1 July 2011/p. 8-9

119 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 14. See also TJRC/Hansard/Women's Hearing/Meru/18 November 2011/p. 21. TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 3-4

- 130 Similarly, in the name of culture, a widow is traditionally not permitted to inherit the matrimonial property, especially if she refuses to be inherited by a male relative of the deceased husband. As a result, many widows are routinely evicted from their matrimonial property or home. On this particular aspect, the Commission heard many accounts from widows across the entire country. The story of Esther Kesi captured earlier in the chapter is reflective of the experiences of many women in Kenya. In Kitui, a widow recounted her story.

My husband was working with the Army. In 1995 while he was on attachment at Wajir just within the camp, he was crushed by a truck belonging to the public works. We had three children, two boys and a girl. My in-laws called me and told me that according to the culture I was supposed to be inherited by one of the brothers of my husband. I refused that proposal and they told me that I do not belong there again. They told me that I have no space in their home and I should go back to my parents to be given land there and bring up the children from there. They told me that when the children are grown up they can bring them back. I also chose not to go. When my parents were called to come and take me home, I instructed them not to come. I told my in-laws that I had not been divorced by my late husband. He only died. Then they told me that I had no land or house and that I did not own property because I was not submissive. So I decided to go back to Nakuru. [Later] to add more pain, they sent for my first born and said that he would be given one acre from the land of his father but my daughter had no right there. I felt so bad. I have suffered as a widow. I have no land and my daughter will face the same fate.¹²⁰

- 131 Even in a case where a widow is allowed to own or continue living in the matrimonial home, this is always considered as an extension of a favour rather than the fact that it is her right or entitlement.

When my husband died, I was told to go away so that I could bring up my children who will then take care of me. [] I was denied land in my father's home. I was given one quarter of an acre and it is on a swampy place. That is my shamba. They say that they sympathised with me and that is why they gave me that land but I was very sad because I have children.¹²¹

- 132 Discriminatory cultural practices relating to land have remained persistent despite legal provisions which guarantee everyone the right to property, whether they are male or female. The Law of Succession, as earlier mentioned, provides for equal inheritance of property between men and women. Similarly, land laws and policies that operated during the Commission's mandate period were gender neutral and could not be said to be discriminatory in and of themselves. However, these laws and policies failed to take into account the fact that ownership of land was influenced by a host of factors including culture.

120 TJRC/Hansard/ Women's Hearing/Kitui/2 Dec 2011/pp. 6-7

121 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 15

- 133 The Registered Land Act,¹²² for instance, provided for absolute proprietorship of land. The effect of registration was to automatically extinguish the interests of third parties, including those who had interests emanating from customary law. This has had negative impact on the rights of women to own, use and access land. This stems from the fact that most land in Kenya registered in the name of the eldest male head of the household.¹²³ The situation was summarised thus by Susan Chesina, a representative of Foundation for Women's Rights, during Commission's women's hearing in Nakuru:

Way back in 1963, when the Government carried out re-settlement of people on farms in Kenya, women were not considered. It was only men who got funds. Women were not given funds. They were left out. The same discrimination has continued to date. The situation has become worse even for married women, including those who have wedded in church and those who have given birth to children and raised families. If a husband dies today, a widow is chased away tomorrow by her in-laws. She is told 'you do not have anything here!' She is chased away and without being given any of the family's property. This happens because the family land is in the name of the husband. Women have not been given an opportunity to inherit the land they struggle to buy with their husbands. When it comes to registration of such land, it is registered in the name of the husband. So, technically, the land belongs to him. If the husband dies, the widow is not allowed to inherit his land. If you claim that it is yours, you are told that it is not yours. The in-laws say that the land is for their brothers or for their son. Many women have been chased away from their husband's homes. They have left their properties and gone away with their children. They have really suffered. You are chased away from your house, where you have lived for between 20 and 30 years. You leave the house without anything.¹²⁴

- 134 Similar observations were made before the Commission in Kajiado:

Women are not involved by their husbands in the sale of the land. Sometimes, the farm is so big and the husband has sold it all and when the woman asks the husband not to sell the land, the elders will sit in the *barazas* and the woman does not have a voice. I have seen women struggling to ensure that they report to the chief, but they will never know what transpires. They just find the farm already sold. That case also applies to the widows. When the husband dies, the farm is sold by the brothers of the husband and the widows do not have a voice. [...] Most of the title deeds have the names of the husband. If it is a family, it is in the father's name. So, you will find that the wife has no say because her name does not appear on the title deed.¹²⁵

- 135 Individual stories of women lend credence to the above general statements. In Wajir, a woman bitterly lamented that while she had bought her matrimonial home

122 Chapter 300 of the Laws of Kenya.

123 P. Kamen-Mbote, 'Women, land rights and the environment: The Kenyan experience' (2005) 49 *Development* 43-45.

124 TJRC/Hansard/Women's Hearing/Nakuru/24 September 2011/p.

125 TJRC/Hansard/Women's Hearing/Kajiado/9 Dec 2011/p. 2.

together with the husband, she was subsequently evicted when they separated 'We bought land together but he has put another wife there and yet I am suffering with my kids'.¹²⁶ Another women, Irene Njeri, was forcefully evicted from her matrimonial home by the husband despite the fact that she had contributed in the acquisition of the property

The properties that we had acquired together were in his name. He threatened me and injured my leg. I also have some other injuries that I cannot explain here. As a result, I was evicted from that place and I went back to my maternal home. Up today, he has never bothered about us. He sold all the property that we had acquired together and he says that he cannot be taken anywhere because the property was in his name.¹²⁷

- 136 Women with disabilities are even in a more disadvantaged position. The plight of two women with disabilities was narrated to the Commission in Kakamega

Most women with disabilities do not get married due to negative attitudes by the society. They are, therefore, left landless if they cannot inherit their father's land. I have two examples here, in 2009, a disabled woman in Emuhaya, called Philly Omuchilo, lost her husband. The brother-in-law who is also the area sub-chief forged a land title deed and wants to forcefully move her out of her land which is the only property her husband left her with. Example number two is Esther Imbalavala, a disabled widow from Ikunga sub-location, central Maragoli, Vihiga District. She is being forced by her brother-in-law to move out of her husband's land. They claim that they do not recognise her as a member of that family.¹²⁸

- 137 The legal protection of a wife's share of the matrimonial property remains weak and inadequate. In essence, a wife is not guaranteed an equal share of the matrimonial property upon dissolution of marriage. Although it is archaic and long abandoned in its mother country, the 1882 English Married Women Property Act (MWPA) of England is still the law that governs matrimonial property in Kenya. The legislation applies in Kenya as a statute of general application.¹²⁹ Section 17 of the Act provides that 'In any question between the husband and wife as to the title to or possession of property, either of them may apply to the High Court or a country court and the judge may make such order with respect to the property in dispute as he thinks fit'

- 138 In interpreting section 17, the courts have thus far focused on determining the extent of a wife's contribution in the purchase of the matrimonial property. In

¹²⁶ TJRC/Hansard/Women's Hearing/Wajir/19 April 2011/p. 12

¹²⁷ TJRC/Hansard/Women's Hearings/Nairobi/21 Feb 2012/p. 20

¹²⁸ TJRC/Hansard/Women's Hearing/Kakamega/28 June 2011/p. 16

¹²⁹ Judicature Act, sec. 3



1991, Kenya's Court of Appeal, in the case of *Kivuitu v Kivuitu*,¹³⁰ established that a wife who makes some financial contribution to family income – whether directly by contributing to the actual purchase of matrimonial property or indirectly by say meeting the household expenditure - is entitled to half the share of matrimonial property on divorce. This decision was reversed in 2007 when in the case of *Echaria v Echaria*,¹³¹ the Court of Appeal held that for a spouse to receive a share of the matrimonial property, she must prove that she had made a direct financial contribution towards the acquisition of the property. As such, gains that had been made in protecting a wife's right to a share of the matrimonial property were substantively reversed.

139. As the Court of Appeal observed in the *Echaria* case the onus is on parliament to enact legislation that will guarantee equal share of matrimonial property between a husband and a wife. However, parliament has been slow, even reluctant, to enact such legislation. In 2007, the Matrimonial Property Bill was tabled before parliament but no progress has been made thus far in enacting the Bill into law.

130 [1991] KLR 248.

131 Civil Appeal No. 75 of 2001, (2007) eKLR (C.A).

A woman's pursuit for justice: The story of Agnes Wegesa

I grew up and got married. My husband paid dowry. However, the man whom I got married to used to mistreat me. So, I decided to return home. I later met an old man and his wife, people who had never been blessed with a child. He took me in as his daughter-in-law. By bad luck, that man passed on. He left me a piece of land where I used to live.

After that, in the year 2002, I got a teacher who asked me to offer him a small piece of land so that he could use it as a passage for his vehicle on his way home. I refused to do that and he started insisting that, that was where my boundary reached. There is a river where I had put a banana plantation. I would sell the bananas and that was what I used to educate my child with. The teacher went to a surveyor, had the land demarcated and it was given to him. I asked him why the administrative office did not tell me about it and he told me that I had changed the boundary and I did not need to be informed. When he did that, he left me in a lot of problems. I followed this up with the sub chief and he told me that I was a Tanzanian and I did not even have an identity card. I went to the lands office and got a search which I brought to him. He then told me that my identity card did not correspond with that of my husband and there was no way I could complain about the piece of land.

From there, I went to the lands office. They told me to take to them all the documents in Nairobi. I was told that the map for that piece of land was in Kisii. In all this, I have been alone. I do not have anyone to assist me. I then went to Kehancha and they told me to go and look for Ksh 10 000. A second person asked me to look for Ksh 5 000. All this time, the man I had a problem with started harvesting my bananas and the man even beat me up. I had sent my children for water and he stopped my children from fetching water. I got a bucket to go and fetch the water and he told me that I had to look for my own source of water. I told him to thank God because he owned that piece of land. He then beat me up and tied me up with a rope. One of my children, while going to school, heard about it and came to the place I was. My child begged him and told him not to kill his mother. However, he and his wife beat both of us up. They tied me up and took me to the police station at Nyamtiro. They were dragging me. Whenever he was asked what I had done, he would say that I was a thief. I even have marks up to now.

When I was taken to Nyamtiro Police Station, the police officers untied me. They then handcuffed him and asked him why he had tied up a woman. I had blood stains all over. The man spoke in English with the policemen and he gave me Ksh 1 000. After seeing how my child was crying and how much he had been hurt, I took the money and decided to take him to hospital. I came back in the evening. Someone gave me some money so that I could continue pursuing the case. The medical officials told me that Ksh 1 000 could not compensate me for what had happened and I had to pursue the case. I left there late in the evening. In the morning, they asked me "Mama, did you beat Mwalimu?" I said I did not. I was then advised to take a P3 Form by the hospital officials. However, when I went to the police station, the policemen offered me Ksh 2 000 which I refused to take. I went to the OCPD at Kehancha and explained everything to him. The OCPD told me to talk to the OCS. I told him the whole story. The policemen and the teacher were called. I told them that they had forced money on me. A policeman then started stalking me at home and intimidating me. He told me that he would plant bhang on me because I had reported him to the OCS. He even brought bhang and planted it on me and said that he had arrested me with it. All that happened because of the piece of land that my father-in-law had left for me. I took care of my children. My child was in Form 2. However, since that piece of land was taken away--- I went and apologised to the teacher and told him "Mwalimu, why can you not let me educate my children so that they can be teachers like you?" I told him that if he saw where I slept, he would really sympathise with me. The teacher still holds that piece of land. I have been following up the matter but I do not seem to get help from anywhere.

That is my story. I am happy that you came and I hope that you will help us. In fact, according to our customs, Kuria's, you can get married the way I got married and with proper support, you can bring up your family.

Education

- 140 Throughout the history of Kenya, women have had limited access to education opportunities. During the colonial period, when formal schooling was introduced, it is boys rather than girls who were encouraged to join. When girls were allowed to go to school, it was not without resistance from communities, which invariably perceived the new education offered by missionaries as informed by the bad intentions of 'spoiling' good girls. Indeed, this is a belief that has persisted to date.

As I said, in the old days, girls did not know of the importance of education. There was the belief that if the girl child was educated, she would learn how to speak the English language and be spoiled. Even up to date, there are parents who do not want the girl child to get education because they say that if the girls go beyond the barrier of cultural traits, they are no longer girls again. That was one reason as to why the girls were not educated. Secondly, they did not go to school because there were a lot of household chores and they could not be given time to attend school. They were just at home doing work. So, the boys had more opportunity to go to school than the girls.¹³²

- 141 The education offered to girls by colonial schools and later by schools in independent Kenya was not completely progressive either. The syllabus was designed to nurture girls' domestic roles as wives and mothers.¹³³

- 142 During the mandate period huge strides were made towards promoting the education of the girl child. However, the rigidity of socially ascribed gender roles has seen girl child education intercepted by early marriage, female genital mutilation and other harmful cultural practices. Culture dictates who, between the girl and the boy, should be given priority. In the rural areas girls are married off in order to get dowry often in the form of livestock that is then be traded for money. It is this money that is used to pay school fees for the boys. A significant proportion of men and women alike, despite increasing civic awareness, still support the education of the boy-child as opposed to that of the girl-child. One woman, in encouraging other women to abandon the support of such practice, summarised the situation as follows during the Commission's hearing in Kitui:

I want to say that as women there are things we are told in our culture. That we are there to be seen and not to be heard. We accepted those words and we started following them [] I want to let you know that you are not there to be seen, and that you are also there to be heard. I want to say this because when we are in homes, even where we were born, we are told that Mutua is the one who is supposed to go to school and that Kamene should be married off, so that dowry can be paid in order for Mutua to go school.¹³⁴

132 TJRC/Hansard/Women's Hearing/Marsabit/5 May 2011:p. 10

133 Kamau (n 56 above): 15

134 TJRC/Hansard/Women's Hearings Kitui 2 Dec 2011:p. 11



143. Another witness made similar observations during the Women's Hearing in Narok:

Another issue that contributes to children not going to school is that fathers of the girl children do not want their daughters to get education. Let me speak the truth. This is because they regard girls as sources of wealth. We are, therefore, appealing to the Government to take this matter very seriously and have parents of girls who do not go to school arrested. They do not have problems with boys going to school. The parents who take their daughters to school are those who live in urban centres. Those girls who live in the interior do not get education.¹³⁵

144. Apart from discriminatory practices that are rooted in culture many other challenges hinder girls' access to education. In the arid and semi arid region of the country, mainly Northern Kenya, girls' education is routinely interrupted by constant migration of families in search for pasture and water. As was put by a witness 'most of the times we are faced with drought and we are forced to go far from where the schools are'.¹³⁶ Insecurity and poverty are other factors that impede girls' access to education. In many rural areas, for lack of sanitary towels, girls periodically skip going to school during their menstrual flow. In this regard the Commission heard that:

The girls undergo certain stages. They get their periods in the midst of boys and do not know how to take care of themselves. Therefore, most of them get scared and miss classes. For a week, the girls miss school while the boys continue studying. Some of them feel ashamed of going back to that class. They will even tell their mothers that they are not going to school because the boys will laugh at them. These are the things that discourage them.

¹³⁵ TJRC/Hansard/Women's Hearing/Narok/p. 14; see also TJRC/Hansard/Women's Hearing/Kapenguria/15 October 2011/p. 13; TJRC/Memo/1648 [Submitted by Maendeleo ya Wanawake, Tana River County].

¹³⁶ TJRC/Hansard/Women's Hearing/Marsabit/5 May 2011/p. 11.

Challenges facing girls' access to education

(TJRC/Hansard/Women's Hearing/Kapenguria/15 October 2011/p. 17)

I also wanted to add about the issues of insecurity because what my fellow speakers had addressed was the issue of school dropouts of the girl-child. It is because of lack of security. When there are conflicts and fights in the other side or here, a mother moves away and the girl-child also follows the mother. So, you find that that girl will waste time and will not go to school. That is the reason why the girl-child cannot continue with education.

Also, there is the issue of the age of the girl-child. She goes to school when she is already past the school going age. When she is in school, she feels like she is like a mother. She becomes ashamed and comes back home.

My fellow women had talked about the issue of sanitary towels and that is the worst part of it. When the girl turns and finds that her dress has been spoiled by menstruation, she stays at home for a week without going to school, especially if she attends a mixed school. So, she feels ashamed to go back to school as she fears that the boys will laugh at her. That makes her to lag behind in education.

There is also harassment from the boys. That also hinders the girl-child from attending school because the schools are very far from their homes. They get harassed on the way from school in the evening. Therefore, it makes the girl-child drop out of school. The remedy to these problems is that we are appealing to sponsors to defend the girls by building boarding schools along the borders because of issues of insecurity.

With regard to bursaries, we would like the Government to allocate bursaries for the girl child education, and especially girls from the pastoralist community. The old men do not want to sell their cows to pay school fees for the girl-child. They feel that if they did, their cows will go and then they will remain poor. The old men tend to think that the girls who are educated go out of the home and become prostitutes. There is no way they can generate wealth back home but it is only through dowry. That is the problem.

- 145 The situation for girls with disabilities is worse. Many children with disabilities are often hidden away from the public by their parents or relatives, a practice that stems from the notion that disability is a curse¹³⁷. As such, they are hardly educated. Those who are lucky to go to school find out that with a few exceptions schools are ill-equipped to teach them. It is estimated that 90 per cent of children with disabilities in Kenya are either at home or in regular schools with little or no specialised assistance¹³⁸.

I was not born deaf. I became sick and that resulted in me being deaf. I did not get an interpreter even in the schools that I went to. Life was very difficult in the family. There were three other children who were treated more special because they were not deaf. As a deaf child, I was ignored. It feels very bad to live in a community when you are being

137 J Biegan. The promotion and protection of disability rights in the African human rights system. In J Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 53.

138 Government of Kenya *Development of education in Kenya* (2004) 2.

treated like that. You are just hidden at home and nobody cares about you. The parents pay school fees for the other children while we remain at home. When we grow up, we do not even know where to go because we have not gone to school.¹³⁹

146 During the children's hearing in Nairobi, a child with visual impairment spoke to the Commission about the challenges children with disabilities face in their efforts to access education. Her testimony is reproduced in detail in the Children's Chapter

147 Girls' and women's limited access to education has strong and direct linkages with the multiple violations and abuses that they routinely suffer. According to 2008 Kenya Demographic and Health Survey (KDHS), 54% of women who reported that they have undergone FGM had no education.¹⁴⁰ Indeed, many girls abandon or are forced out of school soon after they have undergone FGM

The girls are circumcised according to where they come from. For example, in Kacheliba, it is between 11 and 13 years old and in Kapenguria, it is from 15 years or 16 years. In Lomut, it is the same as Kacheliba. After circumcision, they are secluded and they stay there for one month. After they come back, they do not go back to school because most of them are usually booked to be married by old men. Their fathers already took dowry from the men who will marry them. Those who go to school are very few because most of them are married off.¹⁴¹

148 According to another witness

When they are circumcised, many [girls] discontinue school. When they stop going school, the first thing that will happen is that they will get married. They get pregnant immediately after circumcision because they feel that they have grown up, and yet they could only be 14 years old. So the teaching they get during the FGM does not allow them to go to school anymore.¹⁴²

Reproductive health

149 Women's right to the highest attainable standard of health is guaranteed under international and regional human rights instruments. There is now deliberate and justifiable emphasis on the protection of women's right to reproductive health because of its particular relevance to the overall health of women. Under the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), state parties are under an obligation to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those

¹³⁹ TJRC/Hansard/Women's Hearing/Nairobi/21 February 2012/p. 19

¹⁴⁰ KDHS (2008) p. 264

¹⁴¹ TJRC/Hansard/Women's Hearing/Kapenguria/15 October 2011/p. 3

¹⁴² TJRC/Hansard/Women's Hearing/Kegongga/26 July 2011/p. 4-5. See also TJRC/Hansard/Women's Hearing/Nairobi/21 February 2012/p. 28

related to family planning'¹⁴³ They are specifically required to ensure women receive appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation ¹⁴⁴ At the African regional level, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women provides that state parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted ¹⁴⁵

- 150 In terms of improving women's reproductive health, there is a particular focus on reducing maternal deaths It is estimated that over half a million women die each year due to complications during pregnancy and birth although most of these deaths are preventable ¹⁴⁶ Under the Millennium Development Goals states have committed to reduce maternal mortality by 75 per cent between 1990 and 2015
- 151 In Kenya, maternal mortality remains high ¹⁴⁷ After declining from 225 per 100,000 live births in 1990/92 it rose sharply to 365 deaths in 1993 reaching 590 by 1998 ¹⁴⁸ Even though maternal mortality declined to 414 in 2003,¹⁴⁹ it is reported to have increased again to 488 deaths in 2008 According to the KDHS 2008/09, maternal deaths represent about 15% of all deaths of women aged 15-49 in Kenya This is approximately 8,000 women dying annually from complications related to pregnancy and childbirth ¹⁵⁰
- 152 The incidence of maternal deaths is marked by wide regional variations The maternal mortality rate in Northern Kenya is estimated to stand at 1000 to 1300 deaths per live births ¹⁵¹ The high incidence is attributed to fact that 95% of deliveries in that region take place at home with no skilled attendants It is an issue that must be understood in the context of economic marginalisation that this region has experienced for decades Health facilities and other social amenities in the region are few and far between The hospitals are poorly staffed and face a perennial lack of basic facilities and essential drugs Patients are often compelled to buy essential drugs yet most of them live below the poverty line A woman in Garissa told the Commission

143 CEDAW art 12(1)

144 CEDAW art 12(2)

145 African Women's Protocol art 14

146 P Hunt & J Bueno de Mesquita Reducing maternal mortality The contribution of the highest attainable standard of health (2006) 1

147 KDHS (2008) 273

148 Government of Kenya *Millennium Development Goals (MDGs) Assessment Report Requirements For Goal No. 3 Promoting Gender Equality and Women Empowerment* (2006)

149 KDHS (2003)

150 Kenya National Commission on Human Rights *Realizing sexual and reproductive health Rights in Kenya A myth or a reality? A report of the public inquiry into the violations of sexual and reproductive health rights in Kenya* (2012) 32

151 Kenya National Bureau of Standards 2008-09 – Kenya Demographic Health survey preliminary report

We have one district hospital which serves North Eastern Province Garissa, Wajir and Mandera. The hospital does not have enough facilities and doctors. We only have one or two doctors available. There is no section for women and when a woman is taken there, she has to wait with other patients [] We do not have a gynaecologist there and we suffer a lot.¹⁵²

- 153 Another woman described the desperate situation she faced when she took her daughter to deliver:

When I took my first born daughter to deliver, there was no electricity. It forced me to use a torch, and then I bought gloves, the needle, medicine and cotton. It was at night and I did not know what to do. My daughter was only 17 years and she almost died on the floor. When I told the doctor to assist me I was asked whether I had gloves and cotton.

- 154 The roads in this region are generally in a poor condition. This impedes women's access to hospitals or health facilities. As shown in the table below, huge segments of the population have to travel long distances to access the nearest health facility. In Lodwar, Esther Ayepio narrated to the Commission a sad story that is all too common in the region:

There is a major problem during delivery on the south side, especially in Moru, Kainuk and Lemorok. The women [] do not have means of transportation because the roads are very bad. Also, a woman cannot cross to the other side of Muruko because there are many cases of manslaughter [sic]. Right now, there are people who have been slaughtered. There is no farming or fetching water. Also, when River Turkwel overflows, there is no way you can cross because there is no bridge. Very many women have lost their lives. I remember on 27 September 2010 there was a pastoralist woman who was moved from Kalemorok. I went to look for a vehicle to go to the interior to help. The lorry was late and when it arrived, the child was almost coming out. When we reached Kalemorok, the woman died in my hands. She lost her life and that of the child.¹⁵³

- 155 A similar situation obtains in Mandera where the Commission was told of the chronic lack of medicines and essential drugs in the existing public hospital:

I think most of these women who have children have never seen [the inside of] a hospital. [Yet] we have had a government for almost 50 years. We have a very big district hospital in Mandera, but unfortunately, it lacks medicines. There are very good wards in a big hospital but no medicine for children. Coming to delivery, if a woman is in labour and she is taken to hospital, she is given all the prescriptions to buy drugs from a pharmacy. We ask the government to fully equip the hospitals we have with medicine and personnel. We would like the government to give us more nurses and doctors.¹⁵⁴

152 TJRC/Hansard/Women's Hearing/Garissa/13 April 2011/p. 8

153 TJRC/Women's Hearing/Lodwar/11 October 2011/p. 2-3

154 TJRC/Hansard/Women's Hearing/Mandera/26 April 2011/p. 19

Table 2: Percentage distribution of communities by distance to nearest health facility

	500m or less	500m - 1km	1.1km-2.9km	3 - 4.9 kms	5 or more kms
Kenya	4.9	6.4	12.4	28.5	47.7
Rural	3.0	4.4	12	29.0	51.5
Urban	23.3	25.5	15.9	23.7	11.9
Nairobi	-	10.9	8.2	60.7	20.2
Central	5.7	6.2	16.0	43.4	28.6
Coast	3.7	6.2	13.0	16.9	60.3
Eastern	1.5	5.2	2.3	27.2	63.8
North Eastern	3.2	3.5	7.7	-	85.7
Nyanza	0.1	7.8	11.6	36.8	43.7
Rift Valley	10.6	6.7	17.0	17.7	48.0
Western	5.7	6.3	14.4	28.6	45.0

Source: Basic Report – KHBS 2005/6

- 156 Since they have no money to pay for bills or cater for their transport to the nearest hospital, many women in Northern Kenya opt to give birth at home. According to the 2003 Kenya Demographic and Health Survey, 92 per cent of deliveries in North Eastern take place at home. In Lodwar, the vast majority of women who attended the Women’s Hearing had given birth at home. This was the only choice they had. According to one of the women present at the Hearing:

Women give birth at home because we have to pay at the hospital. Most women do not go to hospital because they do not have money. Most of their husbands do not have jobs. Sometimes, those women have children without even a father. [yet they must] pay Ksh 500 for the bed and Ksh 200 for the ward. So, women just give birth at home. Also, those who are in the grassroots cannot reach the big hospital. If you go to the hospital, nobody will give you food and clothes for the baby. So, women are discouraged because they have to pay if they go to hospital.¹⁵⁵

- 157 Mary Ekarau’s testimony corroborated the above statement. She gave birth at home because she could not even afford to get to the nearest health facility:

I gave birth at home because I did not have money. I stayed at home for about seven days and then I went to hospital. I told the doctor that I gave birth at home because I did not have fare to take me to hospital. The doctor can confirm that in the traditional setup, that is how things are.¹⁵⁶

155 TJRC/Women’s Hearing/Lodwar/11 October 2011/p. 1

156 TJRC/Women’s Hearing/Lodwar/11 October 2011/p. 4

Table 3: Place of delivery by province, 2003 KDHS

Province	Private Hospital %	Public Hospital %	Home %
Nairobi	38	40	22
Central	50	17	32
Coast	24	8	67
Eastern	26	11	61
Nyanza	22	14	63
Rift Valley	23	13	63
Western	17	12	71
North Eastern	7	0.3	92
Total	26	14	59

158 In her testimony, Mary Ekarau also touched on an issue relating to the nexus between culture and the right to health

There was a time when I went to hospital to give birth to my third born. Those doctors who are non-Turkanas came and complained asking me why I gave birth alone without consulting the doctor. I told them that in our place women give birth without the help of men. He slapped me and said I am very thick-headed. I went outside the hospital and the doctor confirmed that the child was well. I left the hospital well in good health. In those days, they did not demand a lot of money. They did not demand money and I was not running a business. But nowadays, women who give birth at the hospital are in big problems. The hospital demands a woman to pay Ksh 700 before she can be attended to. After getting out of the ward she has to pay some more money. That is the problem we encounter because we cannot meet the expenses. Even if you want to get gloves it is a problem.

159 Indeed, the Commission learnt that many Turkana women are reluctant to give birth in hospital because they are afraid of offending or failing to comply with cultural norms

Most people in the interior [] are still tied by culture and traditions that they do not go to hospital. According to traditions, you are not supposed to go to hospital. There are certain requirements that are made clear during the traditional wedding. When a woman gives birth, seven days after delivery and after the umbilical cord has dried, there are some rituals which are performed, so that the woman can go back to the house. According to our traditions, after a child has been born the woman will not bath for seven days []. The umbilical cord should also be put in a separate plate. It should not be thrown out. That is our culture. That is why the women at the grassroots level cannot go to the hospital because they will be against the culture. 17

160 The experience of Mary Ekarau and Turkana women in general points to the failure of health facilities to consider that culture is an essential element of the right to

157 TJRC/Women's Hearing/Lodwar/11 October 2011/p. 5

health. It is now established that the right to health entails several interrelated and essential elements: availability, accessibility, acceptability and quality. As spelt out by the UN Committee on Economic, Social and Cultural Rights (CESCR), acceptability requires that facilities, goods and services are 'respectful of culture of individuals, minorities, peoples and communities and sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health of those concerned'¹⁵⁸

- 161 In essence, in the delivery of health services, health facilities should take into account local cultural conceptions of health. Where this has been done, maternal mortality has reduced drastically. In Peru, it was realised that despite high maternal mortality, women belonging to certain communities were reluctant to use health facilities offered by the state. Thus, in consultation with these communities measures were taken to ensure that health services were respectful of their culture. These measures included providing a bed and a sturdy rope to allow women from these communities to give birth in an upright or squatting position. Other measures included ensuring that the attendant was not only female but she also spoke the local language; ensuring the placenta was delivered to the family member present so that it could be buried, and allowing the woman to remain in the health facility for up to eight days.¹⁵⁹
- 162 The plight of women in Northern Kenya is more or less similar to that of women living in rural and slum areas around the country. Across the country public health facilities have historically suffered from chronic lack of appropriate equipment and essential drugs. Medical personnel have been concentrated in urban areas, mainly in Nairobi. Thus, although the number of medical personnel has increased tremendously since independence (for example, the ratio of medical personnel to population stood at 7.8 doctors per 100,000 people in 1964 compared to 15.3 in 2000), their distribution is uneven.¹⁶⁰ Similarly, the number of health facilities has increased over the years,¹⁶¹ but at any given time the number of health facilities has not corresponded to population growth or demographic trends.¹⁶² Moreover, huge disparities exist in geographical distribution of health facilities, North Eastern and Rift Valley have respectively had the lowest and highest number of health facilities in the country. Statistical data shows that while the number of health facilities in North Eastern increased from 40 in 1990 to 71 in 1999, the increase in Rift Valley was from 583 to 1,207 during the same period.¹⁶³

158 CESCR General Comment No. 14 para 12(c)

159 See Huni & Bueno de Mesquita (n 147 above) 7

160 P Kimalu et al A review of the health sector in Kenya (2004) 30-31

161 The number of health facilities increased from 861 in 1967 to 2,131 in 1990 and to 4,235 in 1999

162 Kimalu et al (n 161 above) 28

163 Kimalu et al (n 161 above) 27

- 163 The number of hospital beds and cots has equally increased since independence, from 11,344 in 1963 to 54,378 in 1999¹⁶⁴. Again, regional disparities are evident. In 1999, Northern Eastern and Coast had the lowest number of hospital beds and cots while Rift Valley had the highest number of hospital beds and cots followed by Nyanza, Nairobi and Eastern respectively.
- 164 Significantly also, the health sector remained underfunded throughout the Commission's mandate period. According to Kimalu *et al*, although the total expenditure of the Ministry of Health has been increasing in nominal value since independence, its share to GDP has been declining since 1980. In particular, the share declined from 2.4 per cent in 1980 to 1.7 per cent in 1994 and then declined further to 1.3 per cent in 1999.

Table 4: Registered Medical Personnel per 100,000 Population in selected years

Personnel	1964	1969	1974	1979	1983	1986	1989	1992	1995	1996	2000
Doctors	7.8	11.9	9.6	10.7	12.6	14.4	14	15	14.7	14.1	15.3
Dentists	0.3	0.5	0.7	0.92	1.53	2.1	2	2.8	2.6	2.4	2.5
Pharmacists	1.6	1.5	1.6	1.78	0.60	1.6	2	2.3	5.2	5.1	5.7
Reg nurses	22.8	28.3	37.8	42.76	45.52	45.5	24	46.9	26.4	25.2	31.2
Clinical Officers	-	10.1	9.5	10.03	10.23	10.2	11	11.8	11.3	10.9	15.2
PH officers	-	-	0.8	1.5	1.8	2.1	2	2.9	1.8	2	2.1
PH Technicians	6.4	6.9	6.7	7.60	8.7	10	14.6	14.6	14.9	-	17.1
Pharmacy technologists	-	-	-	-	2.10	-	2	2.9	3.4	3.4	4.2

Table 5: Hospital beds and cots, 1990-1999

Province	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Nairobi	5,886	6,021	6,162	6,314	5,879	6,225	6,373	6,487	6,691	7,005
Coast	3,366	3,491	3,613	3,491	2,781	3,818	3,991	4,136	4,227	4,421
Eastern	4,769	4,769	4,803	4,849	4,881	5,724	6,168	6,361	6,516	6,736
N/Eastern	414	429	491	1,245	1,224	1,447	1,451	1,498	1,501	1,537
Central	5,060	5,170	5,170	5,280	5,324	6,400	6,606	7,009	7,218	7,513
R/Valley	6,474	6,729	6,729	7,587	7,751	9,818	9,928	10,158	10,401	11,240
Nyanza	4,283	4,373	4,403	4,618	5,058	8,947	9,480	9,625	9,879	10,006
Western	2,834	2,944	2,989	4,747	4,373	4,775	5,334	5,567	5,753	5,920
Total	33,086	33,926	34,360	38,131	37,271	47,154	49,331	50,909	52,186	54,378

Source: Statistical Abstract (various issues)

164 Kimalu *et al* (n 161 above) 29

Table 6: Health facilities by province, 1990-1999

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Nairobi	188	186	247	304	357	359	373	380	390	402
Coast	220	280	299	357	453	426	441	448	453	462
Eastern	308	388	417	499	679	683	771	783	793	804
N/Eastern	40	45	52	52	N64	59	65	66	N68	71
Central	324	318	341	405	429	441	450	462	470	481
R/Valley	583	698	814	976	1,103	1,140	1,163	1,179	1,195	1,207
Nyanza	345	282	304	359	432	446	463	473	484	498
Western	123	149	163	192	237	248	267	278	292	310
Total	2,131	2,346	2,637	3,144	3,754	3,802	3,993	4,069	4,145	4,235

Source Statistical Abstract (various issues)

- 165 Testimonies received by the Commission from across the country established that the lack of sufficient number of health facilities and medical personnel in most parts of the country, especially in historically marginalised regions (North Eastern, Upper Eastern, Coast, North Rift, and Nyanza and Western), has had a devastating impact on women's right to health in general and reproductive health in particular. In Bungoma, a witness observed that

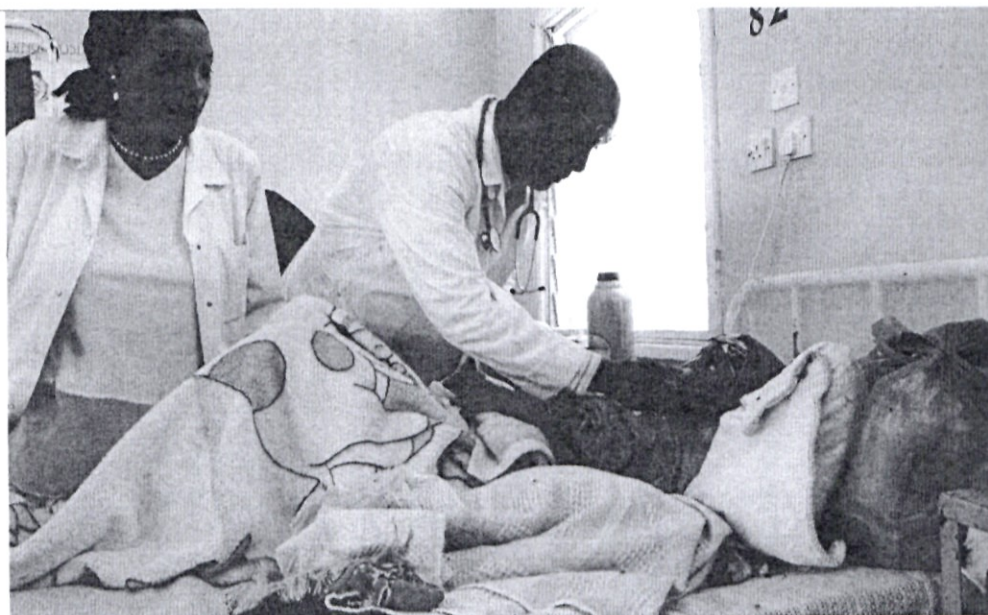
I was talking about reproductive health because we do not go to hospital in good time to get children. We stand a chance of losing the child, mother or both the mother and child because we have not brought clinics and health centres near us. Even if they have been brought the health facilities near, there are no roads to take us there and there are no vehicles to lead us there. Even the traditional midwives have not been adequately trained so that they have facilities like the ones that are in hospital and, yet, 70 per cent of the children are being born in the villages. Why can the traditional midwives not be trained so that our children and mothers do not die at childbirth?"¹⁶⁵

- 166 In Busia when the Commission inquired whether hospitals in general and maternity facilities are accessible, a witness responded as follows

Our main hospital is the one in Busia, which is outside Teso land. We only have one hospital in Teso, which is the Teso District Hospital where there is a Medical Officer of Health (MOH). They have only started operations this year. So, most of the difficult cases in Teso are referred to Bungoma, that is from a district hospital to another district hospital. There is also that pile up of patients when you take patients from one district hospital to another. We have decided to refer our people from Teso to Moi Teaching and Referral Hospital but that is very far. We have few doctors. The referral hospitals are very far, and even malaria kills us.¹⁶⁶

¹⁶⁵ TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011 p. 4

¹⁶⁶ TJRC/Hansard/Women's Hearing/Busia/4 July 2011 p. 9



167. Similar problems are experienced in Kakamega. According to a witness:

On issues of infrastructure, our roads are very bad. Sigalagala-Butere Road, for example, is impassable. I live in Isulu. This road is not passable. Sometimes expectant women deliver their babies on the roadside before reaching hospitals. This is very dangerous for our wives and daughters. The nearest hospital like Shibuye Centre does not have enough facilities. Patients go all the way to Kakamega General Hospital where they can get proper medical attention. However, to visit Kakamega General Hospital, you need to have transport. If you want to take your patient to this hospital at night, transport cost is normally between Ksh 5 000 and Ksh 7 000. Our people are poor and they cannot afford this mode of transport. We are endangering their lives. My recommendation is that we equip all our district health centres and hospitals so that they serve our sick people [...] We really do not have very many health centres. The few that are there do not even have enough doctors and nurses. There is only one doctor with a few assistants at the nearby hospital and they do not work on Sundays. It is also difficult to run this hospital because it lacks water. Blood transfusion is not done in Shibuye Health Centre. This service is only available at Kakamega General Hospital. If it is at night, like yesterday there was a woman who was bleeding and she was told to pay money to be transported from Shibuye Health Centre to Kakamega General Hospital. This lady continued bleeding until she lost the child. The lady is still alive. They had gone looking for money, but when they came back she had lost her a baby through miscarriage. She was supposed to be transferred to Kakamega General Hospital for proper medical attention. So, it becomes very difficult. We die because of petty things which the Government would have helped us to manage.¹⁶⁷

168. The situation is no different in Lamu where it was recounted to the Commission as follows:

¹⁶⁷ TJRC/Hansard/Women's Hearing/Kakamega/28 June 2011/p. 22.

In terms of issues of health, we have a hospital which does not have X-ray equipment up to now. Whenever women want X-ray services, they have to travel to Mpeketoni or Malindi. Are we not Kenyans? The medical services to women are very important. The women do not have employment, and that is why we are crying that an X-ray machine be brought. We were promised last year that it would come after one month. But until today, it has not arrived. Right now, if a mother wants to deliver or something happens to someone, we cannot get good health services. There was a time when we had to seek help from some Europeans to get drip-water to be administered to patients here in Lamu. So, medical services are very important to us.¹⁶⁸

169. The testimony of another woman in Lamu is even more revealing of the many challenges that women face in the region, including the failure of health facilities to take appropriate measures to accommodate religious beliefs and practices of the local community.

I want to talk, first of all, about the issue of health and how we have been suffering in the Abajuni Village, where our parents are coming from. A person can become sick and be taken to hospital. Perhaps she is pregnant and she wants to deliver, but before she is taken there, she will be assisted by the traditional birth attendants. The doctors will say that they cannot be taken to Lamu, and from that place to Lamu, it is around four to six hours. You can imagine the boat can take two to three hours. You have to give out Kshs10 000 or Kshs20 000. For a person like me, maybe I am able and I can manage to pay the money, but there are those people who cannot raise this money because on average, they get a single meal a day. What will you do? It makes you go by the boat and on the way, the person dies or there is a complication. Perhaps, you have succeeded and you have got some assistance on the way. But when you reach the hospital, other problems arise. You are told that there is no doctor and you are referred to Mpeketoni. That is also another problem. Taking a boat to Mpeketoni, you find the doctors are busy or there is no scanning machine and you are then referred to Mombasa for scanning. We would like you to assist us get the facilities. You can be admitted in Lamu and then you go for the drip in town. If there is no drip, how will you help yourself? At times, you have given birth and there is no water. Muslims, do not clean ourselves with tissue paper. We use water for everything, but there is no water in hospitals.¹⁶⁹

170. An inquiry conducted by the KNCHR into violations of sexual and reproductive health rights in Kenya similarly found that huge numbers of women belonging to certain communities do not utilise skilled delivery services because these services go against their cultural norms and practices.¹⁷⁰ The KNCHR found that among communities in upper Eastern and North Eastern Kenya, it is a taboo for

¹⁶⁸ TJRC/Hansard/Women's Hearing/Lamu/10 January 2012/p

¹⁶⁹ TJRC/Hansard/Women's Hearing/Lamu/10 January 2012/p

¹⁷⁰ KNCHR *Realising sexual and reproductive health rights in Kenya: A myth or reality?* (2012) 57

male nurses to attend to expectant women and that among the Sabaot, a woman is not supposed to be seen naked by any male 'stranger' other than her spouse

- 171 Another joint study by the Centre for Reproductive Rights and FIDA Kenya conducted in 2007 found that 'violations taking place when women deliver in health care facilities have been present for decades' and that the Kenyan government has failed to implement its own maternal health care standards and is neglecting to protect women from the gross rights violations that occur before, during, and after delivery in the nation's health care facilities'¹⁷¹ The study documented numerous violations and issues relating to maternal health neglect and mistreatment around delivery, violations involving post-delivery stitching, violations of rights to consent and information, and discrimination in the health care system
- 172 In conclusion, testimonies received by the Commission, coupled with previous findings of other organisations, reveal that although the state has taken measures to promote and protect women's reproductive health, much remains to be done The state has historically failed to meet its obligations relating to securing women's reproductive health as is stipulated in international and regional treaties to which it is a party

Women and HIV/Aids

- 173 The first HIV case in Kenya was reported in 1984 and by the year 2000 the number of reported cases of HIV had risen to more than 2.13 million Because of its rapid spread in Kenya, and the overwhelming impact it had on the social and economic structure of the country, HIV/Aids was considered the 'single most important health challenge that Kenya faced in its post-independence history'¹⁷² HIV/Aids is also the 'only health problem that is believed to have reversed the significant gains made in life expectancy and infant mortality during the first three decades of independence'¹⁷³ For these reasons, HIV/Aids was formally declared a national crisis in 1999
- 174 Following the declaration of HIV/Aids as a national crisis, the state rolled out a national programme and institutional mechanism for tackling the epidemic This included the enactment of the 2006 HIV and Aids Prevention and Control Act In recent years, owing to a massive campaign to prevent and control HIV infection, statistical surveys have shown a declining HIV prevalence rate in persons of age 15-49 years, from 10 per cent at the end of the 1990s to 7 per cent in 2003 The prevalence rate dropped further down to 5.9 per cent in 2005 and 5.1 per cent in 2006 However, the 2007

171 FIDA Kenya & Center for Reproductive Rights *Failure to deliver: Violations of women's human rights in Kenyan health facilities* (2007) 26

172 Kimalu *et al* (n 161 above) 47

173 As above

Kenya Aids Indicator Survey (KAIS) showed a reversal of the declining trend, with an estimated HIV prevalence of 7.4 per cent among adults age 15-49 years.¹⁷⁴

- 175 There is no doubt that women have been disproportionately infected and affected by HIV/Aids since it was first reported in Kenya. The 2007 KAIS showed that more women (8.8 per cent) than men (5.5 per cent) age 15-49 are infected with HIV.¹⁷⁵ Statistics also indicate that women in polygamous unions are more likely to be HIV infected (11 per cent) than those in monogamous unions (7 per cent).¹⁷⁶ Moreover, women who have been widowed and those who are divorced or separated have high HIV prevalence at 17-21 per cent.¹⁷⁷
- 176 But as stated by Amnesty International, 'women are fighting both a virus and systemic discrimination in trying to overcome the threat of HIV/Aids'.¹⁷⁸ The high prevalence of HIV among women is a function of many intertwined factors including structural, economic, cultural, social, and biological factors. High poverty levels among women which partly results from lack of education, coupled with traditional harmful practices and gender based violence, have significantly increased women's vulnerabilities to HIV infection. In the years immediately following the detection of HIV in Kenya, discrimination against persons living with HIV (PLHIV), especially women, was widespread. Those who were related to PLHIV equally faced discrimination. A victim recalled her experience during the Commission's women's hearing in Nairobi:

In 1989, my husband tested HIV positive and it was a difficult time because at the time, Kenya had not accepted that there is HIV/Aids in our country. Everybody was in denial including the government of Kenya. Those people who were infected were discriminated against. People could be buried in polythene papers. That time, my husband decided to go public. When he went public I accompanied him to the HIV/Aids campaigns. He was all over the newspapers and the media. Back in 1990 the World Aids Day was hosted at Makadara grounds and the theme of the day was the Role of Women in the Fight against HIV/Aids. I was invited to go and present a paper on the role of women in the fight against HIV/Aids. After that, the *Daily Nation* newspaper wrote a very big story about me and about my role as a HIV negative woman married to a HIV positive man, that is a discordant couple. That was in December 1990.¹⁷⁹

- 177 Although this victim had not tested HIV positive, when she went back to her workplace, she was denied access. Her case is a classical example of the stigma and discrimination that women who joined the campaign against HIV/Aids faced on a daily basis.

174 KNBS *Kenya Demographic and Health Survey 2008-09* (2010).

175 KDHS *Kenya Demographic and Health Survey 2008-09* (2010).

176 Kenya Aids Indicator Survey 2007.

177 As above.

178 Amnesty International *Women: HIV/Aids and human rights* (2004) 2.

179 TJRC/Hansard/Women's Hearing/Nairobi/21 February 2012/p. 3.

The story of a woman who joined a public campaign against HIV/Aids

TJRC/Hansard/Women's Hearing/21 February 2012/p 4-5

In January 1991, I went back to school. At that time I had left Nyahururu and I was in Nairobi so that I could join Muriuki who was working at the City Council. At that time, the doctors were saying that he would only live for six months, so I left the countryside and came to Nairobi so that I could be with him for the short time he was to live. I was transferred to Heshima Road Primary School. Upon opening school on the first term of the year 1991, I went to school and I was shocked because when I got to the gate, I found a watchman who told me that I was not supposed to enter the school. I asked why because I did not expect such kind of a scenario. He told me that the headmaster had said that I should not enter the school compound and then he went and told the headmaster that I had arrived. I was taken to the office and the headmaster told me that everybody had read my story in the newspaper and that I went public about my husband's status and the whole school, the parents, the children and the teachers do not want me to teach at the school. He told me that as the head teacher of the school, he is not allowed to accept me into the compound and that I would not attend the assembly of the opening day and I should not proceed to class or even to communicate with anybody in the school.

I tried to talk to him and told him that I was not HIV positive but he would hear none of that. He told me that the best he could do for me was to give me a letter and go to the staffing officer at County Hall and present my case. I left the school very discouraged and very disappointed and at that time, I was still a young mother going through the challenge of having a husband who was HIV positive. I went there and met a lady who was the staffing officer.

I went and met the staffing officer and I told her that I was sent to her office by my head teacher. I realised that she already knew my case. I told her that my husband was HIV positive and I had joined him in the awareness campaign and I participated in the awareness campaign the previous year and upon going to school, I was denied access. She told me that she was aware of my case and what they had decided as a Ministry was to ask me to stop those campaigns and they were going to send me to a school where I was not known and upon going to that school, I was to be silent about my HIV status. I was to withdraw from all HIV campaigns and I was to make sure that my husband did not come anywhere near the school and nobody was supposed to know that I was his wife. I told them that it was very difficult for me because I could not stop Muriuki from going public neither could I stop people from coming to my home. It was possible that a teacher could come to my house and eventually meet my husband and my children as well. The community that I was living with in Umoja Estate was aware about us so there was no way I could have lived in secrecy. With that, I realised that I was not able to work in any school. There was no school that was willing to take me in as a woman who was affected by Aids so, I withdrew from teaching.

Up to this time, I have never received any letter from the ministry and my salary was terminated immediately. This had a very big effect on me because I had chosen a career of being a teacher. After that, I started doing HIV work as a volunteer. This affected my children and me so much. At the same time, when my husband went public, my children also suffered a lot of stigma. I remember one day I went to the school that my son was in and I found that they had segregated him to a corner. I had gone because he was performing very poorly and I wanted to

find out why he had deteriorated and I found that they had put him on a separate desk alone. The teachers were not accessing his books and nobody could play with him and this had a big effect on him. I sought another school and I went there and I discussed with the teachers and they accepted my child. The community as well was not friendly.

I lost friends. I used to do a small business of selling rice and from that time, nobody wanted to buy from me so all my sources of income stopped. That has had a lot of impact on me. As a result of that, it has affected my way of investment and even my children's education was affected. I remember one of my sons who was in Alliance Boys left the school with a balance of over 200,000 and one of my other son who is doing a degree, had to stop the degree that he was doing and take another one because time had overtaken him since he was in and out of class. This has had a lot of impact on my children and as a family generally.

My request to this Commission is that they may look into injustices against people affected by HIV/Aids. I am glad that out of our struggle, we fought a lot of stigma and now there is an act that protects people living with Aids against discrimination on issues of employment. Before the Bill, many of us suffered discrimination, rejection and this caused a lot of suffering psychologically, physically as well as economically. It has always been my joy to be a teacher and to prove that, I am doing a programme on education that caters for orphans and vulnerable children. I would love to go back to teaching. Thank you so much.

- 178 Although awareness on the subject of HIV/Aids has permeated most parts of the country, discrimination and social stigma is still relatively common. Many HIV positive women are routinely evicted from their homes after the death of their HIV positive husbands as the Commission heard from a female victim in Embu.

When my husband died, the people neglected me. He was admitted at Aga Khan Hospital until he passed away. The stigma was high. I did not even know what my husband had died of. I realised when I was told that there was a problem. When he was buried, they did not even recognise me as his wife. They looted all the property and I went back to my native home. I really fell sick in Nairobi where my husband left me in a rental house. I suffered for a very long time and my mother was called. She came and took me and I was admitted to the general hospital for one month. I was unconscious and I could not even recognise where I was. After some time, I started recovering. I went back home but the stigma was much.¹⁸⁰

- 179 Despite her tribulations, she concluded her testimony on an inspiring note:

I encourage myself a lot and attend outreach meetings. The stigma has really gone down. I will continue living. I have a grandchild and I am sure I will see my great grand children. I will continue living positively. If I had not accepted my situation, I would have died. Do not discriminate against those who are living with HIV/Aids. Show them love the way my mother did to me. Had it not been for my mother, I would have died a long time ago. I continue to take my ARVs the way I was advised by my doctor. We are preaching against

¹⁸⁰ TJRC Hansard/Women's Hearing, Embu, 22 November 2011, p. 7.

of women living with and affected by HIV'¹⁸³ The study documented widespread violations of HIV-positive women resulting from *inter alia* failure to seek informed consent before HIV testing, breach of confidentiality and lack of proper disclosure, inadequate pre- and post-testing counselling, inadequate PMTCT and post-partum counselling, lack of medical attention or inattentive medical staff, lack of equipment, supplies, infrastructure, and hygienic conditions, and mistreatment and harassment in seeking delivery of services. These violations offend both domestic and international law.

- 183 Evidence suggests that public health facilities across the country have been for decades now sites of gross violations of women's rights and particularly the rights of women living with HIV/Aids. A recent study by African Gender and Media Initiative documented chilling and shocking stories of 40 women living with HIV/Aids who had undergone forced sterilisation in public health facilities around the country¹⁸⁴. According to the study, 'while the country-wide prevalence rates of non-consensual sterilisation of HIV-positive women in Kenya are unknown', the stories of these women 'confirms that the violation is happening, and appears to be systemic in public health facilities'¹⁸⁵.
- 184 Still on structural barriers, both the HIV and Aids Prevention and Control Act and Sexual Violence Act have been found to be discriminatory against women. The two Acts of Parliament criminalise HIV transmission yet because the numbers of women who undergo testing is higher than that of men, they are more likely to be targeted for prosecution. In 2007, the CEDAW Committee raised this concern and noted that Kenya's legislation and policies on HIV/Aids did not adequately take into account gender-specific vulnerabilities¹⁸⁶.
- 185 In Kenya, conflicts and generalised episodes of violence have always exacerbated women's vulnerabilities to HIV infection. For instance, the Commission received evidence of women who contracted HIV during the PEV after been raped. In many instances, these women were abandoned by their husbands and shunned by society in general. Many others, including those who were already living with HIV/Aids prior to the PEV found it difficult to access medication.

I am standing here today like the ambassador of hope for people living with HIV/Aids. During the post-election violence, many people were affected because of lacking access to the medicine because others finished their medicine and they could not access clinics to get more medicine.¹⁸⁷

183 The Center for Reproductive Rights & FIDA Kenya At risk: Rights violations of HI-positive women in Kenyan health facilities (2008) 15.

184 African by Gender and Media Initiative *Robbed of choice: Forced and coerced sterilization experiences of women living with HIV in Kenya* (2012).

185 As above 30.

186 CEDAW Concluding Comments: Kenya UN Doc. CEDAW/C/KEN/Co.6 (2007) para 39.

187 TJRC/Hansard Women's Hearing/Busia 4 July 2011: p. 25-27.

- 186 More testimonies of women who contracted HIV during the PEV and during other periods of generalised violence are contained in the chapter titled 'Sexual Violence' in Volume II of this report.¹⁸⁸

An HIV positive woman fights for her right to property

My names are Mary Muthoni Maina. I live in Dalas and I am living positively. I have suffered for a long time from the HIV virus but did not know what was disturbing my health []

I have six children. I had two miscarriages and one child died. I borrowed Ksh 15 000 when I was sick and unable to work. I used my title deed to borrow the Ksh 15 000. One of my children was joining the National Youth Service (NYS). After borrowing the money, I became seriously ill. I could not manage to continue with my business of selling clothes. The lady who had lent me the money came and demanded back her money and the accumulated interest or else she would take my piece of land. I went and looked for another person, who is the father to a lady friend of mine, and requested him to pay for me the debt in exchange for a piece of land from my land parcel. We wrote an agreement. My father was alive when we wrote the agreement. They said that the land should be transferred, so that they could give out Ksh 120 000 and pay the balance in instalments. I needed money because I had six children to take care of.

Thereafter, my health deteriorated further. I even suffered some disability problems. We even went to Kenyatta National Hospital. I have the medical card. The hospital carried out all kinds of investigations but they could not ascertain the sickness I was suffering from. Meanwhile, at home, they could not transfer the land because the agreement was not complied with. He told me to prove my interest but I could not. I went to a friend of mine from the Catholic Church and asked her to help me. I was hoping that he would have sympathy, and we transfer the land, so that he could pay the last instalment of the money.

The documents were brought to where I was staying and I was told to sign them. I could not refuse because I had nothing to give back. I signed. After I signed, I retained a copy and other copy was given to the other party. I came to discover later on that the title deed was issued in his name and that he had already sold the land at Ksh 1.5 million. That was when I saw someone had sent a surveyor from the Municipal Council. I asked "Why are you surveying this plot?" He told me that Patricia Wahitu had already sold the land to him. I said that, that was not right because I was the owner of the plot, and that I was supposed to give her one half and remain with the other half. This person said that I was lying and insisted that the plot belonged to him.

I could not speak because I was not strong. I called my son. We put a caution on the land and went to the DCIO and reported the matter. After reporting the matter, because the person involved was rich, he hired a lawyer and I was sued for the second time because of cautioning the land. Since that day, nothing has happened. The woman was arrested by the CID. After she was arrested, nothing went on. She was set free. She said that she could even pay me half the amount, and after she paid, she would know what to do to me.

I told her that she could do nothing to me because everything was controlled from Heaven, earthly things would pass but God would fight for me. I am on ARVs currently. I have been charged but I do not even have money. Sleeping is a problem even when I take medicines. I do not know where I will leave my children. Sometimes I do not even take the medicines. I have even lost weight.

188 See also Government of Kenya *Report of inquiry into post election violence* (2008) 263-264

Leadership and Political Participation

Regarding leadership, you know, the past experiences, when a woman wants to become a leader, it is a great challenge for her because our society is patriarchal where women are there to be seen but not to be heard. If you want to come up as a woman, you meet very many challenges even from your own women colleagues.”

- 187 Women’s dominance in numbers has never reflected in the composition of positions of leadership and power in Kenya. During the mandate period, women were generally outside mainstream leadership. They were and are still rarely represented in forums in which decisions including those relating to their well being are debated and approved. They are passive actors for whom decisions are made.
- 188 The lack of women’s representation in forums of decision making is evident in all spheres of life and levels of governance in Kenya. Despite the fact that women played a crucial role in Kenya’s struggle for independence, it was not until 1969, about six years after independence, that the first woman was elected to parliament. This was not different to the situation that obtained during the colonial period. The first African woman to serve in the Legislative Council was nominated into the body towards the end of colonialism, in May 1961. The number of women elected to parliament gradually increased during the mandate period but even so, the recommended threshold of at least 30 per cent women’s representation in decision making was never met.
- 189 Partly due to their low numbers, female members of parliament have traditionally been underrepresented or not represented at all in parliamentary committees. These committees play important functions in parliament: they determine the business of parliament, exercise important oversight role in their respective areas of competence, and are responsible for examining bills that are before parliament. The ultimate impact of women’s underrepresentation in these committees is the chronic failure of parliament to consistently mainstream gender in its work and pass into law legislation that directly impacts the life and well being of women. Indeed, it is no wonder that laws directly impacting on the situation of women have stalled in the legislative pipeline for years on end or were abandoned midway after it became clear that it would be impossible to garner the requisite support from the male dominated parliament. These laws include the following:

- Affirmative Action Bill, 2000

- Marriage Bill, 2007

189 TJRC/Hansard/Women’s Hearing/Kisumu 12 July 2011/p. 3

Matrimonial Property Bill, 2007

Family Protection Bill, 2007

Equal Opportunities Bill, 2007

Table 7: Women representation and participation in parliament: 1963-2008

Parliament	Period	Total no of constituencies	No of women elected	Available slots for nomination	No of women nominated
1 st Parliament	1963 - 1969	158	0	12	0
2 nd	1969 - 1974	158	1	12	1
3 rd	1974 - 1979	158	4	12	2
4 th	1979 - 1983	168	5	12	1
5 th	1983 - 1988	158	2	12	1
6 th	1988 - 1992	188	2	12	0
7 th	1992 - 1997	188	6	12	1
8 th	1997 - 2002	210	4	12	5
9 th	2002 - 2007	210	10	12	8
10 th	2008 - 2013	210	16	12	6
			50		25

Table 8: Women representation in parliamentary committees (10th Parliament)

Committee	Male MPs	Female MPs	Total MPs
House Business Committee	17 (17%)	5 (23%)	22
Administration and National Security Committee	10 (91%)	1 (9%)	11
Agriculture, Livestock and Co-operatives Committee	10 (91%)	1 (9%)	11
Defence and Foreign Relations Committee	11 (100%)	0 (0%)	11
Education, Research and Technology Committee	9 (82%)	2 (18%)	11
Energy, Communications and Information Committee	11 (100%)	0 (0%)	11
Finance, Planning and Trade Committee	11 (100%)	0 (0%)	11
Health Committee	11 (100%)	0 (0%)	11
Justice and Legal Affairs Committee	8 (73%)	3 (27%)	11
Labour and Social welfare Committee	8 (89%)	1 (11%)	9
Lands and Natural Resource	10 (91%)	1 (9%)	11
Local Authorities	9 (100%)	0 (0%)	9
Transport, Public Works and Housing Committee	11 (100%)	0 (0%)	11
Public Accounts Committee	10 (91%)	1 (9%)	11
Public Investments Committee	11 (100%)	0 (0%)	11

Committee	Male MPs	Female MPs	Total MPs
Local Authorities and Funds Accounts Committee	11 (100%)	0 (0%)	11
Budget Committees	14 (93%)	1 (7%)	15
Committee on Delegated Legislation	8 (89%)	1 (11%)	9
Committee on Equal Opportunities	7 (78%)	2 (22%)	9
Committee on Implementation	10 (91%)	1 (9%)	11
House Broadcasting Corporation	10 (100%)	0 (0%)	10
Library Committee	9 (90%)	1 (10%)	10
Catering Committee	9 (75%)	3 (25%)	12
CDF Committee	11 (100%)	0 (0%)	11
Procedure and House Rule Committees	10 (83%)	2 (17%)	12
Select Committee on Review of Constitution	21 (78%)	6 (22%)	27

Table 9: Women representation in key government positions, 2005

Position	Women	Men	Total	% of women
Ministers	3	26	29	10
Assistant Ministers	4	39	43	9
Permanent Secretaries	6	25	31	19
Diplomatic Corps	11	29	40	28
Judges	8	57	65	12
Provincial Commissioners	-	8	8	-
District Commissioners	2	69	71	3
Chiefs	41	2424	2465	2
Assistant Chiefs	225	5394	5619	4

- 190 Similarly, women's appointment to high ranking public offices remained dismal across the Commission's mandate period. As of 2005, only 5 per cent of Cabinet Ministers and 12 per cent of judges were female. Poor representation of women in public offices has often led to the adoption of gender-blind policies or the utter neglect of issues particularly relevant to the well being of women. For example, the majority of Land Dispute Tribunals are male dominated, a fact that makes it difficult for women's interests in land to be appropriately and sufficiently addressed. A female member of such a tribunal spoke to the Commission in Kakamega:

I will talk about issues of land. I am a member of a tribunal in Ikolomani. We are only two ladies in the tribunal. When I get cases affecting women I always feel very sad because there are eight men against two women in the board. So, it becomes very difficult to support a fellow woman because men are more in the tribunal. Our concerns are

not taken serious by those men. So, I am requesting that the number of women be increased in the Land Dispute Tribunal, so that we can actually look after the welfare of other women. There are times when a woman has a case and she needs to go to the site. We find it very difficult because she must pay the members of the Land Dispute Tribunal to visit the *shamba*. If she does not have money to pay them, then they will never go to the site. It becomes almost impossible for her welfare to be taken into consideration. So, when this case goes to court, it is never addressed because she does not have the money to hire a lawyer or facilitate her witnesses to testify on her behalf. So, she is left desperate and she ends up losing her land. So, many women are losing their pieces of land because they cannot transport witnesses to court or get people to help them in the court process. The other thing is that women are weak. Even a witness wants protection because this is a very dangerous process for them. Once she complains about her land, she is viewed as an enemy by the complainant. If the complainant is a man and a witness is a woman, it is usually a big problem for this particular woman. She will face a lot of challenges from the community. So, it is important to provide security or protect witnesses so that they can talk freely without being intimidated. So, if they do not have protection for the witnesses, the witness will run away out of fear.¹⁹⁰

191. Many factors have contributed to women's exclusion in public spaces of influence and decision making, chief amongst which are cultural notions pertaining to the role and place of women and men in society. The traditional presumption in Kenya, being as it is a patriarchal society, is that women are incapable of or should not take up leadership positions. While men, on the one hand, are perceived as strong, assertive and dominant, women, on the other hand, are considered emotional and timid.¹⁹¹ As such they women are considered generally ill-suited for leadership positions. Another notion flowing from the patriarchal structure of Kenyan communities is that women are men's property. It follows therefore that leadership is unlikely to be conferred on a people who are owned.¹⁹² Moreover, women are often grouped together with and/or perceived as children. A witness in Bungoma attributed the lack of women's representation in key leadership position to this notion – that women are children – and added that positions reserved for women are always those that fit well into the society's description of gender roles.

With regard to leadership, women are being discriminated because they are considered children. If you want to vie for a seat, you will be asked, 'what can a woman tell us? She should be given guidance'. If there is any seat being vied for, the one we can get is the position of Treasurer because they know women can take care of property. The men take the decision-making positions.¹⁹³

190 TJRC/Hansard/Women's Hearing/Kakamega/28 June 2011/p. 21

191 N. Kamau. 'The value proposition to women's leadership: Perspectives of Kenyan women parliamentary and civic leaders (2003-2007)' in N. Kamau (ed.) *Perspectives on gender discourse: Enhancing women's political participation* (2008) 1-14

192 D. Okumu. '(Re)configuring gender-based electoral violence as political rape' in Kamau (n above) 77-79

193 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 14

- 192 During the same hearing, another witness spoke about her experience in the context of Kenya Union of Post Primary Education Teachers (KUPPET)

The other thing I want to touch on is representation in KUPPET. For a long time now, the chances that women who try to vie as representatives in KUPPET is just to be a treasurer, meaning that our men and all the rest have accepted that it is only the woman who can be trusted with money. You are told that if you want a post, just try being a treasurer, but never would we be allowed to take the top seats like that one of the chairman or the organising secretary. A woman will not get such a chance. You will be blamed for many things. You will be told that "She is getting into politics or she is sleeping with all these men." So, many bad issues are heaped on us until we just fold ourselves and we do not know what to say and keep quiet. It is like we keep asking for favours. So, they do us a favour by giving us the treasurer's job. There is another post of gender representative which women will be given, but all the other bigger posts are reserved for men.¹⁹⁴

- 193 In Hola, a witness lamented the lack of women's representation in the local community's council of elders which is responsible for making decisions relating to a wide range of issues including those relating to land. In her own words:

In the villages, we have the Council of Elders called "Garza". They are the ones who create and formulate laws on what will be followed and how people will live and rules and cultures to be followed. They use this to explain how we should live. However, as people continue to be educated, oppression continues to add up. The Council of Elders has no woman representative who sits in it. Every Thursday, they meet and there is no woman involved in this meeting. The only way we are involved is when we are told to contribute money when there is a problem. That Council of Elders distributes parcels of land and women are not involved. This thing hurts me and I think it is the government which is oppressing us because it should help us in such situations. If your husband dies and you are left a widow, you do not go to the Council of Elders to listen to what they will decide.¹⁹⁵

- 194 A comparable concern was raised in Kajiado where a witness drew a nexus between the feminisation of poverty among the Maasai community and the exclusion of women in decision making processes:

I want to talk about decision-making mechanism in the Maasai community. We are not part of the decision-making process. When a cow is sold the women are left behind and they cannot ask questions. They do not have rights to question. I want to know why I cannot be involved in decision-making in my own house. Why can I not be involved in the selling of land? The reason why Kajiado is poor is because women are not involved in decision-making.¹⁹⁶

194 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 9

195 TJRC/Hansard/Women's Hearings/Hola/13 January 2012/p. 4

196 TJRC/Hansard/Women's Hearing/Kajiado/9 Dec 2011/p. 11

195 In Bungoma a witness described the situation among the Bukusu

If you look at decision making positions, you will find that a woman is very far away I want to thank the Kalenjin community where when you are going to receive dowry, women have a say in bargaining in the dowry negotiations. However, this is prohibited in the Bukusu community. You just remain in the kitchen and you have no way of making decisions even on things that concern you. You just sit there like yesterday. For how long are we going to continue sitting? Bukusu women have been silenced by the community.¹⁹⁷

196 Discrimination against women and their exclusion in decision-making processes is also rampant and sanctioned in religious institutions. For many, leadership positions in these institutions are the exclusive reserve of men. On exclusion of women in religious institutions, the story of Evelyn Chole who spoke to the Commission in Kitale is instructive. A victim of the 1991 ethnic clashes in Trans Nzoia, during which her husband was killed, Chole joined a local pastors' fellowship but she was later inspired to form a women's lobby group after she realised that women's issues were rarely discussed or given priority in the pastors' fellowship.

Afterwards, the pastors usually had fellowships and there were old men in that fellowship. One day, I was just passing and I saw them sitting there talking about a certain woman who had a problem. I saw that it was odd to speak about a woman and they were all men. So I decided to join them. I asked them why there were no other women and they told me to sit there [] That is when the NCCK came to the ground and found the pastor's fellowship. That pastor's fellowship started dealing with different issues. That is when I found out that I was the only woman in that fellowship. After three years in the fellowship, I saw that the men were only dealing with issues about men. They did not discuss women issues. One day, a woman came and nobody was addressing her issues and that is when we founded a group called *Rural Women Base Link* and I am the Chairperson of that group. That is where we discuss women issues.¹⁹⁸

197. Apart from cultural notions and traditions, there are many other factors that have historically impeded women from ascending to positions of leadership and power, especially in the political arena. Firstly, the first-past-the-post (winner-take-all) electoral system has traditionally made it difficult for women to make it to parliament. As women are generally in a disadvantaged position in society, their competitiveness and chances of winning in a first-past-the post system is impeded. As such, deliberate affirmative action measures must be taken to ensure sufficient numbers of women are elected or nominated into parliament. During the mandate period, efforts to increase women's quota in parliament did not yield

¹⁹⁷ TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 5

¹⁹⁸ TJRC/Hansard/Women's Hearing/Kitale/21 October 2011/p. 7-8

much. In April 1997, an affirmative action bill to increase women's participation in parliament and local authorities was defeated in parliament. The bill had been sponsored by a female member of parliament, Phoebe Asiyo. Instead, through the Inter-Parties Parliamentary Group (IPPG), it was agreed that gender equity would be considered by political parties in nominating individuals into parliament. The result was that four women were nominated into parliament following the 1997 General Elections. Another affirmative action bill, sponsored by a female member of parliament, Beth Mugo, was introduced in parliament in 2000. This bill suffered a similar fate as the one introduced in 1997.

- 198 Secondly, many women who aspire to be leaders lack the requisite resources to undertake political campaigns. In Kenya, as is in most parts of Africa, material resources play a significant role in elective politics. Often, politicians hand out cash or other material goodies in order to solicit votes. Those with huge sums of money get the most votes. Yet, material resources are traditionally in the hands of or controlled by men. In this scheme of things, women are always unable to compete materially with their male counterparts.
- 199 Thirdly, women who contest for political positions have traditionally been subjected to violence or threat of it. According to Kenya Human Rights Commission 'violence and other forms of discrimination against women, in the context of elections, are acts perpetrated by men against women with the aim of devaluing, demeaning and de-humanizing them and their specific identity as women so as to promote men's dominance in electoral politics thereby influencing electoral choices and outcomes'¹⁹⁹ Violence against women during elections has traditionally been carried out to intimidate them to withdraw their candidature or refrain from supporting a particular candidate. In 2007, for instance, Flora Igoki Tera, a parliamentary candidate for the North Imenti Constituency, was physically assaulted and subjected to inhuman and degrading treatment by a gang of men who warned her against vying for the position.²⁰⁰ She was forced to swallow human faecal matter which had been mixed with her hair which had been shaved from her head.²⁰¹ Another woman aspirant for a parliamentary seat, Orio Rogo Manduli, was hospitalised after she sustained injuries in election-related violence in Nairobi.²⁰² Kenya Human Rights Commission documented the following cases of violence against women during the 2007 General Elections:²⁰³

199 Kenya Human Rights Commission *Violating the vote: A report of the 2007 General Elections* (2008) 30
 200 D. Okumu, (Re)configuring gender-based electoral violence as political rape, in Kamau (n above) 77-80
 201 As above
 202 As above
 203 Kenya Human Rights Commission (n 200 above) 30-31

On 6 October 2007, Asha Hussein was violently attacked as she returned to her home in Dandora after a political rally in Nakuru. Asha said it was about 9 pm when she alighted from a public service vehicle in Dandora. Since it was fairly late in the evening, she chose to hire the services of a guard to walk her home. Just a few metres to her home, she was suddenly surrounded by a group of unidentified young men wielding machetes and other weapons including an AK-47. Sensing danger, the guard ran away leaving her alone. The gang proceeded to assault her while one member pointed a gun at her warning her against vying for the seat. Apart from the beatings, Asha said, the gang insulted her, questioning her morality. They continued to torture her until she agreed to denounce her political ambitions.

On the 28 October 2007 at Kianyaga Town, Gichugu Constituency, the DP aspirant for Kabare ward, Jeremiah Geteri allegedly warned people against electing women as they will do nothing apart from looking for men. Allegedly referring to Martha Karua, the aspirant asked, 'We elected her when she was a Mrs. Now she is a Miss. How many people agree that she should now go and marry?'

On 16 October, 2007 at Kibera Primary School in Langata constituency, one aspirant said, '*Wanawake endeni mkapike*' (Women go and cook) '*tokeni ama tutawarape*' (go away or else we shall rape you). This made all the women run away. The reason for the intimidation was because they were supporting aspirant Opete-Opete.

On 16 November 2007 at Dandora Secondary School Embakasi Constituency, Asha Ali was assaulted when a conflict arose between the supporters of Ferdinand Waititu and her supporters.

On 16 November 2007 at Dandora Secondary School Embakasi Constituency during the party nominations, aspirant Jecinta Mwangi was discriminated against at Dandora Area Two. They said, 'People of Dandora cannot vote for a woman'. Some asked her, '*Umepikia bwana malaya wewe? ODM si ya wakikuyu*' (Have you cooked for your husband you harlot? ODM does not belong to the Kikuyu). She was abused, intimidated and threatened.

On 16 November 2007 in Narok North Constituency, Faizah Mohammed was harassed by a police officer and barred from entering a stadium to campaign. Her identity was also questioned by those that were guarding the entrance to the stadium because she was a Muslim.

On 16 November 2007 in Uasin - Gishu in Eldoret South Constituency it is alleged that campaigners of Julius Sang said that other aspirants 'are thieves

and are very immoral' Alleged supporters of David Koros hurled insults on Peris Jepchumba saying 'They cannot be led by uncircumcised women'

On 16 November 2007 hate speech directed at women was circulated via SMS For example 'Why you should be in ODM! ODM women scream YAWA, yawa, YAWA, in praise of NYUNDO while men in PNU are busy telling their wives to PANUA ili kazi iendelee Women in ODM-K are so wet that their men keep asking WAPI WIPER!'

- 200 The Commission heard similar horrifying and chilling accounts from scores of women during its hearings Dorothy Cherop, for instance, narrated how, despite the backing of community elders, she was threatened with violence when she vied for the position of councillor in Kinyoro Ward in Trans Nzoia. Not only was she threatened with violence but her two sons were poisoned, one of whom died as a result of the poisoning

During campaigns in 2007, I was warned against vying I reported the threats to the police station but no action was taken I was given a two weeks' notice to give them Ksh 50 000 or they would kill my children In the first two weeks, they poisoned my first born [] After they poisoned my first born I ran away and left my children in the homestead We lived for seven days in the hospital with my poisoned son and he got better My second born was in Eldoret They followed my second born at school They used somebody to poison him and he died in school²⁰⁴

- 201 Her supporters, mainly women, were also threatened with forceful eviction They were warned that if they supported or voted for her they would be evicted from their homes

Women who wanted to vote for me were threatened by men We were 11 candidates The elders wanted educated people Eleven of us had attained Form Four education After vetting, they decided on me However, the youth protested saying that they could not be led by a woman They formed another team Elections did not happen in the grassroots There was war Elders met again and advised me to seek a ticket from another party I went to Nairobi and secured a certificate of ODM Kenya I vied on that party The elders said that even if I had gone to another party, they wanted me to lead them However, two weeks before the elections there were threats There was something called *Nyumba Kumi* and they told us about the procedure They warned other women not to vote for me or they will be evicted the next day²⁰⁵

- 202 In Kitui, another woman seeking an elective post during the 2007 General Elections was violently attacked at her home where she was gang raped in the presence of her husband

204 TJRC/Hansard/Women's Hearing Kitale 22 October 2011 p. 7

205 TJRC Hansard/Women's Hearing Kitale 22 October 2011 p. 8-9

On 17 March 2007 people attacked us at night. I was with my husband and my children. There was a lot of light in the house all over a sudden. We do not have electricity in the house. My husband woke me up because he thought they are police. Before long, our windows were smashed and they called out my name. I did not answer because I was in shock. My husband asked them whether they want money. They said that they had come to kill [me]. He asked them why they want to kill me and they said that [I was] troubling men. I wondered which men I was troubling. They asked me why I want to be a councillor and yet I am employed. I told them that it is not me but the people want me to be a leader. I told them that I did not want it because I am comfortable where I am. They started cutting the grills on the window. My husband gave them the money in the House. At that time we were selling dairy milk and a shop. It was on a Sunday and so we had not taken the money to the bank. He gave them the money. They took my golden watch which I had been given by a white colleague. I knew that they knew me because they asked for that golden watch. One of them shot at me with an arrow. The arrow went through the wall and the mark is still there even today. They asked for my handbag and I gave them. One of them suggested that they leave because I was not proud. Then another one asked what they are going to say. That is when I realised that they had been sent. They managed to enter the bedroom and said that they wanted to kill me. I went near the cross and prayed. One of them came and kicked me and I fell down. Even up to today I am still affected. They beat me and raped me.²⁰⁶

203 In Kakamega the Commission heard the story of another woman political aspirant whose vehicles were destroyed as part of a violent scheme to scuttle her campaign.²⁰⁷ In Mt. Elgon, a woman aspirant described to the Commission how she lost her teeth after she was brutally beaten to discourage her from vying for a political seat.²⁰⁸

204 Although they routinely face physical violence, as the examples above show, it is notable that much of the violence that women experience in the political arena is psychological and verbal. Women who vie for political positions are often subjected to name-calling, including that they are 'prostitutes' or 'spoilers'. Sometimes these abuses originate from close relatives. A female parliamentary candidate described her experience to the Commission:

In 2007, I decided resign from teaching and go into politics. I contested for Mwingi North parliamentary seat. To add salt to injury, the same father-in-law who had disowned me and insisted that I must be inherited, disowned me at a campaign rally. He said that he could not be a father to such a mad woman. That was a big blow to me because that was where I was born, where I was married and where I lived. It affected my candidature so much.²⁰⁹

206 TJRC/Hansard/Women's Hearing/Kitui/2 Dec 2011/pp. 4-5

207 TJRC/Hansard/Women's Hearing/Kakamega/28 June 2011/p. 25

208 TJRC/Hansard/Women's Hearing/Kapsokwony/24 May 2011/p. 2

209 TJRC/Hansard/Women's Hearing/Kitui/2 Dec 2011/p. 7

- 205 In conclusion, it is important to appreciate that the 2010 Constitution of Kenya contains a number of measures and mechanisms aimed at redressing the historical exclusion of women in parliament. These include the requirement that 'no more than two-thirds of the members of elective bodies shall be of the same gender'²¹⁰ and the creation of 47 elective posts for county woman representatives²¹¹

Women and politics

TJRC/Hansard/Women's Hearing/Machakos/25 November 2011/p. 26

Since we got Independence in 1963 to date, women are still suffering. I want to talk about the problems that we are experiencing as women in politics and leadership. Women in Ukambani are suffering in terms of politics and leadership. Currently, we have a Constitution that gives us the right to participate. However, there are times when our ideas are not considered in any way. Sometimes we have our voting cards hidden so that we cannot vote as women. So, we do not have the freedom of voting for the leaders we want. Most ladies here are born leaders. However, we are not given opportunity to prove ourselves because of churches and our culture. We are seen as people who should just stay in our houses to give birth, cook and take care of our homes. When it comes to voting, especially now when we are going for elections in 2012, when a woman comes forth to seek for any political seat, we do not have peace because elders from Ukambani are sent to us to advise us against the idea. If you are not married, you are not allowed to lead or seek any political seat. Other people are sent to break our meetings and it becomes difficult for us to campaign. Other times, old women will be sent to make noise and disrupt the meeting.

When we are asking for votes in Ukambani as women, our security is not guaranteed. During elections, women move from their houses to neighbour's houses because men will be hired to come and attack you in your house. Other times, the political parties do not allow women to participate in the party nomination. There is a lot of corruption. Most of the times, women do not belong to any political party. When nominations are done, there is a lot of corruption that makes it difficult for women to be nominated. The political parties do not accept us. We cannot be allowed to be together with other people in the party. However, we are grateful for the new Constitution. Women in Ukambani need a lot of education to know what is in the Constitution. This will help those who have the calling of politics to come forth and seek elective positions. We must educate them on their rights. When decisions are made by committees in the markets, we are never included. Generally, women from Ukambani are left behind. When they show a bit of interest in politics, they are called names like prostitutes, spoilers and so forth. Sometimes we are accused of lack of respect for our men and being over-ambitious.

²¹⁰ Constitution of Kenya, sec 81(b)

²¹¹ Constitution of Kenya, sec 97(h)

Women and Conflict

- 206 Women are hardly found on battlefronts. In fact, because of their limited presence in public spaces of influence, they are only marginally, if at all, engaged in the politics and issues that spark conflict. Yet, almost without exception, they bear the greatest brunt of conflict. As observed in the Beijing Platform for Action, 'while entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex'.²¹² According to a study conducted by the International Committee of the Red Cross

Armed conflicts greatly affect the lives of women and can completely change their role in the family, the community and the "public" domain. This is normally unplanned. The breakdown or disintegration of family and community networks forces women to assume new roles. Armed conflicts have created large numbers of female-headed households where the men have been conscripted, detained, displaced, have disappeared or are dead. Women invariably have to bear greater responsibility for their children and their elderly relatives - and often the wider community - when the men in the family have gone. The very fact that many of the men folk are absent often heightens the insecurity and danger for the women and children left behind, and accelerates the breakdown of the traditional protection and support mechanisms upon which the community - especially women - have previously relied.²¹³

- 207 In recent conflicts, because of their sex and the fact that they are often viewed as symbolic bearers of cultural and ethnic identity, women have increasingly become the specific target of violence, especially sexual violence. In particular, sexual and gender based violence against women has become a tool of war. In the 1994 Rwandan genocide sexual violence was the rule and its absence the exception.²¹⁴ Rwandan women, particularly of Tutsi ethnic origin, were subjected to sexual violence on a massive scale.²¹⁵ It is estimated that between 250 000 to 500 000 women were sexually violated during the genocide.²¹⁶ Many were 'individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or through forced "marriage") or sexually mutilated'.²¹⁷

212 Beijing Platform for Action

213 International Committee of the Red Cross *Women facing war: ICRC study on the impact of armed conflict on women* 12

214 *Report on the situation of human rights in Rwanda submitted by Mr Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights* UN Doc E/CN.4/1996/68 (1996) 7

215 Human Rights Watch *Shattered lives: Sexual violence during the Rwandan Genocide and its aftermath* (1996) 2. See also *Report of the Special Rapporteur on violence against women: its consequences submitted by Ms Radhika Coomaraswamy Addendum, report of the mission to Rwanda on the issues of violence against women in situations of armed conflict* UN Doc E/CN.4/1998/54/Add.1 (1998)

216 *Report on the situation of human rights in Rwanda submitted by Mr Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights under paragraph 20 of Resolution S-3/1 of 25 May 1994* E/CN.4/1996/68 (1996) para 16

217 Human Rights Watch (n 216 above) 2



208. In the 11-year civil war that rocked Sierra Leone from 1991 to 2002, all the armed factions in the conflict, subjected women and girls to a multiplicity of sexual violence including rape, sexual slavery and forced pregnancy.²¹⁸ A particularly gruesome form of gender-based violence against women emerged during the conflict. The Sierra Leone Truth and Reconciliation Commission observed that, '[w]hat is particularly repugnant is that many pregnant women had their stomach disembowelled because members of the armed forces wanted to place bets as to the gender of the unborn baby.'²¹⁹ Disembowelment has also been reported in the conflict in Darfur in the Sudan,²²⁰ where government and Janjaweed militia forces frequently used rape as a tactic of war,²²¹ the evidence of which has been described as 'unmistakable and overwhelming.'²²²
209. In the Democratic Republic of Congo, hundreds of thousands of women and girls were raped or otherwise sexually violated from 1996 when civil war first broke out in the country. The scale and brutality of the violence is unprecedented.²²³ In Guinea, the International Commission of Inquiry mandated to establish the facts and

218 Sierra Leone Truth and Reconciliation *Witness to truth: Report of the Sierra Leone Truth and Reconciliation Commission*, vol 3B (2004) 136.

219 As above, 154.

220 Amnesty International *Darfur: Rape as a weapon of war: Sexual violence and its consequences* (2004) 12.

221 See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General* (2005) 87-94.

222 J Wagner 'The systematic use of rape as a tool of war in Darfur: A blueprint for international war crimes prosecutions' (2005-2006) 37 *Georgetown Journal of International Law* 193, 194.

223 In 2007, former UN Special Envoy for AIDS in Africa observed that, '[t]here is no precedent for the insatiable brutality of the war on women in Congo. The world has never dealt with such a twisted and blistering phenomenon', quoted in W Wakabi 'Sexual violence increasing in Democratic Republic of Congo' (2008) 37 *The Lancet* 15.

circumstances of the events of 28 September 2009 during which civilian protesters were attacked by government security forces, found that '109 females, including a number of minors, were victims of rape and other forms of sexual violence'²²⁴ The Commission also found that women were abducted and held as sex slaves by government security forces.²²⁵

- 210 In Kenya, women have always been the subject of violent attacks during conflicts. The range of violations which women experience during conflicts includes: killings, torture, inhuman and degrading treatment, sexual violence and mutilations. In the subsections that follow, the chapter looks into how three selected episodes of generalised violence affected women. These are Mau Mau, Mt Elgon conflict and 2007/2008 PEV.

Women and the Mau Mau war

- 211 Women played a crucial role in Kenya's fight for freedom from colonialism. They were engaged in the Mau Mau war in various ways.²²⁶ They supplied food on a daily basis to members of Mau Mau operating deep within the forests. Some women were stationed in the forests where they served as cooks. They also served as spies and were instrumental in relaying information from the forests to operatives of Mau Mau on the outside. Other women were involved in smuggling letters into and out of detention camps. For instance, in her book on women and Mau Mau,²²⁷ Muthoni Likimani narrates the story of a woman who helped expose the worsening health and sanitation condition in Mitaboni Detention Camp in Coast Province. She did this by smuggling letters out of the detention camp. These letters would subsequently be sent to the British Colonial Office in England and to newspaper outlets. At a personal level, Muthoni was married to a Masai medical doctor who was trusted by the colonial administration, and as such, she was often allowed to enter detention camps. She used this opportunity to pass letters to and from detention camps.²²⁸
- 212 Other women, like Rosemary Wanjiru who testified before the Commission in its women's hearing in Nairobi, were involved in the registration of Mau Mau members.²²⁹ Others were actively involved in the war. Janice Muthange Ndwiga

²²⁴ *Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea* S/2009/693 para 93

²²⁵ As above

²²⁶ See P Kuguru Trailblazer: Breaking through in Kenya (2008) 32 noting that women were also involved in many different ways. One of these was in ensuring adequate supplies of food for those Mau Mau who were stationed in the forest. Some women cooked food daily for the fighters. Other women would deliver food regularly to secret Mau Mau hideouts or to pick-up point.

²²⁷ M Likimani *Passbook number F 47927 Women and Mau Mau in Kenya* (1998)

²²⁸ Likimani (n 228 above) 125

²²⁹ TJRC Hansard/Women's Hearing/Nairobi/21 February 2012/p. 11

was involved in the war at a great price. She narrated her experience to the Commission at its sitting in Embu.

We stayed there, fought and faced very many problems. We had problems with eating because we were being chased away. We used to eat unripe bananas, raw cassava and sugarcane when we got it. We would go hungry when we did not get food. We used to be rained on because we did not have a house. We stayed under the trees. When aeroplanes came to drop these fighters, we used to hide under the trees and the ones which had holes. We used to live in those holes. We could not get out of the holes for fear of being spotted. We fought, ran up and down. I had a problem with my body. I was shot with a bullet and it is in my body. Another bullet passed through my knee while the other one went through my thigh. That is why I praise God and I say God loves me because that bullet could have killed me. God helped me and I did not die there. Well wishers helped me and took me to Embu Hospital. I was treated but the bullet could not be removed. I was taken to King George Hospital and that is where it was removed. I was operated on my leg. A metal was put in my leg and the xray shows that it is still there. When I was taken to Kenyatta Hospital, I was detained and taken to Kamiti. I stayed there and after some time, I was released. It pains me a lot and when I remember what I have gone through, I cry.²³⁰

- 213 Indeed, it is argued that without the role of women in the Mau Mau war, nothing could have been achieved.

Without women's contributions in hiding and feeding the freedom fighters, nothing could have been achieved. It was the women who transported arms and food to the forest edge. It was the women who steered loyalists into the fighters' traps, it was the women, even prostitutes, who stole guns and bullets from those fighting their brothers. And it was the women who spied for the freedom fighters. The women as much as the men hazarded their lives to gain back a country.²³¹

Women played a crucial role in Kenya's fight for freedom from colonialism. They were engaged in the Mau Mau war in various ways. They supplied food on a daily basis to members of Mau Mau operating deep within the forests. Some women were stationed in the forests when they served as cooks.

²³⁰ TJRC/Hansard/Women's Hearing Embu/p. 6

²³¹ Likimani (n 228 above) 78

'How our women participated'

Excerpt from M Likimani *Passbook number F 47927: Women and Mau Mau in Kenya* (1998).

Since the bitter struggle for Kenya's independence began our women folk have fought alongside men all along and even in the independent Kenya they have and are still are, playing a very vital role in the building of the nation. Most historians tend to forget or ignore the role which they play. But listen to this:

"You take my dress and give me your trousers. You men are cowards. What are you waiting for? Our leader is there. Let's get him!" Those were the words of Mary Nyanjiru, from Weithaga, in location 10 of Murang'a District, in Kenya in the 1920's, challenging the men outside the Kingsway Police Station in Nairobi to demand the release of Harry Thuku. The women in the crowd cheered her and they all surged forward until the bayonets and rifles were pricking their throats. When the firing started, Mary Nyanjiru, the brave mother, was the first to die.

It is no longer a secret that women played a crucial role in the forest and undergoing tremendous hardship to rear their fatherless families in the villages.

The colonial authorities recognised the power of the women of Kenya. One of them observed, 'Wives have in many cases persuaded their husbands to take the oath and are often very militant.'

Mary Nyanjiru's death in the 1920's wasn't the beginning of women's involvement in the struggle to free our country. But it did mark a decisive point in the political education of the people, where both men and women willingly and courageously died as that their beloved country might be free.

After their men folk left, either for the forest or taken into detention, many women were left to fend for themselves in the rural areas. Life was far from easy with the chronic shortage of food that threatened the very existence of those who did not support the colonialists. But worse than the sufferings from lack of food, was the brutality they had to endure from the colonialists and their servants.

Sexual abuse was one of the tools used to oppress Kenyan women. But they bravely refused to succumb to the advances made by the "loyalists" or "home guards". This constancy is all the more striking in that few women were sure whether their husbands or lovers would ever come back alive and with their manhood still intact. Many rumours were circulated to try and break their spirits and betray those they loved.

Women had to raise their children, educating them about the truth concerning the struggle. They also put themselves in danger to steal guns and ammunition and drugs for the forest freedom fighters. There were many instances when they had to kill the enemy to get to the precious supplies. Women risked their lives taking news and food into the forest and their missions helped to encourage those who struggled.

Some women who went to the forest carrying food, arms or information refused to go back. They chose instead to fight alongside the men. At first, they were not accepted. As one former freedom fighter admits, he at first thought that to feed and defend women- as though

they could not defend themselves-was unnecessary. Women were given the same domestic tasks they were to do at home. Some women accepted the role assigned to them. As one of them says "It seemed to me that the leaders considered this as part of the women's duty in society." She went on to say that she accepted that the role in order to be of service to her people.

It didn't take them long, however, to discover that women were just good in the battle as men. The forest rules were thereafter amended so that every girl or woman was to be regarded as a regular who could get ranks, up to that of colonel, depending on her activities in the battle. Many women forest freedom fighters distinguished themselves and proved themselves the equals of men. One of them, Muthoni became Marshal General.

When they were captured, women had to suffer worse indignities than men. In Kamiti Prison, which will long be remembered as the place where Field Marshall Kimathi was executed and buried, women detainees underwent untold horrors. Many who passed through it would rather forget about those nightmarish days and nights but amongst all of them, the memories still linger. Mama Ngina Kenyatta, Mukami Kimathi, Rebecca Njeri and Phrisilla Wambaki are some of those who passed through there, to mention just a few.

Many women became barren through the tortures that they underwent. Many of these women, who lived through their detention at Kamiti Prison, walk through life as ghosts of their former selves, lonely, haunted and shunned by their more fortunate sisters who either suffered less or didn't suffer at all. And yet from their suffering and their barrenness sprang the flower and fruit of freedom for all the people of Kenya, which is one of the gifts that the women fighters have given to all the generations who will live in free land.

- 214 But not all women were supportive of or believed in Mau Mau's cause. Writing on the role of Kikuyu women, for example, JM Kariuki wrote that some women for various reasons, either collaborated with or were sympathisers of the colonial administration.

There is no doubt that ninety per cent of the women of the Kikuyu tribe supported the fight for freedom and independence with their minds, their bodies and their souls. It is also false to think that this support was confined to a few educated leaders. Secondly, during the early days of the Emergency the large majority of the women came to support the movement that was being ridiculed as 'Mau Mau'. With the arrest of Jomo Kenyatta they realised that peaceful means of achieving their aims had failed and they accepted the alternative of violence, fully realising the suffering it would bring on all of them. At the same time there were a few women who supported the government – some, for example, but not all of the wives of the Home Guards, certain Christian women who (as was also true of some men) genuinely valued their love of God higher than their love of country, and others who had personal motives.¹³²

¹³² JM Kariuki, *Mau Mau detainee* (1963) 30.

- 215 In general, women suffered untold atrocities, regardless of which faction of the conflict they supported. As is reflected in the story told by Wangari Maathai, Nobel Peace Prize winner, the entire period during which the Mau Mau war was active was generally a traumatic period for girls and women. At the height of the conflict, especially during the emergency years (1952-1957) an entire community would be collectively punished by the colonial administration when it was suspected that some among them were members of the Mau Mau movement. Forced communal labour that was instituted during that period disproportionately targeted and affected women who had been left behind in the villages following the confinement of the majority of men in detention camps. Likimani describes the experience of women during this time:

During the emergency, the colonial government instituted a programme of forced communal labour for the people left in the villages. During communal labour projects new roads were built, providing access to remote villages so that the Home Guards could easily drive there for emergency operations. And with many men in the forest, and others in prison or detention camps, the majority of those forced to labour were women []. Women and the few men left would be forced out to work very early in the morning, before they had even given their children breakfast []. At forced communal work, people stayed there hungry all day long and had no time to attend to their gardens where they got their food. Neither did they have time to care for their cattle and goats; children were left unattended. In many cases such communal work was followed by a curfew.²³³

- 216 Speaking before the Commission, Rosemary Wanjiru recalled:

We were in a village. We had been surrounded in the village. They used to wake us up at 3:00 a.m. to go and work on their land. Anyone who was there then knows what I am talking about. We would get food at 7:00 a.m. and then they would lock us up again in the village. I was one of the Mau Mau fighters. I am the one who registered former Mau Mau fighters in our area.²³⁴

- 217 In addition, women were deliberate targets of violence. Contrary to popular assumptions, violence was meted out against women not only by agents of the colonial administration (including soldiers, police officers and Home Guards) but also by members of Mau Mau. Sexual violence was by far the most common violence against women. British soldiers, policemen and Home Guards were responsible for inexplicable acts of sexual violence:

When the Mau Mau war was going on, women were violated a lot by the colonial soldiers. Women were beaten and raped. Batons were inserted into their private parts. Do you hear that? I do not know if you have heard of that? Have you heard of such things – that our women were beaten up and raped by the colonial soldiers, and that batons were inserted

²³³ Likimani (n 228 above), 24.

²³⁴ TJRC Hansard: Women's Hearing, Nairobi/21 February 2012, p. 11.

into their private parts? Do you know where our private parts are? You can imagine a bottle being pushed in and then you are left there or beaten."²³⁵

- 218 The Mau Mau was particularly responsible for abduction and sexual enslavement of women. Many women who served as cooks for the Mau Mau were also treated as 'wives'. Those who supplied them with food were also routinely raped. A victim of such an experience testified before the Commission:

When I was a young girl of 15 years, I was one of those that used to take food to the Mau Mau fighters. We would find people waiting for us. They would subject us to shameful activities. They used us as their women. We would take food to them. While leaving the forest, they would grab us and remove our clothes and then rape us. Some of us never managed to get children. We are in a lot of pain.²³⁶

Women and Mau Mau War

Excerpt from Wangari Maathai *Unbowed: A memoir* (2007) 64-66

As the Mau Mau period went on, more and more people were mobilized and people were forced to choose to support the Mau Maus or the British. All the able-bodied men and boys, unless they were very young, were required to be part of the Home Guards and were expected to be at their post by six o'clock at night. Gathering the young men at the posts was also a way to prevent their being abducted by the Mau Maus. Both of my older brothers participated in the night watch to protect Ithite from Mau Mau attack and worked closely with the local Home Guards during the holidays. The violence came very close. Across the bridge from Ithite, at Gathumbiro, the Mau Mau burned a Home Guards' depot to the ground, killing more than twenty of them. It was one of the worst local massacres by the Mau Mau and left many widows in the community. Such traumas have never been addressed. Indeed, there has almost been a desire to deny these atrocities took place. There is still need for healing, reconciliation, and forgiveness.

Young girls in particular were at risk of rape from Home Guards, johnnies, and policemen. Genuine Mau Maus did not harass or physically violate women. Instead, they abducted them to serve as cooks, porters, or spies. The Home Guards had a reputation for extreme cruelty and all manner of terror and intimidation. Initially, Mau Mau soldiers were respectful of women and did not abuse them sexually. Later on, however, when the war deteriorated into internal strife between the Home Guards and Mau Maus started using tactics that could punish even the innocent.

During the holidays, the protection available in boarding schools disappeared, so it was common for girls to sleep together in one house rather than being spread throughout the village. This way, if the Mau Maus, Home Guards, or soldiers came, the girls could be more easily hidden or evacuated altogether.

²³⁵ TJRC/Hansard/Women's Hearing/Nairobi 21 February 2012/p. 11

²³⁶ TJRC/Hansard/Women's Hearing/Embu/22 November 2011/p. 9

One night, when I was staying at my cousin Wangari's house in Ithite with two other girls and a small baby, Wangari's mother heard the noise of a raid. We were quickly taken to hide in a nearby woodlot of black wattle trees. The woodlot was thick and dark and full, and that night I remember the moon was very bright. We put the baby on the ground between us to continue sleeping and then the three of us kneeled and began to recite the rosary "Holy Mary, Mother of God, Pray for us sinners now." "Especially now," I thought to myself. But the leopard did not so much as look in our direction. It just walked on and disappeared into the thicket. We looked at each other with much relief.

My family, like many other families at the time, was split between those who sympathised with the Mau Mau and those who supported the *status quo*. Even though I never heard much discussion in the family, I was old enough to know that division existed. My father had a special regard for Mr Neylan and his family, and I know that Mr Neylan trusted him. This presented my father with a dilemma, because those members of the family who supported the Mau Mau perceived him as a collaborator who should have been killed. For a time, my father stopped sleeping at his homestead and took temporary shelter at night in Mr Neylan's compound. Mr Neylan was allowed to carry a gun for self defence.

The division within the families also worked itself out in Nyeri, where my mother was attacked by men she assumed were Mau Mau. It happened at night, so she could not tell for sure. "They held the knife to my neck," she told us. "I thought they were going to kill me!" Although she only received a cut, which was not life threatening, the fear and intimidation she felt lingered for most of her life. After Independence, my mother discovered that her main assailant was a disgruntled member of our extended family who used the emergency situation to avenge grievances against my father but made it appear like Mau Mau terror. My mother never got over the fact that someone within the family would want to harm her. Such was the trauma that many families experienced during these times.

Women and the Mt. Elgon conflict

- 219 The Mt. Elgon conflict had a particularly devastating impact for women. The Commission held hearings in the Mt. Elgon region in May 2011. The hearings revealed that almost all women in the region were affected by the conflict. As such, most of the women still bear physical and psychological scars resulting from violations they were subjected to by members of the Sabaot Land Defence Force (SLDF) and during 'Operation *Okoa Maisha*', a joint security operation by the Kenya Army and Kenya Police. These wounds and scars have not healed. A vivid impact of the Mt. Elgon conflict and *Operation Okoa Maisha* is the huge numbers of widows it left behind.
- 220 A huge proportion of widows who testified before the Commission witnessed the brutal and cruel killing of their husbands and children by the SLDF or state security agents. A witness narrated to the Commission how members of the SLDF killed her husband as she helplessly watched.

On Sunday, 17th September, 2006, in the evening, the SLDF came to my door and knocked. They entered and pointed guns at me. When my husband and I looked at them, they asked him what he was doing in the house. They were putting on police uniform. They said that they were police officers. They beat my husband with a gun until he fell down. There were seven people in the house that time. Four had *pangas* while three had guns. Others were outside. When they got in they beat my husband and children. They also beat me up. Before they got us, we had gone to hide under the beds. My son who was under the bed stuck there. The other one was bending and he was told he will 'eat' a bullet. My husband told them not to kill the boy. The boy came out and knelt down. My husband and the kids were now kneeling down. My son was beaten until his neck got broke. Even now his chest is still swollen. My husband was badly beaten. His head was cut three times, his back too []. As they were beating us, they told us to remove guns and money. My husband did not have anything to say. I told them we do not have anything. I asked them that I go and get whatever money that I had in the house. They told my husband that they go out with him and the children. They took them away. They "slaughtered" my son. They went with my husband and shot him six times at the back. One bullet entered his neck and came out through the mouth. They cut his head, his private parts and hands. I had run away to a neighbour's place and we could see the torture going on. When we went to look for the body the next day - we went up to the DC's place - we were shown where one of the killers came from. We found him there. He was drinking *chang'aa* and his clothes were blood stained.²¹⁷

- 221 The Commission received evidence confirming that in certain cases, SLDF forced wives to watch the killing of their husbands or sons

They started pushing the door and the windows. They pointed guns into the house, my son knelt down and raised his arms and pleaded with them to forgive him and he told them to take anything but spare his life. But they said they did not want anything, but his head and the wealth. They took him and went back to the neighbour's house whom they had earlier tied, they killed the neighbour by cutting his head and put it into the bag. Then they started beating my son on the road. They came up to his house and they wanted to kill him in his house and he started fighting back. He pleaded with them to take everything they wanted. He told them that I was having more cows which they could also take but they told him that they will take all those but first they wanted his head. For sure, that was what they did. They told his wife not to speak or shout and, she was to see what they were doing. They just went with my son, cut him and killed him. They took the wife and walked around with her up to midnight.²¹⁸

- 222 There are those women who lost several members of their family all at once. Such is the tragedy that befell Violet Tuit Chebus. Four of her children lost their lives during the conflict. She also lost all of her property. Here is her story as narrated to the Commission

237 TJRC/Hansard/Women's Hearing/Kapsokwonv/24 May 2011/p. 3

238 TJRC/Hansard/Women's Hearing/Kapsokwonv/24 May 2011/p. 10

One of my sons was killed. They told me that my boy had been killed the previous day. When I reached home, I reported the matter to police officers. I wanted his body so that I could bury him but they declined. We found dogs had eaten his body. I did not know what to say because I was heartbroken. My neighbours helped me to dig the grave but the boy's body was taken to Webuye up to today [] There is too much pain and we did not know where to go to. The other child also got lost, although we tried to follow up the matter with the police. We found the body near the river. He was trying to cross the river using the short-cut. Another child ran away and went to another woman's place in Gitwamba. The army killed another one the next day. Another child was also hit with a metal bar and died. As I talk here today, the incidents are very painful. All the 11 cows were stolen. I also had coffee trees but now I have nothing. We had a tractor but when they were burning houses, they also burnt the tractor. That is what happened to us. I used to have 5 acres of land in Sawe. I lost that one too and up to now, it is only a friend who is hosting me in a small place.²³⁹

223. Another woman witnessed her children burning to death. She narrated her painful story to the Commission during its women's hearing in Bungoma.

I am personally a victim of the clashes. They bombed my house and all my children were burnt. They were looking for my husband, but he ran away. As the children were burning, I wanted to scream. The cows were running away. What a sound! The grenade shrapnel cut the stomach. I just saw that the dogs had taken the legs. I saw the intestines exposed. So, I pushed them back into the stomach of the child, held him and ran away with him. As I ran away, I thought that I would wake up my child, but he did not wake up.²⁴⁰

224. A significant percentage of women in Mt. Elgon do not know the whereabouts of their husbands and sons. It is presumed that they were killed and their bodies thrown either into the forest, river, borehole or pit latrine. A witness testified before the Commission that in Sasur Location alone she knew about 49 women whose husbands were forcefully disappeared.²⁴¹ Some women were denied the right to offer a decent burial for their dead relatives.

When we took the body from Webuye mortuary, they refused and told us, 'You cannot bring the body to bury it at home because we are coming to stay in this village'. We then requested the community at Chepukwai to allow us bury my son there. We buried my son Moses at Chepukwai.²⁴²

225. For most widows in Mt. Elgon, life has become unbearable in the post-conflict period. The death of their husbands, who in the majority of the cases were the family breadwinners, has left them with an enormous financial and socio-economic

239. TJRC/Hansard/Women's Hearing/Kapsokwony, 24 May 2011/p. 16-17.

240. TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 30.

241. TJRC/Hansard/In-Camera Hearing/Women/Kimilili/p. 31.

242. TJRC/Hansard/Women's Hearing/Kapsokwony, 24 May 2011/p. 10.

burden. Most of them are struggling to feed their children and pay for their education. Many women who were displaced from their homes are afraid to go back and are now living in rental houses in, for instance, Bungoma town. A witness, whose two children were killed during the conflict, an incident that left her husband mentally disturbed, spoke to the Commission about the plight of women who fled Mt Elgon during the conflict.

I want to tell the Commission that it is true that, we, who have left Mt Elgon, have seen a lot since 1992. Personally, I escaped death narrowly. I nearly got speared by adherents of the *Janjaweed*. Again, in the year 2006, I escaped death narrowly but my two children were killed. So, I am very afraid. I cannot go back to Mt Elgon. The incident has caused my husband to be mentally disturbed. There are times when he gets severe shocks because the two children who were slaughtered were the only sons I had. Those of us who left Mt Elgon have suffered for a very long time. We are still suffering but we cannot go back because we are still very fearful. We and our children are suffering. Those who survived cannot go to school. We work for other people to get money to buy food for our children. If it is not time to till the land, we fetch water for hotel owners, so that they can pay us a little money, so that we can feed our children. Therefore, I would like to tell the Commission that I and other women from Mt Elgon rent houses. The husbands of some women ran away and left behind their wives and children. So, I am asking the Commission to tell the Government to help women from Mt Elgon, because we are suffering.²⁴³

- 226 Another witness testified of a similar fate. The husband became mentally disturbed following the killing of their son by SLDF.²⁴⁴ Destitution has pushed some widows to abandon their children. In some cases, widows have been compelled to trade sex for financial or material gain to provide basic needs for their children.

I am talking in pain because these women are destitute and they are poor. They do not have anything and can endanger their lives to get food for the day. They do not care for the next day. If they are told, 'I will give you something in exchange for sex', they can endanger their lives []. There is one who left her seven children and disappeared. For three weeks, she was looked for. Later, her people found out that she had gone to get married to another person. When I asked her why she decided to abandon her seven children, she told me that children cannot eat her and she has nothing that she would have done. So she said, 'Let the children stay and anybody who can support them, let him do it. I have just decided to look for food to eat because I am hungry'.²⁴⁵

- 227 Another witness, speaking in Bungoma, made similar observations regarding the situation of the Mt Elgon widows.

243 TJRC/Hansard/In-Camera Hearing/Women/Bungoma/p. 3-4. The SLDF were nicknamed Janjaweed by the local community in Mt Elgon.

244 TJRC/Hansard/Women's Hearing/Bungoma/19 July 2011/p. 20.

245 TJRC/Hansard/In-Camera Hearing/Women/Kimilili/25 May 2011/p. 25.

Concerning the women, a majority of whom are widows, they have gone through very hard times because of the war that has been in Mt Elgon. Most of us are also affected because of that war. It made so many women to be widows today.

Concerning the women, a majority of whom are widows, they have gone through very hard times because of the war that has been in Mt Elgon. Most of us are also affected because of that war. It made so many women to be widows today. Besides being widows, it has been hard for them to help their families because some of them do not have jobs. They are just working for other people or doing domestic work. They also find it difficult to meet their daily needs. In addition to that, even some of them are compelled to work in bars as prostitutes so that they can help their children. This has caused the spread of HIV/Aids which has led to many deaths thereby leaving their children being total orphans.²⁴⁶

228. The Mt Elgon conflict severely strained relations amongst neighbours who had lived together for long. Many victims have to live side by side with their attackers. Women are not only living in fear, but they are also re-traumatised every time they see those who raped them or killed their husbands and sons. A witness, whose husband's brutal killing on 17 September 2006 has already been described above, explained to the Commission how she still lives in fear of her neighbours, some of whom are former members of the SLDF:

I have been displaced from my home. I am very afraid of those people. I have ten children. Two of my boys are in secondary school. One is at home because I cannot pay school fees for him. I abandoned my *shamba* and I do not have a place to dig. I have very many problems [] I am asking on behalf of the women that the Government settles us elsewhere. For as long as we continue living with these people, we keep seeing them and we cannot have peace. We are always in trouble because you cannot tell whether they will come for you at night. If the government minds us, let it build a school for the orphans and sponsor them.²⁴⁷

229. Another witness described her daily struggles to provide for her grandchildren following the killing of their father during the Mt Elgon conflict and the subsequent death of their mother during an emergency delivery:

There are many things in my head as life is so difficult at the moment. I was born in 1950s and at my age, I cannot be able to bring up this family and I do not know how the government will assist me. Every day, I buy milk for the young child whose mother died during delivery. I do not even have money, I just try my ways to get money to buy milk for the young child in order to bring it up.²⁴⁸

246 TJRC/Hansard/Public Hearing Bungoma/9 July 2011/p. 26

247 TJRC/Hansard/Women's Hearing/Kapsokwony/24 May 2011/p. 4

248 TJRC/Hansard/Women's Hearing/Kapsokwony/24 May 2011/p. 11

Women and the Mt. Elgon conflict

[TJRC/Hansard/Women's Hearing/Kapsokwony/24 May 2011/p. 2]

Women were not part of those who started the whole problem. The source of all these problems is land. This problem has been there since time immemorial. Women were beaten up and tortured by the SLDF. They cut women's ears. They killed our husbands and buried some of them even without heads [...] I do not know what to say. We were very innocent.

There was harassment from the political leaders. I personally was a victim. I occupied the seat of the civic education of our council. I was, however, forced to step down or else I be killed. I wondered why they were out to torture women. That was when they beat me up. I even do not have teeth. What I have now are artificial teeth. My body was cut because of the political leaders. They would say that if it is not ODM, do not vie for that seat. Where is the right of women? We talk of equality, but where is it? Try to help women the much you can. Women were abducted and raped. Many of them miscarried, while others were killed. They were stepped on until the foetuses came out. It is very painful.

I am talking on behalf of the women who were tortured like me. There are women who do not have families now because their husbands were killed. They are now crying to God. The police would come and ask which party one belongs to. They said that they were sent by political leaders. It is very painful because we are widows now. Without a husband in the family, there is nothing you can do. One can only cry.

Look at the history of Mt Elgon. There is no industry. There is nothing for which you can say that even women can be employed. We went through a lot of pain. Look at how you will help us. We do not have school fees and our children do not go to school. I am, however, grateful for this hearing. You have decided to come and cry with us. The conflict was politically instigated. The politicians ought to have been here to see the cry of the woman. They are away now eating and sleeping well as we suffer. The woman has been denied her right. Where are we headed to? I request this Commission to hear our cries. Bring us back that woman who said that she will visit the ground to cry with the women and speak to them.

If you look at my body, you will find that it is full of marks. It is all because I wanted to vie for a seat and I was forced to step down. When will we get justice? Now that you are here, let justice prevail. Speak to us so that we know where the truth is. Our children were killed and buried and we do not know where. We do not know where our husbands' heads are because they were beheaded and we buried them without their heads. If, indeed, this is the TJRC, let us know where justice is. I am grateful that you have come here to listen to us.

230. Many women were forced to sell part of their matrimonial land in order to pay for the release of their husbands and sons who were standing trial at the time:

We are the way you see us! We have neither husbands nor children. Even our children were taken away. When the army came, they took away our sons and jailed them. One time we were told that they have been allowed bail through bonds. We were told to take bonds against the quarter farms. So, those children came back from jail and they are just suffering because they have no farms as they were taken away by the army. There was

no evidence, they just said, bring ten, twenty or thirty thousand. Because we did not have anything we started selling the quarter acre farms we had been given to pay the court. So, we are in trouble.²⁴⁹

Sexual violence

331 Sexual violence was another horrid feature of the Mt Elgon conflict. Rape and sexual violence against women occurred either in the homes of the victims and mostly in the presence of their family members or in SLDF's hideouts in the forests. Most victims of sexual violence were also brutally beaten or slashed with machetes. In many cases the perpetrators did not hide their identity. As such, almost all victims of rape and gang rape were warned that they would be killed or face dire consequences if they ever revealed the identity of the perpetrators or report the matter to the police.

232 A victim of gang rape told the Commission of her traumatic experience:

Then I started screaming and asking them why they were killing my brother. They turned on me. They started cutting my hands and I also fell down. One knelt on me and raped me. Then the others also raped me. They were about four. They continued until I got torn down and my ears could not function. It reached a point when I could not feel the pain anymore. My children were screaming from outside and those people left. I slept at the place where they raped me until morning. The body of my brother was next to me.²⁵⁰

233 Another victim testified before the Commission of a similar experience:

They were about 10 people. They came and asked me where my husband was. I told them that I did not know but they thought that I was hiding the truth. They also told me to give them the money that my husband had sold the cow earlier. They said that they knew he had sold the cow for Ksh 10,000. They were armed with sharp knives and pangas. I was very afraid and gave them the money. They raped me until I lost consciousness. I do not know how I left the place to Cheptais.²⁵¹

234. A victim told the Commission of how she was abducted from her home by SLDF and taken to the forest where she was gang raped:

Everybody had run away and I was trying to hide myself but one day, they came for me. They banged on my door, flung it open and beat me up. They threatened to kill me. They took me to the forest and raped me until the next morning. I lost consciousness, my body was swollen and I could not walk. I did not know them, so, I cannot tell who did it to me. They did not want me to see them. I got sick and did not have anything to eat. All my children ran away.²⁵²

249 TJRC/Hansard/Women's Hearing/Kapsokwony/24 May 2011/p. 9

250 TJRC/Hansard/In-Camera Hearing/Women/Bungoma/10 July 2011/p. 10

251 TJRC/Hansard/In-Camera Hearing/Women/Kimilil/25 May 2011/p.

252 TJRC/Hansard/Women's Hearing/Kapsokwony/24 May 2011/p.

- 235 Her experience was similar to that of another victim who was equally abducted and taken to the forest where she was gang raped. Consequently, she became pregnant

I was a business lady selling clothes. When those people came to our home they demanded money. We gave them money but they were not satisfied. They told us that we are doing business with the Kikuyus. That shows that there was an aspect of tribalism in the whole issue. They came in the house and shot a Kikuyu boy at my doorstep. I took the money that was meant for business and gave it to them. They told me to go out where I found other people who were armed with guns, pangas and knives. They had covered their faces and you could not recognise them. I was told to lie down and they removed my clothes. They then started slashing me. Others went into the house for my husband. He was also slashed and he still has a mark on his back. I was living with a certain boy and they also hurt him until he broke his spinal code. He is now totally disabled. I was taken to my stall and they demanded for more money. Then they took me to the forest near Cheptororia. They asked me whether I can recognise them but I said no. They told me that if I reveal anything then my life would be in danger. When they took me to the forest, I was raped and became pregnant.²⁵³

- 236 The Commission received evidence showing that victims of rape included pregnant women and elderly women. In Kopsiro, Chebyuk village, a pregnant woman was attacked with a machete before she taken to the forest where was gang raped

I was seven months pregnant and after I was cut, I lost consciousness. I did not know what was going on for a while. When I came to, they took me to the forest in Kopsiro and asked me whether I had identified them. I told them, 'no'. Two of them raped me and after that, I was told that in case I identified them, my life was in danger. I just kept quiet and did not say anything. It was 8:00 p.m. when this was happening and it was up to 3:00 a.m. when I was released. I tried to walk back slowly and reached my place []. From the time my husband came back, I do not live with him. This is because he is so stressed and he cannot take care of the homestead. So, I called my family and I told them that since I had gone through so much stress, I did not want to be disturbed. Let me stay with my children. So, that is what I decided. I live with my children now.²⁵⁴

- 237 An elderly woman testified to the Commission how she was sexually violated by SLDF members whom she estimated to be the age of her own children. Her testimony reveals that sexual violence was used by the SLDF as a form of punishment. In her case, she was being punished for passing on information about the SLDF to the relevant state authorities

At one time the *Janjaweed* came home and took me to the forest. So many bad things were done to me. I am a mother but they asked me very many questions. They removed my clothes and asked why I was talking to the DC. Those were small children the age of

253 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 25

254 TJRC/Hansard/In-Camera Hearing/Women/Bungoma/10 July 2011/p. 14-20



Women participating in a TJRC hearing.

my children. Some of them are even friends to my children. They removed my clothes and others were making bad remarks. They wanted to cut my neck from the back. I told them to go home and take all the cows and leave me alone but they declined. They took me to another place and I sat down on a stone because I was tired. I was beaten but I got angry and started removing my clothes violently. I knew that once you reach there it is the end of you. They remarked that since I talk to the government I will see. They told me that in Sabaot women have no say. They told me that it was me who had advised my family to run away. I was then interrogated close to 19 hours. I told them to give me a chance to answer them one by one. One of them was like a magistrate and after listening to me he said that there was no reason why I should be killed. He said that since I had answered all the questions, it seems I did not talk to the Government but I only had an NGO. I told them to take the Ksh 5 000 I had and the cows. I went through a lot of tribulations. When I talk I recall everything and I feel sad. I was then released after surrendering everything. They asked me if I knew them and I said I did not know any of them. I heard them saying that they wanted to chop off the head of one of the women. My body went limp and I became paralysed. When I was told to go I could not even stand up. I was shaking and sweating.²⁵⁵

238. Sexual violence was always accompanied by other forms of inhuman and degrading treatment. Perpetrators took pleasure in dehumanising their victims. A victim told the Commission how she was forced to jump like a frog and later raped in the presence of a male pastor.

They forced me to start jumping like a frog. As I did so, one of them hit me and I fell down. I wondered why they were doing that [...] They put me down and tied me with ropes [...] A big man started his work [rape] and I appeared like a small child who has

²⁵⁵ TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 28-29.

never seen anything. Later on, another pastor came around and he said, 'Do not kill that lady. She is a friend who brings us vegetable even on credit. She is a respected mother. If you want to clear [kill] this woman, then God has a purpose for that.' They told the pastor that if God has a purpose, then he stands aside first. The second man took over me. The third one followed. He was stopped by the pastor. He said, 'You should have cleared her instead of the five of you doing that to her.' As I left, the pastor held my hand. I was walking like a kid learning to walk. You would think I had just given birth. They told the pastor that he watches over me not to go to the police to report. We met my mum on the way. She said she had heard painful things. My mum tied a lesso round my waist when she realised that my body was full of blood. She said that nobody should know what had happened to me. She said that we specifically report to the assistant chief. The pastor told my mum that nobody should know about what had happened. He even told her not to talk about him. They held my hand and we walked home. Mum prepared warm water which she mixed with salt and sugar. She did first aid on me. She went to the chemist the following morning to buy medicine which helped me a lot.²⁵⁶

- 239 A few days later, the same perpetrators attacked the victim in her home where they robbed household goods and four head of cattle. Following this ordeal, the husband abandoned the victim and the family.

After three days, those people returned. Our dogs started barking at them and I was quiet. I had not told my husband. I saw torches and the dogs continued to bark. I told my husband that I had encountered a big problem and it is like my attackers are still pursuing me. My husband opened the door leading to the banana plantation. Those people knocked the door and when I opened it, I saw the people I had seen the first day. They told me to kneel down. They asked me whether I had known them and I said no. They told me that they had been sent by their superior who did not approve of what they had done to me. So, they told me to choose between life and paying something. I told them that since they had left me alive, they should take whatever they pleased. They picked our belongings in the house and four animals outside. I had bought the animals from my own sweat. I left everything to the Lord. For everything, I thank the Lord for fighting for me. I cannot tell where my husband went to because he left his family behind. My mum took me and I am under her care. Since then, all my children are taken care of by my mum. She sells sugarcane so that we can get something to eat. We only have one meal a day.²⁵⁷

- 240 Another victim was gagged with a bloody rug and forced to swallow the blood. She was then forced to drink the urine of one of the perpetrators. With exceptional courage, she told the Commission her story in a public hearing in Kapsokwony. Her story is reproduced in its entirety in Box below.

²⁵⁶ TJRC/Hansard/Public Hearing/Kapsokwony/24 May 2011/p. 45-46

²⁵⁷ TJRC/Hansard/Public Hearing/Kapsokwony/24 May 2011/p. 46

Sexual violence accompanied by other forms of inhuman and degrading treatment

(TJRC/Hansard/Public Hearing/Kapsokwony)

It was in 2007 and I was from Kimaswa, going to Chemses. I was going to collect firewood. After collecting firewood on my way to Kimaswa, I met two people. They told me to take my firewood from the head and put it down. They then asked me where I was coming from. I told them I was from collecting firewood and was going home. They asked me "Do you know the mistake you have made?" I told them I did not know. Then they asked again "You do not understand?" I told them I did not know. They told me to sit down. I refused to sit down. I asked them "Why are you telling me to sit down and I am supposed to go home? I am going home and I am late. I am going to cook for my children." They then said "We are telling you to put down your firewood." They kicked my legs and I fell down. I fell down with the firewood. They then asked me "Do you know the mistake you are making?" I told them "I do not know the mistake I was making." They then asked me "Why are you calling us *Janjaweed*?" I asked "When did I call you *Janjaweed*?" They said "If you say you live in Kimaswa, when you see us passing, you call us *Janjaweed*." I told them I had not called them *Janjaweed*. They then told me not to call them *Janjawees*, but *askaris*. I told them I had not called them *Janjaweed* at all.

They then said "Let us go, we will talk as we go." I stood up and tried to take my firewood. When I was bending to take the firewood, one person came from behind and kicked me. I was surprised and asked "Why are you beating me and I have made no mistake?" He told me "Today, you are going to speak. Let us go." We just followed the same route. I was a little bit afraid. He asked me "We *askaris* are protecting you and you people living in Kimaswa are calling us *Janjaweed*." I said I had not called them *Janjaweed*. We continued walking. They were beating me from behind, kicking me and stepping on me. When we reached a place called upper Kipsis in a forest somewhere, they started beating me. It was in the forest and they beat me thoroughly. They said that I called them *Janjaweed*. They were slapping me, kicking me and using sticks. When I fell, they did not care. I tried to cry but there was no help. They could not even hear my cry. They said we were giving them funny names and yet they were giving us protection.

When I looked up the hill, I saw other four people. They were just standing pointing at me. They then said "You lady come here, why are you looking at us?" They were dressed well. They covered their faces and legs and you could not identify them. You could see their eyes only. They were asking me so many questions. They were asking me if I was denying I had not called them *Janjaweed*. I told them I had not called them so. They said "Today, you will be beaten until you talk." It went on like that. They really beat me to say why we were calling them *Janjaweed*, yet they were *askaris*. I never talked. Those who were there with guns came with rags and tied me. It was a very heavy rug. In that rug, there was some blood. When I was trying to spit out that blood, they told me I had to swallow it. I swallowed it and then they told me to go. As we were going, I could not see because they had blindfolded me. I was sucking blood whose source I did not know. They told me just to swallow it and if I vomited, they would beat me. They held my hands and they continued beating me. When we reached some places, I could not pass because they held my hands. When we reached a place I could walk, they let me walk. They kept beating me and I kept falling and standing up.

We reached a place and another one came from nowhere. He slid my legs and I fell down. They had their own objective. They then started raping me. I can remember very well that they were four men. I tried to cry and asked them why they were doing that. I asked them "Why are you doing this to me. I am just a woman?" Then they said "It is you we are going to face now"

After finishing, they woke me up. I could not even see where I was or where I was going. We went on with the journey. They continued kicking me and beating me. They took me to the upper part of the forest. When we reached a place, they beat me thoroughly and then dumped me there. I asked them why they wanted to kill me for something I did not know. They told me what was killing me was calling them *Janjaweed*, yet they were the security officers protecting us. I asked them "Is that the only reason you want to kill me?" They went on beating me, slapping me, stepping on me, beating me with sticks and I fell down. There were some stones they had arranged. They told me "Walk on these stones on your knees" I crawled on them to and from. They then said "Stand up" They told me "Run up to there, to and fro" At that time they had beat me and I could not walk. I tried to run to and fro, adjusting my speed. They told me not to run slowly. They were speaking the Sabaot language.

After one hour, they told me to stand up. They said "Come here!" I went to where the commander was. The other one came, kicked me on my back and said, "When you go to the leader, you run. When you are going to the commander you cannot walk. You have to run!" I ran. He asked me, "Do you know your mistake?" I told him "I do not know what I have done" They then told me "Tell us how the security officers arrested you and how they brought you here and what brought you here" I told them the people got me on my way when I was carrying firewood home and told me to sit down. I obeyed and later they asked me why I was calling them *Janjaweed*. That person asked "Is it only that?" Then the other person said that is why we arrested her. He then said "Go discipline her and let her go"

From there I was injured proper. They tied me and told me to go with them. We went on. As we were going, the other one came and kicked me, I fell down. They then went on with their business. They put me down and started raping me again. They really raped me there. I was really injured and traumatised. They told me they wanted to finish me. I told them even if they killed me I knew I have no mistake before God. I told them I do not know anything they were accusing me of doing. I had done nothing. They said "This lady is supposed to be killed" I told them even if they killed me, I had no mistake. At that time I was tired and I was not seeing anything. After raping me for almost an hour, I tried to cry, but no one could hear my cry. They were almost five men raping one woman.

It was now almost 11:00 p.m. they left me there and went away without untying my eyes. I was tied, my body was full of pain and I could not even walk. I just sat there and after an hour they came back again. When they came back, they asked me "Can you walk up to home?" I told them I could not walk. Then one said I should be blindfolded. When I tried to look, I could not see far. I was looking like a blind person. I knew that was my day to die. They left me there and went. I was just there sitting and after sometime I tried rolling down and hid myself in the forest where I could hold onto a tree. After sometime, I heard them coming from far. They were coming back again. When they came back, one of them asked "If we take you to Kipsis Church, can you walk home or will you die now?" When I heard about death I told them to take me to the Kipsis Church and I would reach home.

There is something I am forgetting, when I fell down, another one came from nowhere and urinated on me and asked me to drink it since there was no water. He forced me to swallow the urine. I swallowed it. Another one said, "Then give her *ugali* to eat." That meant the long call. The other one said, "Do not give her *ugali*, that water is enough for her."

Now after they gave me urine to drink, as I was drinking it, another person came and ordered that I be given some "*ugali*" to eat. Fortunately, one of them said urine was enough for me. So, urine was referred to as water while human faeces were referred to as *ugali*. They forced me to walk long distances but I told them I could not walk any further even if they killed me. I told them that I was ready to die. They decided to carry me to Kipsis, so that I could find my way home. However, I told them even from there, I could not know the direction of my home. They were very annoyed with me and, in fact, they wanted to kill me.

Finally, I agreed to walk to Kipsis. They assisted me to walk because I was very weak to support myself. When we reached at Kipsis church, they asked me whether I could walk home alone. One of them looked at me and said I could not walk alone. They then decided to take me home. They just carried me like that. My body was full of pain. They carried me to my house. When they reached my house, they dumped me at the door step. They ordered my husband to come out to receive a visitor. My husband opened the door and asked them what was ailing me. They told him we have brought your wife. He was really shocked and afraid and asked, "Is this really my wife?" They told him, "Take her and nurse her. We do not want to hear you beat her or take her to hospital. Just nurse her at home." In the morning, people started saying that I had been infected with the HIV virus. My husband disowned me and forced me to go back to my father's land. When I left, my daughter died.

241. The majority of women who indicated to the Commission that they had been sexually violated during the Mt Elgon conflict had been violated by SLDF members. However, state security agents, both police and military officers, were equally responsible for sexual violence during the period of the conflict. The narrative in the box below presents the experience of a woman who was sexually violated in a police cell.

The majority of women who indicated to the Commission that they had been sexually violated during the Mt Elgon conflict had been violated by SLDF members. However, state security agents, both police and military officers, were equally responsible for sexual violence during the period of the conflict.

Sexual violence by police officers

(TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p 31-32)

Thereafter, some police officers came and asked me about the whereabouts of my husband I told them "The clashes have forced him out of the village I do not know whether he has been killed or not I do not know where he is"

The police arrested me I had with me a one month old baby They took me to Bungoma Police Station and then to Kakamega I came back at around 3 00 p.m When they released me, they said "We are going to give you Ksh 100 000 if you tell us where you husband is" I told them "The clashes made him run away from the village" They took me back to the cells

They told an 80-year old man "Onto your marks" The old man bent down, and they started to sodomise him The sodomising went on for 24 hours, up to the morning In the morning, at 10 00 a.m, he was left for 15 minutes Another one bent down and the ordeal went on Another one was mistreated in a similar way There were 99 women I was the 100th woman

There were four policemen who were guarding us One of them came and asked "Why are you leaving this one? She has hidden her husband We want her husband" They put me in the position women take in a labour ward I was still bleeding because I had delivered a baby recently They inserted a bottle of beer into my private parts and said "That is not enough" The policeman came and shot me I was kept in from March to August

Human rights officials heard rumours that there was a woman who had been arrested, and who had been tortured They looked for me When they found me, they took away my child During the period March to August, the child went blind They took me to Kakamega where six white men removed the bottle from my stomach All this was happening to me when my husband was not around My children could not go to school They could not make it home They got lost The baby I had was only one month old

The child is mentally disturbed Sometimes she cries in class for no apparent reason When the teachers called me, I told them "I was arrested with this baby" They asked me "Is this the only child you have?" I told them "I do not know where the others have gone" I got no assistance My daughters have been married but I do not even know where they are For the ones I am with, they are not getting any education I have not received assistance from anywhere Even getting something to eat is a problem

As you can see, I am just a woman who sells kales Sometimes I get money to buy food Sometimes I do not get any money I am living with two children It was even difficult for me to bury the one who died The people who came with her body said "Just dig the grave because we do not know where your husband is at the moment" As of now, I do not know where my daughters went to They were not getting education The ones I am with, they are not getting any education I have not received assistance from anywhere Even getting something to eat is a problem

When the police arrested me, they said that they were looking for my husband's head They told me that if they got him, they would shoot him at the back and throw his body into the waters of Malakisi River I was semi naked I had a skirt on but I was not wearing anything on top That was what I went through To date, I do not know what kind assistance I can get and from where I have heard that there are people who are assisting those who have lost their children and husbands, but I do not know how to start looking for such help from them



Women participate and keenly follow the TJRC hearings in different parts of the country.

Women and the 2007/2008 PEV

242. The majority of women who testified before the Commission were in one way or the other affected by the 2007/2008 PEV. The Commission received evidence demonstrating that during the 2007/2008 PEV, female-headed households were particularly targeted for looting and torching.²⁵⁸ Even when women escaped without been attacked, they were disproportionately affected by conflicts. As is discussed below in detail, they constitute the largest percentage of internally displaced persons (IDPs). Their family life is violently interrupted as many are rendered widows and left behind with the burden of providing for their families. Many of them bear physical and psychological trauma for a long time, ranging from years to decades. For the most vulnerable, such as pregnant, the elderly and women with disabilities, escaping from sites of violence is often almost impossible. On the impact of conflicts on pregnant women, a witness observed:

When there were conflicts here, it is the women and the children who were affected most. We do not have good hospitals. There are cases of women who died during delivery. Women walk long distances to get to hospital and before she gets to hospital, she dies. We lost very many mothers in that situation. Those who cause conflicts are men. When the men are planning their issues, you cannot know. When a woman learns what the men are planning, because of the woman's pain of bearing a child, she would try to save the community. When the men plan, the women are not supposed to participate. That is why the conflicts were planned and those who were affected were innocent women and children. Many women got divorced from their men while others lost many children. Many women lost their husbands and this problem was brought about by very few people.²⁵⁹

243. The table below presents the experience of two pregnant women during the 2007/2008 Post Election Violence as narrated to the Commission by their grandmother.

258 TJRC/Hansard/Women's Hearing/Kisii/21 July 2011/p. 8.

259 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 14.

'If you see the girl now, she is a very beautiful daughter'

(TJRC/Hansard/Women's Hearing/Nakuru/ 24 September 2011/p. 13-14)

During the fight, I had two girls who called me grandmother and both of them were pregnant. On that particular day, we had cooked *ugali*. There were eighteen sheep in the compound. I told the girls to serve *ugali* and I went outside because I do not like staying inside. Because my husband died, I went outside to at least hear what could be going on because I am at the borderline. My farm is at the boundary and there is a road on that boundary line. I saw fire in the first house.

I had a *panga* under my armpit. I told the girls to come out. The two of them were calling me and both of them were pregnant. They came outside and I told them: "As you can see, there is fire!" Fire was all over. We left my daughter-in-law because she said she could not sleep outside that day because we used to sleep outside. I told her: "My daughter-in-law, can you come out? She insisted that she wanted to sleep in the house. I was told that I had to safeguard the home. She said: I have to sleep in the house because I usually see you staying outside. She asked: Why are we staying outside? Today, there is no fight as the Kikuyu are just fighting people in Nakuru. The Mungiki groups are the ones fighting. I felt that I could not sleep in the house, and that is when I went outside. I started persuading my daughter-in-law to come out. I told her to bring my grandchildren and the two girls.

We started walking away. I just carried a *panga* and nothing else. We walked a long distance in the bush until we came across a neighbour's house and found the mother's leg had been cut. The head was chopped and the face was injured, then the hand and the leg. We just passed that place very fast and went into the bush with the two girls and my two grandchildren. We just stayed in the bush near the road. One girl told me; "My grandmother, I feel bad in the stomach." She complained about the stomach. I saw that she was almost delivering and there was no any other help for her. I just knelt down and prayed to God. I called another woman who was passing by. We went together with her and my daughter-in-law to a certain trench and one of the girls slept down. She peacefully delivered a baby, and there was nothing to cover the baby with. I took some leaves called *Mukinduri* [croton tree] and used them to wrap the baby. Behind us, there was fire all over. People were just crying, I told the children to be very silent. I took the baby and wrapped it with the leaves. I cut the umbilical cord with the *panga* and left the placenta and everything there. We continued with our journey. It was a long journey and we were going round. I wanted to come with the child but it was still very young. We walked for about five kilometres. The other one was also crying: "My grandmother, my grandmother, I am dying." She fell down. I held to the baby and I asked God: "God, look upon us, God have mercy on us, because we do not any option!" The *panga* was still stained with blood. I held the girl on the ground. She also delivered the baby girl and I thanked God for that because I believe that those who pray to God do not go astray. I held the baby and took the leaves from the bush and wrapped it. The girl had a small shawl. I tied her waist and then I prayed to God to look upon me. I again used the *panga* to cut the umbilical cord. I cut a piece of my cloth and wrapped the baby with it and we continued with our journey. We walked for around eight kilometres. Along the way, it was about dawn when we heard that my neighbour had died.

We went all along until we arrived at Bahati Police Station. We stayed along the road and the children were blood-stained. I wondered what to do. I thought I was going to be arrested. I went to the gate of the police station and I saw Lucy Njeri passing by. I ran and got hold of her and I told her: "My mother, come." When she came and looked at the children, she went back and brought them shawls and blankets. We put the new born babies like twins and then we

wrapped them together. I was then taken to the camp where I was given some more blankets. I also covered myself because of the cold. As we were walking along the road the whole night with the children, they were profusely bleeding. Sanitary facilities were brought. Lucy Njeri really struggled to assist us and the children with clothing. I felt relieved and thanked God for that. Even at the moment, I thank God. One of the children also fell ill after one week because of the unsterilised *panga* I used to cut the umbilical cord. The clinical officers came and tried to help the children with medication. The children woke up at 2.00 a.m. at night and were dressed up properly in the hospital. Lucy Njeri used to come and visit me and the children became okay. If you see the girl now, she is a very beautiful daughter.

244. In Kisumu, the Commission heard that the 2007/2008 Post Election Violence had huge impact on the life of women and the local community in general.

In Nyanza, the [post-election] violence affected the social fabric that we had. Even the mothers have not yet come to terms with what befell us. My appeal to the women of Kisumu is that since we went through that, we should try to talk to our youth and our leaders so that such events should never be repeated. What we saw was very traumatising. It affected the social and economic situation of this region. We still have problems and I appeal to this Commission to try and make sure that the women of Nyanza are capacitated in areas that affect them, taking into consideration the new Constitution.²⁶⁰

245. During the 2007/2008 PEV, one woman was forced to carry the head of her husband from Nakuru to Kisumu after he was beheaded and the rest of his body burnt beyond recognition. She narrated to the Commission how she had to carry the head in a plastic bag, first to the displacement camp and later travelling with it to his rural home for burial. Her sad and shocking story is reproduced in full in the Table below.

The horrific story of a woman who had to carry the head of her slain husband

I tried calling my husband at around 6.00 p.m. because I thought he had switched off his phone. However, I was not getting through to him. So, I went to a neighbour called Mama Carol and I told her I have been trying to call Baba Peter but all in vain. She encouraged me to continue calling him. The more I tried calling him, the more frustrated I became. I continued trying calling him until it got late. By that time, nobody was leaving her house. Our house was good because we had a gate and you could not climb up the walls to access it. So, we locked the gate from outside, so that nobody could get in. We were living among Kisii's and Kikuyus. The Kikuyus had already run away but we were left with Kisii's, Luhya and Luos. The Kisii's also ran away. So, we were left Luhya's and Luos. So, I was very worried. I could not do anything, I could not concentrate. So, I asked Mama Carol, "What shall we do?" She told me that maybe, they had been locked where they were working and had been told to put off their phones. I just kept quiet until morning when we gathered courage to walk out of the house.

²⁶⁰ TJRC/Hansard/Women's Hearing/Kisumu/p. 3. See also TJRC/Hansard/Thematic Hearing on Women/Nairobi/8 February 2012/p. 5.

As I said, I was living in a plots in Ponda Mali Estate in Nakuru. So, we left with Mama Carol walking, since people were being burned, cut and killed. If you were caught, you would be burned together with your bicycle. But he did not have a bicycle. So, we walked the next day; that was on the 31st. However, it was not safe to walk around at that time. In Nakuru, we did not know whether it was day or night. There was smoke everywhere. Houses were being touched. You would not know whether it was day or night. If you had no phone or watch, you would not know what time it was. There were many policemen with teargas Carol. So much was going on. So, we ran back because we saw policemen. It was the policemen who were killing people. So, we ran back to the house. When we came back to the house, I told Mama Carol, "If you are afraid, I will go alone". So, I left her behind but she followed me. When we reached Ponda Mali, we found some people had been killed. Others were being burned beyond recognition. We reached there at around 10am. Policemen were walking all over in large numbers. I said even if it means death, let me just see what is going on. So, when I reached there, I found he had been killed. He had been beheaded. The head was far from the body. The body had been burnt. What made me know that he was the one, was the collar of the shirt. He had worn a blue and white T-shirt. I could not recognise the body but I could identify him because of the neck. So, I called Mama Carol. I thank God because I was very brave. Mama Carol asked me what we could do. I could see policemen were all over. People were just walking all over. So, I took the *leso* that I had and we tied his head. By good luck, I saw a paper bag. So, we put the head in it.

We carried that head with us. At that time, one could not leave the house to go anywhere. When I reached home, I did not even know what to do because we could not leave the house. Even the children had nothing to eat. There was nowhere to buy food. Nothing was going on. But we had a tap in the house. We just kept taking water and giving the children water to drink. At that time, men were the ones who were being killed. Even if you got a baby boy, they would say that is tomorrow's Raila. I had one son. He is called Peter. When I heard they were looking for boys, I locked him up the toilet. I told him, "Just sit there. Even if you die, just die inside there. We will get you out". When I got into the house with the head, they asked me what I was carrying. I did not know how to tell them what it was that I was carrying. I just kept it in the house. I locked Peter up in the toilet. We just sat with the two other children. I locked him in the toilet because I wanted him to survive.

After three days, the Red Cross people came. They evacuated me and took me to the stadium. I went with my husband's head to the stadium. At the stadium, I did not know what to do. I was not in my right senses. I was given a card and I still have it to date. I did not understand anything, but I needed medical help. They had set up a clinic and I sought medical assistance from them. I was treated. After a while, we saw vehicles coming to take people to Nyanza and Kisumu. So, we were put in the vehicles. Remember, I had that head, the children and my house was full. I did not carry one single item from the house. I was brought to this place. When I reached here, I went to St. Stephen's. I did not have anything. I only had the head in the paper bag. I was told to declare what was in the paper bag and I removed it. When they saw it, they all cried. I carried it to a tent. They facilitated me to go to Oyugis to bury it.²⁶¹

246. Many women were raped and sexually violated during the PEV. This subject is discussed in detail in the 'Sexual Violence' Chapter in Volume 2(A) of this Report.

²⁶¹ TJRC/Hansard/Women Hearing/Kisumu/ 16 July 2011/p. 25-26.

Forced Displacement

General background

247. In recent decades, Africa and the world at large has experienced large-scale forced displacement of people. Forced displacement generates two categories of victims internally displaced persons (IDPs) and refugees. At the UN level, IDPs are defined as 'persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of, or in order to avoid the effects of, armed conflict, situations of generalised violence, violation of human rights, or natural or human made disasters, and who have not crossed an internationally recognised State border'²⁶² The International Conference on the Great Lakes Region (ICGR) has expanded the definition of IDPs to include persons or group of persons displaced 'as a result of or in order to avoid the effects of large scale development projects, and who have not crossed an internationally recognised State border'²⁶³
248. On the other hand, a refugee under the Geneva Convention on the Status of Refugees is a 'person who, as a result of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his or her nationality and is unable, or owing to such fear is unwilling, to avail himself or herself of the protection of that country'²⁶⁴ In the particular context of Africa, the definition of a refugee includes 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'²⁶⁵
249. Forced displacement often represents a failure on the part of a state to ensure the safety of those within its territory.²⁶⁶ It exposes such people to serious threats to their welfare and restrictions on their rights. For many, displacement is a protracted experience, lasting for years and even decades on end. Although refugees have enjoyed international protection since 1951 when the Geneva Convention on the Status of Refugees was adopted, there is still no global binding instrument addressing the plight of IDPs. What is available at the global level is non-binding instruments adopted under the auspices of the UN Guiding Principles

262 UN Guiding Principles on Internally Displaced Persons A/56/168 21 August 2002

263 ICGLR Protocol on the Protection and Assistance to Internally Displaced Persons art 1(5)

264 Geneva Convention on the Status of Refugees 1951 art 1-A-(2)

265 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa art 1(2)

266 L. Hovl *Gender, transitional justice and displacement: Challenges in Africa's Great Lakes Region* (2012) 4

on Internally Displaced Persons,²⁶⁷ and the Pinheiro Principles on Housing and Property Restitution of Refugees and Displaced Persons (Pinheiro Principles). The Guiding Principles on IDPS have attained a significant normative value around the world.²⁶⁸ At the African regional level, there exist three recent binding instruments relating to IDPs: ICGLR Protocol on the Protection and Assistance to Internally Displaced Persons adopted in 2006; ICGLR Protocol on the Property Rights of Returning Persons; and the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa adopted in 2009. These three treaties provide a catalogue of rights of IDPs and the corresponding duties of state parties.²⁶⁹

250. It is important to note that being internally displaced is not a legal status in itself, and as such, international instruments on IDPs do not confer on IDPs a special status. In other words, IDPs are entitled to the same rights as all other individuals within a country. However, international instruments on IDPs recognise the vulnerability and special needs of IDPs that arise from their displacement.
251. It is estimated that almost half of the world's IDPs are in Africa, majority of whom reside in the Great Lakes region comprising of the Sudan, Uganda, Rwanda, Burundi, Kenya and the Democratic Republic of Congo. The levels of displacement in the Great Lakes region have been described as 'chronically high by any standard'.²⁷⁰ Nearly 80 per cent of all refugees and displaced persons are women and their dependent children.

Forced displacement in Kenya

252. Though it came to public interest and attention only following the 2007/2008 post election violence (PEV), the phenomenon of forced displacement in Kenya has been described as a permanent feature of Kenya's history.²⁷¹ Forced displacement dates back to the colonial era when the colonial administration, in its bid to accommodate white settlers, evicted local communities from their lands.
253. In the post independence era, forced displacements have resulted from three primary interrelated factors: natural disasters; violent conflicts; and state sanctioned evictions. Conflicts account for the highest number of IDPs in Kenya. In the 1990s, ethnic clashes experienced during electoral periods led to the forced

267 E/CN.4/1998/53/Add.2.

268 See C Beyani 'The politics of international law: Transformation of the Guiding Principles on Internal Displacement from soft law into hard law' (2008) 102 *American Society of International Law Proceedings* 194, 195.

269 See e.g. J Biegón & S Swart 'The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa: A panoramic view' (2009/2010) *African Yearbook of International Humanitarian Law* 20.

270 Hovil (n 255 above) 5.

271 Government of Kenya Report of the inquiry into post election violence (2008) 273.

displacement of thousands of people. According to the report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya (Kiliku Report) an estimated 54,000 people were displaced in the 1992 ethnic clashes. This data was however computed without considering all the districts in the country that had been affected by the clashes.

- 254 No official figures of IDPs are available in relation to the 1997 ethnic clashes but it is estimated that around 600,000 people were displaced by ethnic clashes between 1991 and 1997 in the Coast, Rift Valley and Western Provinces.²⁷² The Judicial Commission of Inquiry into Tribal Clashes in Kenya (commonly known as the Akiwumi Commission) which was mandated to inquire into the 1997 clashes did not establish the number of IDPs, but it nevertheless recommended that those who had been displaced by the clashes should be resettled back on their lands. This recommendation, like all the recommendations contained in the report of the Akiwumi Commission, was ignored. Indeed, the report of the Akiwumi Commission was not released to the public until towards the end of 2002, when the High Court ordered its release.²⁷³ The state not only delayed the release of the Akiwumi Report for a span of around three years, but it also ignored and contested the findings of the Commission.
- 255 Kenya's worst incident of forced displacement took place during the 2007/2008 PEV. There are varying official statistical data relating to the number of people who were displaced during the PEV. The Commission of Inquiry into the PEV (CIPEV) estimated that the violence displaced 350,000 persons from their normal abodes of residence and or business.²⁷⁴ However, in its registration and resettlement programme of the IDPs, the state found that the number of IDPs was close to twice the figure estimated by CIPEV.²⁷⁵ In particular, the Kenya government Ministry of State for Special Programmes estimates that a total of 663,921 people were displaced during the PEV. It also estimates that out of this total number, 350,000 sought refuge in 118 camps while 313,921 persons were integrated within communities.
- 256 The forced displacement resulting from the 2007/2008 PEV generated not only the highest number of IDPs, but it also resulted to unprecedented number of Kenyan refugees who fled to Uganda for safety. This posed a unique and paradoxical scenario. For decades Kenya was the island of peace to which refugees from war-torn neighbouring countries fled for safety.

272 See Kenya Human Rights Commission Gains and gaps Report on IDPs in Kenya 2008-2010 (2011) 8

273 See *Roshanali v Republic*

274 Government of Kenya Report of the Commission of Inquiry into Post Election Violence (2008) 352

275 Letter from the Office of the President, Ministry of State for Special Programmes, Ref: MSSP/4/13 dated 2 February 2012

- 257 It is estimated that about 640 households fled to Uganda during the PEV and that by 3 February 2012, 287 families had voluntarily returned to the country. According to data available to the Commission by the Uganda Office of the UN High Commissioner for Refugees, there were 1,616 Kenyan refugees and asylum seekers in Uganda as of 28 October 2011. Of these, more than 90 per cent were staying in a refugee camp in Kiryandongo. Due to the large number of Kenyan refugees in Kiryandongo, the Commission made the decision to conduct hearings in Kiryandongo in October 2011. The Commission also held consultative meetings with the Office of the UN High Commissioner for Refugees and the Kenyan High Commissioner to Uganda.

Table 10: Kenyan Refugees and Asylum Seekers in Uganda as of 28 October 2011

Sum of Individual Location	Refugees Status		Grand Total
	Asylum Seekers	Refugees	
Kampala	65	22	87
Kiryandongo	211	1256	1467
Kyaka II		12	12
Kyangwali		12	12
Nakivale	1	31	32
Rhino Camp		6	6
Grand Total	277	1339	1616

- 258 Throughout the mandate period, although the state was aware of the existence and situation of IDPs, it did not formally put in place a policy or mechanism aimed at comprehensively alleviating and responding to their situation. Indeed, relevant state agencies under the KANU administration were not ready to accept even the very notion of IDPs.²⁷⁶ For example, it was not uncommon in the 1990s for state security agencies to disperse or evict IDPs from their camps in an effort to make them invisible to visiting diplomats, human rights groups and the media. In December 1994, for instance, the state forcibly evicted IDPs, mainly of Kikuyu ethnic group, who were staying in Maela Camp and transported them to Central Province, their supposed 'ancestral home'.
- 259 Under the NARC administration, the plight of IDPs was first formally recognised in the party's manifesto which promised to implement the recommendations of the Akiwumi Commission, including the recommendation that IDPs should be resettled. Thus, in November 2004, the Head of the Public Service and Secretary to the Cabinet

²⁷⁶ FIDH & KHRC *Massive displacements in Kenya due to politically instigated ethnic clashes* (2007) 20

appointed a task force – the Task Force on Displaced People in Rift Valley, Coast (Likoni) and Other Areas – to look into the question of internal displacement. The Task Force was specifically mandated to review and ascertain the extent of genuine displacement, identify the extent of loss of land, and make recommendations on modalities of resettlement for genuine victims. This formal recognition of IDPs and the formation of the Task Force came after intense lobbying and activism by civil society organisations, such as the Kenya Human Rights Commission (KHRC) whose efforts contributed to the establishment of the IDPs National Network in May 2004. Dogged with myriad problems,²⁷⁷ the Task Force managed to register a paltry 8,000 IDPs. The Task Force submitted its report to the Office of the President in September 2006 but the report was not released to the public.

- 260 In a nutshell, little tangible results came out of the work of the Task Force. In June 2006, the government allocated around Ksh 400,000 for buying land to resettle IDPs but as at April 2004 no member of the IDP National Network had reportedly benefited from the money.²⁷⁸ As such, as at the time of the 2007/2008 PEV no policy or mechanism had been put in place to address the situation of the about 380,000 IDPs generated by ethnic clashes of the 1990s.²⁷⁹ Moreover, state initiatives to respond to the plight of IDPs (such as the TASK Force on IDPs and the dedicated budget line for resettlement) had not yielded much.
- 261 The unprecedented number of IDPs generated by the 2007/2008 PEV meant that the plight of IDPs could no longer be ignored or dealt with haphazardly as was the case before. As such, parties to the Kenya National Dialogue and Reconciliation (KNDR), agreed on a Statement on How to Address Humanitarian Crisis on 4 February 2008. In the Statement, the parties agreed to
- a) assist and encourage displaced persons to go back to their homes or other areas and to have safe passage and security throughout;
 - b) provide adequate security and protection, particularly for vulnerable groups, including women and children in the camps,
 - c) provide basic services for people in displaced camps, including adequate food, water, sanitation and shelter;
 - d) provide medical assistance with a special focus for women, children, people living with HIV and Aids and the disabled, currently in displaced camps,
 - e) ensure all children have access to education,

²⁷⁷ For a discussion of the challenges that the Task Force faced see IDMC *I am a refugee in my own country: Conflict-induced internal displacement in Kenya* (2006) 39-40.

²⁷⁸ FIDH & KHRC (in 277 above) 23.

²⁷⁹ KHRC (in 273 above) 9.

- f) provide information centres where the affected can get easy access to information regarding the assistance that is available to them and how to access it, for example, support for reconstruction of livelihoods, or tracing of family members
 - g) operationalise the Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post 2007 Election Violence expeditiously by establishing a bipartisan, multi-sectoral Board with streamlined procedures to disburse funds rapidly, and
 - h) ensure displaced farmers are assisted to return to their farms
- 262 Pursuant to this Agreement, the government launched a resettlement programme, *Operation Rudi Nyumbani* (Operation Return Home) in March 2008. Under this programme, the government made two categories of resettlement payments to IDPs depending on the degree of the impact of the PEV on their lives. Firstly, the government provided a start-up capital of Ksh 10,000 to internally households to be used for replacement of basic household effects which had been lost during the PEV. By 3 February 2013, start-up capital had been paid to 162,168 households across the country. Secondly, the government paid Ksh 25,000 to a total of 37,830 households whose houses had been burnt or destroyed during the PEV.
- 263 Approximately 6,978 households who received the start-up capital and the payment in lieu of housing organised themselves into 20 self help groups and bought land on which they erected tents for their accommodation. Envisaging a situation in which these settlements will lead to mushrooming of slums in rural areas, the government intervened by resettling these IDPs on lands purchased by the government itself. By 3 February 2012, the government had resettled 2,576 households on lands measuring 2.25 acres each and efforts were being taken to resettle the 4,402 remaining households. At the time, the government was also taking steps to resettle a group of 2,593 IDPs who had been displaced from Turkana County.
- 264 Independent assessments of *Operation Rudi Nyumbani* have been largely critical of the manner in which the operation was executed. An initial assessment of the programme by KHRC identified seven key issues that touched on gross human rights violations, poor governance and humanitarian crisis. These are poor co-ordination and corruption; mismanagement of IDP profiling process, exclusion and suppression of IDPs, insecurity and poor inter-communal relations, child and gender-based violations; inadequate shelter and gaps in the disbursement of start-up capital and payments in lieu of housing.²⁸⁰

²⁸⁰ See Kenya Human Rights Commission *Out in the cold: The fate of internally displaced persons in Kenya* (2009).

- 265 On the issue of mismanagement of IDP profiling process, KHRC found that registration of IDPs was 'haphazard, incoherent and marred with corruption'²⁸¹ On exclusion and suppression of IDPs, the KHRC report revealed that IDPs were not adequately involved in the resettlement programme. Even more alarming was the finding that the government was, at the time of KHRC's fact finding mission, not only forcing IDPs out of camps but it was also compelling international organisations that were serving the IDPs to withdraw services to camps because such support was deterring the return of IDPs to their original homes ²⁸² A subsequent assessment by KHRC found that although gains had been made in the resettlement of IDPs, the process was marred with corruption and poor profiling ²⁸³
- 266 The findings of the KHRC were later corroborated by an inquiry conducted by the Parliamentary Select Committee on the Resettlement of the Internally Displaced Persons in Kenya The Select Committee, comprising 21 members of parliament, was constituted on 17 November 2010 with the mandate to, *inter alia*, 'look into how the Government has addressed the current plight of IDPs in terms of basic food rations, shelter, education, health and compensation' and 'review existing institutions and organs addressing forced displacements' The Committee was also mandated to examine policies and laws governing all forms of forced displacement with the aim of promoting protection and improving the well being of forced migrants and to come up with a draft bill on forced displacements After conducting inquiries in most parts of the country, consultative workshops with stakeholders and meetings with relevant government and non-state actors, the Select Committee made the following findings, amongst others ²⁸⁴

The Government was ill prepared to handle the humanitarian crisis, its structures were very weak.

The Government's response to the plight of IDPs in terms of provision of security, provision of relief food and non-food items and construction of temporal shelter for IDPs was largely haphazard and uncoordinated

The profiling, payment and resettlement was shrouded in mystery and characterised by lack of transparency whereby the Provincial Administration (Chiefs, DOs, and DCs) were accused of registering fake IDPs and in some instances of altering the registers of IDPs This led to proliferation of IDPs camps and persons, double or triple payments and increased number of fake IDPs thus crippling the resettlement exercise Consequently, many genuine IDPs were left

281 KHRC (n 273 above) 24

282 KHRC (n 273 above) 25

283 KHRC (n 273 above) 3

284 Report of the Parliamentary Select Committee on the Resettlement of the Internally Displaced Persons in Kenya April 2012

out of the profiling exercise while many fake IDPs benefited in the resettlement process. The Committee observed that re-vetting of IDPs was vital to ascertain the genuine IDPs and identify the fake ones. Those identified as fake IDPs should be prosecuted.

The payment of the *ex-gratia* start-up capital was discriminatory, unfair and corrupt resulting in the payment of fake IDPs at the expense of genuine ones. In some instances, the Government officials in charge of *ex-gratia* payments were implicated in the embezzlement of funds.

The IDPs in the camps were given more attention by the Government while the integrated ones, forest evictees (Government Displaced Persons), landslide, historical, and cattle rustling IDPs were left out of the resettlement and assistance plan.

The Government created institutions to handle the resettlement but did not use these institutions in responding to the plight of internal displacement. The National Humanitarian Fund for mitigation of effects and resettlement of victims of 2007 violence was allocated only Ksh 419.28 m in 2011/2012 which is not sufficient. The Committee felt that failure to implement and fully operationalise the Department of Mitigation and Resettlement and the National Humanitarian Fund for mitigation of effects and resettlement of victims of 2007 violence in the Ministry of Special Programmes were the main reason why the Government's response to the plight of IDPs was haphazard and unstructured.

- 267 The Committee concluded that the resettlement of IDPs had taken too long and recommended that the government should move with speed to resettle all IDPs by May 2012. The work of the Commission, especially its hearings, further confirmed these findings. In the section that follows the impact of forced displacement on women is examined in detail.

Women's experiences of forced displacement

- 268 Forced displacement affects men and women differently.²⁸⁵ There are diverse gendered impacts of forced displacement. Firstly, many women assume new responsibilities as heads of households in the aftermath of displacement. Secondly, displaced women are always more vulnerable to sexual and gender-based violence. Thirdly, displaced women are rarely consulted when designing and executing programmes aimed at alleviating their situation. As a result, many such programmes often end up reinforcing gender biases and discrimination.

²⁸⁵ See Hovil (n 267 above); D Meertens, *Forced displacement and gender justice in Colombia: Between disproportional effects of violence and historical injustice* (2012).

269 A number of existing human rights instruments recognise the specific plight and needs of internally displaced women and require states to take special measures to respond to these needs. The UN Guiding Principles provide as follows in relation to internally displaced women (and other vulnerable groups)

Principle 4(2) Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs

Principle 18(3) Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies. That is essential food and potable water; basic shelter and housing, appropriate clothing, and essential medical services and sanitation

Principles 19(2) Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses

Principle 20(3) Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names

- *Principle 23(3)* Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes

Principle 23(4) Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit

270 Under the ICGLR Protocol on IDPs, member states have undertaken to ‘provide special protection for women, children, the vulnerable, and displaced persons with disabilities’²⁸⁶ The ICGLR Protocol on Property Rights of Returning Persons secures the rights of displaced women to own property. Under the Protocol, member states have undertaken to²⁸⁷

deal with special claims of protection by returning spouses, single parents, and single women with respect to disputes on the ownership of family or other property when a displaced spouse is deceased,

²⁸⁶ ICGLR Protocol art 6(d)

²⁸⁷ ICGLR Protocol on the Property Rights of Returning Persons art 5

- eliminate gender based discrimination against women according to the International Convention on the Elimination of All Forms of Discrimination against Women, the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and
 - give effect to the legal capacity of returning women and all women, including single women, to own land and other property in their own right, without discrimination of any kind.
- 271 The Protocol also provides that 'any land or property registration scheme established under Article 4(1)(d) shall accord women the legal capacity to register title to land or property owned by them under both customary and statutory land tenure systems so as to enable them to own such land or property in their own right, and to avoid conflicting claims relating to their ownership of such land or property'²⁸⁸ The Pinheiro Principles further provide that states shall ensure the following ²⁸⁹
- the equal right of men and women, and the equal right of boys and girls, to housing, land and property restitution,
 - the equal right of men and women, and the equal right of boys and girls, *inter alia*, to voluntary return in safety and dignity, legal security of tenure, property ownership, equal access to inheritance, as well as the use, control of and access to housing, land and property
 - that housing, land and property restitution programmes, policies and practices recognise the joint ownership rights of both male and female heads of the household as an explicit component of the restitution process, and that restitution programmes, policies and practices reflect a gender-sensitive approach
 - that housing, land and property restitution programmes, policies and practices do not disadvantage women and girls. States should adopt positive measures to ensure gender equality in this regard
- 272 The Kampala Convention obliges state parties to provide special protection for and assistance to internally displaced persons with special needs including female heads of households, expectant mothers, and mothers with young children ²⁹⁰. State parties are also obliged to take special measures to protect and provide for the reproductive and sexual health of internally displaced persons as well as

288 As above

289 Pinheiro Principles Principle 5

290 Kampala Convention art 9(2)(c)

appropriate psycho-social support for victims of sexual and other related abuses²⁹¹
 Other relevant legal provisions relating to displaced women are contained in the African Women's Protocol,²⁹² and the African Children's Charter,²⁹³

■ *Internally displaced women*

273. The Commission's hearings revealed that the state's response to the plight and needs to internally displaced women was less than satisfactory. Generally, the state's response fell short of its obligations as stipulated in relevant human rights instruments. In addition to listening to IDPs during its individual hearings, the Commission held a Thematic Hearing on IDPs on 3 February 2012. The Thematic Hearing brought together stakeholders who made presentations before the Commission. The Commission also made a site visit to Mawingu IDP Camp in Naivasha where it witnessed and assessed the conditions under which IDPs lived. The UN Special Rapporteur on the Human Rights of Internally Displaced Persons accompanied the Commission during its site visit to Mawingu IDP Camp.
274. A majority of displaced women who shared their stories with the Commission were victims of multiple evictions and displacement, they had suffered multiple violent disruptions of their lives while their properties had been looted, destroyed or burnt several times.
275. For some, the violation continued even up to the date of submission of this report, they continue living in tented camps, five years after they were displaced, and in spite of promises by the state that it would resettle them.
276. Despite their difficult situation, many displaced women who testified before the Commission demonstrated extraordinary determination to rebuild their lives and move on. The testimony below represents one woman's resolve to live on despite suffering multiple forced evictions.

Since 1992, I have been a victim because my permanent house was burnt down and all the property looted. The tea plantation was slashed down and burnt. All the trees were cut down and burnt. All the houses for the children and also the workers' houses were destroyed in 1992. Since that time, I have tried everything possible but I have not got any assistance. During the clashes, I ran away. I have stayed out for three years and when I came back to that land, I put up temporary shelter and started staying there. After five years, there was a general election and what I had built was also burnt down and everything was looted. I went back to where I was. I stayed there for some time and went back to my original farm because where I was staying, at the shops, life was very difficult. When I

291 Kampala Convention art 9(2)(d)

292 African Women's Protocol art 11(3)

293 African Children's Charter art 23

went back to the farm again during the multi-party election, we were told to go away and everything was looted. We were told to go back where we came from. I am a Kisii but I had bought land in the Kalenjin community. They looted everything including all the animals and burnt down the houses. In 2007, we had again gone back and rebuilt it. Even the children had already built their house. I have three boys and three girls. Again during the clashes of that time, the houses were all destroyed. Since 1992, I have been running away from the farm and going back again. I have stayed out at the shopping centre but I am now back in the farm. Some good Samaritans constructed a small house for us. My boys have also built some small houses and are living there. I have gone through so much.²⁹⁴

277. In many cases, women suffered violations during flight to the camps or to places where they hoped they would find refuge. During the 2007/2008 PEV a woman was gang raped on her way to seek refuge at Afraha Stadium, Nakuru.²⁹⁵ She narrated her chilling account in Kisumu:

We started the journey. At around 8.30 p.m. we were just walking slowly. We went out through the sewerage system. We were looking for a roadside sanctuary where to hide from any crowd coming on. We used a *panya* route to Ponda Mali and went to Eliza's House. There was a trench. We heard noise being made by a crowd of people coming towards us. We were shocked. We decided to look for a place to hide, so that they could pass, and we continue with our journey. Afraha Stadium was very far away from where we were living. We were forced to go there because we did not have any other option. We had to look for a way of getting there. Mama Sadam had one child. I had five children. We were walking together. As we looked for a place to hide, we realised the crowd was moving towards where we were. I told the others: "We have to go to the other side and hide, so that these people can pass." I was on the frontline. So, I jumped over the trench to the other side. Amongst those in the crowd were people who were smoking bhang. When I jumped over the trench, they noticed us. Those who were smoking bhang came and grabbed me. I screamed. Mama Sadam was behind with the children. They could not come over because I was already screaming. The children got into the trench but Mama Sadam did not run away. Those people started beating me. I hit my head on a stone. Those were the people who raped me. I can identify them. They were three. They took turns on me, one after the other. I was helped by gunshots which were heard behind us. It seemed that there were police officers who were following the crowd we were trying to hide from. There were gunshots all over, which made those people run away. I remained there full of pain. I did not know what to do. I did not know where the children were. I did not know whether they had jumped to where I was and saw what happened to me. I did not know where exactly they were and what they were going through. I remained there quiet, not knowing what to do. At the time, my older daughter was supposed to join Form Two. She was a big girl. I was full of pain. I said to myself: "What shall I do? How am I going to get up?" By then blood was all over me, oozing from the head wound I had sustained. I was feeling pain all over my body. I stayed there. I felt very cold. I could not make it. That was when my young child

294 TJRC/Hansard/Women's Hearing/Kisii/ 22 July 2011/p. 7.

295 TJRC/Hansard/Women Hearing/Kisumu/ 16 July 2011/p.15.

started crying, calling me "Mother!" I replied "Where are you?" They told me "We are here." I told them to come over. So, the children came over, crying. I was also crying, wondering whether they had seen what had happened to me. We stayed there for about an hour. I tried very hard to ensure that the children did not know what had happened. We started the journey again towards our destination. When we arrived at Afraha Stadium, I was very annoyed and cold. The children were also feeling cold. We found that there were already so many people at that place.²⁹⁶

- 278 In Limuru, an old woman who was escaping to a nearby police station was gang raped. 'On the way to the police station, we met Mungiki (outlawed sect) who grabbed me and blind folded me then teared apart my under pant violently and rapped me at this my old age'²⁹⁷ The same fate befell a woman in Bungoma who was raped in the presence of her children. In her own words

Suddenly, I learnt that there was a group following us from behind. When they reached they slapped the children who fell down in fear then dragged me aside. Three men raped me (gang raping) leaving me thinking I was dead. I could only hear the cry from my children from where I was raped. After a while, I crawled slowly and reached them.²⁹⁸

- 279 Given the abrupt and hurried nature of flight, many women left behind essential documents (such as identity cards) which would later play an important role in determining whether or not they were eligible for compensation under *Operation Rudi Nyumbani*. Some lost documents which were personally dear to them, such as photos of their loved ones who perished or got lost during the PEV mayhem. Speaking to IDP women in Kisumu, Commissioner Chawatama aptly captured the fate of these women

I had an opportunity to visit an IDP camp, and I had an opportunity to speak to some women. Amongst the things that the women missed were just to have a house to sweep. They missed having photos of their loved ones. Most of them complained about their houses having been burnt down, and that they lost their husbands and children, and they just missed the photos that they had put up on their houses, so that they could have something to remember about the loved ones they had lost.²⁹⁹

- 280 Moreover, because of the abrupt need to flee their homes, most displaced persons were not able to take any food or other essentials with them. Accordingly, some arrived in the camps with only the clothes they had worn. The camps were overcrowded and sanitary facilities were in pathetic conditions or unavailable all together. Like other IDPs, women and children went for days without food or a

296 TJRC/Hansard/Women Hearing/Kisumu/ 16 July 2011/p 15

297 TJRC/Memorandum/0170

298 TJRC/Memorandum/0170

299 TJRC/Hansard/Women's Hearing Kisumu/16 July 2011/p 10

decent bath. Life in the camp, as described by various witnesses, was unbearable and stripped the IDPs of human dignity and self worth. A witness provided the following summary of women's life at the IDP camps:

Very many women who are here are victims of the post-election violence. A woman and her children have been staying in IDP camps for four years. It is just like staying outside. We have seen the tents at the IDP camps. People are being rained on together with their children. Rape cases happen there every day. Mothers and children are being raped. Even young boys have been sexually violated. They do not go to school. They do not have clothing. They do not have food. They have not had anything in those camps for all this period. They have lost their livelihoods. Their lives will never be the same again, whatever the case. This is because you cannot do the work that you could have done if you were at your home. Their lives have changed.³⁰⁰

281. Another witness informed the Commission that:

The IDPs do not have shelter. They do not have food or medicine. They do not even have sanitary towels. They do not have clothes. Women are people who would want to dress smartly. They would want to make their hair. Look at these women? They have put on head scarves because they do not have any money to make their hair. They are living a life different from a woman's life.³⁰¹

282. Life was particularly a gruesome experience for who had suffered injuries during the PEV. They could not get immediate medical attention in the camps and their situation worsened. The drug supply for HIV positive displaced women was cut short and as a result their condition worsened. They were also not able to receive appropriate care in the camps. IDPs in Kitutu Chache, Kisii, told the Commission through their memorandum that '[w]e have developed Asthma, breathing problems, High pretention, and Ulcers.'³⁰² They also indicated that '[o]thers especially our women that were raped contracted HIV and AIDS which has infected their husbands.'³⁰³ A comprehensive memorandum from a group of 41 women IDPs who were raped during the PEV contained awful stories of their suffering. They summarized their situation thus: 'Some of us have been divorced, some stay in the house without enjoying conjugal rights; some were infected with diseases such as HIV/AIDS and depression.'³⁰⁴

283. A focus group discussion with internally displaced women organised by the UN Special Rapporteur on the Human Rights of IDPs revealed that the state had failed

300 TJRC/Hansard/Women Hearing/Nakuru/ 24 September 2011/p. 7.

301 TJRC/Hansard/Women Hearing/Nakuru/ 24 September 2011/p. 7-8; see also TJRC/Hansard/Thematic Hearing on Women's rights/Nairobi/8 February 2012/p. 3.

302 TJRC/Memorandum/0059.

303 TJRC/Memorandum/0059.

304 TJRC/Memorandum/0170

to cater for the nutritional needs of special groups such as lactating mothers and persons taking HIV anti-retroviral drugs.³⁰⁵ Not surprisingly, a study which evaluated mortality and morbidity among IDPs in western Kenya following the PEV, found that the majority of adult IDP deaths were ascribed to HIV infection.³⁰⁶ The following quotation captures the dire situation of women IDPs who were victims of rape and other forms of sexual violence during the PEV

I am speaking on behalf of women who we are staying with at the camp. There are some who were raped before their children and husbands and they are not able to express themselves. They are afraid and embarrassed to say it because they do not want to embarrass their husbands. Some of them are living with diseases because they do not have money to go for proper treatment. Some of our daughters gave birth after the rape cases and we do not know what to do. I am one of the people who were raped. When I tried to go for medication, I was prescribed for medicine, but I do not have the money to buy the medicine. So, I have health complications.³⁰⁷

284 Another witness described the situation of women who gave birth at the camps

I received a number of women who had delivered in the camps but for three or four weeks, had not had a shower or got any treatment. When they came, so many of them were smelling. There were also victims of rape, children without parents and women who were traumatised. There are those who stayed for about four days without uttering a word.³⁰⁸

285 The Commission learnt that state response to alleviate the plight of IDPs during and after the PEV was painfully slow, *ad hoc*, and uncoordinated. What this meant was that immediately after displacement, displaced persons gathered in an area, often in a police station, church or a soccer stadium, where they initially spent nights either in the open or makeshift shelters. Later, humanitarian agencies and well wishers provided IDPs with tents and other basic assistance. However, such donations were hardly adequate to meet basic needs. Moreover, with limited spaces and tents, men and women were forced to sleep under a single tent or in the open. This exposed women and girls to sexual violence.³⁰⁹

286 Faced with the constant cries of hungry children, many women in the IDP Camps found themselves in a desperate situation. Accordingly, some chose to seek for casual or informal jobs.³¹⁰ Sometimes these women were forced to trade sex for such jobs. According to a witness, 'sometimes when these women go to look for casual

305 Report of the Special Rapporteur on the human rights of internally displaced persons: Chaloka Beyani. A/HRC/19/54/Add.2 para 35

306 D. Feikin et al. Mortality and health among internally displaced persons in western Kenya following post-election violence 2008. Novel use of demographic surveillance. (2010) *Bulletin of the World Health Organization* 601-603

307 TJRC/Hansard/Public Hearing/Nairobi/Nairobi/21 February 2012/p. 25

308 TJRC/Hansard/Women's Hearing/Kisumu/p. 5

309 TJRC/Hansard/Women's Hearing/Nakuru. 24 September 2011 p. 24

310 TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 16

jobs, they are usually asked for sexual favours;³¹¹ The Commission also heard of cases where displaced women engaged in prostitution as a way of earning a livelihood³¹².

287. The situation was not different for those women who were displaced but had been integrated into local communities or had found accommodation in rental houses in urban centres. In Kisumu, the Commission heard the following testimony

There are a number who suffered gender-based violence and have gynaecological complications. They cannot treat themselves because it is too costly and others tested HIV positive as a result of the rape. A number of them are traumatised and depressed. Some of them have been abandoned by their spouses who witnessed the crime. Others have been thrown out of their homes because they are not Luos. They got married into the Luo community but the Luos did not welcome them anymore and they have nowhere to go. So, they have become squatters. Those who live with their husbands do not share any intimacy but it is convenient to pretend that they are both husband and wife. So, a number have been left alone to look after their children. They are humiliated by the community and are reminded about their status. When they are unable to pay school fees and they plead for their children to continue with school, they are told off by teachers. When they default in rent, their landlords break down their doors. Some of their children have gone to the streets which are considered a better option than starvation at home. Meanwhile, communities lecture them about moving on and to stop saying that they are IDPs.³¹³

288. A similar story was narrated to the Commission in Nakuru

We always try to work here and there for one or two days. We do not get good pay and, considering that we rent houses and have other expenses, life is very difficult. Even our children are getting married very early because of problems. We use the only money we get to buy food. We live from hand to mouth. Our children are just employed as house helps, and some of us have been disowned by our husbands. Like for me, my husband left me. Although people say that poverty will end, I do not see it ending. When I get someone who can give me Ksh 100, I just settle there because I need the money. I was affected and I do not have anywhere else to go. Others have even committed suicide because of poverty. All we do is get money to pay rent. It is hand to mouth life. The husbands do not have money, the wives do not have money. That is why some are even engaging in prostitution. We have so many problems and I do not even know if this Commission is going to help us. We just want you to help us. We sent Hon. Wamwere to go and tell the President about our problems when he was still our MP, that we have more problems than any other people. At least, there are people who have gone to their land and came back but, for us, it is just suffering.³¹⁴

311 TJRC/Hansard/Women Hearing Nakuru/ 24 September 2011/p. 18

312 TJRC/Hansard/Women Hearing Kisii/ 22 July 2011/p. 15

313 TJRC/Hansard/Women's Hearing Kisumu/p. 6

314 TJRC/Hansard/Women's Hearing Nakuru/24 September 2011/p. 22

- 289 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. Those who received the amount, especially the start-up capital of Ksh 10,000, found that it was too little to enable them restart their lives. In this regard, a witness testified as follows:

We were given Ksh 10 000. The money was only given to a few people. We were also told that they would build houses for us but they have not built those houses up to now. I have been forced to live in a rental house. But I have not been able to pay the rent because I am supposed to pay Ksh 700.³¹⁵

- 290 Another witness spoke about the same issue in Kisii.

The money that was given, the Ksh 10,000 for the IDPs, we the women did not get it. There are even some old men who did not get this money. We have even heard that there are some people who have been given Ksh 25,000. Here is a person who was affected but has not been given the Ksh 10,000 or the Ksh 25,000. This is the case and yet others have been given Ksh 35,000. I think of a person who was affected, her house burnt, property destroyed and has not got even a single cent, especially at this time when the price of maize has gone up - it is around Ksh 120 per kilogram. I am a woman who was affected by this violence and I cannot afford this price. Just think how that woman feels. Think about the woman who was raped and was even infected with HIV/Aids.³¹⁶

- 291 The Commission also learnt that in certain cases women were discriminated against in the registration process or that some registration officers were generally insensitive to women's needs.

Even when the Government started saying that the women should go and register, the officer who had been mandated to register the people or the victims would question us. This is the case and yet the officer knew that women are weak and cannot defend themselves. They were even asking us "Do you have a husband? Where did you get money to buy land here?" As a result of all these questions, we became defeated. I was defeated when I started explaining where I got the money to buy the land.³¹⁷

- 292 The Commission also received testimony pointing to the fact that, in certain cases, IDPs were compelled to bribe registration officers so that they could be considered for cash payments under the *Operation Rudi Nyumbani*. As such, and as earlier mentioned, for those who lost identity cards during the PEV, their efforts to be registered became even more complicated.

315 TJRC/Hansard/Women's Hearing/Kitala/22 October 2011/p. 17

316 TJRC/Hansard/Women's Hearing/Kisii/22 July 2011/p. 8

317 TJRC/Hansard/Women's Hearing/Kisii/22 July 2011/p. 7

Even today, where we are, we have people who have never received their Ksh 10 000. Even those people who were supposed to get Ksh 10 000, when they went to collect their money, they had to part with Ksh 3 000. Others even had to part with Ksh 5 000. The government's stand that if you do not have an ID card you will not get money presupposes that people had time to pack their bags and make sure that they collected everything before they left. So, some people cannot get money because they have no ID Cards. Some have been told to go and get ID cards of their fathers, who passed away many years ago. There are IDPs who were able to vouch for others because they knew each other.³¹⁸

■ **Women refugees**

- 293 As of October 2011 when the Commission held its hearings in Kiryandongo, Uganda, 49 per cent of the refugees were female. The majority of refugees in Kiryandongo fled to Uganda during the 2007/2008 PEV. They were mainly from Busia, Malaba, Bungoma and Mt Elgon. In Uganda, they were received mainly by the Red Cross Society who arranged for them to be hosted in churches, schools and police stations. They then moved to a formal transit camp in Mulanda. After staying in Mulanda for a short while and after the PEV had subsided, they were given the choice of returning to the country. Some of the refugees returned but a significant number, still fearing for their lives, chose to remain in Uganda. Those who remained were later moved to Kiryandongo Refugee Camp, which continues to be the largest refugee camp hosting Kenyans in Uganda.
- 294 The women's hearings in Kiryandongo revealed the range of terrible violations that women suffer during flight and subsequently in the refugee camps. For the women, the flight to Uganda was a harrowing experience. An expectant mother gave birth during flight only for the newborn to fall into a river according to one witness. Ugandan security forces recovered the child who is now nearly four years old.³¹⁹
- 295 In one extreme case, victims of the PEV who had fled across the border to Uganda were followed by attackers who attempted to poison their food. This incident happened at Saint Jude School where Kenyan refugees were seeking temporary shelter. Two witnesses testified about this incident one of whom told the Commission:

When we got to the border, we were welcomed and kept at a school called Saint Jude. That is where we stayed [] However, we were followed there. Every evening, we used to hold prayers. One day as we were praying, we were boiling beans for supper, somebody crossed in, came and put poison in the food and the flour. Those who were preparing the food for us went back and realised that there was a lot of foam in the beans. They became suspicious. When they noticed this, they decided to look at it closely with their

318 TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 11

319 TJRC/Hansard/Public Hearing/Kiryandongo/1 November 2011/p. 5

torch and they realised that the flour had also been doused with poison. They told us not to eat it. They saw some children and some grown-ups running away from where the food had been stored. So, they threw away the food. The following day, the place where they poured the food, all the grass had dried up. That was reported in the newspapers, that the refugees at Saint Jude had survived attempted poisoning. So, we stayed overnight without eating any food and the following morning, we continued with our lives. We were able to make some porridge for the children.³²⁰

296. Almost without exception, women refugees in Kiryandongo (like men) had abruptly fled their homes without carrying their belongings. Many lost their belongings to looters. Many refugee women in Kiryandongo were businesswomen with flourishing businesses but during the PEV, their shops and enterprises were looted and burnt down. Ann Wambui had lived in Busia for 25 years where she had a flourishing business and a sugarcane farm. She also reared pigs on her farm. At the height of the PEV all her properties were looted before her house and shop were burnt down. She escaped being attacked by running into a private hospital, then to a police station and finally to Uganda. She painfully narrated her loss to the Commission:

We went to the police station where I found very many Kikuyus who lived at that place. All those who were there did not have anything. They told me that the situation was bad. We wanted the police to take us back to our houses to pick blankets to cover the children. They told us that they had been instructed to take care of us and not our property. Meanwhile, people were looting property from our houses. In the morning, the looting continued. Things were being looted and others thrown on the roads. After a short while, there was fire. They burnt everything, including the shops. We did not manage to rescue anything from the shops. At around 10:00 a.m. I was told that people were also burning the farms. I pleaded with a police officer to go and prevent them from burning the houses but it was all in vain. They burnt my property again. There were some vehicles that had not been burnt. We heard of a plot to burn the people too. So, we prepared to run away. At around 7:00 p.m. we boarded vehicles and headed to Busia Police Station. We stayed there until dawn. There was nothing in the police station, not even food or water. On 1st January, 2008 people started crossing to Uganda. The following day, we were told to go to Uganda to get some assistance from the Red Cross. We were put in a certain school in Uganda. We cooked for the children in the open. The following day, very many Kikuyus arrived there. The Red Cross gave us food like potatoes and we were instructed to cook in one *sufuria* and sub-divide it among the people.³²¹

297. Another victim, Anna Muthoni, narrated to the Commission how she pleaded with looters to allow her to take a few of her belongings which they agreed. But on her way to join her husband at the police station where they had sought refuge, she was violently attacked by a rowdy gang.

320. TJRC/Hansard/Public Hearing/Kiryandongo/1 November 2011/p. 10-11

321. TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 7

On Sunday, when it was announced that Kibaki had won, things became worse. The police officers could not help us anymore. So, people came and started destroying our houses. They were burning and destroying things. I was just there in Mumias. I was in a centre called Nabongo. They came and started destroying everything in the houses, and taking away our things. We ran to the police station where we had slept. In the morning, I told my husband "It is better that we go home; because we did not have even blankets. I wanted to go back and find out whether they had left behind anything, so that we could cover our children and ourselves. When I went back, I found people in our house destroying things. They asked what I had to get from the house. They said that the things were theirs, and that we had been pretending that they were our things. They said "Kibaki has been giving you things but you now see that these are our things". I begged them to help me by allowing me to carry even a few of my clothes. I told them that I wanted to take with me at least a *sufuria* to go and cook some food. One of them allowed me to take a few clothes. I left the rest of the items with them. On my way back, I came across a group of people. This group was not very forgiving. They started beating me up. I fell down. One hit me with a stone on my back. They took everything I had taken from my house and started beating me up."³²²

298. Rosemary Ngugi and her husband had a flourishing business in Malaba making utensils including cooking pots and frying pans. Speaking before the Commission in Kiryandongo, she narrated:

About the materials, most of them were very expensive because they would be sold in areas like Nairobi and Nakuru. People would come and leave orders and we would pack for them. They would then come and take them away. My husband was very hardworking but everything was demolished and property looted by people that we did not know. We were evicted at night and in the morning, we were thrown into lorries. We sent the police to go and check. They told us that they found the doors open and there was nothing there. We left all that to God because it is God who had given us the properties, the energy and the grace to do all that. Since we were alive, we knew we could start all over again."³²³

299. Some women refugees who spoke to the Commission had been displaced multiple times. Teresa Nafula, who was at the time of the 2007/2008 PEV living in Mt Elgon, narrated to the Commission how she was displaced in 1992, 1997 and 2007. During the 2007/2008 PEV in Mt Elgon, she watched from across the border in Uganda as her house was burnt to ashes:

What I have seen and what I continue to see in my life has made a lot of difference since 1992. From 1992, there have been clashes and I ran away in August before the elections. We left food in the farms. We rented a house in Bungoma. We were told that peace was back and we went back. In 1997 again, there were clashes. Normally, people go away before elections. In November, 2006 I saw people moving their belongings to different places. I asked them what was happening, but they did not answer me. One day in the

³²² TJRC Hansard Women's Hearing/Kiryandongo/1 November 2011, p. 10-11.

³²³ TJRC Hansard Public Hearing, Kiryandongo, 1 November 2011, p. 8.

morning, I saw two bodies carried away. There was another body that was found near my home. It was badly cut. I told my children to prepare to run away. Police from Chebukube came near our place. I could see them from home. When you are in this side of Uganda, you can see my home very well. We were warned that we would also be slashed if we went back. At that time, we were living with strangers in Uganda. On the other side, people were burning houses and looting property. I saw my house burning down. I had not carried anything from the house. It was the year of elections and things got worse. I was in Uganda. I did not have food or anything but still, I could not go back home.³²⁴

- 300 Having lost all their lifetime belongings including business merchandise, Kenyan refugee women living in Kiryandongo have found themselves in utter desperation and destitution, a situation that is difficult to reconcile with their previous lives. They are now unable to restart neither their lives nor their businesses. The credit facilities they had back in Kenya are now unavailable in Uganda.

Some of us were living our lives as farmers and business people, but we are now here just like that. As we are here, because it is not our country, one cannot even invest in business or even build a home [] In Kenya we used to get funds through women organisations. I was a businesswoman and could be able to pay loans. For the short time we have stayed in Uganda, we do not have anything other than clothing. We have become poor. We only receive sympathy from good Samaritans from Kenya. They send us clothes to wear.³²⁵

- 301 Another witness explained to the Commission how her life and that of her children had significantly changed since she was displaced and forced into a foreign country as a refugee.

When we were in Kenya, we were managing life because we had organisations like the Kenya Women Organisation but when we came to Uganda, we started suffering. We depend on Red Cross and humanitarian aid. When we were in Kenya, we were feeding people but now we depend on people. I had one daughter who went to Kenya to live with the aunt. She had completed Form Four. After she went to Nakuru and lived there for some time, when she came back she was pregnant. She told me that she suffered while in Kenya. There was no food where she went to live. She was impregnated by a school boy. She wanted to abort but I refused. I also had a son who was in Jomo Kenyatta University of Agriculture and Technology. I used to pay all the school fees. In 2008, he could not continue with his education due to lack of fees. At that time, I was already in Uganda. So, he could not sit for the exams. My daughter gave birth to a baby girl. She then left to go and look for a job. She got a job as a house help but she left because she was being harassed by the employer. In December, 2008, my son came here and wondered whether he would complete his studies. I sold all the maize that I had harvested and gave him Ksh 60,000. We also got contributions from several people to enable my son complete his

324 TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 8-9

325 TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 8

education. Although he has graduated, he really suffered. As you know, it is the mothers who take care of the children.³²⁶

302. In general, life in Kiryandongo Refugee Camp is difficult and less than dignifying. Discrimination against the refugees on the basis of their nationality by the host community is rife. Due to their inability to speak the local language, Kenyan refugees find it difficult to access public services, especially medical and health care services. A female witness told that the Commission: 'Here in Uganda, when you do not know Kiganda, they do not treat you. If you start speaking Kiswahili, they do not talk to you.'³²⁷ This situation has compelled many refugees to resort to bribing medical personnel in order for them to access health care services. This has had a profound impact on women's access to reproductive health, especially those who had suffered sexual violation during the PEV. According to a witness:

You must know how to speak the Ugandan languages, or else you look for a doctor and bribe him in order to get assistance. You do not even have the money with which to bribe anybody. If even getting food is difficult, how can you have money with which to bribe a doctor? If you are supposed to go to Kampala, you sell maize, so that you can have money for transport.³²⁸

303. Indeed, a fairly good number of women who attended the Commission's hearing in Kiryandongo were sick and still suffering from injuries they sustained during the PEV. Anna Muthoni who, as mentioned earlier, was violently beaten by a rowdy gang during the PEV described to the Commission her desperate efforts to find proper medication and how, despite her longing for another baby, her condition had made it difficult for her to have another child.

I would like to say that I have not received any effective treatment. I am still not doing well. I am still not healed yet. The doctors said that I have problems with my bones, that there are bones which are dislocated. They said that I need to go to theatre. So, they only give me medicine. They told me that I should never bend, and that I should not carry anything. I have been given bed rest. They said that this operation is going to be risky, if it is done at Mulago because they do not have a doctor who specialises in bones. They advised: "It would be better if you had gone back to Nairobi, but now you are in Uganda. Going back home is hard." So, I have just been staying like that, and just taking medicine. They have been trying to do physiotherapy. The doctor has already said that physiotherapy cannot heal my bones; I need to undergo an operation. I have two children. My last born is seven-and-a-half years. This situation has made it impossible for me to have another child. The doctor has also said that it would be riskier for me to have a pregnancy. My children are still small. The small one always asks: "Why did you agree to vote for Kibaki? Until when are

326 TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 6-7.

327 TJRC/Hansard/In-Camera Hearing/Women/Kiryandongo/2 November 2011/p. 33.

328 TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 14.

we going to suffer? Mum, you should not have voted for Kibaki” He even wonders why we cannot “buy” another child. I am so hurt because I do not want to stay with two children. I would like to have another baby. All this is happening because of an election yet I have not benefitted in any way. I voted just like any other Kenyan.”³²⁹

304. Similarly, another woman with serious health complications spoke to the Commission about her situation:

I have a kidney problem. My breast also has a problem. They do not do operations on kidneys in Uganda [] So, I normally go there [Mulago] to get pain killers [] I can only go to Kenya or abroad. How do I go to Kenya? I do not have money for medicine.

305. Some of the displaced women narrated to the Commission how their loved ones passed away primarily for lack of access to early or proper treatment or medication:

My son fell ill and I could not get any medical attention. When the illness became intense, he was referred to Kiryandogo. The doctor told me that his condition was not bad and I could go back the following day. At that time, my son had a headache. At around 9:00 a.m., he was given medicine and told to sleep. After sometime, he lost his strength and his eyes changed colour. I asked the doctor why he was behaving that way and I was told that he would be okay. I called my husband and when he came, he found that he was unconscious. At that time, my son could not speak. At around 9:00 p.m., he passed away.³³⁰

306. Another woman told the Commission the following sad story:

I ran away to this place with two children. One was about 14 years old. We struggled with the doctors, thinking that the children had malaria. I started to seek assistance from my neighbours. We took her to Buyale District Hospital. When we reached there, the child was diagnosed with all kinds of illnesses. She did not have malaria. She had yellow fever and other diseases. We came back here and the child went to school. When we went back to hospital, the child was injected with quinine, which caused the girl to become mentally challenged [] After some time, my daughter started screaming, complaining of headache. When we arrived at the hospital, the same doctor injected her with quinine. The situation deteriorated and at 2:00 p.m. my daughter passed away.³³¹

307. A refugee woman, who contracted HIV after she was raped during the PEV and subsequently abandoned by her husband after he learnt of the rape, described the difficulties she faced in accessing anti-retroviral drugs in Uganda. She explained that she had to assume a Ugandan name in order to access anti-retroviral drugs in Uganda’s public health facilities:

329. TJRC/Hansard/Women’s Hearing/Kiryandongo/1 November 2011/p. 11.

330. TJRC/Hansard/Women’s Hearing/Kiryandongo/1 November 2011/p. 8.

331. TJRC/Hansard/Women’s Hearing/Kiryandongo/1 November 2011/p. 13.

I have been tested and I am positive, and the person who attacked me and his wife have already died. When my husband heard about what happened, he left me; he rejected me completely. He was asked "What are you going to do?", and then he rejected me. After being separated from my husband, I have been single, I did not have a child or anyone to help me. Everything that happens to me here, all the medicine that I am using, they keep saying that this medicine is for the Ugandan Government and for the Ugandan people. When I go to hospital, they force me to use a Ugandan name so that I can get help in terms of treatment. My God is helping me speak because I am always coughing, I cough all the time. To get a referral to go to a hospital where you can get tested is hard. I am suffering in silence. We do not have help. I do not have medicine and I cannot go to the shop to buy this medicine. Sometimes I do not have money to go to hospital in a certain week, and then I have to wait for the next month to go for medicine.³³²

- 308 The Commission also learnt that although the Office of the United Nations High Commissioner for Refugees provides food rations to the refugees, the amount is too little to satisfy the needs of many households in Kiryandongo. A witness posed the question 'the food from the United Nations is 15 kilograms and at times it is 12 kilograms. What can you do with that...?'³³³ While in Mulanda, hunger drove some of the refugee children to hunting and eating rats and even snakes.

The children ate rats and even snakes! If you bring snakes and rats here, they can eat. They say that they taste nice []. We have learnt a lot here as our children are eating rats and, if you call them here, you will understand what they are going through. They know how to hunt for rats and it is painful.³³⁴

- 309 Moreover, because of poverty, some of the refugees were forced to sell the food rations or the clothes they received in order to pay for medical services.

We are given 15 kilograms of grains per month. That was what we sold to go to hospital. I have been travelling to Kampala for medication. It gets to a time when you even sell your clothes. A Good Samaritan gives you a dress but you sell it, so that you can go for medication. It is really painful.³³⁵

- 310 But in a number of households within the refugee camp, the food rations have become a source of tension and even breakups of marriage. Due to desperation, many men in the camp have resorted to excessive drinking of alcohol. In certain cases, they have resorted to selling the food rations they receive so as to sustain their drinking habit. This has obviously not augured well with their wives. This leads to divorce and other problems.³³⁶

332 TJRC/Hansard/in-Camera Hearing/Women/Kiryandongo/2 November 2011/p. 22

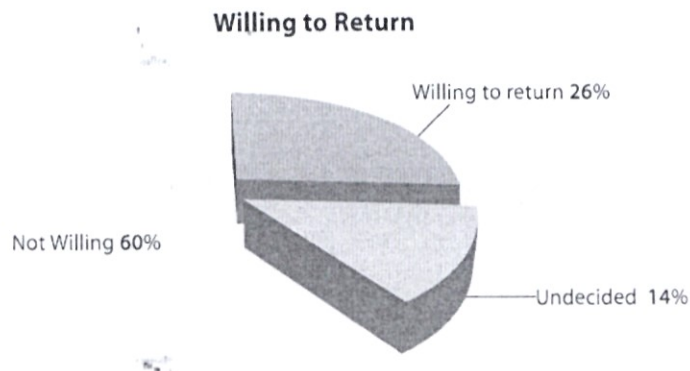
333 TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 18-20

334 TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 18

335 TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 13-14

336 TJRC/Hansard/Public Hearing/Kiryandongo/1 November 2011/p. 12

311. On the question of returning to Kenya, statistics availed to the Commission by the Office of the UN High Commissioner for Refugees, showed that most of the refugees, 60 per cent, were not willing to return. Only 26 per cent were willing to return while 14 per cent were undecided.



312. Many reasons were given for the overwhelming refusal to return to Kenya. After their traumatic experience during the PEV, most of the refugees still fear for their lives. They are afraid that having been rejected and forcefully evicted from their original homes and farms, they would not be accepted back. Their fear was particularly compounded by the fact that the next General Elections in Kenya were to be conducted in less than a year, and for them, there was genuine reason to believe it will be marred with violence.

When you mention Kenya, it is just like telling me to put my leg in burning charcoal [...] As people who witnessed the incidents that happened, whenever you mention Kenya, something pains us. I was sitting with my young daughter and told her: "Go and greet the visitors." She told me: "These visitors have told us to go back to Kenya, where they looted our property and burnt our houses. I will not go and greet them. If these guests are going to Kenya, let us go to the other side of the hill. I am not going back to Kenya. Kenya has made our father go away. Kenya made my sister die. Kenya made my brother die. Kenya has made you mother not to even wash your clothes."³³⁷

313. There were also those who were willing to return but were unsure as to whether the Kenyan government would provide them with new farms where they could build new homes and restart their lives:

We have not refused to go back because home is home, but we are praying that all those responsible in resettling us should set aside funds to give us farms so that we can lead a good life and also our children who witnessed violence that took place in 2007/2008 can try to forget and mind their future.³³⁸

³³⁷ TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 13, 14.

³³⁸ TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 19.

- 314 The fear among the refugees that the government would not resettle them was particularly reinforced when they noted that IDPs were neither being well taken care of nor speedily resettled by the government. This was one of the main reasons why many of the refugees refused to return to Kenya when they were given the option to do so while still at Mulanda

The then Minister of State for Special Programmes pleaded with us to go back to Kenya. At that time, we were getting reports that the Internally Displaced Persons (IDPs) in Kenya were going hungry. That is why we did not come back to Kenya. We stayed there for a long time until we were brought here in Kiryandogo. We underwent many problems here

- 315 Moreover, their fear was strengthened by the fact that while they were still in Mulanda, the government had attempted to make them invisible by claiming that they were no Kenyan refugees in Uganda

After a year's stay here, we heard that the Government of Kenya denied ever having refugees in Uganda. They said those in Uganda were business people. This really pained us but we had no option. We voted for a Government that was not even recognising us.³³⁹

- 316 During its women's hearings, it also became evident that many women found themselves in a dilemma as to whether they should return or not. While some women were willing to return, their husbands were not. As such, they could not return to Kenya without straining or breaking their marriage

We are not happy here. We are suffering. If you can stay here for two or three days you will see. You just see us well dressed and you may think we have good lives. Our husbands have turned against us. Personally, my husband said, "Even if you register that you want to go back to Kenya, I will not go back". At the moment if I want to record a statement he says, "Go and do not come back". Only the elders are standing by me, but I want to record a statement because my country is my country. My husband has turned against me and even if we are together we are not one thing. People do not have any hope and all the burden lies on the women.³⁴⁰

- 317 A refugee woman narrated how her family was ruptured and destroyed during the PEV: her husband disappeared never to be seen again, one of her daughters was killed while another one was raped, and her four sons got lost amidst the mayhem. Here is the tale of how she was reunited with her children and the dilemma that followed as to whether she should return to Kenya or remain in Uganda

While at the camp, I heard people say that there were children whose photographs appeared in newspapers, who were looking for their mothers. On looking at the newspaper, I realised that they were my two children. That was when I went to the Red Cross Society office and explained about the situation. So the officer there told me that he would take me to the Kenya/Uganda border. At the border, the vehicle stopped and we were taken to where the children were. I was told to stop at a particular point and they called three women who

339 TJRC/Hansard/Women's Hearing/Kiryandogo/1 November 2011/p. 6

340 TJRC/Hansard/Women's Hearing/Kiryandogo/1 November 2011/p. 6

went to bring my children. Before they could ask whom amongst the three of us was the mother of the children, my children came to me crying. The photographers started taking photos. I signed a document in the Children's Office and I was given my children. That was when I came back with them to Mulanda. The remaining two could not be traced. After two months, I also heard an announcement that there were children who were in Kakamega at an orphan school. We went to look for the other two. We found them at Kakamega. They were taken to the police station in Malaba. The Red Cross tried to look for their parents but they did not find them. That was when they were taken to the school for orphans.

On arrival at the school, people from Equity Bank told me that I would not be allowed to take the children out of school. They told me to let them learn. They told me that they would look for a place for me to settle, and that they would pay my rent and establish another business for me. I refused. I told them: "I have left my other children in Uganda. If I stay here, what will happen to those children who are in Uganda?" They tried to persuade me but I refused because the other two children were at Mulanda. That was when they gave me transport to come back to Mulanda. When I came back to Mulanda, I found that one of the children had been injured on the head while the other one had been injured on the leg.³⁴¹

318. Generally, it is worth mentioning that the general feeling among the Kenyan refugees in Uganda is that of a people who have been neglected and abandoned by their government.



341 TJRC/Hansard/In-Camera Hearing/Women/Kiryandongo/2 November 2011/p. 11.

The life of a Kenyan woman refugee in Uganda

(TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 10-12)

My name is Anna Muthoni Mburu. I come from Mumias. That is where I was a business lady. I used to buy commodities from Kampala and bring them to Kenya. Two weeks before the election date, some politicians came. They were from the ODM party. They said that they did not want people called "Kikuyu" here. They said that Kikuyu were used to having big shops and big jobs, whereas the locals just cycle *boda boda*. They said that we should either start cycling *boda boda* or we go back to Othaya. On the day of the election, we voted and on 30th December, 2007 after it was announced that Kibaki had won the presidential election, violence broke out. They started burning our houses and stealing our things. On 28th December, 2007 we went to the police station and recorded a statement. We told them what had happened to us. The police officers told us that we should contribute Ksh 500 each and then they would give us security. We did not have an alternative. So, we paid them. They said that they were going to protect us. Truly, that night of Friday we slept well. On Saturday, we also slept well. On Sunday, when it was announced that Kibaki had won, things became worse. The police officers could not help us anymore. So, people came and started destroying our houses. They were burning and destroying things. I was just there in Mumias. I was in a centre called Nabongo. They came and started destroying everything in the houses, and taking away our things. We ran to the police station where we had slept.

In the morning, I told my husband "It is better that we go home", because we did not have even blankets. I wanted to go back and find out whether they had left behind anything, so that we could cover our children and ourselves. When I went back, I found people in our house destroying things. They asked what I had to get from the house. They said that the things were theirs, and that we had been pretending that they were our things. They said "Kibaki has been giving you things but you now see that these are our things." I begged them to help me by allowing me to carry even a few of my clothes. I told them that I wanted to take with me at least a *sufuria* to go and cook some food. One of them allowed me to take a few clothes. I left the rest of the items with them. On my way back, I came across a group of people. This group was not very forgiving. They started beating me up. I fell down. One hit me with a stone on my back. They took everything I had taken from my house and started beating me up. I left the scene and went to the police station. There was no doctor there. The people who were patients at St. Mary's Mumias Hospital were not there. I was in pain for two weeks. I did not have hope until the day I left to go to Nakuru Show Ground.

At Nakuru Show Ground, I was given some medicine for a few days but they were not successful in healing me. One day, my sister told me that they were in Mulanda. She told me that I should go there and see if things were going to be better for me. There were white people there who were treating people. So, I decided to go there. I left my husband at Nakuru Show Ground. From the showground, my husband tried to go back home, in Kikuyu land. Back in Kikuyu land, our brothers had joined the *Mungiki* group. Failure to join the group would have meant my husband being killed by the group so, he followed me to Mulanda. I continued getting treatment from the hospital in Mulanda until the day we came to Kiryadongo. I was taken to Hoima, where I was admitted for a month. After that, I was taken to another hospital called "Mulago", which is a national hospital in Uganda. I have been getting treatment from there for the years I have been here.

I would like to say that I have not received any effective treatment. I am still not doing well. I am still not healed yet. The doctors said that I have problems with my bones, that there are bones which are dislocated. They said that I need to go to theatre. So, they only give me medicine. They told me that I should never bend, and that I should not carry anything. I have been given bed rest. They said that this operation is going to be risky, if it is done at Mulago because they do not have a doctor who specialises in bones. They advised "It would be better if you had gone back to Nairobi, but now you are in Uganda. Going back home is hard."

So, I have just been staying like that, and just taking medicine. They have been trying to do physiotherapy. The doctor has already said that physiotherapy cannot heal my bones, I need to undergo an operation. I have two children. My last born is seven-and-a-half years. This situation has made it impossible for me to have another child. The doctor has also said that it would be riskier for me to have a pregnancy. My children are still small. The small one always asks "Why did you agree to vote for Kibaki? Until when are we going to suffer? Mum, you should not have voted for Kibaki." He even wonders why we cannot "buy" another child. I am so hurt because I do not want to stay with two children. I would like to have another baby. All this is happening because of an election yet I have not benefitted in any way. I voted just like any other Kenyan.

I do not have much to say but only to ask if there is a way you can help me, in terms of treatment. I will be happier. Last week, I saw a doctor who referred me to Mulago but I still do not have transport to go to Mulago to get medicine. So, I would like to plead with you, if you can help me, so that I get treatment.

Secondly, I would like to speak on behalf of my children. My young child keeps saying that I am suffering because of voting. It seems that children are confused in a way. As much as I cannot explain why voting makes him not to get a brother or sister, I understand that he is suffering. He says "You voted. We do not eat. We do not sleep." I do not know what you are going to do as a Commission, so that we can help these children. Children aged three years and above were there when these things happened. What can we do to heal them? How can we heal their bodies and souls?

- 319 In December 2012, the President assented to the Prevention, Protection and Assistance to Internally Displaced and Affected Communities Act (Act No. 56 of 2012). The Act makes provisions for state assistance to IDPs. The Act incorporates into Kenyan law the provisions of the UN IDP Guiding Principles and those of the ICGLR Protocol on IDPS. It establishes a National Coordination Committee on Internally Displaced Persons which shall be the 'official impartial and humanitarian fund body liaising between the Government Departments, the United Nations, non State actors, the Secretariat of the International Conference of the Great Lakes Region, and where appropriate the African Union'. As at the time of submission of this Report, the Act had entered into force.

Women and Peacemaking

320. Although women are disproportionately affected by conflicts, and are always cast as victims, they can and often play an important role in efforts aimed at cessation of conflicts and reconstruction of affected societies. During the First World War, for example, around 1 200 women from warring and neutral countries came together to protest the conflict.³⁴² Across the world, women have always drawn upon their moral authority as mothers, wives and daughters to call for an end to conflict.³⁴³ For the larger part, however, women's participation in peacemaking has been limited to informal processes such as protests. Formal peace processes has often excluded women.
321. As such, the role of women in peace processes has lately received specific attention at the international and regional levels. In October 2000, the UN Security Council adopted Resolution 1325 on Women, Peace and Security,³⁴⁴ which called for enhanced inclusion by member states of women in peacemaking and generally in processes that entail the prevention, management and resolution of conflicts. Since the adoption of Resolution 1325, the world has witnessed relative increase of women's participation in conflict mediations and other peace processes.³⁴⁵ A number of countries, such as Liberia, have in place a national action plan for the implementation of Resolution 1325.³⁴⁶
322. At the African regional level, the African Women's Protocol provides for women's right to peace. In particular, article 10 of the Protocol provides that:
1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.
 2. States Parties shall take all appropriate measures to ensure the increased participation of women:
 - a) in programmes of education for peace and a culture of peace;
 - b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;

³⁴² United Nations *Women, peace and security: Study submitted by the Secretary General pursuant to Security Council resolution 1325(2000)* (2002) 53.

³⁴³ As above.

³⁴⁴ S/Res/1325 (2000). Adopted by the Security Council at its 4213th meeting, on 31 October 2000.

³⁴⁵ C Bell & C O'Rourke 'Peace agreements or pieces of paper? The impact of UNSC Resolution 1325 on peace processes and their agreements' (2010) 59 *International Comparative Law Quarterly* 941.

³⁴⁶ R Ceasar et al 'Implementing Resolution 1325 in Liberia: Reflections on women's associations' (2010).

- c) in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women,
 - d) in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women,
 - e) in all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation
- 3 States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular

323 Similarly, in the AU Solemn Declaration on Gender Equality in Africa (2004), African states agreed to 'ensure the full and effective participation and representation of women in peace process including the prevention, resolution, management of conflicts and post-conflict reconstruction in Africa as stipulated in UN Resolution 1325 (2000) and to also appoint women as Special Envoys and Special Representatives of the African Union'

324 In Kenya, women have traditionally played an important role in both formal and informal peace processes. Their role in this regard is well documented in a study commissioned by the United Nations Development Programme and published in 2000.³⁴⁷ The study chronicled the efforts of individual women to bring peace in their communities. Among the women whose work is profiled in the study are Dekha Ibrahim (who was, until her death in July 2011, a pillar of peace in Wajir and the larger North Eastern region), Tecla Namachanja (vice-chairperson of the present Commission), and Rose Barmasai (who was, until her death in October 1999, a 'Northern Rift Valley pillar of peace'). Dekha Ibrahim and Rose Barmasai met their death in similar circumstances. Dekha Ibrahim died after sustaining injuries in a road accident as she was travelling to Garissa for a peace conference. Rose Barmasai similarly died in a road accident immediately after participating in a peace-building activity.

325 Most recently, women were involved at three distinct levels in the KNDR process during which the agreement to establish this Commission – TJRC Agreement – was negotiated and agreed upon. Firstly, the mediation panel was composed of three eminent African personalities, one of whom was Graça Machel, former

³⁴⁷ M Juma *Unveiling women as pillars of peace: Peace building in communities fractured by conflict in Kenya* (2000)

Mozambican Minister and First Lady. She was instrumental in ensuring that women's issues were taken into account during the negotiations. According to an analyst, 'her level of seniority and long history around women's issues meant that she possessed the skills necessary to identify specific issues of importance'.³⁴⁸ More importantly, it is asserted that 'her seniority and stature meant that she was able to push these issues and speak out in a way that few other women would be able to'.³⁴⁹

326. Secondly, women were involved in the actual negotiations of the KNDR Agreements. Each party to the negotiation nominated one woman representative to be part of their respective negotiation teams. Martha Karua represented the Party of National Unity (PNU) while Sally Kosgey represented the Orange Democratic Movement (ODM). However, these two female representatives did not necessarily advance women's issues during the negotiations. Although they were strong negotiators, they had not been specifically tasked to focus on women's issues. Indeed, their hard line positions on certain issues sometimes brought the negotiations to a deadlock.³⁵⁰
327. Thirdly, women activists from diverse CSOs lobbied and advocated for the inclusion of women's issues in the KNDR Agreements. On 24 January 2008, a Women's Consultative Meeting on the Kenyan Crisis was held in Nairobi. The outcome of this meeting was a memorandum which was later submitted to the mediation panel on 25 January 2008 by a committee of 12 women representing the various CSOs. The memorandum, titled 'Women's Memorandum to the Mediation Team', outlined the gender dimensions of the 2007/2008 PEV and made specific recommendations intended to respond to and redress the situation of women and girls. As such, it is acknowledged that the participation of women activists and their respective organisations was 'critically important in shaping Agenda Four' of the KNDR process.³⁵¹
328. In its hearings across the country, the Commission met scores of women who were involved in peace processes both within and outside their communities in diverse ways. Their stories were always inspiring. Despite their dire situation, women narrated stories of everyday heroism and optimism. Many of the women who attended the Commission's hearings are members of local self-help groups that draw membership from different ethnic backgrounds and political affiliations. They come together to seek solutions to common problems. The stories the Commission heard are stories of a people who are willing to chart the way forward despite their ethnic differences and the injustices that they have suffered in the past.

348 M. McGhie & E. Wamai *Beyond the numbers: Women's participation in the Kenya National Dialogue and Reconciliation* (2011) 17.

349 As above.

350 McGhie & Wamai (n 349 above) 18.

351 McGhie & Wamai (n 349 above) 17.

- 329 During its Thematic Hearing on Women's Rights, Rukia Subow, gave an account of peace processes around the country. She spoke about traditional and symbolic ways of fostering peace.

I have experienced women coming together, cooking together and eating together. I have seen a war stopped in northern Kenya between a tribe in Ethiopia called Irje and Pokots. The women sat together and decided that those breastfeeding women will exchange their children and breastfeed the child of the other tribe. The men were surprised. Traditionally, if you breastfed a child, that child belongs to you and you cannot do anything.³⁵²

- 330 She also gave accounts of how women pioneered the reintegration of those who had been forcefully evicted from their communities.

I know of a woman in Kapsabet whose house was burnt because she is Kikuyu married to a Kalenjin. She lost everything and she had never gone back to her home for many years. She had lived there for over 50 years. She is assimilated and she looks like Kalenjin so her house was burnt. Later, other women surrounding that community saved this woman in their homes and after a few months, they built a better house for the woman. The men came together with the women and they built a house for her and that is a good gesture from the other communities. I know of women in a place called Kipkelion where there was a big camp of IDPs comprising of Kalenjin, Kisii and Kikuyu. That is the first camp in Kenya to disperse because they sat together as the three communities and asked themselves what they had done. They came to realise that they were wrong to kill their neighbours who they have lived with for 20 or 30 years. Those same communities built houses for themselves. They were given money by donors to build homes and all the three communities built the houses together. So the Kipkelion Camp dispersed six months after the post-election violence. That is what we really needed in other camps but that never happened.³⁵³

- 331 The Commission also heard personal accounts of women who had been accepted back into their communities through the action of their fellow women. Prior to the PEV, Teresia Wambui ran a hotel in Busia, where she had resided since 1992. At the height of the PEV, both her house and hotel were looted and burnt down. The goats she owned were brutally slaughtered and the meat shared among the attackers. She fled across the border to Uganda for safety. When she returned to Busia after the cessation of the violence, she was embraced back by women with whom she had lived for close to two decades.

I came back home, they brought me food and many things to eat and we prayed. I could see that they would not have loved such a thing. I saw that they cried with me and said that they had been asking, 'Where were you?' So I realised women are people of peace and they can bring peace. That is why I was saying that because I did not see one single man come to me to talk to me or to my husband or even to talk to my children but women came and they brought us food and prayers. They continued many times until the fear went away and then we started mingling.³⁵⁴

352 TJRC/Hansard/Thematic Hearing on Women/Nairobi/8 February 2012/p. 12

353 TJRC/Hansard/Thematic Hearing on Women/Nairobi/8 February 2012/p. 12

354 TJRC/Hansard/Women's Hearing/Busia/4 July 2011/p. 25

- 332 In Naivasha, the Commission heard the inspiring story of Tawakal Women Support Centre. During the PEV, the Centre took into its care children from diverse ethnic groups and offered them support until they could be reunited with their parents. The Centre remains a home for many victims of the PEV.

We have a group called Tawakal Women Support Centre here in Naivasha and we have 50 children from every tribe here in Naivasha. We have the Luo, Kamba, Somali and Borana. Every tribe is represented in our group, most of whom were victims of the post-election violence. We are not rich but we do the table banking and issue small loans so that we can help these children. At the moment, seven children are in secondary school and the others are still in primary school. We are trying our level best to give them lunch. Every child lives with the grandmother because they are orphans who do not have parents. Out of our good hearts, we are assisting them. During the post-election violence, we took two Luo children who had gone astray and we have integrated them in our group. We have given them food and shelter. We lived with them for four months until we got their families who had gone to Kisumu. We stayed with the children and bought them clothes and took them to hospital until we found their parents after four months. We are many women from different tribes in our group and every day we preach peace and security because we have been together for nine years.

- 333 In the Mt Elgon region, women were involved in searching for and burying bodies of people who had been killed by members of SLDF. Milcah Kemei, who was involved in the exercise, narrated her fulfilling yet traumatic experience.

There was a time Commissioner Namachanja visited the area. We came. We were involved in bringing peace between the Soy and Ndorobo communities. What we went through was difficult. We were chased away, together with Commissioner Namachanja, by the Ndorobo. What I saw was terrible. I was amongst the people who should have died then. So, I decided that since I had survived, I should participate in efforts to bring peace. After Tecla left, we formed a group of people to exhume bodies and identify their families. I was the chair of the body exhuming group. There were bodies whose families we could not identify. We managed to identify some bodies based on their faces and teeth. There was a man who was involved. It was the women who were exhuming the bodies. We would ask some members of the *Janjaweed* and others "Where did you bury him?" They would then show us a pit latrine. They would tell us that the other one was in such and such a hole. We called the media. We used one person who looked mentally disturbed to exhume the bodies for us. We then collected the bones, put them into sacks, and took them to the police. We exhumed about 17 bodies. During this exercise, I found the body of one student of Bungoma High School, who was in Form Three, and I suffered a stroke on one side of my body. I said "We, women, are heavily affected on behalf of our children." Our children were the ones who were used to slaughter other people and go to the forest. It was our children who were slaughtered. It was us who buried the bodies. In the Sabaot community, a woman is not supposed to dig a grave or bury the dead, but this time round, women did the job because we could not leave the bodies unburied. Otherwise, they would

have been eaten by dogs and foxes. So, we took it upon ourselves to bury the dead. When one of us saw someone who had been slaughtered, she would call two or three women. We would dig a shallow grave, wrap the body in a blanket, drag it into the grave and cover it with soil.³⁵⁵

- 334 Commissioner Tecla Namachanja who participated in the exercise recalls her experience too

Around 2008 when the conflict was continuing I could not sit in my comfort zone in Nairobi. I travelled and came to this area. I went to a small church at Toyandet. I came to create awareness about trauma healing. What we experienced was very traumatic and we wanted to heal. I had prepared my flip charts. Day One, I was going to teach this. Day Two, I was going to teach this. But when I arrived, for three days we cried together as women. I could not teach. Then I realised that the route between the Soy Community and the Ndorobo Community was closed. Nobody was travelling there. I encouraged my fellow women. I told them we were going to Chebyuk. Nobody was going to touch us since we, as women, do not own land. If we are fighting over land nobody was going to touch us. We went there. The road was very bushy. You could not pass. We reached there with a group of Soy women. Again, for three days and nights, we cried with women from the Ndorobo Community. They told me that the bodies of some of their loved ones were in pit latrines and boreholes. I encouraged them and told them that most of our youths by then were still in cells. I told them if we spearhead the youth to go and identify these bodies, they will be reprimanded. But for us women, nobody will touch us. I formed a committee of the Soy women and representatives of the Ndorobo Community. The exhumation of the bodies was spearheaded by these women.³⁵⁶

- 335 But it is not always the case that women support peace initiatives. On the contrary, women may be involved in planning and executing violence. They may also be silent endorsers of the conflict. As a female witness observed in Kitale

When our elders planned to go and kill somebody and burn people's houses, where do they plan all that? They plan in our houses and we are the ones who cook food for them and the man comes out of that house and goes to participate in clashes. Why are we, as women, not convincing our men to stop the conflicts and killings so that we can live in peace? It seems that as women, we support our men.³⁵⁷

- 336 During the Mt. Elgon conflict, some women were involved in performing chores for members for SLDF. For instance a woman told the Commission that her role included cooking for SLDF members

355 TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 29-30

356 TJRC/Hansard/Women's Hearing/Women's Hearing/Kapsokwony/24 May 2011/p. 34

357 TJRC/Hansard/Women's Hearing/Kitale/22 October 2011/p. 13

Women and State Repression

337. This report has demonstrated elsewhere that during the Commission's mandate period, the state invariably responded to dissent, opposition or security threat through repressive and authoritarian means. Amongst the means resorted to by the state to achieve its aims include unlawful killings (extra-judicial killings, political assassinations, and massacres), and unlawful detention, torture and ill-treatment. It has also been shown that men were the predominant victims of these repressive tactics. While this is the case, women were both primary and secondary victims of these violations and generally of state repression.
338. As primary victims, 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. In February 1976, for instance, Philomena Chelagat Mutai, one of the pioneer female members of parliament and part of the famous 'six bearded sisters',³⁵⁸ was arrested and arraigned in court on a politically motivated charge of inciting some of her constituents to destroy property on a private farm in her home district Uasin Gishu. This charge came after she made a series of vocal pronouncements in parliament regarding several issues including the violation of the provisions of the National Assembly (Powers and Privileges) Act, and the murder Josiah Mwangi Kariuki (popularly remembered as JM Kariuki). Despite the fact that the charge had been brought under a provision of the Penal Code that applied during an emergency period, she was convicted and sentenced to two and a half years imprisonment. She therefore lost her parliamentary seat.
339. After serving the prison term, Chelagat Mutai was re-elected to parliament but she was soon arraigned in court again, with other opposition members of parliament, on politically motivated charge of making false mileage claims to the Clerk of the National Assembly. She was released on bail whereupon she escaped to exile in Tanzania where she was granted political asylum.
340. Another pioneer female member of parliament, Phoebe Asiyo, was subjected inhuman and ill-treatment by state officials for being suspected of having association with the *Mwakenya* movement. One night, she was arrested by police officers from her house and taken to the office of the Provincial Commissioner where she

³⁵⁸ The term 'seven bearded sisters' referred to a group of politicians whose fiery debates in parliament kept the government on its toes. The six were: Onyango Midika (MP, Nyando Constituency), Koigi Wamwere (MP, Nakuru North), James Orengo (MP, Ugenya), George Anyona (MP, Kitutu East), Chibule wa Tsuma (MP, Kaloleni) and Mashengu wa Mwachofi (MP, Wundanyi).

was humiliated and mistreated by the Provincial Commissioner. Speaking to the Commission in Kisumu, she recalled that ill-fated night:

One day at 3:00 a.m. in the morning in my house, the police came to my home. I was the member of parliament for Karachuonyo. They told me to get out. They were brought to Kisumu. I was in my pajamas and house coat. They said "Come to the sitting room, we want to talk." They chose a day when my husband was not home. I was taken to the PC's office. The PC was drunk even at that time of the night. He could hardly raise his head but when he did he asked me "Are you the woman who wants to get rid of the government of Kenya?" I did not respond because I was not a *Mwakenya*. I did not know about the activities of *Mwakenya* and God knows this is the truth. I had a very hard time. I could not come out of the PC's office because I was naked, I did not have clothes. There were no mobile phones those days. I did not have my car and my driver was not there. So I was forced to walk on my slippers to Jubilee Market. The humiliation and indignation was too much. I know that whatever these people who have died went through must have been terrible. I was only there for one night and it was bad. I was so dehumanised and did not even want to look up to my people as their member of parliament.³⁵⁹

- 341 As part of its crackdown on *Mwakenya* movement, state security and intelligence officers (mainly from the Directorate of Intelligence/Special Branch) routinely subjected relatives of suspected members of *Mwakenya* to unthinkable atrocities. Kangethe Muigai, a victim of torture, recollected how his mother was beaten up by Special Branch officials:

Honourable Commissioners, as this was happening, there was a repression that was taking place and it was completely unknown to us, the harassment of our families back home. I was made to understand later when we came out of prison that my home in Kabete - this was narrated to me by my mother - her home was converted to something worse than a grave. Nobody would ever dare enter that home. This was because the police were looking for my three other brothers, luckily one of the brothers got a scholarship and went to another country. But the other two were around either in Kenya or Tanzania. The police wanted to arrest them and in the process they were harassing our parents and relatives. My mother narrated to me how the police came to her and told her to produce her sons. They did not mention Kangethe, but they said "*Tuko na Kangethe*." They wanted the other two. They started beating her up. She told me that before, she had never been slapped by a strong able bodied man with full force. I asked her how many slaps she suffered, she told me that she could not remember, but they were from six upwards. So they beat her in front of her daughter. There was one of our sisters who was left at home and they were beating our mother while she was watching. Finally when she could not produce her sons, she was arrested and taken to Muthaiga Police Station and locked there. Honourable Commissioners, being beaten and taken to a cell was the worst form of torture for a lady of 77 years.³⁶⁰

359 TJRC/Hansard/Public Hearing/Kisumu/14 July 2011 p. 27-28

360 TJRC/Hansard/Thematic Hearing on Torture/Nairobi/28 February 2012/p. 8

- 342 Similarly, Veronica Wambui Nduthu was tortured and detained together with the husband primarily because their son, who was later killed most probably by state agents, was suspected to be a member of Mwakenya

The police were consistently at our home at night or even at around 2.00 a.m. They would even come and check under the bed and keep asking where he was. We were harassed and even our neighbours did not want us because they had been told that we were bad people. We were left as loners and we continued staying like that [] They arrested us and took us to Kericho with my husband. We spent the night in the cells and in the morning they took my husband to court. At that time the former President Moi had a meeting in Nakuru. We were released and transported back home. We thought they were taking us to President Moi and started wondering if they were going to kill us. By then my children were left crying. In Nakuru, we were detained again at the Central Police Station where we spent the night. In the morning they called us and started interrogating us with a lot of harassment, torture and beating. They kept asking us "Why did you give birth to this son? What kind of a son is this?" We told them it was okay because it is God who blessed us with the son. They locked us in for about two weeks. They went for his brothers and his friend. There was a lot of torture and they were not feeding us. They kept telling us that we were going to produce our son.³⁶¹

- 343 Many other women relatives of Mwakenya suspects would be detained and tortured during those repressive years.³⁶² Another disturbing story was narrated by Wilson Awuor Ang'onga whose wife was pregnant at the time when he was detained and tortured by Special Branch officers. One evening they abducted Ang'onga's wife and took her to a freshly covered grave where they showed her the clothes of the husband, in effect making her believe he was dead. This traumatic experience would contribute to the miscarriage that she later suffered and the strained relationship she had with the husband when he was released from detention:

What was very unfortunate was that during the time I was in jail my wife was at home. She was pregnant. Special Branch officers in Kisumu used to come for her during the night drive her to unknown destination and later bring her back to the house and tell her not to inform my parents. That happened for about five times. On the fifth day, she was taken to some places in Western Kenya, where man-made graves were. One of them had my clothes, which I had when I was jailed. One of the officers asked where her husband was, if she knew those clothes. When I went back home, I found that some rituals had already been performed because she had reported that I was dead. The family did not know that I was released. It was a problem. When I went home, I decided to stay in my mother's house for two days. I did not go to my house. My mum was very welcoming but my wife was very negative. To her, it was like she was seeing a ghost. So, my mother talked to me at length and explained all that had happened. She told me that she would take me to some herbalist for cleansing before I rejoin the family. I accepted because I was not a difficult

361 TJRC/Hansard/Thematic Hearing on Torture/Na rob/28 February 2012 p. 33

362 See e.g. TJRC/Hansard/In-Camera Hearing/7 March 2012/p. 24

person. We went to a certain herbalist, who gave us some medicine for use in my house. I did that under the instructions of my mother.³⁶³

344 The wife would pass away not long after Ang'onga was released from prison

Due to the long time of isolation, I was a very quiet man with my wife. This disturbed my wife and later on she miscarried. I told her to accept the situation and we buried the baby. So, my wife developed a sickness. As I had left the prison alone, I never wanted to discuss things about prisons. People feared me in the community. Most of the time, I was just in our home. My wife used to cry from time to time because she realised that life was going to be very difficult since I did not have any employment. I kept reassuring her that life would be normal but it did not work. On 15th February, 1996 my wife passed on.³⁶⁴

345 Many more women were killed, tortured, raped and subjected to a variety gross violation of human rights during what the state commonly referred to as security operations. However, the vast majority of women were 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. For instance, Mercy Njoki Kariuki's husband was arrested and later convicted of being a member of *Mwakenya*. Not long after his conviction, he died in custody. She described to the Commission the difficult life she had to endure following the death of her husband.

I have suffered a lot. This is because I was not in employment and so I was dependent on my husband. I was left with the children when they were very young. I was not able to educate them well. I took one to school, but I could not sustain that for lack of funds. I also have medical problems.³⁶⁵

346 The husband of Joan Kabaselleh was equally arrested, tortured and later imprisoned for being a *Mwakenya* member. The torture and imprisonment of her husband psychologically affected her for decades. During her husband's incarceration she not only experienced societal stigma but she was faced with the economic burden of educating her children using her meagre salary.

As a civil servant getting less than Ksh 10,000 a month that is what took us through and paid school fees for our children including paying rent. This was not easy. My father decided to take one of the boys to go to the rural area so that we had few of them with us. So, we remained like that toiling and sometimes later, we could have few friends.

363 TJRC/Hansard/Thematic Hearing on Torture/Nairobi/7 March 2012/22-23

364 TJRC/Hansard/Thematic Hearing on Torture/Nairobi/7 March 2012/p. 23

365 TJRC/Hansard/Public Hearing/Nairobi/20 February 2012/p. 4

coming in to see us and a few relatives. People feared that if they were connected with people arrested in connection with *Mwakenya*, it was easy for them to also be arrested.³⁶⁶

347. More testimonies and discussion on how women experienced and were affected by state repression are contained in Volume II of this report. But women were not just victims of state repression; some of them were active agents of the repressive regime. Many male victims of detention and torture indicated that those who tortured them included women. In most cases, they would be required to strip naked before the presence of the female Special Branch officials.³⁶⁷

Conclusion

348. Kenyan women have suffered unspeakable and terrible atrocities, and in the majority of cases, it has been for no other reason than that they are of the female gender. This Chapter 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.

349. As at now, the vast majority of women feel abandoned by the state. In its hearings, many women indicated that the Commission was the first public entity to lend an ear to their cries. Some were under the impression that the Commission would immediately redress their situation. The testimony of a woman who spoke to the Commission in Narok is reflective of the general cries of women across the entire land:

Truly speaking, since that day to date, there is nobody who has come to find out how we are doing. Nobody has given us even a single tin of maize. We heard that people were being given blankets. Nobody has ever come to give us blankets or even a cup for drinking water. We have just stayed like that. We have just been praying to God.³⁶⁸

350. Although in recent years many reforms have taken place to ensure women's empowerment, much more still need to be done for these reforms to make substantive and real contribution in their 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.

³⁶⁶ TJRC/Hansard/Thematic Hearing on Torture/Nairobi/7 March 2012/p. 14.

³⁶⁷ See e.g. TJRC/Hansard/In-Camera Hearing/7 March 2012/p. 21.

³⁶⁸ TJRC/Hansard/Women's Hearing/Narok/30 September 2011/p. 17.

Appendix 1

Women's Memorandum to the Mediation Team

Your Excellency Kofi Annan

Your Excellency Graça Machel

Your Excellency Benjamin Mkapa

We thank Your Excellencies for the opportunity to address this forum. We make this presentation on behalf of Kenyan women who have been meeting in Nairobi over the last two weeks. Action Aid International, Vital Voices, UNIFEM, Nairobi Peace Initiative and Urgent Action Fund-Africa have facilitated the consultations. A committee of 11 women present here, represents the larger group.

Kenyan women assert their rights as citizens of this country to participate in all political processes and initiatives that seek to find solutions to the crisis that currently that our beloved motherland faces. We are mindful of our special responsibilities in all the spheres of nation building including truth & justice seeking, peace building and reconciliation. We embrace all our diversities as we collectively seek solutions. We acknowledge that in the resolution of the current conflict, there has to be 'give and take' from both sides of the political divide. We assert that as citizens we must take responsibility for resolving and transforming the conflict and the inclusion and participation of civic groups, including women's groups at the community level is critical to the success of efforts to resolve the conflict.

The important role of women's participation in the prevention and resolution of conflicts is reaffirmed in The Constitutive Act of the African Union, The AU's Solemn Declaration on Gender Equality, The Protocol to the African Charter on the Rights of women in Africa, The African Charter on the Rights and Welfare of the Child, and by United Nations Security Council Resolution 1325. The resolution stresses the importance of women's equal participation and involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention.

The UN Resolution 1325 further calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia

- a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post conflict reconstruction
- b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace process
- c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary,

All these instruments recognise the centrality of women to the development of democracy and democratic institutions and the importance of their participation at every level, and in every process. Women are central actors and 'right holders' in any process that addresses sustainable development, security and human rights. During this crisis, Kenyan women have been at the forefront in community peace building and mediation efforts in the North Rift and other areas.

Is there a conflict? What are The Facts?

A political crisis has engulfed the country following the announcement of presidential results on December 30, 2007. There are allegations of a flawed tallying process by the electoral commission, hence the dispute as to who the actual winner of the presidential vote was. As a consequence, violent conflict broke out in many parts of Kenya from December 30, 2008 and continues to this day. This conflict is expressed in the following ways:

- 1 Spontaneous and organised demonstrations against the ECK and the government
- 2 Killings that have so far claimed the lives of over 700 Kenyans. These killings are by a) extra judicial executions by the police of targeted communities and demonstrators b) Militia executions, torture and mutilations of civilians targeted at particular ethnic communities (these include forced circumcisions & castrations) and c) by ordinary citizens
- 3 Criminal conduct by citizens looting, burning and destruction of private and public property
- 4 Increased sexual violence against women and children
- 5 Suspension of constitutional freedoms including the freedom of conscience, assembly and worship
- 6 Violation on the rights of the media and right to information by a ban on media broadcasting of live events
- 7 Ethnic and politically instigated evictions of populations of certain communities from their properties resulting in large numbers of internally displaced Kenyans (approximately 260,000)
- 8 Ethnically instigated employment displacement of workers in certain regions (tea pickers in Kericho) and eviction rental properties

This situation has resulted in

- A breakdown in the rule of law and a lack of confidence in institutions of law and order. Breakdown of social relationships and trust among Kenyan Communities and an exacerbation of existing ethnic tensions
- Human insecurity (including food insecurity)
- Continued systematic and widespread violation of human rights and a lack of respect for the sanctity of life
- Proliferation of propaganda by all parties including the state and an increase in hate media on all media (FM stations -in particular vernacular FM stations, print, electronic and new media -text messaging, email, internet) that demonises particular communities

What are the gender dimensions of the conflict?

Institutionalised discrimination against women even before the current violence broke out has informed the expression of gender-based violence. Discriminatory laws sanction marginalisation and exclusion of women. Despite a 2006 presidential decree for a 30% inclusion of women in public institutions, there is no constitutional provision or law providing for affirmative action.

Rapes and sexual violence on women and children has reportedly increased. Statistics from the Nairobi Women's Hospital show a steep increase in admission and treatment for rape. Majority of the new cases since January 1, 2008 are of victims of gang rapes. Increased exposure to HIV/AIDS and sexually transmitted diseases.

High levels of poverty and landlessness affect women disproportionately.

Humanitarian Relief Aid

The majority of displaced are women and children. Humanitarian Relief kits often fail to take account of the needs of women and children. There exists a gap in the provision of Sanitary towels, infant mix and Mosquito nets. Sanitation and hygiene needs of women in the camps require attention.

Security in the camps and troubled areas is insufficient. Threats of gender specific attacks against women are high.

People living with HIV/Aids have had their treatment interrupted, Provision of Health services has been compromised. Access to PEP's and immediate medical care for rape victims' non-existent. The closure of certain areas by security personnel has locked in populations from accessing health facilities.

Recommendations on the resolving the Crisis

Immediate

A political solution backed by force of law that assures the following

- An immediate end to the killings
- A public acknowledgement by both parties that the current crisis was triggered by electoral malpractices in the tallying process that culminated with the announcement of results of the presidential election of December 2007
- An acknowledgement that Kenyans are entitled to know the truth and to seek justice over the issue having participated in the electoral process. The problem (and solution to it) is beyond the two political protagonists. Women as a group constitute 52% of Kenya's population and the majority of voters and those most affected by the current crisis.
- An independent investigation into the trigger event to establish the truth of what happened. The outcome of which should be tailored to establishing a political solution to the current impasse and restoring public confidence in Kenya's institutions of democracy. Any agreement should be backed by force of law and ensure women's participation as key actors.
- Immediate reinstatement of constitutional freedoms – the right to assemble, right to worship, right of media to broadcast live events. Citizens have a right to assert their constitutional rights without hindrance.
- Cessation of violence against civilians by the police, militia and others.
- Immediate cessation of hate propaganda currently on all media (by Legislation or administrative action).
- Resettlement should take account of the special needs of women and children displaced by the violence. State should provide security for the civilian population.
- End to impunity for violations of human rights (by all parties) by investigating crimes that are being committed and prosecuting perpetrators.
- Strengthening of institutions that support democratic constitutional governance (The Electoral Commission, the Judiciary, the Anti Corruption agencies and parliament). This can be done through immediate legislative reform pending comprehensive constitutional reform.

Medium and long term –Nation Building

Women acknowledge that they must embark on a process of Nation building for sustainable peace to be achieved. Important mid-term solutions include the following. The times call for Women of Kenya call for transformative leadership at this time that brings values and ethics to the management of public affairs.

- A minimum constitutional settlement and reform that would ensure an urgent reform of institutions that support a constitutional democracy grounded on sound legal framework followed by,
- Comprehensive Constitutional Reform that would ensure equitable distribution of national resources, gender equality, affirmative action, equal rights for minorities and persons with disabilities including rights political participation
- Transitional Justice mechanisms that deal with the question of historical injustices that include gross human rights violations, massacre, assassinations, economic crimes and corruption , ethnic and political clashes establishment a historical record, confronting and gaining truth about past injustices creating accountability for human rights violations and ultimately reconciling Kenyan communities
- Finalisation and adoption of the Peace and Conflict Prevention Policy
- Peace education for prejudice reduction in primary schools

Recommendations for the Process

- That there should be a mechanism for accountability by the mediation team to Kenyan women on the progress of the mediation. Such mechanism could be spelt out in a public mediation agreement
- That there should be continued engagement with women as key stakeholders in all stages of the mediation
- That a local gender advisor be appointed to provide the necessary expertise to the team of mediators. There is sufficient expertise within the women's movement in Kenya in the fields of gender, children's rights, women's rights, and peace and conflict transformation
- Political parties should have women represented on their teams in keeping with the enabling instruments
- That the mediation continues until such time as peace is restored in Kenya

This statement is presented and signed by the Committee Nominated by the Women's Organisations 25th January 2008

- 1 **Florence Mpaayi** – Nairobi Peace Initiative –Africa
- 2 **Atsango Chesoni** – Member ODM and Consultant, Human Rights
- 3 **Njeri Kabeberi** – Center for Multi Party democracy
- 4 **Mildred Ngesa** – Association of Media Women of Kenya
- 5 **Margaret Shava** – International Alert
- 6 **Catherine Mumma** – Consultant, Human Rights & Governance
- 7 **Kaari Betty Murungi** – Urgent Action Fund-Africa
- 8 **Saida Ali** – Young Women's Leadership Institute
- 9 **Rukia Subow** – Maendeleo ya Wanawake
- 10 **Josephine Ojiambo** – Member of PNU's National Coordinating Committee
- 11 **Margaret Hutchinson** – Education Centre for Women in Democracy

Appendix 2

Women and state repression: The story of mothers who demanded for the release of their detained sons

Excerpt from Wangari Maathai *Unbowed: A memoir* (2007) 216-226.

In Kenya in the early 1990s, outrages and abuses happened wherever you looked, and often simultaneously. Many young men landed in prison for political agitation. In January 1992, as I was still in the hospital recovering from my time in a police cell, Terry Kariuki, the widow of murdered politician J. M. Kariuki, acting as a friend of the mothers of these political prisoners brought the mother of one of the several dozen political prisoners then held by the regime to the hospital to visit me. The mother, Monica Wamwere, told me that she and a few relatives and friends had formed a group called Release Political Prisoners to appeal to the government to release their sons from detention. Some of the prisoners – such as her son, Koigi, Mirugi Kariuki, the brothers Rumba and Robert Kinuthia, Harun Wakaba, and Samuel Kang'ethe Mungai – were well known for their political activism, others were not, but all of them had been detained for advocating for greater democratic space.

The mothers hoped, they said, that I would join them and put pressure on the government to have these men released now that it was no longer a crime to advocate for multipartism. I had not been directly involved with the issue of political prisoners, but the case the mothers were presenting seemed very strong. Since it was no longer a crime for Kenyans to demand a plural political system, there was no reason for the sons to be in prison. I agreed to meet with them as soon as I was released from the hospital.

By late February, I had been out of the hospital for several weeks and had regained my ability to walk, although, my knees would never quite recover. I was still out on bail so ran the risk of being rearrested, but I wanted to help the mothers and didn't want to allow a false charge to stop me from pursuing the truth. I suggested that we meet in my house. To my surprise, many of the relatives and friends were afraid, not merely to meet but even more so, to meet in my house. They were fearful of the system and knew that I myself was a target. I assured the women that my house served as an office; so if the police came we could always say we were members of the Green Belt Movement discussing tree planting and advocacy issues.

Indeed, some of the women were members of the Green Belt Movement, and I knew that the

Release Political Prisoners campaign was an issue Green Belt was concerned about and was part of the movement's mandate to promote democracy and respect for human rights. So a few mothers and other relatives, most of whom were female, came regularly to my house and we discussed our strategy over cups of tea. As I listened to these women, I felt compassion for them. As a mother myself, I wondered what it would be like to have your child thrown into a cell with no sense of when he might be tried or released. I thought of my own sons and brothers: what wouldn't I do for them?

In the course of these meetings I suggested to the women that they meet the attorney general and petition him to free their sons and all the political prisoners. I agreed to accompany them to provide moral support and to serve as a translator. We agreed to meet at Uhuru Park and walk

together to the office of the attorney general. The government always responds to something that is done aloud and publicly." I said to the women, "If you go to the attorney general quietly and appeal to him, you'll be wasting your time. He'll say, yes, yes, yes, but he'll do nothing." I had another strategy: "When we see him, we'll tell him, 'We will wait in Uhuru Park for three days for all the sons to be released. During that time we'll go on a hunger strike and pray.'" I also recommended that we take our bedding with us to the meeting. Then the attorney general would know, I said, that the mothers wouldn't leave Nairobi for their villages without their sons and that we were prepared to sleep in Uhuru Park while they waited.

On Friday, February 28, 1992, about five mothers, their supporters, and I met in Uhuru Park and walked with our bedding to the office of the attorney general. He received us and I served as the translator as the women explained their case. When the meeting ended, we told him that we were going back to Uhuru Park to wait for their sons to be released. The attorney general was taken aback: "Don't go to the park," he said. "Go home. We've received your petition and we'll review the cases and we will take action." But we knew all about the government, how it never really listened or did what it promised. When we left the office, we walked back to the park and camped at the same intersection of Uhuru Highway and Kenyatta Avenue from which we started. There we were joined by others, mostly men, who supported the initiative and wanted to make sure we would be safe spending the night at the park.

Evening arrived, and the sons had not come. We took fifty-two candles, one for each man we knew was in prison, put them in brown bags, and lit them. We almost caused traffic jam at the corner, as people from all over the city slowed their cars to look at the flickering lights in the park. Pedestrians stopped, too, to listen to the women explaining why they were on a hunger strike. By the time night fell, our camp had grown to include more than fifty women, many of whom were mothers and relatives of political prisoners. We built a fire to keep ourselves warm.

Kind gestures came from many ordinary people who supported our cause. One Indian man gave us a huge tent because he was worried that it might rain and several of the mothers, who were between sixty and eighty were frail. Some people donated money, while others brought water, juices, or glucose to keep the mothers healthy since they were not eating. Still others joined us as we sang freedom songs and hymns to keep our spirits up.

The mothers had many supporters whom came to meet over the course of what became a long campaign. One of them was Dr. Ngorongo Makanga (also known by his Christian name, John), a member of the pro-democracy movement who ran a pharmacy at the Hilton Hotel in Nairobi. He and I later cofounded the Green Party in Kenya, of which he became secretary general. Dr. Makanga also joined me and the Green Belt Movement in many other struggles, including over the infamous tribal clashes in the Rift Valley.

The night came and went. Saturday dawned and a second night passed, and still the women had not been reunited with their sons. On Sunday, we decided to hold a church service, which Reverend Njoro and other clergy, dressed in their vestments and carrying Bibles, conducted for us in the park. As people left their own churches after Sunday services, many joined us and the gathering swelled. We decided to erect a sign, so I asked some of friends to prepare a large board and write FREEDOM CORNER on it and bring it to us. We planted it where our encampment was, so the spirit of the corner matched the spirit in which the park had been named. That section of Uhuru Park has been called Freedom Corner ever since.

Over the three days, many people who had been victims of torture came to Freedom Corner and began to tell their stories. "What you do not know," they said, pointing to the Nyayo House, a government building opposite the Nyayo Monument in Uhuru Park and immediately across the

road from Freedom Corner, "is that underneath that house are torture chambers. Men have been maimed there. Some of them have died after what they have gone through."

As the victims related their horrific experiences, others, including grown men in their forties, embrace the freedom of that corner and found courage to speak up. "Let me tell you my story," "I have never spoken about this before. I've been out of prison now for ten years, and this is the first time I have told anyone that I was tortured." Some related that they had been abused, beaten to the point where they would never be able to father children. While we listened to the men, we prayed and sang for comfort and courage.

Laypeople and the clergy bore living witness to what the government had been doing to its citizens behind closed doors. While some of us knew, or at least suspected, that such things were happening, it was nevertheless shocking to hear the details. However, women were hearing this information for the first time, and people barely believe the horrific stories they were being told by fellow citizens.

Throughout Monday, there was still no sign of the sons. By this time, there were several hundred of us at Freedom Corner. Although we had told the attorney general we would wait in the park for three days, we knew we couldn't leave now. The next day, March 3, dawned mild and sunny. During the morning, we saw groups of paramilitary police, batons and guns at the ready, cordoning off the area to prevent anyone else from reaching us.

Around three o'clock that afternoon, the police ordered a member of the Release Political

Prisoners campaign to tell us to disperse. There wasn't enough time to do anything before the police began firing tear gas into the camp and charging at us from behind and in front, beating us with their batons. Chaos! People ran everywhere, including onto the streets surrounding the park. Some of the young men who joined us fought back as the police chased them across the road to Nyayo House and down Kenyatta and Haile Selassie avenues as well as through the park.

As the battle continued throughout the afternoon, tear gas and the sounds of gunshots filled the air. Police reinforcement stormed the tent where I was singing and praying with the mothers when the police arrived in the tent, the fifty or so people inside were initially defiant, not believing the police would attack them. The protestors linked arms, which meant that when police began their assault they could not easily take one without taking many. I saw people rise up in groups as police batons rained down.

In that immediate moment, I recall worrying that the paraffin lamps we lit would be disturbed and the tent would go up in flames. In the next instant, however, I was knocked unconscious. Even in the Melee, good Samaritans rescued me and rushed me to the hospital with two other women who were badly hurt.

The mothers in the tent refused to be intimidated and they did not run. Instead, they did something very brave: several of them stripped, some of them completely naked, and showed the police officers their breasts. (I myself did not strip.) One of the most powerful of African traditions concerns the relationship between a woman and a man who could be her son. Every woman old enough to be your mother is considered like your own mother and expects to be treated with considerable respect. As they bared their breasts, what the other mothers were saying to the policemen in their anger and frustration as they were being beaten was "BY showing you my nakedness, I curse you as I would my son for the way you are abusing me."

By the time I arrived at the hospital I was dehydrated. Fortunately, my doctor, Dan Gikonyo, was at hand at the hospital and as always attended to me promptly. It was important for those of us in the pro-democracy movement to have doctors we could trust, and Dr. Gikonyo was a man I trusted.

whenever I needed medical assistance. When I first came to, I had the strangest feeling, as though I were hanging upside down. One of my friends and Green Belt board member, Lillian Njehu, was with me and I kept telling her I felt like I was falling. Lillian stayed with me throughout my time in the hospital, which was a big sacrifice for her, and made sure I was protected day and night. Such was the spirit of sisterhood.

When I was sufficiently recovered, I called a press conference. I was told that the police claimed I had incited them to beat me unconscious and that I had asked to be given a black eye and a baseball-sized lump on my head. I informed the press that although after what had happened to me I would have to stay away from "dangerous grounds," I wouldn't be silenced or deterred from telling the truth and I wouldn't go away. "The mothers," I emphasized, "had a right to seek the freedom of their sons."

The evening of March 3 the police forcibly removed all the women who were still in the park and took them to their homes. As they were being removed, the women cried, "We will only move from this place when the government brings our sons here!" the authorities ordered the women to end their hunger strike and told them not to return to Nairobi. Freedom Corner was cordoned off and we were unable to get to it again. By the time the police left, all our bedding and personal effects, including blankets, lamps, and the tent, had disappeared with the Nairobi City Council, never to be seen again.

When I think of what happened, I believe that it was the stories of torture that made the government decide that what we were doing was dangerous. Perhaps we had false sense of security. We thought that even this government wouldn't hurt old women – mothers who simply wanted their sons to be released from prisons where they were being held for their political conscience(s). But the regime knew neither mercy nor justice and we were accused of threatening "the security of citizens and the nation." The government had decided that a revolt was brewing and that it could unleash as much venom and violence as it wanted to stop it.

The story of Freedom Corner did not end with my hospitalization or the dispersal of the mothers. We remained unbowed. The day after the police attack, many of the women, on their own, returned to Freedom Corner. Finding the area guarded by hundreds of armed soldiers, the women decided to seek help at nearby All Saints Cathedral in contacting the other mothers and their supporters. All Saints sits directly adjacent to Uhuru Park and is the seat of the Anglican archbishop. During the 1990s, the cathedral's clergy had begun to speak out against the government's oppression and provided space for prayers by and for pro-democracy groups.

The women met with the Reverend Peter Njenga, the Cathedral's provost (and later the bishop of Mt. Kenya South Diocese), who agreed to give the women a temporary sanctuary so they could trace their colleagues. They learned that some of us were in the hospital, and indeed some of them came to the hospital to visit us while others remained at the cathedral. When night came, some of the women were still at the cathedral and had nowhere to go, so Reverend Njenga allowed them to stay in the cathedral's crypt. Reverend Njenga and the mothers expected the vigil to last for a night or two: It lasted a whole year. During this time, the mothers rotated their hunger strike. As one woman became weak from lack of food, another would take over while the first one recovered.

When I was sufficiently healed and could walk properly again, I went straight to All Saints Cathedral to offer the mothers my help. Along with others, I organised supplies and support for the mothers during their yearlong vigil. Beside the mothers, there were male relatives who guarded the doors and acted as protection, because there were many visitors. Throughout their protest, most of the women remained strong despite intimidation and threats, both against them as individuals and their families, as well as police aggression.

I stayed with the women throughout. Unless I went out of the country, I made the cathedral my second home. I wrote and had printed up leaflets telling the stories of these women's sons, and had these leaflets distributed on the streets of Nairobi. I wanted people to know about these men: what they believed in, what had happened to them, their parents, and their families, how they had been declared enemies of the state or revolutionaries trying to overturn the government, and why they should be released.

The women also had their stories. One woman told me that the authorities had come to her home, claiming that her son had hidden guns there. 'There are no guns,' she told them. 'We know your son has hidden guns here,' they yelled back. 'So dig!' They pushed this mother to the ground and forced her to dig the earth with her bare hands until her fingers bled. They found no guns, because there were none! Such stories only made us more resolute.

One night, I was awakened and told that there were people saying they were policemen at the cathedral's door demanding that we open it and let them in. I looked out of the window and saw Nairobi's provincial commissioner and armed men in paramilitary attire, which was a relief since that meant it was the government and not hired thugs or hooligans outside. 'Mothers, the president has heard your cry,' the provincial commissioner called out to us. 'He sympathizes with you. Open the doors and go home, and your sons will follow you.'

Some of the women wanted to open the doors. They still believed their president was honest and they were desperate to see their sons. But others knew that if doors were opened, the police would rush in and arrest them and force them out. In the meantime, we realised there was a very large number of soldiers, perhaps five hundred in number, surrounding the church. We were fortunate that some of the soldiers were religious and refused to breakdown the church doors, even though they had been ordered to do so.

Eventually the provincial commissioner and others at the door gave up, but the soldiers remained on the compound. By morning, the news that the cathedral had been turned into a military barracks, with soldiers surrounding the mothers, was everywhere. The government was forced to discuss the situation with the archbishop of the Anglican Church, Manasses Kuria. It was eventually agreed that the military should leave the compound but the mothers could stay in the crypt. As long as the soldiers remained, we never opened the doors.

Unfortunately, the continuous presence of the mothers in the crypt tended to divide the cathedral's congregation. All Saints, as the seat of the Anglican Church in Kenya, is expected to be pro-establishment. It was the church of the state, especially during the colonial period. Because of this heritage, the clergy's giving support and shelter to the striking mothers of political prisoners shocked some in the congregation who expected their church to support the establishment. They questioned why the cathedral was getting involved in politics, and many failed to see the connection between their faith and the need for all people, including people of faith, to respect human rights. However, Reverend Njenga and the leadership of the Anglican Church upheld this pursuit of justice, good governance, and the rule of law. So the mothers continued their vigil in the crypt.

After the agreement between the archbishop and the government, we were able to leave the crypt and move onto the church grounds during the day. The church became a centre of pilgrimage. Many political figures in the pro-democracy movement, including Mwai Kibaki, Oginga Odinga and his son Raila, Michael Wamalwa, James Orengo, and Paul Muite, came and expressed solidarity with the mothers, while religious leaders from all denominations came and prayed with them. Soon the gathering at the cathedral turned into a national sit-in demonstration, a forum for everyone, including the press, to hear how people had suffered under the general mis-governance of the country.

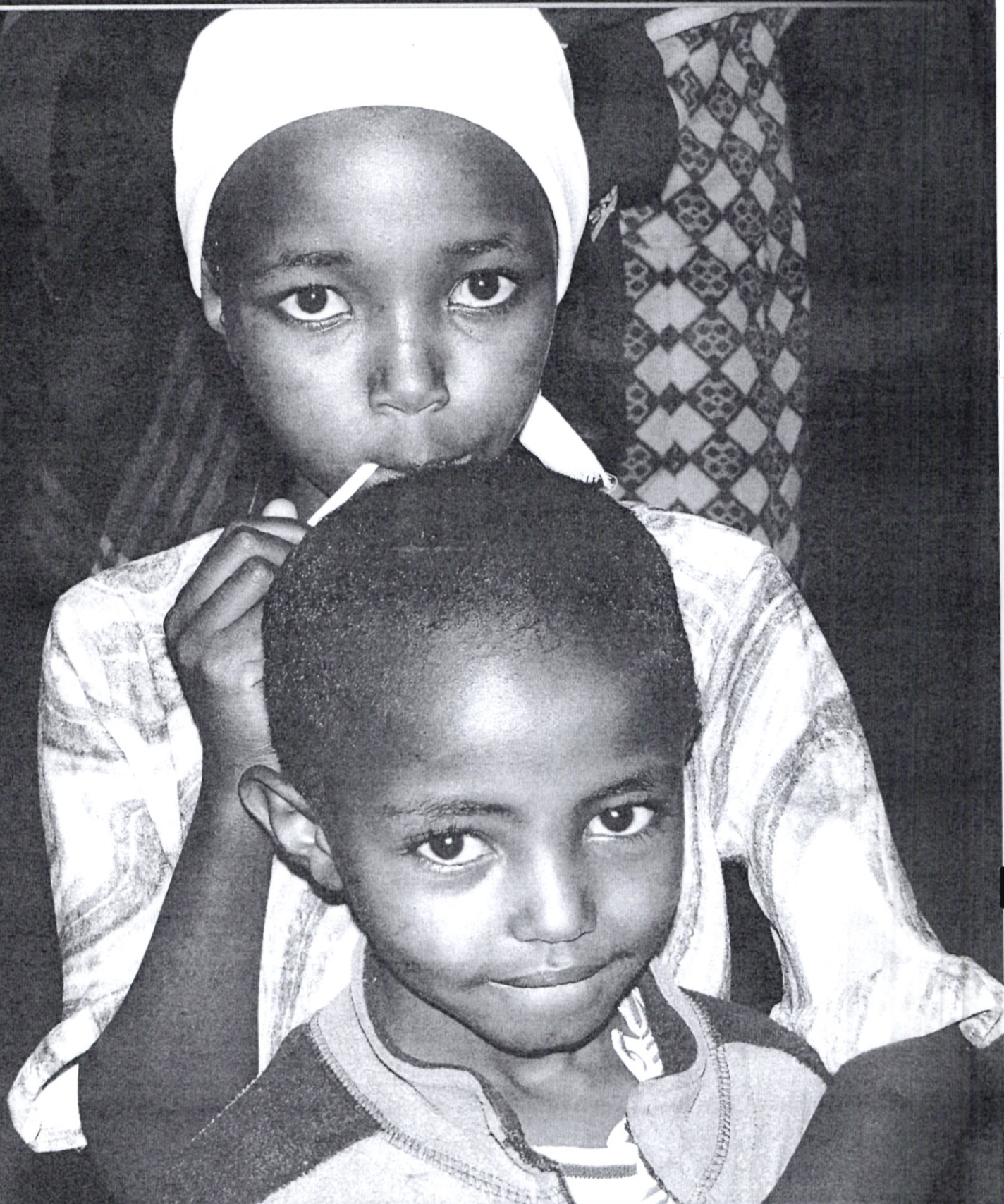
The danger for the mothers was far from over, however. We were always afraid the government would apprehend us and abort the campaign. I suggested to the mothers that we keep ourselves chained together, so that if one of us was arrested, all of us would have to be dragged out together. The mothers trusted me. Not only could I speak English and translate for them, I was the leader who could articulate the connections and show how the struggle for the sons' freedom fit into the bigger picture of the pro-democracy struggle.

At that point, the government tried a different tactic. It attempted to break up the women's group by promising the individual women that their sons would be released if they abandoned the vigil. About four women left the group and went to State House for tea with the president. They were told that I was misguiding them and that they should go home and their sons would be released. We knew it was all a ploy – and that the sons would not be set free under such arrangements.

They were no, and one mother even came back to the church. The vigil continued. Over the course of that year, the mothers' nonviolent protest became a focus, in Kenya and in other countries, for those wanting to end state-sponsored torture, random imprisonment, and the unjust suppression of the rights and voices of the people. Pressure on the government to release the sons intensified and came from many quarters. The vigil ended early in 1993 when suddenly all but one of the fifty-two sons were released en masse. (The fifty-second prisoner, we learned from informal sources, had been arrested on charges that were not politically motivated. Release Political Prisoners adopted his case and continued to fight for him; he was eventually released in 1997.)

Upon the sons' release, we held a service of thanksgiving at All Saints. During the service, I gave each of the women a "certificate of endurance" that I hear still hangs in a special place on walls of their homes. After the ceremony the women proudly walked with their sons out through the cathedral's open doors into the bright light of midday. They could sleep more easily now that their sons were free at last.

The Release Political Prisoners groups decided not to disband but to continue pressing for the release of other prisoners and for the respectful treatment of all people in Kenya held behind bars. A good number of the sons, once they were freed, joined Release Political Prisoners and provided the leadership for greater freedom in Kenya and better conditions for the people in jail, efforts that continue to this day.



CHAPTER

TW

Children and Gross Violation of Human Rights

I think for our country to be well and good, children should be put into consideration. They should be taken care of because as you know children are the future generation of the nation.¹

Child's Testimony before the Commission

I would like to tell the Government to help us children because we did not vote or were not voted for. Therefore, we did not have any issues. The adults are the ones who had issues. For us children, they need to assist us in education because we did not vote and we were not voted for. They did not have any reason to harass us. They inflicted us with pain for no reason.²

Child's Testimony before the Commission

Introduction

1. Children constitute a large proportion of the population of Kenya.³ Directly or indirectly, they have been affected by the gross violations of human rights and historical injustices committed in Kenya since independence in 1963. As the largest group in society, children suffer in large numbers during situations of conflict and

¹ TJRC/Hansard /Thematic Hearing /Children/Nairobi/14 Dec 2011/ p.19-20

² TJRC/Hansard/Thematic Hearing/Children/Nairobi/14 Dec 2011/p. 26-27.

³ According to the 2009 Census Report, Kenya has a population of over 16 Million children between the ages of 0-14 years. If we consider, however, that children between 15-18 years are included within the 15-64 year old category, numbers could be higher.

generalized violence. Furthermore, because of their age, coupled with the fact that they are in a crucial period of their emotional and cognitive development, children face adversity differently from adults. Victimization (of all kinds) during childhood can have negative long-term or permanent consequences. Moreover, children depend upon adults to play a positive and protective role in their development. Hence, they are not only affected by violations directly against them, but also suffer indirectly from the violations perpetrated against adults. For example, the death or disappearance of a parent or caregiver is a direct loss that dramatically alters a child's life chances.

- 2 Conflict and political unrest exacerbate the vulnerability of children, not only do they become frequent targets of direct abuse, but the effects of human rights violations, displacement, poverty, and a general lack of protection have important physical, psychological, and socio-economic repercussions in their lives. Although children are victims and witnesses of violence and abuse, they are also active and resilient members of society. Their contribution to the crucial process of learning about good citizenship and democracy can be fundamental in the prevention of the recurrences they themselves suffered so save future generations of Kenyan children from the same.
- 3 While the mandate of the Commission did not have a child-specific focus, the Commission was encouraged to focus on children by provisions in the Act that contemplate the creation of special arrangements and specific mechanisms and procedures to address the experiences of children.⁴ The Commission made deliberate efforts to facilitate children participation in its proceedings in order to ensure that their interests and their views were captured in its findings. The Commission developed and implemented a program of robust engagement with children and organisations representing children. In carrying out this work, the Commission was guided by international, regional and domestic legal provisions on human rights generally, as well as by child-specific rights. The Commission was also guided by international minimum standards required of truth commissions with respect to engagement with children.
- 4 This Chapter provides an account of gross violations of human rights suffered by children during the Commission's mandate period and the impact of such violations on their lives. It is based on approximately 2000 statements from children and multiple reports and testimonies from adults and representatives of civil society organizations and child protection agencies.

⁴ Truth, Justice and Reconciliation Act, sec 27(1) (b).

Conceptual and Legal Framework

5. Children currently make up over half of the Kenyan population. As such, the Commission sought to capture their unique experiences both as direct and indirect victims of human rights violations. In some instances the engagement with children not only provided children's perspectives and experiences of human rights violations, but also provided additional information on the occurrences themselves. In addition to providing accounts of children's experiences, their statements and testimonies pointed to possible responses that could address violations and abuses. It is also important to note that a significant proportion of adults who testified before the Commission also testified about their experiences of violations during their childhood. Their stories are documented here partly to demonstrate the long-term impact of violations experienced during one's childhood.
6. This section of the Chapter discusses conceptual issues relating to children and transitional justice the legal framework supporting the involvement of children in the Commission's mandate and the Commission's efforts to adhere to minimum standards of protection.

Children and truth commissions

7. Evidence on the specific impact that human rights abuses have on children has increasingly forced truth commissions and other transitional justice mechanisms all over the world to embrace a child-specific focus. The quasi-judicial character of truth commissions makes them especially well-suited to promote children's participation in transitional justice processes.⁵ When adequately crafted, truth commissions can provide children and young people with a safe space to share their stories. With adequate protection measures and protocols that ensure that the best interests of the children are protected, such truth commissions can ensure that children form an integral part of the process.
8. A child-specific focus in the work of a truth commission is justified firstly by, the recognition that the vulnerabilities of children not only aggravate their experiences during conflict or when human rights are being violated, but also renders them prone to flagrant and specific targeting.⁶ Children are direct and indirect targets of human rights violations.

⁵ G Machel *Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms Graça Machel*, submitted pursuant to General Assembly resolution 48/15; UN.Doc A/51/306, 26 August (1996) p.15

⁶ The notion of vulnerability underscores the fact that, because of real life situations or social discrimination, certain groups need special attention in order to have their rights adequately enforced. Because of social inequalities and vulnerability, measures that nominally apply to all equally do not adequately guarantee the enjoyment of such rights. While children are vulnerable because of their age and level of maturity, they also may experience additional layers of vulnerability because of their economic status, gender, ethnic background, victimhood, loss of parents etc. The overall vulnerability of children calls for specific efforts to protect children and respond to the impact of violations against them.

- 9 Secondly, a core mandate of truth commissions is the determination and documentation of an accurate account of patterns of human rights abuses and other gross violations over a given period of time. Children, both as victims and witnesses, can offer invaluable information and make critical contribution towards the realisation of this mandate.⁷
10. Thirdly, truth commissions are required to provide a roadmap for preventing future violations and children's views, experiences and perspectives can be instrumental in informing this exercise.⁸ Moreover, transitional justice processes in general and truth commissions in particular envisage the heralding of a new dispensation that directly impacts upon children's present and future. The involvement of children can be critical in defining what constitutes proper redress, in devising child-related reforms and in creating a new dispensation with the involvement and support of the next generation that will implement, and benefit from it.
- 11 Fourthly, the participation of children in transitional processes has been increasingly recognised and even mandated by both international and domestic legal provisions. The right to participation is enshrined in article 12 of the United Nations (UN) Convention of the Rights of the Child,⁹ which calls upon Member States to guarantee the right of children to express their views in matters affecting them.¹⁰
- 12 Finally, the involvement of young people in justice and reconciliation efforts can be formative in fostering or renewing a culture of respect for children's rights, thereby contributing to their participation and protection, and ultimately, to the prevention of further violence and abuse.
- 13 With this in mind, a number of truth commissions have adopted protocols and implementation mechanisms to ensure the participation and protection of children, included children's perspectives in their final reports and issued child-specific recommendations. The truth commissions of Guatemala and South Africa, for example, documented and highlighted how children had been affected by human rights abuses, while the Peruvian Truth Commission involved young people in its outreach and information-collection activities. The level of engagement in the Peruvian Truth Commission's work played a crucial role in promoting civic participation and reconciliation among youth.¹¹

7 UNICEF & ICTJ *Children and Truth Commissions* (2010) 8

8 UNICEF & ICTJ (n 7 above) 9-10

9 Ratified by Kenya on 30 July 1990

10 *UNICEF Factsheet: the Right to Participate*. Available at <http://www.unicef.org/crc/files/Right-to-Participation.pdf>

11 B. Christine *Truth and Reconciliation Commissions in Guatemala and Peru: The Children's Perspective*, included in the Annex of the Outcome Document of the Expert Meeting on Transitional Justice and Children, convened at the UNICEF Innocenti Research Centre, November 2005.

- 14 Established in 2002, the Sierra Leone Truth and Reconciliation Commission was the first commission expressly to include children in its mandate. In addition to their participation in statement-taking and hearings, children contributed to the publication of the first child-friendly version of a truth commission report.¹² Drawing on best practices from Sierra Leone and elsewhere, the Liberian Commission included children throughout its activities, holding children's hearings across the country. As these experiences illustrate, the fact that some truth commissions did not have a child-specific focus or mandate did not preclude them from addressing issues related to children. More recent truth commissions, including this Commission, have benefited from lessons learned from their predecessors about the risks and benefits of children's participation.

Legal framework

- 15 The Commission's mandate was predicated upon the recognition of human rights as providing fundamental entitlements and protections for all persons. The preamble to the Universal Declaration of Human Rights of 1948 asserts that "all human beings are born with equal and inalienable rights and fundamental freedoms"¹³ This recognition of rights inherent in all human beings was reiterated in subsequent international and regional legal instruments, as well as national constitutions including the Constitution of Kenya, 2010. Section 2(6) of the 2010 Constitution of Kenya provides that international and regional treaties ratified by Kenya are part of the law of Kenya.
- 16 While human rights apply to all human beings irrespective of age, there are certain additional rights that apply specifically to children. The rationale behind child-specific rights is that because of their age they constitute a vulnerable group and are therefore entitled to special care and protection. This specific entitlement is recognised in the Constitution of Kenya¹⁴ and in the Children Act of 2001,¹⁵ as well as in several specific regional and international treaties, including the following:
- Geneva Declaration of the Rights of the Child of 1924,¹⁶
 - Declaration of the Rights of the Child of 1959,¹⁷
 - Convention of the Rights of the Child of 1989 (CRC),¹⁸ and

12 UNICEF and ICTJ *Children and Truth Commissions* (2010)

13 G.A. res. 217A (III) U.N. Doc A/810 at 71 (1948)

14 Constitution of Kenya sec. 53

15 The Children Act No. 8 of 2001

16 Adopted Sept. 26, 1924 League of Nations O.J. Spec. Supp. 21 at 43 (1924)

17 G.A. res. 1386 (XIV) 14 U.N. GAOR Supp. (No. 16) at 19 U.N. Doc A/4354 (1959)

18 G.A. res. 44/25 annex 44 U.N. GAOR Supp. (No. 49) at 167 U.N. Doc A/44/49 (1989) entered into force Sept. 2, 1990. Other important human rights documents that recognise children-specific rights are The Universal Declaration of Human Rights (G.A. res. 217A (III) U.N. Doc A/810 at 71 (1948)); the International Covenant on Civil and Political Rights (G.A. res. 2200A (XXI) 21 U.N. GAOR Supp. (No. 16) at 52 U.N. Doc A/6316 (1966) 999 U.N.T.S. 171 entered into force Mar. 23, 1976 - Articles 23 and 24); the International Covenant on Economic, Social and Cultural Rights (G.A. res. 2200A (XXI) 21 U.N. GAOR Supp. (No. 16) at 49 U.N. Doc A/6316 (1966) 993 U.N.T.S. 3 entered into force Jan. 3, 1976 - Article 10)

African Charter on the Rights and Welfare of the Child of 1999¹⁹

- 17 Other regional and international instruments that have relevance for children's rights include the following.
- International Covenant on Civil and Political Rights,
 - International Covenant on Economic, Social and Cultural Rights;
 - Convention on the Elimination of All Forms of Discrimination against Women,
 - Convention on the Rights of Persons with Disabilities,
 - Rome Statute of the International Criminal Court;
 - African Charter on Human and Peoples' Rights,
 - Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- 18 The legal basis for the participation of children is grounded within constitutional provisions that guarantee human rights generally and specifically for children. The Constitution of Kenya and child-specific human rights treaties specifically recognise the need for special safeguards for children, care and protection, including access to health care, an adequate standard of living and primary education²⁰In particular, the CRC underscores the obligation of states to protect the child against hazardous work, drug abuse, sexual exploitation and abuse, abduction and sale,²¹ as well as torture and cruel, inhuman treatment or punishment, amongst others²² The CRC and other international instruments make specific reference to situations of conflict because the resulting destruction of infrastructure, displacement and loss of family members make children especially vulnerable during violent conflicts. Indeed, it has been recognised globally that not only are children among the most affected by violations of human rights, but in certain cases they are specifically targeted for inhumane acts such as killings, abductions, forced recruitment, sexual violence, torture and other grave violations of their fundamental rights²³
- 19 The mandate of the Commission as set out in the TJR Act makes reference to children on two occasions. The first is in respect to the definition of the term "genocide", which follows the definition in the UN Genocide Convention and includes 'forcibly transferring children of the group from one place to another' if

19 OUA Doc. CAB LEG.24 9/49 (1990) entered into force Nov. 29, 1999

20 See Articles 24 -28 in the CRC and sec 53 in the Constitution of Kenya

21 CRC articles 32-35)

22 CRC article 37

23 C Apte & V. Ladisch *Through a New Lens: a Child-Sensitive Approach to Transitional Justice* (2011) p 5

done with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.²⁴ Secondly, Section 27 of the Act empowers the Commission to put in place special arrangements and adopt specific mechanisms and procedures to address the experiences of children.²⁵ The Commission was empowered to collect relevant information from persons with material information, including victims, witnesses, communities, interest groups and persons directly or indirectly involved in human rights violations. As noted, children have not only been direct and indirect victims of human rights violations, but have also witnessed human rights violations, and were therefore in possession of information relevant to the mandate of the Commission.

20. Finally, Article 53(2) of the Constitution of Kenya and section 4 of the Children Act of Kenya requires the consideration of the best interests of the child in matters concerning children. The determination of the best interests of children, as recognised by the CRC, suggests the need for the active participation of children.



Commissioners and TJRC staff visiting an orphanage in Mt. Elgon.

²⁴ Truth, Justice and Reconciliation Act sec. 2

²⁵ Truth, Justice and Reconciliation Act, sec 27 (1)(b)

Methodology

21. In fulfilling its obligations with respect to children, the Commission was guided by internationally-recognised minimum standards governing the participation of children in the process. In tandem with the requirement to take into consideration the best interests of children, the Commission designed specific child-friendly processes through its Special Support Services Unit during statement-taking and hearings, which promoted the participation and protection of children

Statement taking

22. A special form to take statements from children was designed by the Commission in consultation with child rights institutions. The draft Statement Form for children 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
23. In keeping with key principles governing the participation of children, this form ensured that consent from the children's parents or guardians was acquired before including them in Commission processes. The language used in the Statement Form was simple and child-friendly. Moreover, statement-takers were specifically trained to record statements from children. The scope of the training included relevant aspects and provisions of domestic and international law on children's rights. The training equipped the statement takers with proper techniques for gathering information from children. Statement-takers were also trained to identify and respond to trauma

Thematic Hearing on Children

24. Sensitive to the unique experiences of children, the Commission (with the generous assistance of the German Development Agency, GIZ) organised a thematic hearing on children on 13 and 14 December 2011. Children and adults testifying on children's issues participated in this hearing. Before the hearing, children were provided with counselling in order to make the experience as conducive to healing for the children as possible. Counsellors with experience in working with children were present during the sessions. The children's family members or friends were allowed to be present at these sessions.
25. To ensure that children participated meaningfully during the hearings and in the statement-taking sessions, they were given full information about the Commission, its mandate and their roles in the sessions. This ensured that they consented to participating in the sessions with the full knowledge of the Commission's

mandate and the nature of their involvement. Children were also taken through the procedures of the Commission, which put them at ease during the sessions. Throughout the sessions, the Commission also ensured that the children understood the conversations and were at liberty to ask questions.

26. The Commission relaxed its rules and procedures during the children's hearings and interacted with the children in an informal manner. Children were also invited to visit the Commission to familiarise themselves with the surroundings and feel comfortable when they testified. In accordance with the Children Act, the Commission put in place measures to ensure that the identities of the children testifying were protected.²⁶ Further, protection was guaranteed by having all the children's testimonies heard in-camera.

Youth Forum in Kiryandongo, Uganda

27. The Commission held a special hearing session exclusively for refugee children in Kiryandongo, Uganda. In addition to wishing to understand the specific plight of Kenyan refugee children, this hearing was prompted by the Commission's initial research and investigations that revealed that children and youth living in Kiryandongo Refugee Camp had very separate views from their parents and guardians concerning the question of whether or not to return to Kenya. The hearing took the format of the women's hearings. That is, the participants, whether or not they recorded a statement with the Commission, were allowed to speak on a wide range of issues and essentially to have a conversation with the Commissioners. The hearing was labelled 'Youth Forum' because it included young adults in their twenties.

Partnership with stakeholders

28. The Commission partnered with and received assistance from a number of children's rights organisations. These organisations included: The CRADLE; African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) Kenya Chapter; Child Rights International Network (CRIN); Jacaranda Special School; Coalition on Child Rights and Child Protection in Kenya; World Vision Kenya; UNICEF; Acorn Special Tutorials; Kenya National Autistic Centre; Nyumbani Home; Dagorreti Children's Home and Wajibu Wetu Home. The Commission held consultations with these children's rights organisations to facilitate interaction with children.
29. The Commission also held consultations with relevant government departments, such as the Department of Children within the Ministry of Gender, Children and Social Development and the National Council for Children's Services.

²⁶ Children Act, sec 77.

Socio-Cultural Context

- 30 Throughout Kenyan history, children have occupied a special position within the community.²⁷ In traditional Kenyan culture it was understood that the whole community took responsibility for the wellbeing of children. In most villages, children were raised by all of the adults. Children enjoyed the knowledge that they were part of a protective community and adults felt responsible for the development of each child. The loss of biological parents, in this context, was less catastrophic for children as relatives and even neighbours took care of them.²⁸
- 31 With the rise of modernity, however, extended family and community ties gradually weakened and children were increasingly dependent for their well-being on their biological parents. While in some cases the extended family continued to contribute to the raising of children, their involvement became limited. Thus the absence of biological parents in many cases led to the abandonment of children.
- 32 While modernity has had the effect of limiting the traditional collective responsibility over the wellbeing of children, it has not succeeded in eliminating harmful cultural practices that adversely affect their wellbeing. As discussed in detail in the previous Chapter on 'Gender and Gross Violations of Human Rights: Focus on Women', various communities continue to engage in harmful cultural practices. These practices violate recognised children's rights and hamper their proper all-round development. The most prominent harmful practices highlighted during the Commission's work involved the girl child, namely, female genital mutilation or cutting (FGM/C) and forced marriages. Female genital mutilation is still practiced in Kenya on children as young as seven years of age.²⁹
- 33 Childline Kenya, a non-governmental organisation with an operational focus on child rights, reported to the Commission that in 2010 it dealt with 30 cases of female genital mutilation.³⁰ FGM/C and forced marriages often go hand in hand. The Commission received testimony that, amongst the Maasai, FGM/C is still prevalent, and that as soon as a girl undergoes the ritual she is deemed ready for marriage.³¹ Marriage is seen as a source of income for the family, and thus young girls are often forced into marriages for the convenience of their families, without consent or even consultation. Once married, the children discontinue their education, hence limiting their opportunity to earn a living and consequently making them dependent on their family or husband for support.

27 See for example J Kenyatta *Facing Mount Kenya: The Tribal life of the Gikuyu* (1953) 164

28 See for example DJ Penwill *Kamba Customary Law* (2005) 26

29 Seventh periodic report of States parties: Kenya CEDAW/C/KEN/7 (2010) at 14

30 TJRC/Hansard Thematic Hearing: Children/Nairobi/ 14 Dec 2011, p 13

31 TJRC/Hansard/Public Hearing/Narok/Sept 29 2011/ p 57

34. During the larger part of the mandate period, that is until 2001, child marriages were permitted by law. Under African Customary law and Islamic law both of which were and are still recognised as sources of law in Kenya the age of puberty was generally considered as an appropriate age of marriage. Thus, under the Mohammedan Marriage and Divorce Act (Cap 156), a girl of 9-16 years was eligible for marriage provided it was based on a good match in the eyes of the parents. The Marriage Act (Cap 150) provides that the minimum age for marriage is 16 years for both males and females. However, parents' or guardians' consent is required for persons under the age of 21 years wishing to marry. Similarly, the Hindu Marriage and Divorce Act (Cap 157) prescribe 16 years as the minimum age of marriage for females.

Economic Status

Education

35. The education system in Kenya is referred to as the 8-4-4 system which stands for: eight years spent in primary school, four years spent in high school and four years spent in the university. In 2003, the government introduced free primary education, which enabled many children who could not afford tuition fees to attend primary school. UNESCO statistics reveal that this led to a remarkable increase in primary school enrolment. For instance, the National Enrolment Rate (NER) percentage, which is the number of pupils in the theoretical age group who are enrolled expressed as a percentage of the same population, was 62 percent in 1999 and rose to 76 percent in 2009.³² Unfortunately, there has not been a commensurate growth in the number of trained teachers or investment in the training of teachers.
36. While the numbers are high for primary school, only about 70 percent of children proceed from primary to secondary school, mainly due to financial constraints.³³ The enrolment of male children remains higher in comparison to female children. In 2009, the NER for male children was 78 percent while that of female children was 74 per cent.³⁴ There are still alarming rates of gender inequality in some areas, such as the North Eastern region where 80 per cent of the girls do not attend school.³⁵ This is attributed to cultural beliefs and practices which

³² UIS Statistics in Brief (2010) available at <http://stats.uis.unesco.org> (accessed on 18 June 2012).

³³ UIS Statistics in Brief (2010).

³⁴ UIS Statistics in Brief (2010).

³⁵ UNICEF *Kenya at a Glance: Critical issues affecting children* Available at http://www.unicef.org/kenya/overview_4616.html (accessed 20 June 2012)

privilege male children. In some areas, female children are left at home to carry out household chores and other tasks. Similarly, some female children who are enrolled in schools are distracted from their education due to responsibilities given to them at home. There are also many cases where girls drop out of school to get married or as a result of pregnancy.³⁶ Notwithstanding a change in policy, some schools still dismiss pregnant students. A 16-year-old deaf and blind girl who was raped reported that she was denied re-admission to school on the basis that she had given birth.³⁷ Other factors, such as lack of sanitary towels and toilets negatively impact the performance of female children who are forced to absent themselves from school frequently.

37. Secondary schooling dramatically changes a Kenyan child's life opportunities. A recent study observed "Secondary schooling in Kenya has large effects on human capital, reducing low-skill self employment, increasing formal employment, and with suggestive evidence of reducing the job search time after school. Teen pregnancy is dramatically reduced by secondary schooling, and I find suggestive evidence of a similarly marked decline in child mortality."³⁸
38. With the introduction of free primary education in Kenya in 2003, many children are now able to attend school. However, there still remain real impediments that prevent children from exercising their right to education. Children cite child labour, irresponsibility of caregivers, lack of other necessary provisions, such as school uniforms and writing materials, as among the obstacles to the enjoyment of this right. Unstable family settings also interfere with a child's ability to pursue education.³⁹
39. A key concern that emerged during the Commission's Thematic Hearing on Children was the inaccessibility to education by children with disabilities.⁴⁰ The Kenya Society for the Blind, for example, informed the Commission that there are about 57,955 children who are visually impaired in Kenya. Braille machines and learning materials for these children are expensive and beyond the reach of many children.⁴¹
40. Institutions catering for disabled children are few and inadequate. For instance, there are only ten institutions that deaf or blind children can attend in Kenya. In

36 CREAW & GTZ *The Status of Women and Girls in Kenya: The Urgent Need to Uphold Human Rights*. Available at <http://www.creawkenya.org/creaw-publications/the-status-of-women-and-girls-in-kenya.html> (accessed 10th June 2012).

37 Memorandum to the TJRC by Parents of Deaf and blind Persons Organization.

38 O. Ozer *The Impact of Secondary Schooling in Kenya: A Regression Discontinuity Analysis* (2010) 18.

39 See e.g. TJRC Statement /0043.

40 See KNCHR *Objects of pity or individuals with rights: The right to education for children with disabilities* (2007).

41 Kenya Society for the Blind "Memorandum on the State of Injustice for Children & Youth with Visual Impairment in Kenya" (2011).

effect, such children have to travel long distances to those schools and, in most cases, board in the schools. These additional boarding and travel costs lock out some children whose parents cannot afford the costs.⁴² A visually impaired child told the Commission:

Other than the limited number of schools, the visually impaired students lack enough learning materials, for example, Braille machines, books, talking calculators and computers equipped with proper programmes. The inadequacy of facilities result in the regulation of the number of students admitted in unintegrated or integrated schools...The shortage of specialised teachers and transcribers challenges the learning programmes of the visually impaired.⁴³

41. Another visually impaired child said:

In high school, in subjects like biology, sometimes they come up with practical examinations which give us so many problems. According to us, we find them very difficult but the KNEC does not consider us much. So, most of the time, we end up not reaching our goals, not because we are not able but because of the things they set for us are too difficult. Also, at times, you find that when our exams are set, they are usually incomplete. For example, even as I was sitting for KCSE examination this year, in our biology papers, there were some questions which were missing. It becomes very challenging because many times our exam papers come late or they are incomplete. So, most of the time, our exams are greatly affected. That is why you find that many people with visual impairment end up failing and you are left wondering why they fail. Most of the time, we do not fail because of ourselves but it is because of the problems that are brought to us by the KNEC. Most of the time this makes people to stop dreaming. It shatters people's dreams. They just get demoralised because they know that they have already failed and there is nothing they can do. That is why you find that not very many people with visual impairment are able to join the university because of these problems and the other challenges they face as they go through their academics⁴⁴

42. Full realisation of the right to education has the potential to improve the individual development and socio-economic status of children in the long run. In many cases, violation of this right condemns children to poverty, which in turn hinders them from enjoying basic human rights. It is more than telling that the majority of children who submitted statements to the Commission requested assistance to be able to attend school.

42 Parents of Deaf and Blind Persons Organization "Memorandum to the TJRC relating to gross violations among the deaf and blind persons in Kenya (2011).

43 TJRC/Hansard/Thematic Hearing/Children/Nairobi/13 Dec 2011/ p 33

44 TJRC/Hansard/Thematic Hearing/Children/Nairobi/ 14 Dec 2011/ p.3

It is a sea of challenges for children with disabilities

(TJRC/Hansard/Children's Hearing/Nairobi/14 December 2011/p 3-5)

Basically, what I am going to talk about are the general problems that people with visual impairment mainly face. When you talk of academics, like you see in schools, sometimes, it becomes a very big challenge. Most of the schools we have in the country do not have adequate facilities for us. Most of the times, we find that we lack textbooks, especially the essential textbooks. Personally, I did not have books for the sciences and the likes. So, it became very difficult. Most of the times, even when we forward our complaints, they are never taken into consideration. So, most of us end up suffering so much, because we are forced to depend so much on the others.

At times when you depend so much on other people, you become a burden to them. When it appears to you that people are getting tired of you, because you are really depending on them, you even tend to lose psyche. You become demoralized. It is a very big challenge because most of the people with visual impairment go to school, especially in high schools, but they do not complete their education because they are faced with challenges like lack of books. So, they are frustrated. They are left wondering what they are supposed to do next. Most of the teachers even do not give you much support. So, it becomes very difficult in that area.

Also, most of the teachers in those schools, especially those in integrated schools, do not care much about people with visual impairment. You can find that in a class, you are the only student who has visual problem. So, whenever the teachers come, they do not even remember. They just teach. They do not even pay much attention to you. So, most of the time, you find yourself losing track. They are not even interested or they do not want to learn about you. They do not want to engage themselves with you because they think that you need too much care. So, they do not pay much attention to you. So, it becomes another challenge. Most of the time, we find ourselves getting lost in the middle of a lesson because most of the teachers do not have the experience of teaching visually impaired students. They do not even take time to learn or they are not even interested in you. So, it becomes a big problem also to those people.

When it comes to the Kenya National Examinations Council (KNEC), most of the time when there is writing exam for people with visual impairment, they do not pay much attention because some of the things become too challenging for people who do not have sight. For us to do certain things well we must be able to have sight but many times, they are not taken into consideration. For example, tackling science exams in primary and secondary schools becomes very challenging because many times, the questions have many diagrams and lines. Therefore, it becomes very technical. For us to be able to understand the diagrams, we have to touch them. When they become too complicated, we are not able to visualise or get the picture. Most of the time, we end up not performing so well not because we are not able but because some of the things just become too difficult for us to work with. So, it becomes very difficult, even when it comes to practical exams.

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challenging because many times our exam comes late or they are incomplete. So, most of the time, our exams are greatly affected. That is why you find that many people with visual impairment end up failing and you are left wondering why they fail. Most of the time, we do not fail because of ourselves but it is because of the problems that are brought to us by the KNEC. Most of the time this makes people to stop dreaming. It shatters people's dreams. They just get demoralized because they know that they have already failed and there is nothing they can do. That is why you find that not very many people with visual impairment are able to join the university because of these problems and the other challenges they face as they go through their academics.

To add on that, when it comes to subjects also, in high school, we have around 12 subjects which people do before they are allowed to drop some. For us, when we go to some schools, we are forced to do a fixed number of subjects, eight subjects only. We are not given the opportunity to do some of the subjects that we are able to do because at times, there are teachers in school who think that it will become too much work and become troublesome and complicated for them to teach us. So, they decide to fix subjects for all of us, so that when we enter there, we just do the same subjects. We are not given the chance to choose subjects or have a variety of subjects. Most of the time, this affects the careers that some of would like to pursue at the university. When you take your cluster of subjects at the university, you find that you did not do some of the subjects in high school. So, it becomes very much complicated for us.

Also, in the country, we have special schools. For example, we have schools which are exclusively for the blind. In some ways, those schools are not so good because many a time, when you are taken to such a school, you tend to get withdrawn from the society. We feel isolated. We feel hated and neglected by the society because you are kept in one room. Wherever you go, you just meet with people with the same disability. All of us have the same problem. At times, you cannot even help each other. So, it becomes a great challenge to many of us because when a problem comes up, we cannot even help each other. Academic-wise, the performance is usually pathetic because all of us feel that after all, we do not belong to the society. You cannot do much for the society.

So, we end up having loss of esteem as a group, and we influence each other. So, it becomes a big problem for those schools which have been set up specifically for people with visual impairment. It is a very big challenge for those people who stay there. Even some parents use such schools as a place for dumping their children with visual impairment. If you go there, you will find very small children from the age of two years. They stay in school. They are not even picked when it comes to holidays. So, they just stay there. It is as if they have been moved to live there. Their parents would not even check on them. Most of the parents just do that to their children with visual impairment because they think that they are a burden to them.

So, most of the time, you find that children with visual impairment have been kept in such schools and they have been forgotten. They have been left to live there. It becomes a very big challenge because you do not even get the chance to interact with the outside world. Even when you get out there, you are never comfortable with the rest of the people. You are usually not ready to work with them simply because the life you have been used to living for quite---- Most of the time, people would stay in such schools from a tender age of two years up to the age of 19 years or 20 years. After the bad performance in high school, they are forced to repeat classes the whole year. So, many times, you will find people with visual impairment from those exclusive schools, for example, schools for the blind, leave school when they are too old. They have even lost psyche for life. They cannot do much for the society. So, most of them end up having miserable life.

Also, in the society, even in our homes, we face many challenges. You would find that you are not fully accepted in the family. You find that people are wondering how to cope up with you. They have a negative attitude towards you. They think that you cannot do anything. They do not give you much support at times. Relatives will abuse you and your parents because of your disability. The neighbours are left wondering. Sometimes they ask you questions which are not so good. They ask you very bad questions. At times, you might find someone asking you "Are you able to feed yourself? How are you able to trace your mouth while eating?" Most of the times, it makes us have a bad feeling of worthlessness and very low self-esteem.

Even in public places, like in towns, we would say no. We need to develop a sense of independence when we walk in town. If you come across bad people, they might cheat you or steal from you or misdirect you. It becomes very difficult. Many a times, those with visual impairment are mistreated and mishandled in public places like shops and supermarkets. At times, you are given wrong change but you cannot even realise. Maybe, you are sold substandard stuff. Sometimes you are overcharged or something like that. It happens to very many people with visual impairment in this society of ours.

Even out there, you may find that some of the girls with visual impairment may be victims of sexual abuse. Many times, we have heard stories of those people who do not have sight having been raped or engaged in sexual activities against their wish. It happens even in schools. In boarding schools, girls are raped. They are sexually violated by other people or even by the school workers. Many a times, when you go to school, you are usually given protection though not so much. They try because many a time, we are exposed to dangers such as rape and the likes.

Child health

- 43 There are two main indicators that are usually used to assess child health: infant and child mortality. Between the 1970s and 1990s, Kenya registered rapid decline in infant and child mortality.⁴⁵ However, this trend began to reverse towards the end of 1990s. Infant mortality rate increased from 60 per 1000 in 1990 to 74 in 1998 and further up to 77 in 2003. Similarly, infant mortality rate increased from 90 per 1000 in 1990 to 112 in 1998 and 115 in 2003. On a brighter note, the 2008 Kenya Demographic and Health Survey indicates that there is a decline in the rate of both infant and child mortality rates. The survey indicates that 'Comparing data for the five-year period preceding each survey, under-five mortality has declined by 36 percent from 115 deaths per 1,000 in the 2003 KDHS to 74 deaths per 1,000 in the 2008-09 KDHS, while infant mortality has dropped by 32 percent from 77 deaths per 1,000 in the 2003 survey to 52 deaths per 1,000 in the 2008-09 survey'.⁴⁶

⁴⁵ A Wamae *et al* *Child health services in Kenya* (2009) 1

⁴⁶ Kenya Demographic and Health Survey 2008-2009 (2009) 104

44. Despite these improvements, and the implementation of a number of programmes aimed at improving child health, infant and child mortality rates remain unacceptably high in Kenya. It is estimated that one in every 19 children born in Kenya dies before its first birthday, while one in every 14 does not survive to age five.⁴⁷ As such, Kenya remains one of the countries in the world with high infant and mortality rates. This situation is linked to factors such as economic status, the mother's level of education, health care and nutrition.⁴⁸
45. Evidence received by the Commission revealed that not all children in Kenya access health care services. Economic and infrastructural factors were cited as major reasons limiting access to these services. It emerged that even minimal fees payable at health care institutions are beyond the reach of a good number of families. Statements from children revealed that this compromises their health and they do not always seek medical assistance when they need to. A child narrated to the Commission 'sometimes I am not able to get treatment because of lack of money even to travel to the District Hospital, which is almost 20km away'.⁴⁹
46. In many cases, the inaccessibility of health care services is compounded by the lack of responsible caregivers. A child whose brother died due to lack of medication informed the Commission 'I spend a lot of time in the dumping site and sometimes have no food'.⁵⁰ The quality of child health is particularly worrying amongst the most vulnerable groups. Provision of free health care services for HIV positive children, for example, is crucial. Where this is offered, children have benefitted immensely and have been able to lead healthy lives. This is particularly significant in cases where children are orphaned.⁵¹

Child labour

47. The phenomenon of child labour is old and dates back to the colonial period during which children worked on farms owned by white settlers. The incidence of child labour has been on the rise since then. It is estimated that there are one million children engaged in child labour in Kenya.⁵² A 2011 child labour baseline survey in Busia District found that '42.8 percent of the population aged 5-17 years reported having engaged in an activity for pay, profit or family gain for at least one hour in

47. As above

48. C. Opiyo et al. Infant and child mortality in Kenya demographic and health survey 2008-2009 (2010)103-111

49. TJRC/Statement/02C2

50. TJRC/Statement/0126

51. TJRC/Statement/0017

52. African Network for the Prevention and Protection against Child Abuse and Neglect. Memorandum to the Truth, Justice and Reconciliation Commission- Kenya on 13th/14th December 2011 on the thematic hearing on children " (2011)

the week prior to the survey'⁵³ On the question of child labour the Commission was told that

When it comes to child labour in the country, thousands of children have been deployed in industries such as fishing, salt and sand harvesting, quarries, plantations such as sugar cane, tea and coffee plantations. While working there, they are subjected to hard labour way beyond their physical and mental capabilities and subsequently denied the right to their development. Some of those children have been known to die of diseases caused by the horrendous conditions that they work in while others have been buried alive in collapsed quarries and mines. Worryingly, some children have been murdered by their exploiters for varied reasons including the exhibition of resistance and display of frailty.⁵⁴

48. As in many parts of the world, child labour in Kenya is often the product of the vulnerable economic status of families. Children from indigent families are forced to fend for themselves and their families.⁵⁵ HIV/AIDS infections and health crises in general have also increased the number of orphaned children and made them more vulnerable for child labour recruitment.⁵⁶

49. The Commission received evidence of extensive accounts of child labour involving, prostitution, drug trafficking and the sale of illicit brews. One child narrated to a statement-taker that she had been forced by an adult lady to deliver bhang to her clients and engage in prostitution.⁵⁷ Another child recorded a statement that her grandmother routinely forced him to sell illicit brew.⁵⁸ Some families encourage girls to engage in child prostitution to boost the family income. This is a particularly serious issue at the Coast. A study conducted by Comitato Internazionale per Lo Sviluppo Dei Popoli (CISP) revealed that it is quite common for girls in Malindi to seek tourists as clients in order to earn money for their families. Child prostitution in Malindi is unfortunately, becoming increasingly acceptable as a means to better the economic situation of a family.

Most of them dropped out of school, went to Malindi and they came back with old *wazungu* and as we speak all the girls in that family have *wazungu* and the home has now changed for the better, very good houses and they drive very good cars and their parents are now living a good life. Now just imagine what the neighbours who have daughters and sons think about that and maybe to make the matters worse their children have even completed school and they are at home idle with no jobs. So you see

53 IPEC Kenya child labour baseline survey, Busia district (2012) xii

54 TJRC/Hansard/Thematic Hearing/Children/Nairobi/13 December 2011/p. 7

55 C. Suda 'The invisible child worker in Kenya: the intersection of poverty, legislation and culture' (2001) 10(2) *Nordic Journal of African Studies* p. 164

56 Kenya Institute for Public Policy Research and Analysis. An overview on issues affecting children and vulnerable groups in society. Memorandum submitted to the TJRC (2011)

57 TJRC/Statement/0530

58 TJRC/Statement/0050

it is very easy for them to be tempted into going to Malindi to look for the *wazungu* so that they could get rich as their neighbours.⁵⁹

50. In some cases, children are lured into prostitution by tourists who pose as sponsors. An elder in Malindi narrated that:

The problem here is tourists who have come in the form of sponsors of children. They gain the trust of the child and her /his family and eventually invite them over to their villas or homes. Then they exploit them. This child cannot say anything because they have taken a lot of money and gifts from the tourist.⁶⁰

51. In essence, most children do not actively seek opportunities to engage in illicit activities, particularly prostitution. Sometimes, poverty and hardship pushes children to engage in various forms of labour. A 14 year old girl from Mombasa testified as to how she was pushed by economic factors to engage in prostitution:

So, I started doing that work also because I did not have something to eat; my aunt was also unable to provide for me. The money she got could not provide for me; she was a brewer of *chang'aa*. My aunt said she could not pay school fees for me and, so, I was forced to be a beach girl also because there was no other job for me to do. When I was doing that job, sometimes I would go to the beach and the police would arrest us; sometimes I would sleep in cells. Now, one day they set me free and I went back home to my friends where I used to stay because I did not have any other option. I did not know what to do and I did not know where to go and beg. I tried to look for a job, the small job in houses; as a house girl, the job was too much for me and I decided to go back to the beach. Sometimes I would be caught by the police and I would go round the beaches with them. As we were going round, beach boys would bribe the police to leave me alone. I would then have to pay the beach boys using my body. Now, I did not know what to do. I was sleeping with the Europeans; sometimes you would go with them to the room and then they did not pay you. After he had used you, he would chase you out of the room; he could even beat you up. Someone could give you KES 1000, which was so little, but because you were hungry, you were forced to take that money, so that you could help yourself with it. I was doing that work for my survival; I did it to get food because back home, I did not know how my parents were surviving.⁶¹

52. Enforcing the law in cases of sexual exploitation is hampered by uncooperative relatives who opt to receive compensation instead of calling for the prosecution of the perpetrators. The absence or loss of parents often leads to children fending for themselves leaving them susceptible to being exploited for labour.⁶²

59 D Oliech 'Assessment on children's vulnerability to sexual exploitation in Malindi' (2009) p 28

60 Oliech (n 59 above) 18.

61 TJRC/Hansard/Thematic Hearing/Children/Nairobi/ 14 Dec 2011/ p.37

62 TJRC/Statement/0131

- 53 Domestic violence also potentially increases the vulnerability of children to child labour. Children experiencing violence at home sometimes opt to run away from home and end up being employed to meet their basic needs. Another important predisposing factor is violent conflicts. Many children, for instance, were forced into the labour market by the 2007/2008 PEV. As narrated by a child who was a victim of the PEV:

We were displaced by the post elections violence. My mother became sick as a result of stress emanating from her inability to provide for us. Although I did not like it, I was forced to engage in prostitution so as to feed our children and buy medicine for my mother.⁶³

Children and Conflict

- 54 Violent conflicts and episodes of generalized violence have devastating impact on children. In 1996, the UN study on the impact of armed conflict revealed that an estimated two million children had been killed in armed conflict during the preceding decade. The study proceeded to note that:

These statistics are shocking enough, but more chilling is the conclusion to be drawn from them: more and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values, a space in which children are slaughtered, raped, and maimed, a space in which children are exploited as soldiers, a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink.

- 55 In Kenya, violent conflicts that have marred Kenya since independence have had a profound impact on children in many different ways. During the colonial period, the Mau Mau, children were subjected to traumatic experiences, many of them were witnesses to atrocious crimes that were committed against their parents and adults in general. In his book *Trailblazer: Breaking through in Kenya*, Peter Kuguru writes that '[f]or all children, the Mau Mau skirmishes, the Emergency situation and the ensuing confusion, instability and insecurity took precedence over learning'. He adds that 'It was often almost impossible to study under circumstances that were themselves traumatizing'. His memory of those traumatic days is captured in the Box below.

63 Rift Valley Child Rights Network. Memorandum to the Truth, Justice and Reconciliation Commission.

Children and Mau Mau

(Excerpt from P Kugur *Trailblazer: Breaking through in Kenya* (2008).

Although I was a young child while the Mau Mau liberation struggle was gathering force in the country, I was not totally oblivious to, nor was I unaffected by, what was happening. Aguthi location, where our Muruguru Farm was situated, was bubbling over with Mau Mau oathing, rebellious talk and the government's counter-insurgency activities. I remember several incidents that were very alarming to a five-year-old boy.

[...]

The best primary school in our vicinity was Ichuga Primary School, a few kilometers from Kiamaina.

[...]

When I began living at Kiamaina, I was not much aware of the, nor was I overly worried by Mau Mau activities. It was a relatively peaceful time for me, perhaps because of my young age. But as time went by, the sound of gunshots shattering the silence of the night went from occasional to frequent by the end of 1952. By 1953 it was not just gunshots which rent the air, but also full-blown combat engagements and daily bomb detonations. Soldiers, armed to the teeth, patrolled the countryside, beating people and raping women. The colonial government had eventually declared a State of Emergency on October 20th 1952, believing that the mayhem and bloodshed would end very quickly. They also hoped that the Mau Mau adherents would be disoriented when their leaders were eliminated or, at least, taken out of circulation. Many people were arrested that night and from then on detention without trial became the norm.

[...]

The State of Emergency pushed the Mau Mau militia even deeper into the forests from where they carried out increasingly frequent attacks on settlers and loyalists, including Chiefs and Headmen. The curfews, confiscations of cattle and collective punishments imposed by the colonial government did little to deter the Mau Mau movement. The Mau Mau had the upper hand all over Kikuyuland where they had the support of the masses in their role as political liberators and in their struggle for the return of the stolen lands. New songs in support and praise of the Mau Mau were being composed and sung everyday across the countryside. Kenyatta was hailed as the unseen head of the liberation movement in many of the praise songs.

This was the prevailing atmosphere when my two sisters and I joined Standard 2 in 1953. Things had changed at school too. I was no longer the class monitor, and we had a new teacher. But the major changes were deep-seated than that. Now, uniformed government soldiers patrolled the schools. Army jeeps, filled with soldiers with guns at the ready, drove up and down the road near our schools at regular intervals. Gunfights were the order of the day all over the countryside. Day and night, bombs targeting Mau Mau hideouts were dropped from planes into the Mt Kenya forest, which was only five kilometers from Ichuga Primary School. We could see that the Karatina-Nanyuki trains that passed thirty metres or so from our classroom were filled with armed soldiers. The Mau Mau made several attempts to derail the trains.

[...]

I remember one vicious and intimidating white man nicknamed "Wai Wai" because he was always asking "Why?" He was said to be a son of one of the members of the British aristocracy who occupied a large ranch near Nanyuki. Still alive, I am told he "hangs out" today on a farm near Rimuruti. Accompanied by two African soldiers, Wai Wai would drive around our neighbourhood with a sten gun slung over his shoulder. He used the gun to randomly shoot people at a whim. One day I was walking home from school with a group of children. Wai Wai drove past us and stopped his jeep just in front of us. He jumped out and shot a chicken just to frighten us. Wai Wai induced fear in everyone, as he was a brutal and trigger-happy sadist.

[]

1954 was a real year of reckoning in my young life. I was now in standard 3 but still academically all at sea. Everything that has happened, including the fact that I had now changed schools three times, had disoriented me. For all children, the Mau Mau skirmishes, the Emergency situation and the ensuing confusion, instability and insecurity took precedence over learning. It was often almost impossible to study under circumstances that were themselves traumatizing. In January, as soon as the school year had begun, a troop of soldiers led by the infamous Wai Wai stormed our school and began screening our teachers, interrogating them for Mau Mau intelligence. Some of them were seriously beaten in front of their students, and others were taken away to detention camps. The aircraft were meanwhile circling overhead blaring out the anti-Mau Mau propaganda. This time they were announcing that the famous Mau Mau leader who hailed from Kiwarigi, General China, had been captured, and that *150 itoi* had been killed overnight. *Itoi* was a word that Homeguards had coined to depict the Mau Mau as outcasts.

[]

I resumed Standard 3 in my fourth school, Muruguru Primary school, in early 1954. I had a lot of trouble adjusting and fitting into this totally new environment. I did not know anyone in my class and everything was strange. The children were very suspicious and steered well away from me. It was as if I was a traitor and they were Mau Mau. In fact, some of the boys would follow me around and question me, trying to establish whether or not my family had been brought into the village to inform on them. It was a long while before I gained acceptance and made a few friends. Inevitably, under these conditions my school work suffered.

Security at the school was tight. Homeguards religiously escorted us to school everyday, although the school was only a football pitch away from the village drawbridge. There was a twenty-foot high sentry tower from which armed Homeguards were stationed at the school, and white soldiers passed through regularly, harassing teachers and pupils alike. Yet despite the security measures, the Mau Mau still came, did whatever they wanted, and left. There was a well-organized secret communication network between the villagers and the Mau Mau, and it is obvious that some Homeguards must have been part of that network.

- 56 Between 1963 and 2008, the Commission's mandate period, children were direct victims of violence and atrocities during conflicts and state sanctioned security operations. Indeed, the most abhorrent and ghastly accounts of violence that the Commission heard involved children. Atrocities against children included killing, maiming, torture and sexual violence. Children were also witnesses to crimes, as a result of which, many who survived the crimes have remained traumatized for

years. The Commission found that children were both direct and indirect victims of gross violation of human rights committed in the following contexts: Shifta War, security operations in Northern Kenya, Mt. Elgon conflict, ethnic clashes of 1992 and 1997, and most recently, during the 2007/2008 Post Election Violence (PEV).

- 57 The number of children who have been victims of violent crimes during these incidents runs into thousands but the stories of many have never been heard. In relation to the number of children who were affected by the PEV, a representative of a child rights organization told the Commission that

We might not know the actual number of the children who suffered in this country because some of them died. Some were unable to tell their stories. Others decided to be quiet because there was nobody to tell their stories or they had no words in which to express how they felt. However, there are others who have been brave enough to risk reliving that moment through the stories they have been able to tell in various forums. These have been the voice of those who could not tell the story as it was. The video presented by children of Bondo is an example of some of those brave children who lived to tell their story in a video, perhaps to appeal to the hearts of those who are responsible for keeping children safe and ensuring that they grow up to realise their full potential, and also to the hearts of those who perpetuated the violence to think again and change.

- 58 Although no statistical data is readily available, there is no doubt that children have been gravely affected by conflicts. Conflicts have contributed to the breakdown of the family unit, which, in turn, has impacted children's livelihood. The death or disappearance of a loved one, particularly one who is responsible for a child's well-being, is particularly devastating. Children victims of the PEV who testified before the Commission spoke about how their lives had changed following the death of their parents or relatives during the PEV.⁶⁴ Many of these children are now orphans and are staying in orphanages.⁶⁵

Killing and maiming

- 59 Many children have lost their lives during conflicts in Kenya, many of them in the most abhorrent of ways. Testimonies received by the Commission show that the age of children who have been killed in conflicts in Kenya range from infants of a few days to teenagers of 17 years. The Commission was told of a newly born baby that was snatched from the mother and hacked to death by a machete.

On 27th [December 2007], when I was walking behind a man, I saw him holding a kid's hand and there was a lady behind him who seemed to have come from maternity. This man was called by a group of people and asked where he was going and where he was coming from. He was also asked what had happened where he was coming from. He did

⁶⁴ TJRC/Statement/0004, TJRC/Statement/0464, TJRC/Statement/0201, TJRC/Statement/0302

⁶⁵ TJRC/Hansard/Public Hearing/Bungoma: 9 Jul 2011, pp. 24, 25 and 28.

not answer, he started trembling. By then, I had reached where the group was and the lady had also arrived. She was told to place what was in her hands down and when they discovered that it was a baby, they hacked it and I said 'Oh, my God' The baby that the man was holding was hacked and he fell down⁶⁶

60. A woman explained to the Commission how her child was killed in a terrible manner during the Mt. Elgon conflict

In 2007 we encountered a difficult time. I tried to tell my husband and my child to run but my child would only cry. Those people took my child and placed her on an arrow and then speared her on the forehead. I feel very bad about how my child was killed⁶⁷

61. In Hola a mother described the killing of her child in the following words: 'He was slaughtered like a chicken and he was thrown in the river in the farm where we were living'⁶⁸ Another mother used similar language to describe the killing of her two children during the Mt. Elgon conflict.

I got into the house where my children slept. I found my children lying outside the house. They had been slaughtered like cows. Blood was oozing all over. I ran away. It was like I was running mad. I ran back, while screaming [] I found my husband there with my neighbours. They asked me "Why are you crying?" I told them "No, my children have been slaughtered!" When they heard this, we went back to the scene. When we reached my children's house, we found their bodies sprawled on the ground outside. Both of them were taken out there and slaughtered. One was Robert Simiyu, who was 16 years old, and the other was James Wanjala, who was 13 years old⁶⁹

62. Another woman narrated a starkly similar story

I was not thinking properly. I decided to go slowly to where my children were sleeping. When I arrived there, and on reaching the door, the first thing I saw was blood splattered everywhere. I just moved slowly and I found the door was open and my two sons had been slaughtered like cows and they were just there naked. I was mentally disturbed by the scene⁷⁰

63. In Mt. Elgon, bodies of some children who were killed by Sabaot Land Defence Force (SLDF) were eaten by dogs⁷¹

64. The Commission heard several cases of children who were burned to death during the PEV. At the Kiambaa Kenya Assemblies of God Church, Eldoret, children were among those people who were burned to death⁷² That the church is a sacred place

66. TJRC/Hansard/In-Camera Hearing/Women Kisumu/16 July 2011/p. 22

67. TJRC/Hansard/Women's Hearing/Bungoma/9 July 2011/p. 49

68. TJRC/Hansard/Women's Hearing/Hola/ 13 January 2012/ p. 9

69. TJRC/Hansard/In-Camera Hearing/Women/10 July 2011/p. 2-3

70. TJRC/Hansard/In-Camera Hearing/Women's Hearing/Bungoma/9 July 2011/p. 19

71. TJRC/Hansard/Women's Hearing/Kapsokwony/24 May 2011/p. 16

72. See TJRC/Hansard/Public Hearing/Eldoret/4 October 2011.p. 1-36. TJRC/Hansard/Thematic Hearing/Children/Nairobi/ 13 Dec 2011/ p. 24

of worship did not matter to the attackers. A few children miraculously escaped the tragedy at Kiimbaa. A man who lost his wife and a five year old child in the tragedy narrated to the Commission how the rest of his children managed to escape from the church:

God did a miracle because the day the church burnt down, one of the children was in the church but he was able to jump over other people. When he ran out, he found other boys waiting for them outside. So, they managed to run without being injured. My daughter who was also in the church survived together with her children.⁷³

65. In Naivasha, members of the same family including eight children were burnt to death. The children's father explained to the Commission that the killing of his family members in such a brutal way had left him 'like a naked person'.⁷⁴
66. During the 2007/2008, some children were also killed by police officers. The deaths caused by police officers were mainly as a result of gun shots. A mother narrated to the Commission the painful story of how her son was shot dead by a police officer:
- On 1 February 2008 my son, who was in secondary school, was killed by police officers. He was in Form II in Ngariet High School. During that conflict, they were told to come back home because the school is near the boundary of Kisii and Kipsigis. When he was at home, he left to go somewhere and before he even could walk for one mile, he was shot by a police officer and he died on the spot.⁷⁵
67. The Commission received evidence which suggested the possibility that children of a particular ethnic group were targeted during the 2007/2008 PEV. The Commission was informed that in Nakuru, attackers mainly of the Kikuyu ethnic community were particularly looking out and targeting children of the Luo ethnic community. The intention of the perpetrators was to kill Luo children so that they do not become 'tomorrow's Raila'. According to a witness:
- At that time, men were the ones who were being killed. Even if you got a baby boy, they would say that is tomorrow's Raila. I had one son. He is called Peter. When I heard they were looking for boys, I locked him up the toilet. I told him, "just sit there. Even if you die, just die inside there" [...] I locked him up in the toilet because I wanted him to survive.⁷⁶
68. In some circumstances, conflicts have led to the large scale killing of children. This was the case at a school in Turbi, Marsabit, on 12 July 2005.⁷⁷ In this tragedy, which has come to be known as Turbi Massacre, 95 people were killed and several others injured. Of these, 22 were children killed within the grounds of Turbi Primary School. As a witness testified:

73 TJRC/Hansard/Public Hearing/Eldoret/4 October 2011/p. 27.

74 TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p. 4.

75 TJRC/Hansard/Women's Hearing/Kericho/20 September 2011/p. 2.

76 TJRC/Hansard/Women's Hearing/Kisumu/p. 25-26.

77 See detailed discussion of the Turbi Massacre in Volume 2 of this Report.

In July, the school and manyattas were invaded and my son who was in class eight was killed. Many children and women were murdered. There was nowhere we could run to, so we stayed in the same place. The Government did not help us. An airplane carrying the NTV crew came. The plane that carried the soldiers stayed in the hills and they saw the people who had been killed and the animals that were being driven away. Nobody came to our rescue. We asked ourselves why we were not rescued and yet we were born in Kenya. Just imagine 21 or 22 children were killed. These children were supposed to be the future leaders of this country.⁷⁸

- 69 Another witness who was aged twelve at the time of the Turbi Massacre narrated his experience as follows

At that time, I was a candidate and as per the school rules as a candidate, one had to wake up at 5:00 am. I woke up at the usual time and went to class with four of my classmates. As we were deeply engrossed in our studies, one man dressed like a policeman entered the class and started interrogating us. We stood up and started wondering what was happening. I then saw many people surrounding the school and I got frightened. They then entered the class and shot one of my classmates as he tried to escape. They shot him in the heart and I hid under my desk. They also followed me there and shot me as they interrogated me. They shot me on my left leg and the right side of my hips and I have a scar that has not recovered. They came in with uniform and killed my classmate and shot me on my right limb. I found myself lying on the body of my friend. They went out and killed those people who were coming to the school. They killed 28 pupils except me and three others. Three pupils had also been raped by the bandits. The bandits went to the village and at that time there were three policemen who were there. They tried to rescue others but, unfortunately, the bandits were over 700. They surrounded the villages and killed elders who were over 70 years and above. By this time, except the three candidates, there were a total of 31 people who had been killed. Majority of those people had guns while others had spears. They spoke in Amharic, the Ethiopian Language and could not be understood. As time went by, they took all the animals, shot everybody on sight and went away. After a few minutes later, the DC for Marsabit arrived. They crossed the border but nothing was recovered. I was taken to Marsabit Hospital where I stayed for two weeks and later to Kenyatta National Hospital where I stayed for almost five months. I was later on discharged. I did my KCPE while at Kenyatta National Hospital where I scored, 373 marks.⁷⁹

- 70 Before the Turbi attacks, the school had 294 pupils, of whom 22 were killed and 20 injured. Approximately 80 children were orphaned as a result of the massacre. Many of these "Turbi orphans," as they are sometimes called, have not been able to return to school. The school was targeted because it was considered the heart of the community and have the greatest impact. Residents of Turbi criticised the government for failing to prevent the massacre.

78 TJRC/Hansard Public Hearing/Marsabit/ 4 May 2011/ pp 2-3

79 TJRC/Hansard/Thematic Hearing/Children/Nairobi/ 14 Dec 2011/ pp 41-42

71. Anecdotal evidence suggests that a far greater number of children are seriously injured in conflicts and moments of generalised violence in Kenya than those who are killed. Such injuries have left these children maimed for the rest of their lives. During the Mt. Elgon conflict, SLDF were responsible for cutting off the leg of a five year old boy.⁸⁰ Another child victim of violence was hacked with a machete on the head and his private parts mutilated. He survived the brutal attack but his life has fundamentally changed:

This child remained in the house and he stayed there alone. Everybody had gone to different direction and we stayed out for two days without knowing where the child was. We found him on the third day. We found some policemen who helped us. We found him in a bush where his head and private parts had been cut and he was bleeding. He could not get treatment. He has not gone to school. It is because of his health problems that he has not gone to school.⁸¹

A mother speaks about the shooting of his son by a policeman during the PEV

TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 20-21

I sent my son, Michael Oluoch, to look for food at Kibuye Market [...] One person was from my house going to his place at Nyalenda. He heard that people had been killed at Kibuye. He called my daughter, Carol, and told her: "I have seen a boy lying down and he looks like your brother who had been sent to the market by your mother." I could not even manage to cry. I was vomiting and falling down. Even my mother was around. I walked through the market of *Manyatta* and found two children who told me: "Mama Michael, Michael has been taken to Russia." I walked with those two children very fast to get to Russia because gunshots could be heard all over.

When we reached there, I started with the Casualty because I was told that three people had been taken to the mortuary and two to the Casualty. When I reached the Casualty, I found my son crying. The other one had been shot on the hand and there was flesh hanging. They shot his hand and foot. Mine had been shot on the foot. He was crying and telling me: "Mama, please give me some water." People just held me because I did not have strength. The one who was there just died as I was watching. They started treating my son. He was taken for X-ray to see whether there was a bullet in his body. It had shot him and gotten out of the body. So, there was just flesh hanging. My son stayed in Russia Hospital for three years. He was admitted and after a while, he got discharged. I keep buying medicine for washing the wound and also for his use. While he was still in Russia, my husband died out of shock. I have been living with my son in Russia.

There were some people who had come from China to visit the Russia Hospital. They called me and told me: "Mama Michael, come to hospital. Your son's foot is going to be cut because it has been badly infected and cannot heal." They asked if they could get blood from me. I told them that I had been very unwell and was suffering from High Blood Pressure and so, I could not donate blood. I called Michael's brother who went to Russia and donated blood and Michael's foot was amputated. [...] Up to now, he is mentally disturbed and says things which we do not understand.

80 TJRC/Hansard/Thematic Hearing/Children/Nairobi/ 14 Dec 2011/ p. 32

81 TJRC/Hansard/Thematic Hearing/Children/14 December 2011.

Sexual Violence

- 72 As with other types of violations, there are an increased number of defilement cases during periods of violent conflict. Sexual violence against children is particularly abhorrent and appalling and often leads to devastating long-term physical, psychological, social and economic effects. Evidence submitted to the Commission of Inquiry into the Post Election Violence (CIPEV) documented 262 defilement cases received at the Nairobi Women's Hospital during the 2007/2008 PEV period.⁸² This Commission was informed that the actual number of children defiled during election-related conflicts was higher than the number documented. This is mainly because many children were displaced and were unable to report to the authorities.
73. In a memorandum to the Commission, CRADLE presented several cases of sexual violence in the period running to and during the PEV.⁸³ In Korogocho, Nairobi, a 12-year-old girl was defiled by the outlawed Taliban group during the 2007 General Elections campaign period. While some acts of sexual violence were opportunistic and committed randomly by strangers, there is evidence showing that security agents have always committed sexual violence during security operations. According to a statement of a 17-year-old girl from Eldoret, her friend, a 16-year-old girl, was attacked by seven Administrative Police Officers who gang raped her. Still in Eldoret, gangs went to houses and defiled young girls who had been left behind by fleeing parents.
- 74 The Commission also heard many cases of children who had to witness as their mothers or sisters were being raped and sexually violated. In Kericho, a mother was raped by administrative police in the presence of her 10 year old daughter. The child remains traumatized five years on.
- My 10-year old daughter is the one who witnessed the rape because she had not managed to get under the bed. She kept on calling out "Woi mama!" That child has never been counselled to date.*-
- 75 Sexual violence committed against children during conflicts is essentially an upsurge of what happens during peacetime. Sexual violence has remained an issue of great concern in Kenya for decades. This concern informed the enactment of the Sexual Offences Act, which specifically provides stringent and punitive sanctions against perpetrators who abuse children sexually.⁸⁴ In spite of extensive provisions in this

82 Government of Kenya *Report on Post Election Violence*(2008) p 248

83 Child Rights Advisory Documentation and Legal Centre (CRADLE) *Memo to the Truth Justice and Reconciliation Commission on historical gross violations of child rights in Kenya* (2011) p 14

84 TJRC/Hansard-In-Camera Hearing:Women/Kericho/ 20 Sept 2011; p. 23

85 No. 3 of 2006. Laws of Kenya

Act, sexual violence against children continues to occur in all parts of the country. According to the Kenya Police 2011 crime statistics, 3,191 cases of defilement and 277 cases of incest were recorded.⁸⁶ The Commission received testimonies of grave sexual violence against both female and male children. These testimonies reveal that sexual violence increasingly occurs in environments that should be safe havens for children, such as homes and schools. But of all the locations in which girls are sexually abused, homes are the most common.⁸⁷ Due to the nature of the relationships in this setting, many of the cases are unreported and victims experience the abuse repeatedly.

- 76 Evidence reveals that more and more cases of sexual violence against children are perpetrated by individuals who should be protecting them, such as parents, family members, teachers, religious leaders and members of the police and military.⁸⁸ In many of these cases, the children are subdued into silence about their experiences, and as such, these cases are never reported to the police.

When I was in class six, I was raped by my dad [] I told my mom. However she told me it was a lie. I went to school and told my teachers. They took me to hospital.”

- 77 Another child told the Commission that she recalled she could not report attempts by her brother-in-law to rape her because, in her words, ‘he was paying fees for me [and if I reported him] I could not go to school anymore’. When she told her parents of her experience they asked her to ‘keep quiet about it’. Another child told the Commission the following story:

When my mother sent me to fetch water and wash clothes in the river, I met a certain man. He was working with the Ministry of Public Health. I was still a student. He got hold of me and took me to the forest. He told me not to speak and not to mention his name. He raped me and I became pregnant. I did not know until when I went back to school. I was in a boarding school then. I told my mum but she said that if we reported the person then our businesses would be closed. So, I kept quiet. In the middle of the term, I felt ill. I did not know that I was four months pregnant.⁸⁹

- 78 A doctor and counsellor at Kisumu District Hospital explained to the Commission that in many cases where perpetrators of sexual violence are known to the victims, the victims are always given financial incentives not to report or to drop such cases:

What pains me most is the fact that the parents of children who are defiled collaborate with the rapists. The rapists pay some little money, ranging between KES 2,000 and KES

86 Kenya Police Annual Crime report for the Year (2011) p 25. Available at: <http://www.kenyapolice.go.ke/resources/CRIME%20REPORT%202011.pdf> (accessed 1 July 2012).

87 CRADLE *Sexual Violence: Blood, Sweat, Fears and Tears* p 6.

88 See e.g. TJRC/Statement/0003.

89 TJRC/Hansard/Thematic Hearing/Children/Nairobi/ 14 Dec 2011/ p 55.

90 TJRC/Hansard/Women’s Hearing/Baringo/ 25 Oct 2011/ p 15.

3,000 and the parents forgive them. Many of the young children I attend to have been defiled by their fathers. When such a child goes out and says that she has been raped, because her mother wants to defend her husband, she says "Let this issue be resolved at this place." This trend is affecting the lives of our girls because after some time, the girl becomes afraid of men."

- 79 As some of the testimonies above show, while the assumption is that perpetrators are always male relatives, there is evidence that female relatives perpetuate this vice either through complacency or actively encouraging it. An epileptic girl told the Commission that "My mother, a bar-lady, beats me and brings me men to rape me and if I refuse, I am beaten and bottles put in my private parts"⁹² Vulnerability of girls to sexual violence is linked to socio-economic and cultural factors. Vulnerable children such as street children are always raped by strangers at random locations. There are also cases where perpetrators target institutions such as girls' boarding schools. The Commission heard of a case in which robbers attacked Hawinga Girls Secondary School in 1993 and sexually assaulted students

A group of robbers went to the dormitories, where they beat up students, took their personal belongings, money et cetera. It was during this time that they attacked some of those students sexually. They were over ten, and I want to whisper to you that some of them were infected. About ten girls were sexually attacked.⁹³

- 80 A similar incident happened at Kangubiri Girls High School in 2006. While educational institutions have taken some measures to ensure the security of students, the incidents at these schools show that these measures are sometimes inadequate

- 81 In schools, perpetrators of sexual violence also include teachers and other individuals in positions of authority. In the period 2009-2010, it is reported that 1000 teachers were sacked for sexually abusing children.⁹⁴ Another study conducted between 2003 and 2009 revealed that 12,660 girls were sexually abused by their teachers, yet only 633 teachers were charged with sexual offences.⁹⁵ During the Commission hearings in Busia a narrated how her minor daughter was defiled by a teacher

When they reached the teacher's house, [Theresa] knocked at the door and the teacher came out. While he was standing at the door holding [Nancy's] hand, [Theresa] gave the luggage that she had. The teacher pretended that he was checking the luggage and in the process pulled [Nancy] into his house. [Theresa] ran away and proceeded to school. The teacher locked up [Nancy] in the House and as such she did not go to school. The teacher

91 TJRC/Hansard/Public Hearing/Kisumu, 22 Jul 2011' p. 24

92 TJRC/ Statement/ 52

93 TJRC/Hansard/Public Hearing/Kisumu/ 18 July 2011' p. 40

94 IRIN Analysis 'Sex abuse in Kenyan schools' (2011)

95 J. Ruto 'Sexual abuse of school age children: Evidence from Kenya' (2009) 12 *Journal of International Cooperation in Education* 177

too did not go to school. He stayed behind and defiled the child. When the child tried to scream he threatened to kill her with a knife. So, the child just persevered until evening. In the evening a young man visited the teacher's place. Because [Nancy] was still in uniform, he brought home clothes and pleaded with [Nancy] to remove her uniform. They tried to convince her to get married but she refused. They continued arguing but she refused to remove her uniform. The young man went back to their home. That evening, [Nancy] remained in the teacher's house. The teacher continued defiling her the whole night.⁹⁶

82 According to guidelines issued by the Teachers Service Commission (TSC) in 2010 any sexual abuse of a child by a teacher should be reported to the TSC within 24 hours. However, in 2009 for instance, 90 percent of cases involving sexual abuse perpetrated by teachers were not reported to the TSC. In 2009, only 35 teachers were found responsible of defiling students.⁹⁷

83 A worrying trend that became evident during the Commission's hearings is the increase in the number of cases of girls being defiled by their peers. In 1991, 71 girls at St Kizito High School, Meru, were raped by their male counterparts. In general, cases of minors convicted for defiling girls are on the increase.

84 Sexual violence against male children is increasingly also an issue of concern in Kenya. According to the 2011 Kenya Police Statistics, 114 cases of sodomy were reported to the police. Although this data is not broken down by age, it is likely that most of the victims in such cases are male children. Similar to sexual abuse against girls, boys are sexually abused by close relatives as well as by strangers.⁹⁸ Socio-economic factors also contribute towards increased vulnerability of boys. Street boys, for instance, experience higher incidents of sodomy.

My suffering began when my mother left for Nairobi and left me with my grandfather. I ran away from home and lived in the streets of Nyahururu. I have suffered assaults and attempts of sodomy from older boys while on the streets.⁹⁹

85 A child in Mombasa similarly recounted:

My parents died when I was three years. I was adopted by a street mother who brought me to Mwakinye dumping site. I was sodomised while on the streets.¹⁰⁰

86 Based upon the testimony received and on the opinion of experts, the Commission recognises that sexual violence against boys is grossly under-reported. Testimony

96 TJRC/Hansard/Women's Hearing/Busia/4 July 2011/p.11

97 Teachers put on notice over sex abuse of learners. *The Standard* 10 February 2010

98 TJRC/Hansard/Thematic Hearing/Children/Nairobi/14 Dec 2011/p. 31-32

99 TJRC/Statement/104

100 TJRC/Statement/0113

received by the Commission suggests that, for cultural and other reasons, boys tend to remain silent about these incidents

Forced recruitment

- 87 Vigilante or militia groups in Kenya sometimes target children for forced recruitment. The phenomenon of forced recruitment of children into these groups underscores the status of such children as victims and perpetrators all at once. Their rights are violated through the act of abduction and forceful enlistment. Upon enlistment, they are forced to commit crimes against innocent citizens, sometimes against their own family members. The Commission received testimony of forced recruitment involving two particular militia groups, Mungiki and SLDF. In relation to Mungiki, a witness in Nyeri told the Commission that

The other problem is the groups that we have been told about by this lady here. Innocent youths are being forced to join those groups. They are beaten and injured. So, they just join the groups because of fear. What will we do to save our children from such situations? What will we do to those who are oppressing our children to join those groups? I will ask the TJRC to think about the politicians and what they will do about our children. They are supposed to be counselled and enlightened so that they can protect themselves from joining illegal groups which they are not supposed to join.¹⁰¹

- 88 In Mt. Elgon region, the SLDF forcefully enlisted children into its ranks and those who resisted enlistment were severely punished. The Commission received testimony from a boy who was forcefully enlisted into SLDF at the age of 13. His chores in the SLDF camp included fetching water and looking after a herd of cattle. He described to the Commission how he was enlisted:

After finishing my KCPE exam, we went out and found there some men. We were taken away. When we were about to reach where they were staying, my friend asked them where they were taking us. But the man was caned thoroughly and he was forced to accompany us. As we reached there, the first duty that I was given was to fetch water. The next morning I was assigned the duty of looking after animals. That was the duty I took until I left the camp.¹⁰²

- 89 Later, when state security officers invaded the camp, he was shot and wounded in the knees but it was not after about three weeks that he was allowed to leave the camp to seek proper medical attention.

We were about to take our breakfast, when they shot bullets in the air and everybody ran away. I also ran away and hid in a certain bush. As they were moving towards where I was, one of the bullets hit me on the knees. After two hours, they left and I went back. I

101 TJRC Hansard/Public Hearing Nyeri, 8 Nov 2011, p. 20.

102 TJRC Hansard/Public Hearing Kapsokwonji, 24 May 2011, p. 2-8.

found that most of them had come back. I was told that some of our members had been shot dead. So, we were to go and bury him. We went there and dug the graves and buried them. I was hurt on the knee. I stayed that way. After two weeks, my wound worsened []. I asked the commander of that group to grant me permission to go and look for treatment. I had to look for the traditional herbs before as I waited for permission. So, I persevered for three days. That was when I told the Deputy Chairman []. He asked me whether I got my secondary admission letter. I told him, yes, I got it. He then commanded them that I had to leave and go to school. They then granted me permission and I went back home. On arriving home, I found everybody had migrated. My mother was living at Kapsakoy. I showed her my wounds and she took me to hospital. I was treated and discharged.¹⁰³

- 90 During the PEV, teenage boys were involved in attacks against 'enemy communities', with some participating voluntarily in such attacks. In Nakuru, however, the Commission heard that boys of Luo and Kalenjin ethnic communities would be forced to join in attacks against the Kikuyu. According to a witness:

During that time, members of the Kalenjin community were saying "This is our fight". They wanted the Luo to join them in fighting the Kikuyu, because they were the ones who were fighting because of politics. All the boys aged 14 years and above would be forced to go and fight. The young Luo boys who did not know how to use the arms were not coming back. The situation forced people to hide their 14-year-old boys, so that they were not forced to go and fight. The fight was between the Kikuyu on one hand, and the Kalenjin and the Luo on the other. I also had a young son I was living with, who was around 18 years old. I told him "Do not go. Just stay in the house."¹⁰⁴

Impact of conflict-related violence on children

- 91 Direct or indirect violations of children's human rights have profound and long-lasting physical, psychological, and socio-economic consequences. Global reports reveal that owing to their vulnerability and their physical and psychological immaturity, violations against children have long-term effects.¹⁰⁵ Some of the violations committed against children investigated by the Commission had grave and irreversible consequences. For instance, besides the acute emotional and physical harm that sexual violence leaves behind, there are also cases in which sexual violence victims were infected with sexually transmitted diseases such as HIV/AIDS. In other cases, the victims became pregnant following sexual violence and now had the added responsibility of bringing up children.
- 92 Together with physical harm, many children also suffer psychological damage, including post-traumatic stress disorder and other serious psychological and

103 TJRC/Hansard/In-Camera Hearing/Kapsokwony/24 May 2011/p. 2

104 TJRC/Hansard/Public Hearing/Women's Hearing/Kisumu/p. 13-14

105 G. Machel, *Impact of Armed Conflict on Children* (1996) 50

emotional conditions, resulting from human rights violations. Children who submitted statements to the Commission often used words such as anger, fear, pain, bitterness and sadness to describe their emotions following the violations. From their submissions it was clear that many of them were traumatised by some of the incidents they witnessed and experienced. A boy who witnessed the hand of a man chopped off, which was then eaten by a dog, informed the Commission that he was still traumatized by the incident.¹⁰⁶ A mother told the Commission how the brutal murder of her children had affected her other children:

One child saw the others being slaughtered and her mind is not okay. There are times she gets shocked. She cries a lot when she starts thinking. There is another one who keeps talking to herself and saying "If we had our brothers, maybe, we would be peaceful and would not have suffered like this". So, the mental health in my family is not okay. If you tell my husband to even listen to these cases, when he goes home, he will not eat or sleep. So, this issue has disturbed my family mentally.¹⁰⁷

- 93 Some children bear deep feelings of anger and would like to take revenge. For example, when asked what he would do to those who chopped off his right leg, a child unequivocally stated that 'I will kill him'.¹⁰⁸
- 94 These deep feelings of trauma, anger, and in some cases desire for revenge, may fuel further violence in the future. It was clear from the testimony that the Commission heard that the cycle of violence that has plagued Kenya is developing new roots in the younger generation. Constant exposure to violence normalises it and children begin exhibiting violent tendencies. For instance and as earlier observed, following the 2007/8 post-election violence, several schools were razed to the ground by students.
- 95 Even for those children for whom the trauma does not lead to feelings of anger and revenge, it often leads to loss of their confidence and may prevent them from realizing a better life. According to a child who spoke to the Commission, 'what I saw during the violence cannot enable me to perform well in my studies'.¹⁰⁹ In some cases, the psychological damage may manifest physically:

the first person to be killed was killed inside our shop. When my five-year-old brother was sitting there outside he saw what happened. He was unable to talk and from there he took one year before he started to talk. And for now he is a stammerer because he usually remembers.¹¹⁰

106 TJRC/Statement/0689

107 TJRC/Hansard/In-Camera Hearing Bungoma/10 July 2011/p. 10

108 R TJRC/Hansard/Thematic Hearing/Children/Nairobi (n 192 above) p. 35

109 Rift Valley Child Rights Network. Memorandum to the Truth, Justice and Reconciliation Commission (2011) 3

110 Rift Valley Child Rights Network. Memorandum to the Truth, Justice and Reconciliation Commission (2011) 9

Children and Forced Displacement

96. Forced displacement has major adverse consequences for children. Displaced children (internally displaced and refugees) are always subjected to extremely harsh conditions which negatively interfere with their access to education, health care, decent shelter, adequate food and other basic human needs. As discussed in the previous chapter, forced displacement has a long history in Kenya. Although statistical data on displaced children is lacking, there is little doubt that children have traditionally constituted a huge proportion of displaced persons. Information on IDPs of the 2007/2008 availed to the Commission by the government did not disaggregate the data according to the age of the IDPs. However, it is estimated, for instance, that 75% of IDPs in the 1990s were children.¹¹¹
97. Children separated from their caregivers or unaccompanied children are always the most vulnerable among displaced children. Some of them are never reunited to their families,¹¹² and may eventually become street children. Empirical evidence suggests that the period after the 2007/2008 PEV saw an upsurge of street children in Kenya. There was an increase of street children in such towns as Molo, Kitale, Naivasha and Eldoret. A study conducted by UNICEF in December 2011 found that 37 percent of street children profiled were IDPs generated by the PEV.¹¹³ The study found that food insecurity is the most fundamental factor causing children to connect with the streets.¹¹⁴ Other factors that IDP children cited as reasons for joining the streets are as follows: displacement leading to family separation; poor living conditions and lack of support in camps; humanitarian withdrawal and camp proximity; inability to rebuild livelihoods due to unsystematic, rushed resettlement programmes; and death, separation or injury of family members.¹¹⁵
98. The condition and life of displaced children who end up in streets is located in its broader context; the general phenomenon and plight of street children in Kenya. The number of street children has been increasing over the years. In 1989, it is estimated that there were 16,300 street children in Kenya.¹¹⁶ This rose to more than 40,000 less than a decade later in 1997.¹¹⁷ In 2007, experts estimated

111 R Rogge *The internally displaced population in Nyanza, western and Rift Valley province: A needs assessment and a program proposal for rehabilitation* (1993) 3.8 cited in Human Rights Watch *Juvenile justice: Police abuse and detention of street children in Kenya* (1997).

112 See e.g. TJRC/Hansard/Thematic Hearing/Children/Nairobi/ 13 Dec 2011/ p.28.

113 UNICEF *The chronic urban emergency in Rift Valley Kenya: Report from profiling children connected to the streets in Rift Valley province* (2012) 45.

114 As above. 49.

115 As above., 49.

116 Human Rights Watch *Juvenile justice: Police abuse and detention of street children in Kenya* (1997).

117 As above.

that there were nearly a quarter of a million children living on the streets, with approximately 60,000 children in Nairobi alone.¹¹⁸ Most of these children are driven to the streets by poverty, loss of parents or caregivers and/or abuse. Increasingly, parents send out their children into the streets to beg for money and food.¹¹⁹ But for some children, the street is the only home they know,¹²⁰ and as such, the number of children born to street children has steadily increased over the years. With no other viable options, children born on the streets are more vulnerable and are subjected to harsh conditions.

- 99 Street children usually lack basic human needs and are subjected to gross violations of human rights on a daily basis. A fact finding mission conducted by Human Rights Watch in 1996 found that street children were subjected to a wide range of violations by law enforcement officers.¹²¹ These include physical abuse, extortion, sexual abuse of mainly girls, arbitrary detention. The mission further documented violation of the rights of children in the juvenile justice system and concluded that 'in addition to the hazards of living on the street, these children face harassment and abuse from the police and within the juvenile justice system for no reason other than the fact that they are street children'.¹²² A few years later in 2001, another study found that police brutality against street children was still rampant and institutionalized.¹²³ Although in recent years, significant changes have occurred in the way the government responds to street children, interviews with street children in 2012 revealed that their greatest fear is being arrested by the police and municipal authorities, 'who conduct regular violent round-ups of children, and whose whips and beatings, have caused some children to be hospitalised'.¹²⁴ Still, the greater challenge lies in addressing the root causes that push children into the streets. As has been noted, the problem of children in Kenya is symptomatic of deeper structural issues among which are issues of land distribution, governance, corruption, ethnic division and unemployment.¹²⁵

118 IRIN Youth in crisis: Coming of age in the 21st century – KENYA: Nairobi's Street Children: Hope for Kenya's future generation (2007). Available at <http://www.irinnews.org/InDepthMain.aspx?InDepthId=28&ReportId=69987&Country=Yes>

119 TJRC/Statement0125

120 TJRC/Statement0124

121 Human Rights Watch *Juvenile justice: Police abuse and detention of street children in Kenya* (1997)

122 As above

123 Human Rights Watch *Rights at risk: Issues of concern for Kenyan children* (2001)

124 UNICEF *The chronic urban emergency in Rift Valley Kenya: Report from profiling children connected to the streets in Rift Valley province* (2012) 42

125 UNICEF *The chronic urban emergency in Rift Valley Kenya: Report from profiling children connected to the streets in Rift Valley province* (2012) 18

Plight of internally displaced children

100. With an estimated 663,921 people displaced during the 2007/2008 PEV, it is safe to conclude that the PEV generated the most number of internally displaced children in Kenya's history. A score of them spoke to the Commission about their experience following their forced displacement. Many children had to spend nights in the cold immediately following their displacement and before they could locate a proper IDP camp. At the camps, children had to spend the nights in makeshift tents and do with one meal a day. According to a displaced child:

We walked to the police station where we found others who had already arrived. We stayed there for two weeks. The police officers fed us and some of them gave us soap. We were so many and the Government was not able to feed all of us. After two days it was decided that we would only be eating supper but toddlers would be given porridge at lunch time. At some point even that one meal was not forthcoming.¹²⁶

101. The health of many children deteriorated because of the harsh and squalid conditions in the IDP camps. A study on mortality and health among IDPs in western Kenya found that internally displaced children were hospitalized at a higher rate than resident children, that is, children who were not displaced and were therefore living in their homes during the survey period.¹²⁷ The study revealed that most internally displaced children who were admitted in hospitals were at critical stages of illness. This, the study suggests, could be attributed to the fact that they were presented to hospital later in the course of illness because 'IDP parents may have been less likely to take their sick children to outpatient clinics because of lack of familiarity with the area and may have waited to take them to hospital when they were sicker and required admission.'¹²⁸ Indeed, the study found significantly lower rate of outpatient visits among internally displaced children than resident children.¹²⁹

102. Displacement during the 2007/2008 PEV had a huge impact on children's education. The state of insecurity generally disrupted studies across the country. According to a child:

When the violence was taking place in 2008, I was in class eight and was preparing for my KCPE examinations. This made the environment for me to study difficult as I could be told to put off the lights to avoid invasion from the Kalenjin people. Some of my colleagues could not come to school at all fearing invasion at school and this greatly affected their results.¹³⁰

126 Rift Valley Child Rights Network (2011) p.7. See also TJRC/Statement/0689.

127 D Feikin *et al* 'Mortality and health among internally displaced persons in western Kenya following post-election violence, 2008: Novel use of demographic surveillance' (2010) *Bulletin of the World Health Organization* 601 605.

128 As above.

129 As above.

130 Rift Valley Child Rights Network, 'Stories Narrated by Children Affected by Post Election Violence (2011) p.2.

- 103 The situation was dire, and remains so for internally displaced children who are still living in camps. Indeed, many internally displaced children were forced by circumstances to discontinue their education.¹³¹ Although arrangements were made by the government for internally displaced children to resume their education, this response was delayed and not implemented in all areas

We did not go to school the whole term. The second term we were taken to school but the head teachers did not want many children but our chief talked on our behalf and we were admitted in various schools. The effect was that we were all to repeat a class which was not good for us.¹³²

- 104 Some who resumed school eventually dropped out due to a myriad challenges including the inability of their parents to afford school fees. The Commission also learnt that the government did not consider the needs of children, especially their access to education, in designing its resettlement programme – Operation Rudi Nyumbani. Because implementation of the programme was delayed, in some cases for years, the resettlement programme disrupted the education of children who had already adapted their new environment and settled in schools located around the camp. On this issue, the Commission was told as follows

This whole circus of resettlement might not end soon because currently the children who were in class four by the time they went to those camps are today in class eight. They are waiting to sit for their exams and then the Government is saying in three weeks time they will relocate them to Ndaragwa. To which schools and they are already registered where they are? I think those are some of the issues that the Government is not being sensitive to. That is why I was saying that the Government needs to be sensitive to the way they handle the whole issue of IDPs.¹³³

Plight of refugee children

- 105 The experience of Kenyan refugee children living in Kiryandongo Refugee Camp is unique and deserving of special attention. Their access to education has been severely hampered not only because the education system in Uganda is vitally different from that in Kenya but also because of a communication breakdown resulting from the inability of the refugee children to speak the local language

My child went to school but when he saw the condition of the refugees, he refused to go to school. He told me, "Go and speak to Kibaki and Raila so that we can go back to our country". My child really suffered. We could not even get treatment in hospitals. They gave priority to their people. Even Mama Njeri suffered so much in hospital and in the process lost her child. I remember Pastor Mwangi who would tell us, "It is my wish that one day the Government of Kenya will give us farms so that we go back to Kenya". He wanted to go back home. It is unfortunate because he developed diabetes and died. We buried him in May this year.¹³⁴

131 TJRC/Hansard/Women's Hearing/Muranga/11 Nov 2011/p 11

132 Rift Valley Child Rights Network/Memorandum to the Truth, Justice and Reconciliation Commission (2011)/p 2

133 TJRC/Hansard/Thematic Hearing on IDPs/Nairobi/3 February 2012/p 44

134 TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p 5-6

106. According to a mother:

Staying here is difficult because of the children. I had grand children who were schooling in Kenya but here it is difficult because the education system is different. There is also the problem of language. Here, pupils are taught in the native language of Acholi and that creates a communication problem. Now the children do not want to go to school. They want to go back to Kenya.¹³⁵

107. In addition, because of their destitution, many children especially girls have dropped out of school. A mother lamented during the women's hearings that many girls had resorted to getting married instead of continuing with studies. She painfully pondered about the future of the girls:

It is painful for us women. We lacked education and our children are also going to lack education. Now, we are asking ourselves, 'What is the fate of our future?'

108. Orphans or unaccompanied children living in the refugee camp are disadvantaged by economic constraints and their responsibilities as heads of households disrupt their education. As a child refugee narrated:

When you are an orphan you have to work at home, dig and go to school. This has resulted in many cases of school dropouts. Some of my fellow youths have left school. Not that they are stupid but because maybe they do not have uniform.¹³⁶

109. Another specific problem to refugee children relates to the question of returning to Kenya. During the Commission's Youth Forum held at the camp, the majority of the children and youth expressed their desire to return to Kenya. However, as the Commission learnt, their parents were not ready to return to Kenya. In Uganda, the adults had found land where they could cultivate and make a livelihood. As such, they were not very keen on returning to Kenya. Life was relatively better for them in Uganda than in Kenya. A teenage boy of 17 years explained to the Commission his predicament:

Recently, we had a verification exercise of all Kenyans who are in Kiryandongo Camp. Some youths tried to request UNHCR if they could be separated from their guardians and parents, but UNHCR refused. We also tried to use some methods. They told us that if you want to go back with your parents, we register. Unfortunately, our parents or my guardians, for instance, do not want to go to Kenya. We went to register alone but they refused us to do so, saying that we must be accompanied by our parents because we looked too young. [...] So the Government of Kenya should talk to the UNHCR to take us back to Kenya. But if our parents want to stay here, they should stay. We love our country. I am staying with my guardian who is my brother and I am 17 years old. But I would like to go back to Kenya.¹³⁷

135 TJRC/Hansard/Women's Hearing/Kiryandongo/1 November 2011/p. 8.

136 TJRC/Hansard/Youth Forum/Kiryandongo - Uganda/2 November 2011/ p 7-8.

137 TJRC/Hansard/Youth's Hearing/Kiryandongo/Uganda/2 November 2011/p. 8.

Juvenile Justice

- 110 The Children Act of 2001 established a new legal framework relating to juvenile justice in Kenya. The Act establishes specific institutions that support juvenile justice, including the Department of Children's Services, Children's Court, rehabilitation schools, remand homes and borstal institutions to deal with juvenile delinquents. Minimum guarantees for child offenders are set out in the Children's Act,¹³⁸ as well as in the Constitution.¹³⁹
- 111 Notwithstanding these improvements, the Commission received testimony concerning violations against juvenile delinquents. The Children Act specifies that children in need of care are to be set apart from child offenders. The former are children who need to be taken care of¹⁴⁰ while the latter refers to children that have committed offences that can be tried in a court of law.¹⁴¹ In practice, this distinction is superficial and children in need of care and protection, such as abandoned children, often find themselves in the juvenile system which is designed for child offenders. Street children, many of whom fall under this category, testified that they are harassed by police officers instead of being assisted.
112. At the pre-trial stage and during trial, if a child has to remain in custody, they must be placed in remand homes. However, remand homes in Kenya do not have the capacity to cater for all these children. Children are, therefore, placed in cells and separate wards in prisons. The Commission received evidence showing that children's rights are not protected within these facilities. In some cases, children are kept together with adults and there have been allegations of sexual abuse in such instances. While most prisons have created separate wards for children facing trial, the overall environment is not conducive for children. Just like police cells, these wards lack adequate facilities, such as beds and appropriate food necessary for the proper development of children. Moreover, while in theory there are separate wards for children in most of the facilities, in practice children are exposed to adult criminals who may influence their character.
- 113 While the diversion programme allows police officers to use restorative justice mechanisms when dealing with alleged child offenders, it emerged that such mechanisms are rarely used. Instead, officers opt for the usual court process. Bearing in mind the developmental processes of children, restorative justice

¹³⁸ Children Act sec 186

¹³⁹ Constitution of Kenya sec 53

¹⁴⁰ Children Act sec 119

¹⁴¹ Children Act part VIII

mechanisms, such as conferencing and victim-offender mediation, may be more useful in promoting responsibility amongst children and rehabilitating them.

114. Children's desks are now provided in some police stations. However, it is evident that they are not operating optimally. Some officers running the desks have not been trained on child rights and child-friendly procedures. While non-governmental organisations have been training officers assigned to these desks, it emerged that constant transfers result in the under-utilisation of those so trained.
115. The national legal aid scheme is still at the pilot stage and therefore many children who are charged with offences are not represented by lawyers. This especially affects poor children. Notwithstanding the Constitutional and statutory requirement that custodial sentences are ordered as a last resort, some children who are not suited for custodial sentences are committed to borstal institutions. Borstal institutions are intended to rehabilitate children, yet they are operated by prison officers who are trained to run traditional retributive prisons meant for adults. For example, despite the outlawing of corporal punishment, it is still practised in some borstal institutions. Institutions dealing with juvenile delinquents are not well equipped to rehabilitate juveniles who are drug addicts, for instance. This is inconsistent with the right of children to be protected from the use of harmful drugs.¹⁴²



142 Children Act, sec 14.

Responses to Violations

State responses

116 There have been several initiatives taken by government institutions towards respecting, promoting and ensuring the enjoyment of child rights in Kenya. This section looks into how key relevant state institutions are responding to violation of child rights

■ *Police*

117 The police force is a crucial institution in the protection and enforcement of children's rights as it is, in many cases, the first point of contact for victims. There have been attempts to incorporate a child-sensitive approach in the police service. In 2006, the Department of Children's Services was established at Kenya Police Headquarters and subsequently, children's desks were gradually placed in some police stations. However, the desks are sometimes run by officers who have not been trained on children's rights, which poses a challenge to achieving the program's objective. Non-governmental organisations have organised training sessions for officers but it is common for trained officers to be transferred and replaced by others who are not trained. The police service has perennially faced huge financial constraints and has not, therefore, been able to provide facilities that are child-friendly to cater for children in their custody. Owing to lack of separate facilities for children, some children have been abused while in custody.

118 Statements submitted to the Commission indicated that police officers have sometimes organised for vulnerable children to be placed in charitable homes¹⁴³. However, accusations of inaction are routinely levelled against the police. A child testified that 'my father beat my mother and set all our clothes on fire. We reported to the police and even filled in a P3 form but nothing was done'¹⁴⁴. Another child recorded a statement indicating that

I was raped, got pregnant and gave birth. I reported the matter to my father who, when delivering the same report at Meru Police station, he was told to go to the Children's Department. It is CRADLE that assisted me because at the police station, even up to date, they have not arrested the suspect¹⁴⁵.

119 Allegations of police officers colluding with people alleged to have violated children's rights are rampant¹⁴⁶. The Commission heard that in some cases victims

¹⁴³ TJRC/Statement/0131

¹⁴⁴ TJRC/Statement/0063

¹⁴⁵ TJRC/Hansard/Thematic Hearing/Children/Nairobi/ 13 Dec 2011/ p 24

¹⁴⁶ Oliech (n 59 above) p 42

do not report their cases due to factors such as the distance to the police station, especially when they cannot afford the related travel costs.

■ *Judiciary*

120. The courts have been and are instrumental in enforcing child rights recognised in Kenya. They have, for instance, been proactive in ensuring that parental responsibility, especially in material terms, is taken up by parents. This is especially crucial where parents having custody of children have financial constraints that undermine the full realisation of children's rights, such as access to health care, adequate food and education. In such cases, simplified procedures in the Children's Courts have made it possible for parties unable to afford lawyers to access justice. However, there are still important obstacles; for example, there are no formal mechanisms to assist illiterate parties to obtain justice.
121. Courts have to a large extent been implementing the Sexual Offences Act, which provides harsh and stringent sentences for those convicted of sexual offences against children. However, there have been some instances where sentences have fallen short of what has been provided by law.

■ *Department of Children's Services*

122. The Department of Children's Services deals with a wide variety of issues related to children, ranging from providing the courts with social enquiry reports in matters involving children to directly intervening where children are in danger. Violations of children's rights are reported to them for action. Being social workers, children's officers are able to resolve issues and protect the welfare of children. The Department of Children's Services also runs rehabilitation schools, remand homes and rescue centres.
123. This Department is, however, understaffed and does not have adequate resources. It also lacks sufficient numbers of officers with specialised skills.¹⁴⁷ Children's officers are mainly stationed at the district level, and as a consequence, the majority of children are not reached. Due to these bottlenecks, the Department of Children's Services is not operating at its optimal level. Essentially, the Department should be pivotal in promoting and protecting child rights and the coordination of stakeholder activities, but the limited resources of the Department have forced many children in need of care and protection to obtain help from non-governmental organisations that should ordinarily play a complementary role to the Department.

¹⁴⁷ Department of Children's Services 'Response to the Truth Justice and Reconciliation Questionnaire in preparation for the thematic hearing on children slotted for 13th -14th December 2011'(2011) p.4

Children have a special place in any human society. By virtue of their age, they deserve special attention and care. Contrary to both moral and legal tenets, terrible atrocities have been committed against children in Kenya's history.

Non-state actors

124. Non-state actors such as non-governmental organisations (NGOs) play a key role in the promotion and protection of children's rights in a variety of ways. For example, an important role that they play is investigating and reporting about the abuses committed against children. A lot of relevant and useful information was submitted to the Commission by these organisations. NGOs also run shelters and children's homes.
125. Also, some non-state actors are directly involved in challenging violations of children's rights and undertaking remedial measures where they occur. For example, the CRADLE, an NGO based in Nairobi, has consistently challenged violations of children's rights and has been engaging in policy and legislative advocacy to promote these rights.
126. These non-state actors have also been creating public awareness about the rights of children and promoting social change against practices that are not compatible with the realisation of these rights. Non-state actors also provide technical assistance by training stakeholders who are directly involved in matters of children's rights, such as the police. Others have provided financial assistance to key government departments. Some are based within the communities and provide practical solutions preventing or dealing with violations of children's rights. For example, some organisations provide shelters for child victims and others assist families to attain financial sustainability, hence reducing vulnerability.
127. In spite of their immense contribution in promoting and ensuring the realisation of children's rights, some non-state actors have been accused of violating these rights. For instance, some children's homes are in deplorable conditions that are unfit for children. Other homes are said to treat children inhumanely.



Children at the Pipeline IDP camp in Nakuru during a visit by TJRC staff.

Conclusion

128. Children have a special place in any human society. By virtue of their age, they deserve special protection and care. Contrary to both moral and legal tenets, terrible atrocities have been committed against children in Kenya's history. This Chapter has recorded just a handful of such atrocities. The Commission hopes that never again will such atrocities be committed against children nor will they have to watch their loved ones or neighbours undergo such atrocities. Although much has been done to promote and protect the rights of children in recent years, much still needs to be done to make every home and institution in Kenya a safe haven for children.



Members of the Sengwer community performing a traditional dance ahead of TJRC hearings in Kapenguria.

Minority Groups, Indigenous People and Gross Violation of Human Rights

Introduction

1. Worldwide experience has shown that minority groups and indigenous people are often more vulnerable to injustices and violations than other segments of society. In particular reference to indigenous people, it has been observed in a recent practitioner's resource book on strengthening indigenous rights through truth commission, that indigenous people are:

among those most affected by contemporary conflict. The resource-rich territories they occupy are covered by powerful, often violent groups. Their identity is perceived with mistrust, sometimes with hate. Indigenous communities live at a precarious intersection between unresolved historic injustices and the contemporary incursion of industry and political violence.¹

2. And that:

susceptibility to violent conflict and poverty are both a cause and an effect of another phenomenon affecting indigenous peoples: their weak voice in the political arena and in judicial institutions. As a result, when societies decide to confront the legacy of war, tyranny, or entrenched injustice, the suffering of indigenous communities is often marginalized or inadequately addressed.²

¹ ICTJ *Strengthening indigenous rights through truth commissions: A practitioners resource* (2012) 1.

² As above.

- 3 As part of its mandate to look into historical injustices and gross violations of human rights, the Commission took measures to ensure that minority groups and indigenous people participated in its processes and that their situation was considered
- 4 Through its statement taking process, the Commission received statements from individual members of minority and indigenous groups. The Commission also received memoranda prepared jointly by members of these groups and listened to some of their testimonies during its public hearings. The Commission also heard evidence from experts on minorities and indigenous peoples' issues during a Thematic Hearing that took place on 13 February 2012 in Nairobi. The Thematic Hearing provided an opportunity to look deeper into patterns, causes and consequences of abuse on minorities and indigenous people. The Commission also undertook comprehensive review of academic papers and reports based on action research by various organisations, including the United Nations, on the subject of indigenous and minority rights globally and in Kenya
- 5 This Chapter is structured in three main parts. The first part addresses the terminological and conceptual issues relating to minorities and indigenous peoples and their relevance to group rights violations within the Commission's mandate. The second part pays attention to the legal context (both national and international) that is responsible either directly or in the manner of application to the specific challenges of minorities and indigenous groups. The Chapter then engages in a comprehensive review of the key human rights concerns that confronted marginalised groups during the temporal mandate of the Commission. This part of the Chapter is especially important because it incorporates in greater detail the evidence and views of communities presented to the Commission. The credibility of these views was augmented by reports from key national and international institutions as well as academic literature. All these findings paint a grim picture of exclusion, loss of land, poverty and denial of justice. A specific part of the Chapter is dedicated to the rights of indigenous and minority women whose predicaments are often forgotten when assessing the global picture of these groups

Through its statement taking process, the Commission received statements from individual members of minority and indigenous groups. The Commission also received memoranda prepared jointly by members of these groups and listened to some of their testimonies during its public hearings.

Definitions

6. Identifying concrete parameters for defining minority groups and indigenous people has proven controversial both in Kenya and beyond. A generally accepted starting point for defining minorities is the Capotorti-Deschênes definition proposed by the now defunct UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (now replaced by United Nations Human Rights Advisory Committee). This definition specifies that minorities:
- are numerically inferior to the rest of the population of a state;
 - are in a non-dominant position;
 - reside in the state;
 - possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population; and
 - show, if only implicitly, a sense of solidarity directed towards preserving their distinctive collective identity.³
7. The absence of a universally accepted definition notwithstanding, the United Nations Human Rights Committee has asserted that: 'The existence of a [...] minority in a given state party does not depend upon a decision by the state party, but requires to be established by objective criteria.'⁴ States - Kenya included - are therefore required by international human rights law to establish objective standards on the determination of existence or otherwise of minorities within their borders. Indeed, two African human rights treaties make specific reference to minorities. The African Charter on Democracy, Elections and Governance provides that: 'State Parties shall adopt legislative and administrative measures to guarantee the rights of [...] ethnic minorities [...] and other marginalised and vulnerable social groups.'⁵ It further mandates states to improve education and literacy standards of ethnic minorities.⁶ This treaty language confirms that minority rights are gaining increasing acceptability in the continent as a tool for addressing group-based exclusion otherwise not addressed through the individual rights framework.⁷

3 F Capotorti *Study on the rights of persons belonging to ethnic, religious and linguistic Minorities* Doc. E/CN.4/Sub.3/384/Add.1-7 (1977) para. 568; J Deschênes *Proposal concerning the definition of the term 'Minority'* Doc. E/CN.4/Sub.2/1985/31 (1985) para 181.

4 Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994) at <<http://www1.umn.edu/humanrts/gencomm/hrcom23.htm>>

5 African Charter on Democracy, Elections and Good Governance, article 8 (2).

6 African Charter on Democracy, Elections and Good Governance, article 43

7 M Makoloo *Kenya minorities, indigenous peoples and ethnic Diversity* (2005) 5-6.

- 8 Generally, minority groups are known to include national, ethnic, cultural, linguistic and religious minorities, as well as some migrants, refugees and indigenous peoples. Minorities are likely to be discriminated against on the grounds of their membership in the minority group and they often develop increased group loyalty and associated behaviour as a result of discriminatory relations with the state.
- 9 In Kenya, minorities include
- non-Africans such as Kenyan Asians⁸, although their status as a 'non-dominant' group can be differentially argued depending on the issue under consideration,
 - religious minorities such as Muslims, Hindus and those who follow traditional African religions,⁹
 - ethno-linguistic minorities such as Nubians,¹⁰ and
 - indigenous peoples such as pastoralists and hunter-gatherers.
- 10 Indigenous peoples are distinct from minorities both in character and in the rights that they possess under the international system.¹¹ The two groups share many of the same characteristics, however, in different contexts. The definition of indigenous peoples has been contested because the relationships between indigenous peoples and dominant or mainstream groups in society varies from country to country. 'Indigeneity' is a division of ethnic identity that refers to collective perceptions and kinship around cultural practices, language and even history.¹² A working definition for indigenous peoples was proposed by the UN, which states that:
- Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹³
- 11 A Kenyan case that went before the African Commission on Human and Peoples' Rights (African Commission or ACHPR) provided a clear set of criteria for determining

8 Y. Ghai & D. Ghai *The Asian Minorities of East and Central Africa* (1971)

9 M. Ndeda *The Struggle for space: minority religious identities in post-independence Kenya* (2009) Available at www.ifra-nairobi.net/cahiers/Cahier_41/6Ndeda.pdf (accessed 1 March 2012)

10 Makoloo (n 7 above) 10

11 See e.g. P. Alston *Peoples rights: their rise and fall* (2001) 274

12 ICTJ *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource* (2012) 8

13 Study of the problem of discrimination against indigenous populations sub-commission on the prevention of discrimination and the protection of Minorities UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986)

the beneficiaries of indigenous rights protection in the continent. In its decision in the *Endorois Case*, the ACHPR confirmed the definition of 'indigenoussness' that was laid out by its Working Group of Experts on Indigenous Populations/Communities which identified *four decisive factors* for the classification of a group as "indigenous peoples", namely:

- the occupation and use of a specific territory;
 - the voluntary perpetuation of cultural distinctiveness;
 - self-identification as a distinct collectivity, as well as recognition by other groups; and
 - an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.¹⁴
12. While de-emphasising the requirement of aboriginality in Africa's evolving understanding of indigenous peoples, the African Commission in the *Endorois Case* further provided the following ascriptive and objective markers of indigenous identity in the continent:
- an unambiguous dependence on a specific territory for their economic survival;
 - the experience of marginalisation and discrimination;
 - the extent of non-accommodation of the group's livelihood by dominating development paradigm, and;
 - an ancestral link to their communal lands whether or not they are still in possession.¹⁵
13. The African Commission has also challenged misconceptions of African states that lending effective protection to Africa's indigenous peoples would result in the enjoyment of special rights to the detriment of others, by providing that:
- The issue is not special rights. [...] The issue is that certain marginalised groups are discriminated in particular ways because of their particular culture, mode of production and marginalised position within the state. This is a form of discrimination which other groups within the state do not suffer from. It is legitimate for these marginalised groups to call for protection of their rights in order to alleviate this particular form of discrimination.¹⁶

14 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and Peoples' Rights, Communication 276/2003, para. 149

15 *Endorois Case*, para 158

16 IWGIA & ACHPR *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa (2005).

- 14 The African Commission has further specified that indigenous groups in Africa include hunter-gatherers, certain pastoralists and other groups for which "survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon"¹⁷
- 15 The various criteria for identifying indigenous peoples in Africa largely mirror standards set by a working group established by the Kenya National Commission on Human Rights (KNCHR) and the Centre for Minority Rights Development (CEMIRIDE), which incorporated the following definitional ideas regarding indigenous peoples
- having a sense of collectivity/solidarity/belonging,
 - claiming rights to ancestral land in collectivity/common originality,
 - practicing and retaining a cultural lifestyle,
 - retaining traditional institutions and social organisation,
 - depending on natural resources in their respective territories,
 - suffering exclusion and discrimination from and by the mainstream systems,
 - possessing unique or common religion and spirituality, and
 - utilising unique means of livelihood and traditional occupation¹⁸
- 16 It is important to note that the minority rights and indigenous rights movements in Africa substantially overlap. Indigenous peoples in Africa are, almost without exception, also minorities.¹⁹ The opposite however is not necessarily true as only a sub-set of ethnic, cultural and religious minorities also identify as indigenous peoples
- 17 For example, Kenyan Asians may constitute a minority group but are not identified as indigenous peoples. In contrast, the Yiaku, often incorrectly called *Yaaku* or falsely *Mukogodo-Maasai*, exhibit both characteristics of an indigenous community and a minority group. Living in the Mukogodo forest west of Mount Kenya, the Yiaku have inter-married with the Maasai and Samburu, threatening the cultural and linguistic survival of the group
- 18 The Yiaku community presented a memorandum to the Commission and described themselves as follows

¹⁷ Makoloo (in ¹⁷ above) ^17

¹⁸ ACHPR *Report of experts meeting on minorities and indigenous peoples rights in Kenya* (2006) 16-17

¹⁹ But note that there are significant exceptions such as the Berbers of North Africa who self-identify as indigenous peoples but who are a majority of the population in many countries and regions

The Yiaku people (community) are Cushitic by origin, hunters and gatherers and speak the Yakunte language. The Yiaku people inter-married with the Maasai and Samburu (Maa speakers) and this led to the start of the diminishing of Yakunte language. The language is an important element in identifying cultural communities and thus the government has an obligation to rescue, preserve, document and revive the Yakunte language among others.²⁰

- 19 Representations made to the Commission from communities such as the Boni, Endorois, Nubians and Maasai reveal how communities view themselves in comparison to other ethnic groups on the one hand and the state on the other. The Boni assert “*Sisi jamii ya Waboni ni jamii inayotambulika kuwa ni jamii yenye idadi ya watu wachache na pia hawana watu wasomi na wenye nguvu kisiasa na katika serikali yetu*” (‘We the Boni are a community acknowledged to be numerically inferior to others. Our members have neither much education nor political influence in government in Kenya’)
- 20 This narrative of disempowerment of groups is also articulated by the Nubian community which identifies itself as a ‘minority and marginalised group – neglected due to either religious belief or ethnic background’²¹. The Endorois proudly told the Commission of being “indigenous peoples in Kenya, who for millennia have maintained their indigenous culture, systems and practices – residing in an area with high concentration of biodiversity and relative ecosystem integrity”²². The Talai referred to themselves as a ‘clan of the Kipsigis’ whose reign as ‘rulers of the Kipsigis’ was violently extinguished by the colonial government.²⁴
- 21 A memorandum submitted to the Commission by members of the Maasai community elaborated the logic of exclusion thus
- Initially, colonial policy was structured to make Maasai politically and economically dependent to prevent them from asserting their control of the land. Maasai people were structurally excluded from participating in policies that affected their lives – like other indigenous peoples.²⁵
- 22 During the public hearings in Kapenguria, the Pokot, Sengwer and Sabaot identified themselves as indigenous peoples of Trans Nzoia,²⁶ although in another instance, the Pokot were identified as ‘one of the minority groups that live in the North Rift region’²⁷

20 TJRC/Memo/1274 [Submitted by the Yiaku Cultural Group, Laikipia North District]

21 TJRC/Memo/0606 [Submitted by Boni community, Lamu District] p. 2

22 TJRC/Memo/0311 [Submitted by the Nubian community, Nairobi]

23 TJRC/Memo/0002 [Submitted by the Endorois community, Baringo]

24 TJRC/Memo/1593 [Submitted by the Talai community, Kencho]

25 TJRC/Memo/0063 [Submitted by the Maasai community, Narok]

26 TJRC/Hansard/Public Hearing: Kapenguria, 14 October 2011/p. 26

27 TJRC/Memo/1211 [Submitted by the Pokot community]

The Sengwer also identified themselves as a long-suffering 'minority community' in relation to the skewed land ownership structure, the Pokomo demanded that as an indigenous group in Hola, Tana River, they should be given first-priority in allocation ²⁸

- 23 Based on the foregoing literature review and evidence of self-identification presented to the Commission, indigenous peoples in Kenya include the following groups (although this is not an exhaustive list)
- Pastoralists and agro-pastoralists - Borana, Endorois, Gabra, Maasai, Pokot, Rendille, Samburu, Turkana, Somali, Kuria, Marakwet and others.
 - Hunter-gatherers - Aweer (Boni), Ogiek, Sengwer, Yiaku²⁹, Waata
 - Fisher peoples - Ilchamus, El Molo, several coastal communities including the Bajuni, Pokomo, Wardei, Boni, Munyoyaya and similarly situated groups
- 24 Overall, the Commission observed that pastoralists, hunter-gatherers, nomadic groups and other practitioners of traditional livelihoods tend to lack of voice in policy formulation, were found to be economically emasculated by the wanton spoliation of lands held through custom, suffered historical injustices perpetrated through the instrumentality of security forces and experienced widespread structural poverty, requiring specific redress. A minority rights or indigenous peoples' rights framework is useful in enabling a more rigorous assessment of these groups' challenges, despite the contested nature of these concepts
- 25 In reviewing the situation of self-identified minorities and indigenous groups, the Commission was also presented with the problem of minorities within minorities or "internal minorities". While ethnic groupings are often assumed to be internally homogenous, recent studies reveal the existence of complex hierarchies within them ³⁰ The clan, among some communities, constitutes a fairly coherent political community quite distinct from the ethnic grouping. Thus, in the case of the Somali, the Commission heard about inter-clan tensions pitting at least three clans, the Ajuran, Garre and Degodia that often result in serious violent conflicts ³¹ Where such clans held themselves out to the Commission as distinct units that bore specific grievances against the state or other clans or tribes, the Commission resolved to treat such clans as minorities and to address their human rights concerns in this chapter. This approach is important for at least two reasons

28 TJRC/Hansard/Public Hearing/Hola/14 October 2011/p 12

29 Often incorrectly called *Yaaku* or falsely *Mukogodo-Maasai* are a people living in the Mukogodo forest west of Mount Kenya

30 *Kenya constitutional legislative and administrative provisions concerning indigenous peoples* (2009) 1 Available at http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf (accessed 3 January 2012)

31 Government of Kenya *Report of the judicial commission to inquire into tribal clashes in Kenya* (Akiwumi Report) (1999) 76

26. First, failure to appreciate internal hierarchies, whether gender, class or incipient nationalism, is unhelpful in bringing closure to historical issues that *a priori* gave rise to human rights violations.³² Second, as will become evident in subsequent parts of this report, certain colonial statutes whose operations continued beyond the 1960s resulted in deep-seated marginality among communities. Some of these statutes spell out specific clans as subjects of regulatory orders governing, for instance, Closed Districts. Failing to address the concerns of these clans merely on the ground that they are sub-tribes does not do justice to the unresolved human rights and justice issues. Further, to the extent that that such recognition extends rather than deprecates protection of individuals within such groups, the Commission is duty-bound to consider them under the rubric of minorities.
27. The following section describes the international normative framework that obligates the Kenyan government to ensure promotion and protection of the rights of minorities and indigenous peoples.



Representatives from the Njemps Community following TJRC hearings in Baringo.

³² A woman in Mandera identified herself as being from 'the Garre community' as opposed to being from the Somali community. See, TJRC/Hansard/Women's Hearing/Mandera/26 April 2011/p. 8; another male witness testified in Mandera that the Malkamari massacre targeted the 'Degodia and Garre communities.' See, TJRC/Hansard/Public Hearing/Mandera/27 April 2011/p. 19.

Minority Groups, Indigenous People and International Law

- 28 Explicit recognition of minorities in international human rights law is contained in Article 27 of the International Covenant on Civil and Political Rights as further elaborated in the UN Declaration on Minorities³³ Moreover, indigenous peoples' rights have recently been codified by the UN Declaration on Indigenous Peoples,³⁴ although this is by no means the only global standard "
- 29 Africa's premier human rights treaty, the African Charter on Human and Peoples' Rights (African Charter),³⁵ while not explicit in its mention of minority or indigenous rights, contains various provisions that are applicable to the situation of such groups With specific reference to communal groups, under which minorities and indigenous peoples falls, article 19 of the African Charter states that 'all peoples shall be equal' and 'they shall enjoy the same respect and shall have the same rights' It also provides that 'nothing shall justify the domination of a people by another' Article 20 further notes that
- All peoples shall have the right to existence They shall have the unquestionable and inalienable right to self-determination They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen
- 30 Elsewhere in the African Charter, it is provided that 'the mass expulsion of non-nationals shall be prohibited' According to the Charter, mass expulsion is that which is aimed at national, racial, ethnic or religious groups' In effect, any attempt by a member-state to 'ethnically cleanse' communal groups within their borders is prohibited by the African Charter. In addition to these broad standards, explicit recognition of minority ethnicities and groupings is beginning to emerge in African human rights treaties,³⁷ while various declarations and judicial determinations speak to the protection of indigenous communities around the continent³⁸

33 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993)

34 Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (2007)

35 See for instance, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991

36 African [Banjul] Charter on Human and Peoples Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

37 African Charter on Elections (n. 3 above), article 8 (2). See also, Tim Murithi, 'The African Union and the Prospects for Minority Protection', in A. Xanthaki and P. Ghanea (eds.), *Minorities in Peoples and Self-Determination* (2004), 221

38 African Commission on Human and Peoples Rights, *Resolution on the Rights of Indigenous Women in Africa* (adopted during the 49th Ordinary Session, held in Banjul, The Gambia, from 28 April to 12 May 2011). The Resolution recognizes rights of indigenous populations to property, to freely dispose of their wealth and natural resources, to practice their culture and their right to development as guaranteed in the African Charter and other pertinent international instruments []. See also, *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97, a 196/97 and 210/98 (2000). In indicting Mauritania for its treatment of Black Mauritians, the African Commission determined that 'for a country to subject its own indigenes to discriminatory treatment only because of the colour of their skin is an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and of the letter of its article 2 - para. 131



31. The standards demonstrate that minorities and indigenous peoples have specific rights under international and regional laws. In addition to the fundamental rights guaranteed to all human beings, members of minority groups and indigenous peoples are specifically protected in relation to:
- the right to exist - that obliges states to protect minorities and indigenous peoples from genocide and physical displacement;
 - the right to non-discrimination and substantive equality: states should protect minorities and indigenous peoples from discrimination on the basis of ethnic, religious, cultural and linguistic grounds;
 - the right to self-determination - the right to political self-determination and autonomy generally applies to indigenous peoples;
 - the right to protection of identity - preserving the freedom of minorities to practice their culture, language and religion;
 - right to development - entails a right to a process in which all human rights are considered as an integral whole in both the process and outcomes of development;
 - right to participation and consultation - minorities and indigenous people have a right to participate in decision-making processes that directly affect them;
 - right to a remedy for violations of their rights: All victims of gross human rights violations have a right to a remedy under international law.
32. Kenyan law and practice concerning the rights of minorities and indigenous peoples is therefore best understood and analysed using the set of international and regional standards mentioned here.

Injustices and Violations Specific to Minority and Indigenous People

Systematic Discrimination

- 33 It is clear that both the laws and policies directly impacted the status of minority and indigenous communities during the temporal mandate of the Commission. The constitution inherited from the British in 1962, otherwise known as the Lancaster Constitution, was based on a delicate compromise of the colonial interests of the white settler population on the one hand and the disparate ethnic aspirations and fears of Kenya's communities.³⁹ The constitution adopted two mechanisms for securing the accommodation and autonomy of minority communities.
- 34 The first was the establishment of regional governments, which were vested with authority to manage the affairs of communities resident in those regions while, through the senate, ensuring that regional concerns were well articulated within the supra-state level.⁴⁰ The constitution also established, what was then in the early 1960s a robust bill of rights to address the equality demands of Kenyans.
- 35 Certain provisions of the bill of rights were to cater for the specific interests of coastal communities whose membership in the Kenyan state had been acceded to by treaty.⁴¹ These constitutional guarantees included non-discrimination, freedom of religion, recognition of Kadhis courts as arbitral institutions in personal matters affecting Muslims and respect for pre-established land rights at the Coast.
- 36 These constitutional arrangements collapsed soon after independence with the abrogation of regional assemblies and the abolition of the bi-cameral legislature as well as the fusion of all these powers under an imperial presidency. Under this constitutional structure, the presidency was used as an instrument of crude accumulation of state largesse, but most crucial for minorities and indigenous people, for land grabbing.⁴²
- 37 Deprived of initial safeguards and in-built checks and balances, the retention of new constitutional provisions had deleterious impact on minority and indigenous communities living in Northern Kenya. For instance, while section 29 of the

39 KA Sing'Oei, *Kenya at 50: unrealized rights of minorities and indigenous peoples* (2012) 8, see generally D Branch, *Kenya between hope and despair 1963-2011* (2012).

40 Constitution of Kenya (1963): Part IV.

41 H Ndlovu, 'Muslim relations in the politics of nationalism and secession in Kenya', 1 *Islamic Africa Journal* (2010) 21.

42 Through two schemes—the 1 million hectares scheme and settlement trust fund mechanisms—land were acquired in the Rift Valley to the prejudice of minorities. See C Leo, 'Who benefitted from the million acre scheme? Toward a class analysis of Kenya's transition to independence', 15 *2 Canadian Journal of African Studies* (1981).

independence constitution provided procedure to be followed in the event of a declaration of a state of emergency, this provision was subject to the operation of the Independence Order in Council. Under Section 19 of the Kenya Independence Order in Council (Kenya subsidiary legislation, 1963) the Governor General and later the President had wide discretionary powers to rule Northern Kenya as he deemed fit. Such powers included the power to declare a state of emergency which had the effect of suspending the rights of citizens. Section 19 provided that:

The Governor-General may by regulations which shall be published in the *Kenya Gazette*, make provisions as appears to him to be necessary or expedient for the purpose of ensuring effective government or in relation to the North Eastern region without prejudice to the generality of that power, he may by such regulation make temporary adaptations, modifications or qualifications or exceptions to the provisions of the constitution or of any other law as appear to him to be necessary.

38. Several other amendments to the independence constitution had severe negative impact on the social, economic and political experiences of communities living in Northern Kenya. The third constitutional amendment (via Act No.14 of 1965) altered the parliamentary majority required for approval of a declaration of a state of emergency from 65 percent to a simple majority. The fourth amendment (via Act No. 16 of 1966) extended the President's power to rule the whole of North Eastern Province, including Marsabit, Isiolo, Tana River, Lamu and Samburu Districts by decree.
39. The sixth amendment had the effect of enormously enlarging the President's emergency powers. It completely removed existing safeguards relating to parliamentary control over emergency legislation by repealing this provision and replacing it with one which gave the President a *complete discretion* and authority 'at any time by order in the *Kenya Gazette* to bring into operation generally or in any part of Kenya, part III of the Preservation of Public Security Act or any part thereof'.⁴³
40. The powers granted to the President in relation to the Northern Frontier District (NFD) - which included Tana River in the Coast; Garissa, Ijara, Wajir and Mandera in North Eastern; Isiolo, Marsabit, and Moyale in Upper Eastern; West Pokot, East Pokot (East Baringo), Samburu and Turkana in Rift Valley - complimented existing draconian colonial legislations the operations of which did not cease with the end of colonial rule. These statutes included the Outlying Districts Act, the Special District (Administration) Act⁴⁴, the Stock and Produce Theft Act⁴⁵, among others. Notwithstanding the clear contradiction between these colonial laws and the independence constitution, the

43 The Constitution of Kenya (Amendment) Act No 16 of 1966. See generally, Legal Notice No. 264 of 1966. North Eastern Province and Contiguous Districts Regulations, 1966 made under the Preservation of Public Security Act, Chapter 57, Laws of Kenya pursuant to the Provisions of Section 127 of the Constitution

44 Special Districts (Administration) (Repealed) Act (Cap 105), section 7.

45 Stock and Produce Theft Act (Cap 355 of Laws of Kenya).

offensive laws were retained pursuant to recommendations of the Committee on the Bill of Rights that drafted the constitution in 1962, thus

The Committee considered whether it was desirable for the Bill of Rights to permit the continued imposition of such restrictions of freedom of movement as are now authorised under the special districts (Administrations) Ordinance and the Outlying Districts Ordinance. The Committee recognises that there may be certain objections to permitting the continuation of legislation of this type but on balance they consider that in present circumstances it is necessary to do so, provided that the Bill of Rights lays down certain limits within which such legislation may be operated. The Committee considers that this result might be suitably achieved in the following way. The two particular Ordinances in question would be specifically preserved until such time as the legislature decided they could be dispensed with.⁴⁶

- 41 After many decades of failure to recognise and address the problem of exclusion, the Constitution of Kenya, 2010 included several provisions intended to secure an efficient legal framework for the protection and promotion of the rights of minorities and indigenous peoples. Among other things, the Constitution, acknowledged the rights of minorities and marginalised groups (section 56) and guaranteed access to justice for all persons (section 48)
- 42 Further, the Constitution protects against discrimination whether by public or private actors and calls on the state to 'take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals and groups because of past discrimination,' (section 27 (6))⁴⁷
- 43 In addition, section 260 of the Constitution provides definition to terminologies that had previously been loosely applied. A marginalised group is defined as a group of people who because of laws or practices before, on, or after the effective date were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4) (i.e., race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth).
- 44 Further, under section 260 states a marginalised community means.
- a community that because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole, or
- a traditional community that, out of a need or desire to preserve its unique culture and identify from assimilation, has remained outside the integrated social and economic life of Kenya as a whole, or

⁴⁶ Preservation of Public Security Act (Cap 57) sec 4(2) (a)

⁴⁷ Constitution of Kenya (2010) sec 24 and 33

- an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
 - pastoral persons and communities, whether they are (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, have experienced only marginal participation in the integrated social and economic life of Kenya as a whole.
45. These broad provisions of the 2010 Constitution were designed to reverse years of normative sanction of minority and indigenous rights violations. However, the intent of the Constitution will remain unrealised without statutory and institutional arrangements to convey constitutionally-granted rights to communities. The Commission noted with concern the fact that there is no specific statute, policy or institution that seized with the responsibility of ensuring inclusion of minorities and indigenous communities in Kenya. This reality contrasts sharply with the situation of other marginalised groups such as the youth, persons with disabilities, women, children and refugees all of which are governed by very specific statutes, policies or institutions.⁴⁸ The subsistence of this policy lacuna relative to minorities is inconsistent with the aspiration of a reconciled nation-state.
46. The Commission is, however, cognisant of the opportunity presented by the new Gender and Equality Commission, whose mandates include the coordination and facilitation of the mainstreaming of issues of marginalised groups in national development and to advise the government on all aspects thereof.
47. Systematic discrimination of minority and indigenous people has taken varied forms in Kenya. However, three manifestations of discrimination stand out: lack of formal recognition; violation of rights relating to citizenship and negative public portrayal of minority and indigenous people.

Formal recognition and right to identity

48. Identity is the individual's "social profile", including inter-personal ties such as family relations, as well as ties to a culture, religion, or geographical place.⁴⁹ The right to identity is therefore associated with several other rights, such as the rights to a name, nationality, juridical personality, family and culture, but does not precisely equal any one of these rights.⁵⁰ Arguing for recognition of identity, Taylor asserts that:

48 See e.g., Children Act No. 8 2001; Refugees Act No. 13 of 2006; Persons with Disabilities Act No. 14 of 2003; National Gender and Equality Commission Act No. 15 of 2011; Youth Policy, Social Protection Policy; IDP Policy, etc

49 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, Art 27

50 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc. A/810 at 71, art. 6 (1948) (hereinafter "UDHR").

[] our identity is partly shaped by recognition or its absence. Often by the misrecognition of others, a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves⁵¹

- 49 Despite widespread popular belief that Kenya is a composite of 42 tribes, there is no statutory or policy basis for this belief. The '42' comes from the tribes enumerated in the 1989 population and housing census report, the last such report to publish the answer to 'the tribe question' until 2009. In the 1989 census, only 42 options were available as answers, so this figure of 42 was not arrived at through self-identification by citizens. Not being one of the 42, most minorities were identified under the broad rubric "Others", or subsumed within a dominant identity such as Kalenjin or Luhya - a factor that contributes to deep-seated feelings of exclusion.⁵² Giving testimony before the Commission, a member of the Munyoyaya community said:

I am from a small community known as Munyoyaya who live in the northern part of Tana River [] These people are between 30,000 and 40,000. When the 44 (sic) tribes of Kenya were registered, they (the Munyoyaya) were probably not in a position to be recognized. They were lumped with the bigger tribe, when the census is done and when identification cards are issued, they are referred to as 'Other Kenyans' [] we were not distinguished as a distinct community, that is one thing we are rejecting. We do not want to be referred to as 'Other Kenyans' because we came to Kenya several centuries ago, before most of the other communities migrated into Kenya. Why have they been recognized and we have not been recognized? We are not recognized as a community.⁵³

- 50 The Commission heard about the non-recognition of many minority and indigenous communities in the population enumeration exercise - Nubians, Munyoyaya, Waata, Ogiek, Sabaot, Kuria, Kona, Bajuni, Hara, Saakuye, Burji, Isaak, Sengwer, Suba and many others - whose right to identity had been denied by the state. During the thematic hearings, the Commission was informed about the manifestation of non-recognition and utility of identity thus:

Shirazi community are scattered all over the coastal region. The census indicates that they are Shirazi/Swahili, but they say that they do not want to be bundled together with Swahili because Swahili is not a community or tribe. When you are recognized you will get employment opportunities. Since Shirazi is not recognized, out of about 20,000 people, it is only 700 who are educated, that is, they reached Form Four and above. Another one is the Sanye Community. They are about 7,000 people. Others include Burji but they have been bundled together with other communities. A community is

51 C. Taylor (1994) 'The Politics of Recognition' in C. Taylor & A. Guttman (eds.) *Multiculturalism and the Politics of Recognition* (1994): 25

52 S. Balaton-Chrimes 'Counting as citizens: recognition of the Nubians in the 2009 Kenya census' 10 *2 Ethnopolitics* (2011): 208-18

53 TJRC/Hansard/Public Hearing/Lamu/9 January 2011/p. 11-12

supposed to be recognized either as Burji or Nubian and given a code number so that they can have access to rights like other people. The problem of not being recognized would lead to culture and history loss. When you lose your history and culture, then you will have lost the community.⁵⁴

51. Presenting numbers in relation to ethnic belonging in the national census can be controversial. The government worries about inciting conflict over population numbers. Additionally, the government argues that ethnic data emphasises particularism rather than national unity, which in Africa's multi-national states can be latched upon to further fracture the state.⁵⁵ What African governments - Kenya included - fail to reveal however, is that behind the campaign for an ethnic-blind census is an attempt to conceal a complex hierarchical access to state resources; a situation which privileges dominant groups while disadvantaging minorities. Consequently, detailed statistical information about ethno-linguistic minority groups and indigenous peoples in Kenya is difficult to accurately report because many groups have over time been excluded from the census.
52. Based on an analysis of population and household census reports over the last 40 years, the Commission established that certain communities such as the Sengwer, Ogiek, El Molo, Waata, Munyoyaya, Yiaku and others have often been lumped with relatively larger ethnic categories with whom they share no social or cultural solidarity. - This enforced assimilation through the census process is quite incompatible with the approaches of data gathering from population groups by the state during the earlier part of the temporal mandate of the Commission. For instance, the 1969 census contains detailed ethnic data broken down at the district level of at least 42 "Kenyan African tribe or nationality". The number of Kenyan African communities had reduced to 38 by the time the 1979 census report was published, reflecting a homogenising attempt.
53. In the 1989 census, data was ethnically disaggregated and 40 communities were specifically identified. In 1999, the population and household census report adopted an ethnic-blind approach to population enumeration, instead using administrative units only as the basis for identity. The Kenya 2009 census report reverted to ethnically disaggregated data, but information provided was not broken down at the sub-national levels. Such an approach suggests that the state is keen on using ethnicity as a political construct at the national level as opposed to a tool of developmental planning. This is especially relevant given Kenya's deepening decentralisation, where ethnic data at a sub-national county level would be more relevant.

⁵⁴ TJRC/Thematic Hearing/Minority and Indigenous People/February 2012/p. 12

⁵⁵ See generally, G Lynch 'The wars of who belongs Where: the unstable politics of autochthony on Kenya's Mt Elgon' 10:3-4 *Ethnopolitics* (2011) 391-410

- 54 The Commission noted that accurate data collection through government programmes provided an important starting point for recognition of minority groups and in particular the census. As has been observed:

A major concern of minority and indigenous communities in Kenya is the persistence of the colonial notion that Kenya is a country of '42 tribes'. This statement obliterates the existence of numerous groups and perpetuates the idea that certain minority and indigenous communities are of no consequence in the national discourse.⁵⁶

- 55 A representative of the Nubian community during the public hearings in Kisumu gave testimony that exemplified this fact:

We try to sensitise our people and a good number of the Nubians know that they are the 43rd tribe of Kenya. But whenever the census is held, they indicate that there are 42 tribes in Kenya. So, I do not know if this was put straight to the other Kenyans too.⁵⁷

56. Because of Kenya's highly diverse religious and ethnic composition, it is important to examine minority rights issues both at the national as well as sub-national levels, namely the county. Some communities may be segments of a national group that is dominant in nature but which may be a minority religion or ethnicity in a particular county. Furthermore, certain groups such as pastoralists may be regionally concentrated while others, such as the Ogiek, are dispersed over a wide geographical region.

- 57 These geographic distinctions were important for the Commission in its analysis of the legacy of state policies that have targeted particular regions and in consideration of reparative measures and guarantees of non-repetition of violations. Both regionally concentrated minorities and nationally dispersed communities are arguably protected under international law, although consideration of 'national' as opposed to regional minorities is much more developed and accepted.⁵⁸

Citizenship

- 58 A deeper and more egregious form of breach of the right to identity is when legal provisions are applied to exclude a given ethnic group from access to citizenship. The Commission received evidence demonstrating that communities in North Eastern and Upper Eastern regions of the country and Muslims in general have suffered discrimination for decades in relation to their right to citizenship. A study by KNCHR found that 'Applicants for Kenya's citizenship in the Northern region often

⁵⁶ Indigenous Women Stand Against Violence: A Companion Report to the United Nations Secretary-General's Study on Violence Against Women (2006).

⁵⁷ TJRC/Hansard: Public Hearing/Kisumu/18 July 2011, p. 68.

⁵⁸ K. Henrard, 'The right to equality and Non-Discrimination', in S. Dersso (ed.) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010): 210.

undergo stringent vetting - at least compared to other peoples in other parts of Kenya'⁵⁹ The study proceeded to observe that this form of discrimination has particularly had greater impact for females in Northern Kenya:

Being female, Muslim or belonging to the Somali ethnic group further complicates the application procedures for obtaining a passport or ID card. Women from the region for instance are without automatic citizenship and must be linked to men (husbands or fathers). The result of this has been the chronic delay and outright denial of this valuable document to many people in the region.⁶⁰

- 59 Testimonies received by the Commission confirm the findings of KNCHR. A member of the Somali community testifying to the Commission in Eastleigh in Nairobi stated

Eastleigh was designed as a Somali sector by the colonial government. However, the children are still having a problem of not having a sense of belonging to the place. This is simply because of the government's attitude. As I said earlier, national IDs is evidence of nationality and when it is denied your citizenship is in doubt. Anytime a document is issued to a Somali, it is viewed with suspicion and may more often be ignored when presented by the holder.⁶¹

- 60 In North Eastern and Upper Eastern, the Commission heard over and over again how the process of acquiring identity cards takes longer and far more rigorous than in other parts of the country. As a result, residents of the two regions view themselves, at best, as second class citizens. Their plight was well articulated by a witness in Marsabit

We feel as if we are third class citizens of Kenya. It is as if we do not have equal rights with other Kenyans in terms of citizenship and instructions. We face constant scrutiny in terms of national registration. I remember that I could not join the university simply because I did not have an identity card. I got that identity card in a manner which I ought not to have followed. I had to bribe an official at the registration bureau to have my identity card issued at Kibera Location. I had applied for the identity card more than two years before that date. But my application would be rejected because there was no conclusive proof that I was a Kenyan. We cannot deny that the people of northern Kenya and southern Ethiopia are but one people who are merely separated by the artificial political borders. We do not deny that most of us have our kin on the other side. However, this does not mean that we are not Kenyans. We have our fellow Kenyans from western Kenya and our fellow Maasais who live in border areas but they are not subjected to the same scrutiny. As we travel to Kenya, we face the strict burden of proof that we are, indeed, Kenyans. If the four of us were to travel in the same vehicle, the presumption would be that the rest are all Kenyans, but I am a foreigner. So, at the numerous road blocks which are lined up all the way from here to Isiolo where Kenya starts, I have to produce my identity card, in default of which I would face severe consequences.

59 KNCHR *Foreigners at home: The dilemma of citizenship in northern Kenya* (2009): 7

60 As above

61 TJRC/Hansard/Thematic Hearing/Minority and indigenous people/Nairobi/13 February 2012/p. 63

- 61 Prior to the enactment of the Constitution of Kenya, 2010 and the adoption of the Kenya Citizenship and Immigration Act and Kenya Citizens and Foreign Nationals Management Service Act, 2011, the repealed Registration of Persons Act and the Citizenship Act were procedural laws which provided the framework for the mandatory registration of Kenyan citizens and their issuance with identity cards
- 62 One of the problematic hallmarks of the legal regime governing citizenship during the temporal mandate of the Commission was the fact that the law gave the minister responsible for citizenship sweeping powers.
- 63 The Citizenship Act stated that the minister 'shall not be required to assign any reason for the grant or refusal of any application under this Act and the decision of the minister on such application shall not be subject to appeal or review in any court'⁶². The requirement that some communities – Muslims, Nubians, and Somalis – be subjected to a vetting process is one arbitrary measure introduced and executed through ministerial fiat
- 64 In addition to the wide discretion enjoyed by the minister in the granting or revocation of citizenship rights, Section 8 of the Registration of Persons Act empowered a registration officer to require any person registered under the Act to furnish such documentary or other evidence of the truth of the information given by that person. Using this legal provision, the Principal Registrar of Persons issued regulations in 1989 that:
- In accordance with section 8 of the Registration of Persons Act, the Principal Registrar requires all persons of the Somali ethnic community resident in Kenya who are of eighteen (18) years and above to attend before registration officers at the centres specified in the second column of the schedule and furnish such documentary or other evidence of the truth of their registration between 13th November, 1989 and 4th December, 1989'⁶³
65. The screening exercise which was in effect a mass verification process of the Somali community was designed to flush out aliens or those owing allegiance to another state. It was carried out through the use of vetting committees composed of politically selected elders and members of the Provincial Administration and Civil Service.⁶⁴
66. The Commission was informed during public hearings in Tana River that in 1990, for instance, pursuant to the directive of the Principal Registrar of Persons, the Galjeel

62 Registration of Persons Act (Repealed) Section 9

63 Legal Notice No 5320 of 10th November 1989

64 Kenya Human Rights Commission (KHRC) *Foreigners at home: The dilemma of citizenship in northern Kenya* (2009)

(a minority clan of the Somali currently living in Mwina location and Bondeni sub-location of Coast region) 'were forced to give out our identity cards, almost 50 of them. We were told that we are not Kenyans [...] and identity cards forcibly taken.'⁵⁵

67. A study of this actual nullification of citizenship indicates that around 1989, the government of Kenya started to get concerned about escalating insecurity and proliferation of firearms in the country. The government of Kenya took steps to arrest the problem by introducing a screening process for all members of the Somali community in order to ascertain whether they were Kenyan or Somali. All non-Kenyan Somali deemed illegal immigrants in the country were to be identified and deported back to Somalia. A screening team was constituted and the process of screening citizens and non-citizens was started targeting mainly the Somali community in the North. Government officers in charge of the screening process were given overwhelming powers which were invariably abused.⁶⁶ While the screening process was well intentioned (to deal with illegal immigrants), it had far reaching consequences on the Kenyan Somalis, especially the Galjeels.⁶⁷

68. The Galjeels have borne the brunt of this screening exercise and recounted their suffering to the Commission:

The Galjeel community was wealthy in terms of cattle, goats and sheep. We were living in mobile villages because we normally go where there is pasture and water. Some of our people were arrested for no reason at all. These men and women were arrested. They were told that they must give out their wealth, that is, at least some of their animals. They were forced to give out their identity cards, almost 50 of them. The DO is the one who took the 56 ID cards. This incident that happened in Danisa with this clan of Galjeel was broadcast on television.

69. At the time of screening, those in possession of national identity cards (IDs) had their IDs withdrawn by the state. They were issued with screening cards instead. The screening cards served as evidence that the holder was still under scrutiny to determine his or her citizenship status. The screening process itself involved a vetting exercise which was described as brutal by those who went through it. Conversely, the screening committee was prematurely disbanded and the government of Kenya never took practical steps to correct the situation. Despite the fact that the screening process ended over two decades ago, the negative impact of the exercise remains. Some Galjeel members who surrendered their IDs during the exercise have not received their IDs back, even though they were confirmed to be

65 TJRC/Hansard/Public Hearing/Hola/12 January 2012/p. 35.
66 KHRG (n 64 above).
67 TJRC/Hansard/Public Hearing/Tana River/12 January 2012/p. 33.

Kenyan citizens by the vetting exercise more than ten years ago. The Galjeel were viewed as illegal immigrants into the country and were often forcibly deported back to Somalia, their alleged home.⁶⁸ This act of forced deportation amounts to collective expulsion.

70. The standard for determining whether collective expulsion occurred does not turn strictly on numbers of those expelled but rather on whether the decision to expel is based on 'group considerations'. One approach to determining whether 'group considerations' exist is to look for a pattern where the state has expelled individuals based on membership to a particular group rather than on particular characteristics resulting from a review of the merits of each case.⁶⁹ The International Law Commission (ILC) has indicated that collective expulsion exists in the absence of a procedure to identify distinct and specific reasons for expulsion in each individual case:

[T]he expulsion of even a relatively small number of aliens may violate the prohibition of collective expulsion if the expulsion of each alien is not considered on an individual case-by-case basis. The collective character of the expulsion of a group of aliens as such is the essential element of the prohibition of collective expulsion of a group of aliens is the essential element of the prohibition of collective expulsion.⁷⁰

71. The continuing nature of this violation with regard to other sections of the Somalis in Northern Kenya was evident in testimony given before the Commission:

The identity cards which were issued in the year 2009 for about 340 Form IV leavers have unilaterally been cancelled by the Provincial Commissioner, North Eastern Province [] after the triple vetting process and we were lucky that 3,000 plus identity cards came, they have been cancelled by one man. This is the case and yet we are claiming to have a new constitution and we are claiming to be Kenyans. That is very unfair.⁷¹

72. Even Somalis who have for decades lived outside Northern Kenya face similar challenges of accessing national identity cards as evidenced by the experience of Somalis who have lived in Naivasha from colonial days:

In Naivasha, we have a problem of identity cards. I told you that I was born in Naivasha in 1954 and I have a birth certificate and an identity card, but my child who is 22 years old now does not have an identity card. When you go to fill the forms, they reject them when they see a Muslim name. I do not know why our children are not getting identity cards. When we fill forms for bursary, we do not get but our neighbours' children get the scholarship. Our children also do not get bursary from the CDF kitty. When we fill the forms with our fellow members in the group, their application will be attended to but ours

68. KHRC (note 4 above).

69. International Law Commission, 'Expulsion of Aliens' Memorandum by the Secretariat para 985, U.N. Doc. A/CN.4/565 (August 2006). Available at: untreaty.un.org/ilc/summaries/9_12.htm.

70. TJRC/Hansard/Public Hearing/Tana River/12 January 2012/p. 33.

71. TJRC/Hansard/Public Hearing/Garissa/12 April 2011/p. 14.

will not be attended to. I do not know whether this is religious or tribal conflict. We do not understand.⁷²

73. This was corroborated by another witness at a public hearing in Naivasha:

My daughter has three children but she still does not have an ID card although she has a waiting letter. All our Somali children in Naivasha do not have ID cards but they have grown up here. There is even a 50-year-old woman who has not been given an ID card. We are not at a border such that they can say we crossed over from another country. This is open discrimination.⁷³

74. The Commission also heard of discrimination against Nubians in accessing identity cards, a fact corroborated through research by diverse scholars.⁷⁴ A Nubian representative spoke on behalf of the Nubian community in Kisii town. He lamented the lack of formal recognition of the Nubians by the State and linked their situation to their inability to secure elective positions in the National Assembly

Now, I ask myself: Why has it taken the Government over 100 years to realise that we have the Nubian community whose citizenship is not recognised by the constitution? Even when we were growing up, any place we went to, we felt that we were second class citizens, and not full citizens of Kenya. We face a lot of problems because we are viewed as non-Kenyans. As a minority community, we should get automatic nomination, so that we can get representation. That has not happened and we do not know where to get fairness. We should get it so that we are represented politically, and our issues can be taken forward and we get some help.⁷⁵

75. Aside from actual denial, bureaucratic delays in the issuance of identity documents often results in loss of economic opportunities for minorities as a Nubian youth in Nakuru district told the Commission:

The perception of Nubians being non- permanent citizens drags them into long, tiresome and bureaucratic process [s] leaving them without the national identity card resulting [in] to [sic] lack of jobs for the energetic Nubian youth.⁷⁶

76. A similar story was recounted in Nairobi:

Nubians in Kibera are not recognized at all. Our parents were all born in Kibera but we are not recognized. Our children go through the same problems. A child who is not a Nubian will come and after two weeks, they have an ID and passport but for the Nubians, it will take even a year.⁷⁷

72 TJRC/Hansard/Women's Hearing/Naivasha/27 November 2011/p. 7

73 TJRC/Hansard/Public Hearing/Naivasha/26 November 2011/p. 54

74 Balaton (n 52 above) 217

75 TJRC/Hansard/Public Hearing/Kisii/p.16; see also TJRC/Hansard/Public Hearing/Kisumu/18 July 2011/p. 64-69; TJRC/Memo/0977; TJRC/Memo/1401 [Submitted by the Nubian Council of Elders]

76 TJRC/Memo/1156 [Submitted by the Nubian youth from Nakuru District]

77 TJRC/Hansard/Public Hearing/Nairobi/20 February 2012/p. 45.

- 77 While most minority communities have not sought judicial resolution of their challenges on citizenship, the Nubians have. In 2003, the Nubians sought the intervention of the High Court, alleging discrimination in the application of the provisions of the constitution and the enabling legislation relative to citizenship. Responding to the action, the state raised three issues: that the Nubians were foreigners who had never renounced their Sudanese citizenship, that they had been negligent in not pursuing citizenship by registration and lastly that their claim was deficient on the grounds of *laches*.
- 78 The court, in total disregard of principles of class action, saddled upon the Nubians the added burden of documenting all the members self-identifying as Nubians in order to satisfy the courts that the community was not a phantom.⁷⁸
- 79 Dissatisfied with the manner in which their access to justice was fettered by Kenyan courts, Nubians sought legal protection in regional adjudicative mechanisms. In 2011, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC or African Children's Committee) made a decision on a communication filed by the Institute for Human Rights and Development (IHRDA) and the Open Society Justice Initiative (OSJI) on behalf of Nubian children who had sought legal protection against violation of their rights to acquire a nationality, unlawful discrimination and consequential violations.⁷⁹
- 80 The African Children's Committee's ruling found Kenya in violation of the rights of the Nubian community's children. In particular, the Committee made five key recommendations:
- The government of Kenya should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.
- The government of Kenya should take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognised are systematically afforded the benefit of these new measures as a matter of priority.
- The government of Kenya should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth.

⁷⁸ *Yunus Ali and Others (On behalf of the Nubian Community) v Attorney General of the Republic of Kenya and Other* Nairobi High Court Civil Application No 256/2003

⁷⁹ *IHRDA and OSJI v The Government of Kenya* African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Communication No. 2 of 2009

The government of Kenya should adopt a short-term, medium-term and long-term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities

The government of Kenya should report on the implementation of these recommendations within six months from the date of notification of this decision, and that the committee appoints one of its members to follow up on the implementation of this decision

- 81 The Commission is also cognisant of the decision of the High Court in Mombasa in 2011, which issued conservatory orders restraining the Ministry of Immigration from enforcing an administrative circular requiring persons of Arab and Asian identity to produce documentary proof of ancestry beyond those required of other Kenyans and to be subjected to a verification process (vetting) before being granted identity cards or passports. In arriving at this interim decision, the court ruled the circular a nullity for “singling out Kenyan Arabs and Asians as communities members of which must supply parents’ and grandparents’ birth certificates before being issued with national identity cards.”⁸⁰
- 82 Despite these judicial determinations, the Commission was not made aware of any serious action taken by the Kenya government towards ensuring full enforcement of the orders granted
83. It is important to note that the majority of people against whom the above restrictions relating to access to national identity cards have been enforced are Muslims. Actually, these restrictions have almost without exception targeted communities whose membership is predominantly Muslim. The 2009 study by KNCHR on citizenship rights of people living in Northern Kenya found that ‘religious affiliation too affects the issuance of Government documents’⁸¹. In this regard, the study noted that:
- application difficulties increase as one moves from Northwest, predominantly traditionalists and Christians, to NEP with a large proportion of Islamic population. People with Islamic names have higher tendencies of being vetted in acquisition of ID cards than those with traditional or European names. The largest number of people vetted has Islamic nomenclature or are of Islamic background.”

⁸⁰ *Muslims for Human Rights and Others v Attorney General and Others* High Court of Kenya in Mombasa, Petition No. 1 of 2011

⁸¹ KHRC (n 64 above) 36

⁸² As above

- 84 In 2007, President Mwai Kibaki, in tacit recognition of the fact that Kenyan Muslims have historically faced varied forms discrimination on the basis of their religious affiliation, appointed a special action committee to look into concerns of the Muslim community in regard to alleged harassment and/or discrimination in the application or enforcement of the law. The Committee was specifically mandated to
- a) receive individual complaints of alleged harassment and/or discrimination in the treatment of persons who profess the Muslim faith with regard to security issues,
 - b) ascertain whether on the face of it, there is merit in a complaint, and whether to act on the complaint appropriately, which may include channelling it to the responsible Department of Government for action,
 - c) inquire into allegations of wrongful or illegal denial of entry into or exit out of Kenya by Kenyan citizens who profess the Muslim faith,
 - d) take immediate action as far as is possible to solve the problem disclosed in (a), (b), and (c) above,
 - e) oversee, coordinate, monitor and follow up specific action on identified problem cases
 - f) review regulations, codes of conduct, processes and procedures in the Public Service and recommend changes necessary to avoid or reduce similar complaints.
 - g) prepare advisory opinions or proposals on appropriate remedial action to be taken by the Permanent Secretaries or Chief Executives of responsible Ministries or public bodies,
 - h) Recommend appropriate policy and legislative reforms
- 85 In execution of its mandate, the Committee conducted public hearings from the 5 November to 6 December 2007, in all the Provinces. Upon completion of its work, the Committee prepared a report which was submitted to President Mwai Kibaki in March 2008. However, President Kibaki did not release the Report of the Committee to the public. All efforts by the Commission to secure the report were unsuccessful. In one of its responses to the Commission's requests for reports of commissions of inquiries that have never been released to the Public, the Secretary to the Cabinet and Head of the Public Service informed the Commission that the release of the report requested was 'at the discretion of the H.E. the President'.

- 86 The Commission nevertheless received a copy of the report from a credible unofficial source. The Commission believes that it is in the public interest and in furtherance of the objectives for which the Commission was established that it publishes the copy of the report that it received (see Appendix 1). The report has been published as part of documentary evidence received by the Commission in terms of the TJR Act.
- 87 The copy of the Report received by the Commission reveals that the Committee made 10 findings which confirmed, according to the Committee, that there was 'substance in most of the complaints raised by the Muslim community'. The findings are as follows:
- a) The Committee established that there are discriminatory practices against Kenyan Muslims in the issuance of national Identity Cards and Passports. In fact there exists a special Vetting Committee for Muslim Passport applicants at the Ministry of State for Immigration and Registration of Persons Headquarters.
 - b) The operations of security agents and especially the Anti-Terror Police Unit came under serious criticism from the Muslim community for operating without due regard to the existing law of the land.
 - c) There was evidence that Kenyan Muslims have been unlawfully removed from Kenya to foreign countries without due process of the law.
 - d) Past historical injustices and human rights violations in Northern Kenya, including the Wagalla massacre, have not been addressed to date.
 - e) The Committee found that Muslims in urban settlements who have occupied land allocated to them for generations have not managed to acquire Title Deeds for their land. The classic cases are those of Nubians in Kibera and Mjini Village in Muranga.
 - f) The Committee established that there is a serious shortage of IRE Teachers particularly in areas where Muslims are a minority. In various learning institutions the freedom of worship as guaranteed in the Constitution is not observed.
 - g) Another finding of the Committee was that the institution of Kadhi's Court lacks both human and financial resources to effectively undertake its constitutional mandate.
 - h) With respect to access to justice, the Committee established that the entire Northern Kenya has no High Court and adequate Subordinate Courts.

- i) The Committee found that the majority of Muslim inhabited areas lag behind in development due to lack of public and private investments from years of marginalization. The banning of international Islamic NGOs has further aggravated the situation.
- j) In Public Service appointments, at the level of policy and decision-making, there is a visible absence of Muslim representation.

88 The Committee recommended that the Government should urgently address the concerns raised by the Muslim community in order to restore public confidence, fully integrate the Muslim community in the mainstream development so as to build national cohesion.

Public portrayal

89 The manner in which minority groups are portrayed, whether in school curricula, government documents or public pronouncements of officials has a significant impact on the way in which minority communities feel their unique identity is respected.

90 Moreover, use of the education and state information systems to promote tolerance and to eliminate discrimination based on race and ethnicity is an obligation of the government of Kenya under the Convention on the Elimination of all Forms of Racial Discrimination, to which Kenya became a state party in 1981.

91 Negative portrayal may also rise to the level of discrimination where attempts are made to distort a community's history. A memorandum submitted to the Commission by members of the Nubian community raised concerns that a primary school textbook had, according to them, erroneously indicated that the Nubians came to Kenya in 1946.⁸³ Yet, as one of them testified before the Commission, the Nubians came to Kenya 'at the turn of the 19th Century' and they have been in Kenya 'for about 150 years' and that the Nubians 'have been in Kenya before Kenya was a country'.⁸⁴

92 The way in which youth are educated to understand the population of their country is an important starting point for state recognition of minority groups. Diversity education helps build tolerance and appreciation for the multi-cultural nature of Kenya. This is separate from, but related to, a minority groups' right to be educated in their own culture, language, and religion.

83 TJRC/Memo/1401

84 TJRC/Hansard/Public Hearing/Nairobi/20 February 2012/p. 42

- 93 Currently, the nature of diversity education in Kenyan schools, both public and private, could be described as informal. The switch to the 8-4-4 educational system in Kenya has focused the curriculum in large part on students obtaining practical skills and engaging in rote learning.⁸⁵ For a long time, promotion of national unity and tolerance for diversity was not a primary goal of the educational system. Even today, such a goal remains largely in the theoretical domain. In 2011, a commentator observed that

Kenya's Standard Four history text bypasses the generations of coastal anti-imperialism and accentuates the many decades when abuses of the slave trade occurred. It tars the 'African' Swahili with the same brush used to depict the Arabs as evil by erroneously stating that the Bajuni came from Oman. The Bajuni are actually a hybrid of original Bantu population of Shungwaya and ancient Cushitic clans who settled in the Kenya region 2000 years before the Bantu came.⁸⁶

- 94 Portrayal of minority communities all parts of the public sphere are a key issue. For instance, hunter-gatherer communities in Kenya have consistently been referred to in the media, in government documents and other public forums by names that were developed by other communities as derogatory terms. The following testimony given during the Commission's women's public hearings in Hola district by a member of the Waata indigenous group provides an example of the use of such derogatory terms to refer to members of minority and indigenous communities in Kenya

My name is Amina Abdalla. I am from Waata community which originated from Malindi, Garsen, Hola, Sombo and Bura Tana. These people have always been hunters and they depended on wild fruits []. Among other communities, we are referred to as the Waata community and they use abusive words like 'kawasanye' which means someone who is not lucky.⁸⁷

- 95 As this quote reflects, portrayal of hunter-gatherer communities as poor, backward, and without possessions is a factor contributing to their marginalisation and dispossession of ancestral lands. Recognition and respect is an important component of multiple human rights protected under international and regional norms, such as the right to exist, the right to practice culture, religion and language and the right to be free from discrimination.
- 96 The Kenyan state has failed in many cases to recognise that minority and indigenous groups exist in Kenya. Consultations with minority groups during Kenya's African

85 Catherine Dean, 'Understanding diversity and seeking unity in the Kenyan educational context' (Strathmore University Ethics Conference, 2011) at <http://www.strathmore.edu/ethics/pdf/DeanCatherineUnderstandingDiversity.pdf> (accessed 20 July 2012).

86 P. Goldsmith, *The Mombasa republican council conflict assessment: Threats and opportunities for engagement* (Kenya Civil Society Strengthening Programme, November 2011).

87 TJRC, *Hansard/Women's Hearing Hola* 12 January 2012, p. 1.

Peer Review Mechanism (APRM) process in 2006 highlighted lack of recognition as a major concern for communities

- 97 The APRM report notes that during consultations, communities 'complained about the continued disregard for their cultural identities as evidenced in a series of derogatory and insensitive political remarks about them and their region, particularly at the higher political levels' The APRM report also described a 'discernible feeling of unjust treatment, lack of equity and a palpable sense of neglect, bitterness, anger, apathy and alienation' during their consultations with marginalised groups
- 98 The APRM process however confirmed the 'existence of tribal minorities and groups that seemed to qualify as indigenous tribes who retain their cultural identity such as pastoralists, hunters and gatherers'⁸⁸

Collective Punishment

- 99 The Commission's hearings, statement-taking, investigations and research revealed that collective punishment by the state have predominantly occurred in Northern Kenya, a region inhabited by various minority groups and indigenous people Collective punishment, many of which have occurred in the context of security operations or disarmament, has often resulted in massacres of innocent citizens A host of other gross violations of human rights have also occurred during these security operations, including sexual violence, torture and denial of social and economic rights The massacres in this regard include. Bulla Karatasi Massacre, Wagalla Massacre, Malka Mari Massacre, Lotirir Massacre, and Murkutwa Massacre

Statutory basis for collective punishment

- 100, During the mandate period, the Kenyan state maintained in its statute books a plethora of oppressive laws that had a particularly adverse effect on minority groups and indigenous people Specifically, these laws sanctioned the collective punishment of communities Such laws include the Special (Administration) Districts Act and the Stock Theft and Produce Act. While they were applicable in theory across the entire country, these laws were in practice only applied in Northern Kenya, a region which is occupied mainly by pastoralist groups
- 101 The Special Districts Act authorised a Provincial or District Commissioner to arrest or seize the property of or detain members of communities

In the event of any (scheduled) tribe or any section or members of the tribe acting, in the opinion of the Provincial Commissioner or of the District Commissioner, in a hostile manner

⁸⁸ Africa Peer Review Mechanism Country Review Report of the Republic of Kenya (2006) 52

towards the government or towards any foreign power in amity with the government or towards any persons being or residing in Kenya, the Provincial Commissioner or the District Commissioner in charge of the district or area in which the acts are committed may order (a) the arrest wherever they may be found within the district or area of all or any of the members of that tribe, (b) the seizure of all or any property belonging to that tribe or its members, or any of them, which may be found within the district or area, (c) the detention in safe custody of any person or property so arrested or seized, (d) that all or any members of that tribe shall not leave the area reserved for their use⁸⁹

- 102 The Act applied to all the districts of NFD already covered under the Outlying District Act as well as Marsabit, Isiolo, Samburu, Tana River, West Pokot, Mukogodo Special Reserve, as defined in the Fourth Schedule to the Government Lands Act (as the Schedule stood immediately before the 1st June, 1963), Narok, Kajiado District, Turkana, Lamu and Machakos districts.
- 103 The scheduled ethnic groups within the meaning of this Act included all those communities scheduled under the Preservation of Public Security (Movement Control) Regulations as well as the following additional ethnic groups Maasai of Kekunyukie section, Lodokilani section, Il Kisongo section, Matapatu section, Kaputiei section, Purko Section, Il Damat section, Dalaletkutuk section, Sighirari section, Ngong section, Loita section, Moitanik section, Uasin Gishu section, Siria section, and various sections of the Kamba Those members of the Kipsigis, Tugen, Nandi, Kikuyu, Luo and Kisii ethnic groups 'normally resident in the above sections' would also suffer the harshness of these regulations
- 104 The Stock Produce Theft Act legalised collective punishment of ethnic groups and clans for the offenses of their members once that ethnic group was declared 'a hostile tribe' by the Provincial Commissioner The long title of the statute stated that the purpose of the law was to 'provide for the recovery of fines imposed on Africans (including Somalis) for the theft of stock or produce by levy on the property of the offender or his family, sub-tribe or tribe' Although a statute of general application, this law was mainly applied in areas occupied by pastoralist communities
- 105 Moreover, the application of emergency laws described earlier in this Chapter, first in North Eastern Province and later in 1966 throughout the NFD, established two separate legal regimes one set of laws applied exclusively to NFD and another set to the other parts of Kenya In the process, the government deployed full emergency powers in the NFD region – powers applicable only when Kenya was at war
- 106 Although the attempts at secession as well as its repression were pursued militarily, the government's approach appeared to treat the communities in the NFD as

⁸⁹ Special (Administration) Districts Act (Cap 105) (Repealed) Section 7

enemies, referring to them either as *shifita* or *ngoroko*⁹⁰ and unleashed a set of regulatory disadvantages against these groups based merely on their membership in the scheduled communities

- 107 These regulations created certain offenses that were punishable without due process of law. It also created "prohibited" and "prescribed" zones in the region. The regulations defined a "prescribed" area to mean the area comprising the North Eastern Province and the Isiolo, Marsabit, Tana River and Lamu districts and a "prohibited zone" as the aggregate of the areas within the prescribed area. In these areas the offence of possession of firearm, consorting or harbouring one with a firearm was punishable by death upon trial.
- 108 The offence of harbouring anyone who may act in a manner prejudicial to the preservation of public security, for instance, was punishable by life imprisonment. Even the owning, operating or use of boats or any other means of transport on Tana River was made a crime liable to imprisonment. Entry into the region by members, other than civil servants and members of the security forces was prohibited.
- 109 Members of the armed forces were authorised to carry out the functions of a police officer with wide powers of search, arrest, restriction and detention of persons in the region. Members of the provincial administration and the security forces were given power to preside over "judicial trials". District administrators were at times sitting in as magistrates in Courts. The regulations also suspended the application of sections 386 and 387 of the Criminal Procedure Code (which requires the holding of an inquest into the death of persons in police custody or who die under suspicious circumstances) and instead stated that the provisions did not apply to persons dying or found dead in the "prohibited" zone.
- 110 In 1967, the government published the Public Security (Control of Movement) Regulations pursuant to sections 3 and 4 of the Preservation of Public Security Act.⁹¹ These regulations mandated the minister in charge of security or an officer authorised by the minister to

By order direct that all members of any one or more of the specified tribes living in any particular area shall do all or any of the following things (a) within a specified period move from the area in which they are living to such other area as may be specified in the order, (b) remain within the limits of such area as may be specified in the order, (c) live in such part (hereafter in these regulations referred to as a residential part) of the area specified in

⁹⁰ Kenya National Assembly *Official Record (Hansard)* (Dec 4 1979 - Jun 18 1980) (discussing the *Ngoroko* menace)

⁹¹ Republic of Kenya Legal Notice No. 43 of 1967 Public Security (Control of Movement) Regulations pursuant to Sections 3 and 4 of the Preservation of Public Security Act Section 3

the order and remain in such part during such hours or at such times as may be specified in the order.

111. The specified ethnic groups under the regulations included the: Gurreh, Murulle, Degodia, Leisan, Ashraf, Shebelleh, Sheikal, Shermoge, Warabeya, Garabeya, Gurreh Murreh, Adjuran, Ogaden, Rendille, Gabra, Boran, Burji, Konso, Saakuye, Isaak, Herti, Aulihan, Adb Wak, and Abdulla.' The "movement control order" required them to move from a specified area or remain within the limits of a specified area or comply with 'conditions regarding reporting to the police [...] if they wanted to exit the area. The delegation of this authority by the minister to the provincial administration saw its deployment in the most draconian forms in Northern Kenya and Upper Eastern regions. Disconcertingly, no mechanisms for supervising the exercise of this authority by either the minister or his delegates was availed by the Act or regulations made there under, leaving the fate of the "scheduled" communities to the whim of administrators and security agents.
112. The regulatory framework for meting out extra-constitutional treatment against communities in the NFD was strengthened further in 1970 with the adoption of the Indemnity Act.⁹² This law was meant to indemnify government agents and members of the security forces working in the region against any claims on account of any loss or damage occasioned by their actions. The objective of the Act is clear in the long title of the Act: "to restrict the taking of legal proceedings in respect of certain Acts and matters done in certain areas between the December 25 1963 and December 1 1967." The Act provided for the broadest range of indemnity to security officials against judicial proceedings:
- No proceeding or claim to compensation or injury shall be instituted or entertained by any Court or by any authority or tribunal established by or under any law for or on account of or in respect of Act, matter or thing done within or in respect of the prescribed area, after the December 25 1963 and before December 1 1967...if it was done in good faith or done in execution of duty in the public interest by a public officer or member of the armed forces.
113. Therefore, as long as an action was done in "good faith" or in "execution of duty" within the "prescribed area",⁹³ public officers or members of the military ran no risk of legal liability. This means that if mass killings of unarmed civilian populations were carried out "in good faith" and "in execution of duty", individuals who executed such acts were not legally liable.

⁹² Indemnity Act (Chapter 44 of the Laws of Kenya, came into force on 5th June 1970)

⁹³ Indemnity Act (n 98 above) Section 2, defined the prescribed area as to mean the entire North Eastern Province and Isiolo, Marsabit, Tana River, Lamu and Samburu Districts

- 114 The Indemnity Act foreclosed the possibility of the communities in the NFD pursuing judicial remedies. To the extent that this legislation applied only to certain districts in Kenya's North Eastern province, effectively shutting out the possibility of access to justice, this legislation offends the provisions of Article 2 of the African Charter, which provides that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status'. The ouster of judicial review or appeal by the Indemnity Act further constituted a violation of article 7(1) of the Charter⁹⁴
- 115 Although human rights law was still in its embryonic form in the early 1960s when these laws were applied to the NFD, the fact that the Kenyan state deliberately allowed these regulations to subsist over a 30-year period clearly makes the state's actions inexcusable. Indeed, by the time some of the regulations were repealed in the early and late 1990s, Kenya was a state party to numerous international and regional human rights treaties which define more clearly the extent of state liability. The most important instruments relate to violations against groups in the NFD include the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of Racial Discrimination (ICERD). In determining the existence of discrimination, the Committee on Elimination of Racial Discrimination which monitors the Racism Convention will examine whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin⁹⁵
- 116 Section 127 of the old constitution, which laid the foundation for the state of emergency in NFD, was repealed only in 1992 as was the North Eastern Province and Contiguous Districts Regulations of 1966 made under the Preservation of Public Security Act.⁹⁶ Later, the Outlying Districts Act and the Special Districts (Administration) Act were also repealed in 1997 under the Statute Law (Repealed and Miscellaneous) Amendment Act, 1997. The repeal of these laws, while

⁹⁴ ACHPR *Civil Liberties Organisation Legal Defence Centre Legal Defence and Assistance Project v Nigeria*, Comm No 218/98 (1998) para 27 available at www1.umn.edu/humanrts/africa/comcases/218-98.html. The right to be heard applies not only to criminal but also civil cases.

⁹⁵ See U.N. Committee on the Elimination of Racial Discrimination: General Recommendation 14: Definition of Discrimination (Art. 1 par. 1) UN Doc A/48/18 at 114 (1994), para 2. Cf. European Court of Human Rights *D.H. & Others v. the Czech Republic*, Application no. 5735/00, Eur. Ct. H.R. (13 November 2007) para 175 (holding that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group [. . .]); Article 14 of the European Convention on Human Rights states that: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

⁹⁶ Miscellaneous Amendment No. 6 of 1992, Section 12.

a significant step forward in the restoration to the people of NFD of their fundamental rights and freedoms, did not provide parameters for resolution of questions arising from the systemic violations of individual and group rights over the preceding decades.

117. The Commission heard many accounts of violations of civil and political rights of minorities during the temporal mandate largely through the application of emergency and stock management regulation within the “Closed Districts” or NFD. These violations not only had serious impact on individuals from minority groups but more significantly devastated their economic basis largely premised on livestock keeping within the expansive rangelands.
118. The subsequent section of this Chapter exposes some of the abuses minorities and indigenous peoples have endured as a consequence of having such laws in place.

Collective punishment and security operations

119. Kenya’s immediate post-independence emergency laws discussed above had a basis: to ensure the defence of its territory and people. They were also designed to nip in the bud the political attempts by communities in Northern Kenya – Somali, Borana and others – to secede from Kenya and join Somalia.
120. An attempted secession by the Cushitic groups of Northern Kenya during the referendum in 1962 was driven by a quest not only to create a self-reliant pan-Somali state⁹⁷ but also the real fear that an independent Kenya would not fully integrate the economic model of communities in the region, hence perpetuating the poverty and destitution which colonial domination had nurtured.⁹⁸ Unfortunately, the anticipated marginalisation of communities from Northern Kenya by Kenya’s post-independence government has materialised. A witness who testified during the Commission’s public hearings in Garissa town to the North of Nairobi said people of Northern Kenya have always felt isolated from the rest of the country from the time of independence through to the post-Moi era:

Even though Kenya got Independence in 1963, we, the people of North Eastern Province, have never been independent. We became independent only in 2003.”⁹⁹

⁹⁷ J Drysdale *The Somali Dispute* (1964) 183. See also, Nene Mburu, *Bandits on the Border: The Last Frontier in the Search for Somali Unity* (2005, Red Sea Press, NJ) p 75-106

⁹⁸ National Archives, *Details of Kenya Constitutional Conference, 1962 - special issue - of 28/6/1962*. This fear materialized as independent Kenya’s economic vision evolved. See C Leys *Underdevelopment in Kenya: The political economy of Neo-Colonialism* (1973) 27

⁹⁹ TJRC/Hansard/Public Hearing/Garissa/13 April 2011/p.7

121. Security operations against minorities and indigenous peoples in Kenya have a long history of resulting in human rights violations against minorities. While the state has an obligation to provide security to and protect the property of its citizens, the pursuit of state security must be carried out in a manner that protects the human rights and, in particular, the personal integrity of all Kenyans. Based on numerous examples, the Kenyan state has failed to protect its citizens from the abuses of its security forces.
122. An example of this failure is the Wagalla Massacre. Details relating to the Wagalla Massacre are explored in full elsewhere in this Report. The Wagalla Massacre is a particularly tragic example of a consistent pattern of state action against minority groups and indigenous people, especially pastoralists in Northern Kenya.
123. The Kenya government has responded to inter-community conflict, particularly in pastoralist areas, through disarmament programs at various times. The Wagalla Massacre resulted from a severely oppressive operation to confiscate illegal firearms. Because disarmament is often uneven and is rarely coordinated across porous regional borders, it tends to exacerbate security concerns. Uneven disarmament leads to rearmament and revenge attacks. Accordingly, communities re-arm, and the government moves in again with oppressive security measures.
124. Far from being isolated incidents related to specific communities, the problem of cattle raiding is a regional issue involving related communities and conflict systems from Kenya, Uganda, South Sudan, Somalia and Ethiopia. There is general agreement among scholars who have examined the phenomenon of cattle raiding over the past half-century that the practice served cultural purposes related to male rites of passage and wealth accumulation for marriage dowry. Cattle raiding also correlated to resource scarcity – scarcity that was in part a natural phenomenon and in part artificially exacerbated by colonial policies of relocating minority tribes and border demarcation of tribal areas.¹⁰⁰ There is also agreement that since 1979, the practice appears to have become more lethal and has been exploited by conflict-entrepreneurs and political actors who have benefited economically from the spoils of raiding itself and from the instability that it creates.

¹⁰⁰ See e.g. S. Krati and J. Swift *Understanding and managing pastoral conflict in Northern Kenya: A Literature Review* (1999); P. Goldsmith *The State of Pastoralist Affairs 2004* (paper presented at the Kenya Pastoralist Week, Nairobi, CEMIRIDE and SNV, 2004); B. Arthur, J. Okello & J. Ngoya *The Tragedy of Natural Resources Dependent Pastoral Communities: A case of Teso-Karimoja Border Land Conflict* (ACODE Policy Research Series No. 23, 2007); B. Rachel *Conflict over natural resources among pastoralists in Northern Kenya: A look at recent initiatives in conflict resolution* 15 *Journal of International Development* (2003) 245-57; M. Nene *The proliferation of guns and rustling in Karimoja and Turkana Districts: the case for appropriate disarmament Strategies* (undated).

- 125 The increasingly lethal nature of these raids is generally understood to be an outcome of the influx of small arms and light weapons throughout the region as a result of policies associated with the Shifita War in Kenya, the fall of the Idi Amin regime in Uganda and the resultant looting of the Moroto Armoury by the Karamojong, the collapse of the Siad Barre state in Somalia and the long-term civil wars in Sudan and Northern Uganda. Accordingly, cattle rustling has transitioned from a primarily culturally-based practice governed by customary rules (which protected women and other civilians to a large extent) to an economically and politically-based activity governed by rules of political expediency and profiteering with little interest in protection of civilians
- 126 The Commission was made aware of the Pokot experience of military operations-within either the context of disarmament or an attempt at clamping down on cattle rustling. In a detailed elaboration on the subject, the Commission heard
- The Pokot people experienced the third military operation (two previous military operations occurred during the colonial period) during Mzee Jomo Kenyatta's administration in 1976. The Pokot cattle rustlers (sic) stole cattle around Makutano Town in December 1976. The District Special Branch boss Mr Lawrence Ngisirei drove in his official Land Rover towards Kishaunet Trading Centre, West Pokot District, to track the cattle rustlers and the cattle. He was shot in the right thigh while driving. The District Special Branch Officer (DSBO), Mr Lawrence Ngisirei, was airlifted to Nakuru Memorial Hospital, where he was confirmed dead on arrival due to excessive bleeding. The Provincial Police Officer (PPO), Mr James Erastus Mungai of Rift Valley Province mobilized the security forces to crack down on the cattle rustlers in West Pokot District. The security forces rounded up 100 people around Kishaunet/Nasokol indiscriminately and they torched houses, looted money and the Provincial police officer (PPO), Mr James Erastus Mungai was overseeing the security process the Kenya security forces killed one old man [] Mzee Siwanyang Loyolmoi.¹⁰¹
- 127 Recounting another military expedition that took place on 17 September 1979 the Pokot testified before the Commission that
- The President [] declared the mopping up of illegal guns owned by the Pokot militia. The Kenya security forces tortured civilians of Chepkopegh sub-location of Kipkomo location, West Pokot district, leading to the deaths of nine people. The security forces took away 2 500 livestock of Francis Yoponyang, the chief of Mazol location. Mr Lokorion was tortured, tied to General Service Unit Land drover that pulled (sic) till death.¹⁰²
- 128 The Pokot also testified about a massive disarmament programme (Operation *Nyundo*) undertaken by the Kenyan military

¹⁰¹ TJRC/Memo/1206 [Submitted by the Pokot Community]

¹⁰² TJRC/Memo/1206 [Submitted by the Pokot Community]

The Kenya Army [] used heavy artillery and helicopters to round up 30,000 livestock in the whole of West Pokot district into concentration camps in Keringet, Mtember and Kongalei. The Kenya Army made sure that those 30,000 cattle were denied pasture & water so that the owners could surrender illegal guns to the security forces.¹⁰³

- 129 Collective punishment was always accompanied by the seizure of community assets, notably livestock. The fragile social fabric of most minority groups today is directly linked to their experience of violence unleashed on them by state security agencies. Indeed, in 2006, the Commission on Legal Empowerment of the Poor determined that torture, arbitrary arrests and confiscation of livestock that resulted from the applications of various statutes discussed here were 'mainly perpetrated by the Kenya Police, the Kenya Army and the Administration Police and even in some instances game rangers from the Kenya Wildlife Service (KWS),'¹⁰⁴ constituted grievous violations of various international instruments, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)¹⁰⁵. Some of the atrocities meted-out on the residents of NFD, including "rape, castration of males, amputation and brutal beatings," it was determined, amounted to inhuman and degrading treatment.¹⁰⁶
- 130 Another trigger of many of the conflicts between communities and the state is land. Illegal and irregular land allocation has been a feature of Kenyan governance for decades, as made clear in the Njonjo and Ndungu Land Reports. When communities resist the illegal allocation of their land or their uncompensated eviction, the state regularly responds with violence. Violence begins at an individual level with regular beatings and arrests of indigenous community members who try to enter land from which they have been evicted.¹⁰⁷ When communities engage in collective action, the state escalates the response.
- 131 According to the UN Special Rapporteur on Indigenous Peoples, in Laikipia in 2004, Maasai protesters marking the expiration of leases under the 1904 treaty with the British were severely repressed, resulting in the death of an elder and serious injury to four people. Rape of women and looting in local villages were also reported as a result of the security operation that ensued.¹⁰⁸

103 TJRC/Memo/1206 [Submitted by the Pokot Community]

104 C. Ngondi, *Access to Justice and the Rule of Law in Kenya: Paper prepared for the Commission on the Legal Empowerment of the Poor* (2006) 35.

105 G.A. res. 39/46 [annex 39 U.N. GAOR Supp. (No. 51) at 197 U.N. Doc. A/39/51 (1984) entered into force June 26 1987]

106 Customary international law strictly prohibits torture as non-derogable even during times of emergencies. See e.g. *Prosecutor v Furundjija* ICTY Case No. IT-95-17-T at 9 (Judgment of December 10 1998).

107 E.g. ICJ OMCT & CEMIRIDE Kenya, *An alternative report to the UN Committee on economic, social and cultural rights* (2008) 29.

108 *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people Rodolfo Stavenhagen: Mission to Kenya* U.N. Doc. A/HRC/4/32/Add.3 para. 60.

132. Human rights reports also describe beatings and attacks by security forces on members of the Endorois community when they collectively resisted eviction from their land around Lake Bogoria. Similarly, members of the Sengwer community who moved into the Embobut Forest after being displaced from their traditional settlements in the plains also have a long history of conflict with security forces. According to reports, security forces believe that the Sengwer have no rights and are not entitled to protection from the state because they are viewed as illegal squatters in the forest. Accordingly, every few years, security forces enter the forest and burn down Sengwer homes. In 2006, approximately 8,000 Sengwer were evicted by the Forest Service from the forests where they had taken up residence, with no compensation or resettlement assistance.¹⁰⁹
133. In conclusion, it is important to note that the Kenyan state has a duty under the international norm of 'Responsibility to Protect' (R2P), which was affirmed by the UN General Assembly in 2005¹¹⁰, to ensure that it protects pastoralists and other communities in primarily pastoralist areas from mass killings and other atrocities. Simply because the violence is inter-communal in nature and may be grounded in a long-standing, culturally-based practice does not exempt it from the gambit of the R2P. In describing recent inter-communal violence in Nigeria for instance, the Global Centre for the Responsibility to Protect noted that:
- This responsibility requires preventing massacres before they are perpetrated and halting them should they begin. It involves ensuring that ... military, police and government officials - local, state and federal - do not commit R2P crimes and take appropriate measures to prevent and halt atrocities committed by non-state actors¹¹¹
134. The R2P obligations particularly arise when these crimes are foreseeable. As multiple communities have reported to the Commission, pastoralists have sought assistance from authorities to address impending raids but state security forces have regularly failed to provide assistance or have arrived after attacks have been in progress for days and have resulted in many deaths. Some reports indeed suggest that the collusion of security forces in political and economic-based raiding is a major impediment to effective provision of security.

109 Republic of Kenya, *Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project* (2006) 25 available at http://www.ogiek.org/indepth/2006_Kenya_WKCDD_NRMIPPF.pdf (accessed 12 July 2012)

110 See U.N. Doc. A/60/L.1. Adoption of the 2005 World Summit Outcome (Sept. 15, 2005) (describing at para. 138 that "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it.")

111 Global Rights, *Atrocities in Nigeria's Plateau State and the responsibility to Protect* (2010), http://globalr2p.org/media/pdf/Atrocities_in_Nigerias_Plateau_State_and_the_Responsibility_to_Protect.pdf

Violation of Land Rights

135. To minorities and indigenous groups, land is more than a factor of production. Rather, land is a living space within which a complex range of social-cultural and spiritual relationships subsist and are negotiated. Consequently, displacement from such land causes not merely material deprivation, but may result in the physical destruction of the group¹¹²

136. Pastoralists and hunter-gatherers in Kenya have been affected most severely, by land loss, land fragmentation and forced evictions. The result has been increased marginalisation, deepening poverty and cycles of conflict with neighbouring communities and with the state. As the UN Special Rapporteur made clear in his report after a mission to Kenya

Loss of land through colonization, nationalization and privatization can be illustrated with the example of the Maasai, whose grazing areas were split by a colonial frontier installed between Kenya and Uganda at the end of the nineteenth century. It is estimated that the Maasai lost one-third of their territory through coercive treaties in 1904 and 1911 imposed by the colonial regime and were allowed to retain only small amounts of marginal land in the Kenyan districts of Narok and Kajiado. In Laikipia District, 75 percent of the land still remains in the hands of European owners. The Special Rapporteur personally observed traditional rangelands which were being fenced off, thus restricting the seasonal movement of the livestock herds of the nomadic pastoralist communities, as well as constricting the natural ecosystems of wildlife, including migratory routes.¹¹³

137. The Special Rapporteur further remarked that

After independence in 1963, the formerly closed Maasai districts were opened to immigration from other ethnic groups based on the false assumption that large areas utilized by the Maasai for seasonal grazing were "idle land." The Ndungu Report documents the faulty adjudication of the Iloodo-Ariak in Kajiado District to hundreds of government officials and their relatives. Though they were not local residents, they were issued title deeds, while "many rightful inhabitants of the area were disinherited from their ancestral land." It is estimated that the Maasai lost another third of their lands in Narok and Kajiado districts as a result of these processes. In Kajiado alone, 50% of Maasai households did not have land in 1997 as compared to around 8% in the 1980s.¹¹⁴

138. The Kenyatta government ignored the demands for land redistribution and instead nurtured elite accumulation of land.¹¹⁵ The Commission also heard how massive

112. See generally, BA Kwonkwo *Land Rights of Indigenous Peoples in Africa* (2012).

113. *Report of the Special Rapporteur Rodolfo Stavenhagen*, para. 30.

114. *Report of the Special Rapporteur Rodolfo Stavenhagen*, para. 69.

115. TJRC/Hansard/Public Hearing/Naivasha/26 September 2011/p. 72.

communal land which was lost during the colonial days passed on to post-colonial political and economic elite from dominant groups:

Kedong Ranch is about 75,000 hectares. It belonged to a white man called Lord Nasore, who had grabbed it from the Maasai people. It stretched from Suswa all the way around Longnot and borders the farm where we live in at the moment. The farm live on now is 3 000 acres. Namucha is 8 000 acres. The white men had employed our parents. As they were leaving, they said that they were leaving the land to our parents. There was no agreement (written) that was signed. We would like this Commission to help us to get back the land we lost to the white man since the Government that took over from the white man also brought about some injustices, but we shall not move out of this land.

139. Instead, land distribution for the most part in the former White Highlands favoured the Kikuyu, leading to tension between them and other communities particularly within the Rift Valley. In fact there are claims that Kenyatta's government is not only the reason for existence of minorities in Kenya today but it laid the foundation for the systematic violation of the rights of indigenous peoples to natural resource ownership and use.¹¹⁶

140. Until the adoption of a new constitution in 2010, Kenya's constitutional law did not focus much on land issues. This is despite land having been one of the drivers of the independence struggle. Section 75 of the repealed constitution generally protected property of every description; By this language, the constitution foreclosed any possibilities of fundamentally altering property relations in post-independence Kenya. This also means that communities who had lost land due to colonial annexations of territory by virtue of the application of the Crown Lands Ordinance, such communities had no constitutional basis for redress. The only land that received constitutional *imprimatur* was Trust Land, which was defined in Section 114 as including 'the areas of land that were known before 1 June 1963 as Special Reserves, Temporary Special Reserves [or] communal reserves; Further, section 115 of the constitution provided that:

All Trust Land shall vest in the county council within whose area of jurisdiction it is situated [...] Each county council shall hold the Trust Land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual; Provided that no right, interest or other benefit under African customary law shall have effect for the purposes of this sub-section so far as it is repugnant to any written law.

141. This definition raises two concerns. First, many minority communities such as the Ogiek, Sengwer, Boni and coastal communities that were previously not vested with a 'special reserve', 'temporary reserve' or 'communal reserve' under colonial law, were not beneficial owners of land vested to county councils by virtue of their being 'persons ordinarily resident in that land' within the meaning of section 115(1) of the Constitution. Second, how would the beneficial ownership of minorities within county councils be reconciled with that of majoritarian groups?
142. Further, when the Kenyan state desired to acquire trust land for a specific public purpose - a process known to Kenyan law as "setting aside" in contrast to "compulsory acquisition" - the rules that govern the exercise of the sovereign's eminent domain¹¹⁷ were unclear in relation to the rights of minority communities.¹¹⁸
143. The rights of communities generally within trust land were limited to the use of the land subject to customary laws of that community. However, the application of such customary norms was subordinated to statutory regimes.¹¹⁹ Such weak protection has been criticised as 'inadequate to protect the rights of communities'.¹²⁰ The Trust Land system is also criticised in the National Land Policy. The policy notes

117 PG Veit *et al Protected Areas and Property Rights: Democratizing Eminent Domain in East Africa* (2007) Available at pdf.wri.org/protected_areas_and_property_rights.pdf (accessed 12 July 2012)

118 Section 75 of the Constitution of Kenya Act (repealed in August 2010 but operative during the Endorois litigation) provided for the protection of "property of any description" from compulsory possession or acquisition unless such possession or acquisition complied with several conditions: public purpose for the acquisition; proportionality of public purpose to private hardship expected from the compulsory acquisition; prompt payment of compensation; access to court for aggrieved parties. While the Land Acquisition Act (Cap 295) prescribes a comprehensive procedure for compulsory acquisition, Section 7(1) of the Trust Lands Act establishes the procedure for "setting aside" of trust lands in contrast has much weaker protections, particularly for communities. Where written notice is given to a council under sub-section (1) of section 118 of the Constitution that an area of Trust Land is required to be set apart for use and occupation for any of the purposes specified in subsection (2) of that section, the council shall give notice of the requirement and cause the notice to be published in the *Gazette*.

(2) Before publishing a notice under sub-section (1) of this section, the council may require the government within a specified reasonable time -

(a) to demarcate the boundaries of the land, and for this purpose to erect or plant, or to remove, such boundary marks as council may direct; and

(b) to clear any boundary or other line which it may be necessary to clear for the purpose of demarcating the land, and if the land is not demarcated within the time fixed by the council, or if the person or body on whose application the land is to be set apart so requests, the council may carry out all work necessary for the demarcation of the land and require the applicant to pay the cost of the demarcation.

(3) A notice under subsection (1) of this section shall specify the boundaries of the land required to be set apart and the purpose for which the land is required to be set apart, and shall also specify a date before which applications for compensation are to be made to the District Commissioner.

(4) Where the whole of the compensation awarded under section 9 of this Act to persons who have applied before the date specified in the notice given under subsection (1) of this section has been deposited in accordance with section 9 of this Act, the council shall make and publish in the *Gazette* a notice setting the land apart.

119 Section 69(1) of the Trust Lands Act provides: In respect of the occupation, use, control, inheritance, succession and disposal of any Trust land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing African Customary law or any subsequent modifications thereof, in so far as such rights are not repugnant to any of the provisions of this Act, or to any rules made there under, or to the provisions of any other law for the time being in force.

120 *Endorois decision*, para 199.

that the Trust Land system has been abused by county councils,¹²¹ which, rather than act as custodians of the land, councils 'have in many cases disposed of trust land irregularly and illegally' Responding to the failure of the Trust Land regime to accord adequate property rights protection to communities, the Constitution of Kenya, 2010 transforms all land under trust, except for public forests and national parks or reserves into community land to be held by specific communities in accordance with an organic law.¹²² The failure of the Trust Land regime is best exemplified by the Endorois' land case

- 144 The Endorois - a distinct community that has been living on the shores of Lake Bogoria and in the Monchongoi Forest in Kenya for centuries - are a pastoralist group that inhabited trust land In the 1970s, Lake Bogoria was designated a game reserve by the Kenya government. This decision led to a long series of rights violations against the Endorois community, including displacement, property loss and loss of access to traditional cultural and religious sites During protests against their forced eviction from their ancestral lands community members were beaten by security forces Families lost all their property as houses were destroyed and looted Addressing the Commission's public session in Baringo, Endorois' representatives related that

In January, 1973, police officers arrived at the farm They evicted the people and arrested some During that time, we were still practicing female circumcision Unfortunately, the girls were still in the initiation process They were arrested and taken to court in Nakuru However, after the local leaders intervened, they were told "you are now free Go back home" but do not go back to that land Since then, part of the land is still vacant That was how we lost our land in Nakuru District

- 145 This eviction, according to the community, was undertaken without compensation Ultimately, the community filed a claim at the African Commission on Human and Peoples' Rights In its memorandum presented to the Commission, the Endorois presented the decision of the Africa Commission handed down in February 2010, which determined that the Kenya government was in violation of various rights The African Commission determined that the property of the Endorois people has been severely encroached upon and continues to be encroached upon It observed that the encroachment was not proportionate to any public need and was not in accordance with national and international law The African Commission further found that by forcing the community to live on semi-arid land without access to medicinal salt licks and other vital resources for the health of their livestock, the Kenyan state had created a major threat to the Endorois' pastoralist way of life As such, the African Commission was of the view that the very essence of the Endorois'

121 *Government of Kenya Sessional Paper No 1/2009 National Land Policy Annex 1 para 65*

122 *Constitution of Kenya 2010 sec 63*

123 *TJRC/Hansard/Public Hearing/Baringo/24 October 2011/p. 14*

right to culture had been denied, rendering the right, to all intents and purposes, illusory

- 146 To remedy these violations, the African Commission recommended that the Kenyan state should '[e]nsure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle' Additionally, the state was directed to '[p]ay adequate compensation to the community for all the loss suffered', which includes the loss caused by the Endorois' inability to enjoy its cultural and religious practices on its ancestral and sacred lands over the past three decades
- 147 The African Commission recommended that Kenya "[r]ecognise rights of ownership to the Endorois and restitute Endorois ancestral land" Additionally, the African Commission recommended that the Endorois be compensated for their losses associated with the government's infringement on the Endorois' right to property.
- 148 Despite initial promises by the Kenyan state that it would implement the recommendations of the African Commission no substantive actions have been taken in this regard Violations of the rights of Endorois community continue
- 149 The Nubians also described before the Commission how they were forcefully and brutally evicted from Kibera in Nairobi According to a representative of Nubians who spoke before the Commission

The general feature of demolitions in Kibera was brutality that was used Without proper notice, tractors, policemen and administration police would descend upon the residents and proceed to demolish In the process, they would damage people's property and yet people were not compensated The other feature of the demolition was that after demolition, the areas in the periphery, everybody was forced into the centre of Kibera, hence the present congestion¹⁴⁴

- 150 A Nubian woman also stated that

My mother gave birth to me at Moi Girls Nairobi We were five of us and when my mother and father died, they left us there We were evicted and we were told to demolish our houses and why they demolished our houses and moved us to the middle, we do not know Until now, there is a symbol of my parents there They had planted mango trees which are still there and nothing has been built there We have seen a fence that has been put up but there is nothing and the government is not bothered about where we were relocated to and they do not know where we were relocated to¹⁴⁵

¹⁴⁴ TJRC/Hansard/Public Hearing/20 February 2012/p 43

¹⁴⁵ TJRC/Hansard/Public Hearing/20 February 2012/p 45

Eviction and displacement of the Nubians from Kibera, Nairobi

(TJRC/Hansard/Public Hearing/Nairobi/p. 42-43.)

Over the years, most of our problems can actually be encapsulated in the problem of land. I know most of you here know Kibera as a slum area. But that was not the state of Kibera. When the Nubians were settled in Kibera in 1902, the place was actually a forest and hence the Nubian name "Kibera". But later, we understand also because of the pressure of rural urban migration, especially after independence, the population grew astronomically. That was not the only reason. One other reason was that politicians who sought their fortune in Kibera imported voters from their communities. That is a problem that continues to this day. To exacerbate our problem, the National Housing Corporation, the City Council of Nairobi started hiving off pieces of land from Kibera. The original land on which the community was settled was bordered by Ngong Road on one side, Langata Road on the southern side, by the City mortuary, Magadi Road, and the road from Kenya Science Teachers College up to Langata Road. The area was a total of 4,997.9 acres.

The present acreage is now less than 800 acres. A lot of land was hived off, especially by the NHC in the name of upgrading the standards of living. But the truth is that very few people from our community actually benefited from those houses. Instead, the houses were floated in the open market and everybody with the ability or right connections managed to get them.

We also felt that the methodology used in terms of development of houses was less than equitable in as far as Nubians are concerned. We have no other place we call home. We would not readily move into flat-like residences considering the whole family used to live together. When I say "the whole family", I mean in the African sense, the extended family.

A lot of hiving off was done without any consultation. From 1950, where the Woodley Estate is, according to my earlier description, you would appreciate that was part of Kibera. They later named it Karanja Estate. Langata; a big chunk of land was taken and on it Otiende and Ngei estates were developed. The present Olympic Estate, we used to call it Gala Lima. The list is long. Ironically, one of the beneficiaries of Kibera land happened to be the judiciary. The judiciary actually put up a court there. In the sense of priority, that was wrong. Peoples' houses were demolished and the court was placed there. Yet, we had a very functional court in the DC's compound. So, if you go to Kibera, one of the outstanding buildings is actually the court building. Later, the area known as Camp Lei, those of you who know, Moi Nairobi School, a lot of land was grabbed and people were removed from that area. The land was ostensibly given for the expansion of Moi Girls, Nairobi. But to this day, if you go to that area, you will find the place very well fenced by stone wall, enough to build three Moi Girls. The truth is that this land was grabbed by the people who were in power at that time.

The general feature of demolitions in Kibera was brutality that was used. Without proper notice, tractors, policemen and administration police would descend upon the residents and proceed to demolish. In the process, they would damage people's property and yet people were not compensated. The other feature of the demolition was that after demolition, the areas in the periphery, everybody was forced into the centre of Kibera, hence the present congestion.

- 151 During the mandate period several pieces of land related legislation played a significant role in restricting the extent to which minority groups and indigenous people exercised land rights. These include the Government Lands Act, Registered Land Act, Forest Act, and the Land (Group Representatives) Act

Government Lands Act

- 152 The Government Lands Act (GLA) was a successor of the English Foreign Jurisdiction Act 1890 as amended by the 1901 East African (Lands) Ordinance in Council and the Crown Lands Ordinance of 1902 and 1915. Under these laws, the Crown (as represented by the colonial Governor in Nairobi and thereafter the President of the Republic of Kenya) was given unfettered discretion to control and dispose of all "waste and unoccupied land in the 'Protectorates' with no settled forms of government and where land had not been appropriated to the local sovereign individuals."¹²⁶ Under the GLA, the President, through the Commissioner of Lands, had the power to allocate any un-alienated land to any person he or she wished.¹²⁷
153. Un-alienated land was defined by the GLA as 'Government Land' which is not for the time being leased to any other person or in respect of which the Commissioner of Lands has not issued any letter of allotment¹²⁸ - in other words, lands which are vested in the government and over which no private title has been created
- 154 Once allocated, such land is held as a grant from the government on payment of such rents to the government as the government wishes.¹²⁹ Most of the zones occupied by the Ogiek, Sengwer and other hunter-gatherers are covered by the Forest Act and thus deemed un-alienated land, in the sense that it is not occupied. Moreover, most lands in Coast Province remained governed under the GLA, leaving most communities in these parts of the country as squatters at best and trespassers at worst.
- 155 The report of the *Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* revealed that some 200,000 illegal titles were created between 1962 and 2002. Of these, 98 percent were issued between 1986 and 2002. The categories of public land affected include forests, settlement schemes, national parks and game reserves, civil service houses, government offices, roads and road reserves, wetlands, research farms, state corporations' lands and trust lands.¹³⁰ Most of

¹²⁶ Sections 30 and 31 of the Crown Lands Ordinance 1902

¹²⁷ Former GLA Section 3 (a) mandated the President to "make grants or dispositions of any estates, interests or rights in or over un-alienated Government land

¹²⁸ Section 2. GLA

¹²⁹ Section 3. GLA

¹³⁰ African Centre for Open Governance (AFRICOG) *Mission Impossible? Implementing the Ndung'u Report* (2009)

the grabbed lands include ancestral lands occupied by minority and indigenous groups including the Ogiek, Maasai, Sengwer and coastal communities such as the Boni, among others. Unfortunately, only few of the recommendations of the Ndungu Commission have been implemented to date.

Registered Land Act

156. Under the Registered Land Act (RLA),¹³¹ any person may acquire absolute ownership of any land once he or she has been registered as the absolute owner. On registration, such a person acquires freehold or leasehold interests on the land.¹³² Freehold implies absolute proprietorship. Between 1988 and 1997, the President through the Minister for Environment de-gazetted government forests amounting to 107 000 hectares which the Ogiek claim as their ancestral land,¹³³ and converted it to absolute proprietorships under the Registered Land Act. Overall registration processes led to substantial losses for minority communities.

Forest Act

157. This Act, enacted first in 1942 and amended just after Kenya's independence in 1964, gives the Environment minister wide powers to declare any un-alienated land a forest area, to declare the boundaries of such forest and to alter the boundaries.¹³⁴ The minister is also vested with powers to declare that a forest area ceases to be a forest, in which case all he must do is give a 28-day notice to the public through the *Kenya Gazette*.¹³⁵ The Act also gives the minister power to issue licences for the use of forest produce. Under this Act, the Ogiek, Sengwer, Boni, Waata and other hunter-gatherers have found they are contravening the law by using forest products, including honey, without the consent of the minister. This is despite the fact that:

Traditionally Ogiek are a forest-friendly community and have never destroyed trees but have continued taking care of the forest because it is their source of livelihood. Ogiek ate wild meat, honey, wild fruits, roots, herbal trees, weeds shrubs. The forest is/was an Ogiek home. It is suffice to say the destruction of the forest was equally the destruction of Ogiek.¹³⁶

¹³¹ Repealed by the Registration of Lands Act, Act 3 of 2012

¹³² Section 27 of the Registered Land Act provides that (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto, and (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

¹³³ See paragraphs 30-38 below for specific particulars of the conversion of government forest into private lands to the prejudice of the Ogiek

¹³⁴ Section 4 (1). Forest Act, Cap 385 Laws of Kenya

¹³⁵ (n 179 above) Section 4 (2)

¹³⁶ TJRC/Memo/004 [Submitted by the Ogiek -Tinderet Forest Reserve]

- 158 The provisions of this Act have also resulted in the excision of much ancestral land beneficially owned by forest communities such as the Ogiek. It has also contributed to violent eviction at very short notice. One such incident was narrated to the Commission by the Ogiek thus:

On 10th June, 2005, evictions started. The people from the county council, police officers and administration police descended on us; they burnt down our houses. We had nowhere to go. We were evicted because they said that we were encroaching on the forest. According to us, this is not true.¹³⁷

- 159 While this law has been succeeded by a new Forest Act 2005 that better incorporates communities in forest conservation, the latter law does not grant any concrete tenure rights in favour of forest communities.

Land (Group Representatives) Act

- 160 The former Land (Group Representatives) Act (GRA)¹³⁸ gave group ranch status to groups in specific districts that were shown to have customary rights over the ranch or pastureland in question. A group for the purpose of the Act is a "tribe, clan, family or other group of persons, whose land under recognised customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner, where such person has under recognised customary law exercised rights in or over land which should be recognised as ownership."¹³⁹

- 161 Under the GRA, the procedure of acquiring the rights is sophisticated: there are requirements that the group must have a constitution and elected group officers in accordance with their constitution, hold meetings of members to make resolutions pursuant to which the group representatives are incorporated. The group after incorporation becomes a legal entity to sue and be sued. The group officers have to exercise their powers on behalf and for the collective benefit of its members. The group representatives are also enjoined to maintain an office and a postal address for the group to hold regular meetings and keep books of accounts which should be open for inspection by all members of the group.¹⁴⁰

- 162 The summation of these requirements is that, although the law allegedly protected communal ownership of land, its procedures were too onerous for most marginalised

¹³⁷ TJRC/Memo/004 [Submitted by the Ogiek -Tinderet Forest Reserve]

¹³⁸ Repealed by the Registration of Lands Act Act 3 of 2012

¹³⁹ Section 23 (2) (a) GRA; see also P. Kimeri-Mbote, *Property rights and biodiversity management in Kenya: the case of land tenure and Wildlife* (2002) 71-72.

¹⁴⁰ Sections 2, 5 and 7 of GRA.

communities to take advantage of The GRA also provides an element of confusion and uncertainty in regard to the aspect of disposition of land. Although the group representatives are to hold the land and other assets on behalf of the group for the collective benefit of all members, disposition of group land may be made simply with approval of the group representatives themselves, no broader consultation is required

163 In practice, this law has been applied in a limited sense only in some areas of Narok, Kajiado, Samburu and Laikipia districts, where former Trust Lands have been converted to group ranches. Ultimately, most of the group ranches have been individualised to male heads of households, hence defeating the purpose of the legislation¹⁴¹

164 The loss of traditionally-held land and natural resources as a result of these laws discussed here violates various international instruments relating to minorities and indigenous groups. More importantly, the main remedy for these violations is the right to restitution of ancestral lands. The failure of Kenya's post-independence constitution to recognise group rights creates specific challenges for minorities and indigenous communities, particularly in relation to access to justice for violations as a result of the laws above. As observed by one Kenyan judge

The scheme of the protection of fundamental rights envisaged by our constitution is one where the individual as opposed to community or group rights are the ones enforced by the courts. The emphasis is clear. Except for a detained person for whom someone else may take up the cudgels, every other complainant of alleged contravention of fundamental rights must relate the contravention to himself [sic] as a person. There is no room for representative actions or public interest litigation in matters subsumed by section 70-83 of the Constitution¹⁴²

165 Consequently, many minority groups' claims before judicial organs of the state in relation to land were either not given due consideration or the remedies that flowed from such claims were inadequate. The case of the Endorois, who challenged state annexation of their land both in domestic courts and at the African Commission, also highlights the plight of communities who have been negatively impacted by lack of free, prior and informed consent related to their lands as well as resulting forced eviction

141 M Ritten *Selling wealth to buy poverty: the process of the individualization of landownership among the Maasai pastoralists of Kajiado District Kenya 1890-1990* (1992) 10

142 High Court Miscellaneous Civil Application No. 82 of 2004 (OS) *Rev. Dr. Timothy Njoya & Others vs The Attorney General & Others* delivered on 25 March 2004

Violation of Right to Development

- 166 Since independence, Kenya has had two long-term development policies and several five-year development plans that have guided investment and planning. The first long-term policy is *Sessional Paper No 10 of 1965 on African Socialism and Its Application to Planning*, which focused on investment of resources in areas with absorptive capacities concentrated in the former White Highlands. Other policies which had similar focus included the *Land Reforms and Agricultural Settlement Fund, Sessional Paper 10 of 1967 on Development Blueprint* and *The National Policy on Kenyanisation of Public Services, Trade and Industry*, which established the Development Bank of Kenya, Industrial and Commercial Development Corporation (ICDC) and the Agricultural Finance Corporation (AFC) in the 1960s and 1970s.¹⁴³ These supportive policies targeted the same “high potential” areas at the expense of areas ignored by the colonial government. Although the Kenya Meat Commission (KMC) was established during the same period, it was located in Nairobi’s Athi River area, forcing pastoralist cattle keepers to travel thousands of miles to access this singular terminal market at great loss.
- 167 During the Kenyatta regime (1963 to 1978) poverty and under-development gripped areas dominated by minority communities. The NFD remained a closed district whose visitors had to be licensed by government and those living in the region had to have a chief’s letter to enter. For that reason, the region was unattractive to investment interests. As one author described it: “This is the one half of Kenya that the other half knows nothing about and probably does not care.”¹⁴⁴
- 168 Former President Moi ushered in the second long-term development policy under the *Sessional Paper No 1 of 1986 Economic Management for Renewed Growth*, which espoused a structural adjustment program. Like the Kenyatta regime, Moi’s tenure extended political power and economic benefits in a skewed manner. As a consequence, groups felt excluded from participating effectively in national affairs. Although minority communities may seem to have received some political representation during Moi’s regime, this did not translate into development gains in areas inhabited by minority groups.
- 169 The launch of the District Focus for Rural Development (DFRD) focused on the Fifth Development Plan (1984-88) was themed ‘mobilizing resources for equitable

¹⁴³ Ministry of Justice, National Cohesion and Constitutional Affairs, *Draft National Cohesion and Integration Policy* (2011) available at www.kippra.org/docs/Draft%20National%20Cohesion%20and%20Integration%20Policy.pdf (accessed 12 July 2012).

¹⁴⁴ GL Dadacha, *The politics of deprivation and separation – the case of Northern Kenya* (2009) <http://odaa.com/oduu/1304/2009/10/29/kenya-the-politics-deprivation-and-separation-the-case-of-northern-kenya/> (accessed July 13, 2012).

development' and gave hope for inclusiveness. However, the centralisation of budget resources in Nairobi-based ministries amidst rampant public resource mismanagement rendered DFRD a futile planning exercise. The sixth National Development Plan, dubbed 'Participation for Progress' did little to accelerate agriculture or industrial diversification between 1989 and 1993.

170. In 1999, the government accepted the 1999 launch of the International Monetary Fund (IMF) and World Bank-sponsored Poverty Reduction Strategy Paper (PRSP). The PRSP failed to address marginalisation, historical injustices and the unique circumstances of minority communities and indigenous peoples.¹⁴⁵ At the same time, Kenya launched the Medium Term Expenditure Framework (MTEF) budgeting approach to improve the link between policies, plan, and budgets. This reform has yet to reach the grassroots where most minority communities and indigenous peoples are located.
171. Despite this multitude of policy initiatives, lack of effective implementation of the programmes undermined many of the potential benefits they might have rendered for minority and indigenous groups. Moreover, many of the programmes perpetuated the marginalisation of parts of Kenya that are home to minority groups, such as the NFD.
172. After President Moi's term, the National Rainbow Coalition (NARC) government of 2003 instituted the Economic Strategy for Wealth and Employment Creation (ERS-2003-2007). The ERS aimed at creating 500 000 jobs annually, reducing the poverty level by at least 5 percent, achieving high gross domestic product (GDP) growth, containing average annual inflation to below 5 percent, increasing official foreign exchange reserves and increasing domestic saving to enable higher level investment for sustainable development.¹⁴⁶ By 2007, ERS had succeeded in raising the economic growth rate to 7 percent but had equally contributed to increased ethno-geographical wealth inequalities.¹⁴⁷ Further, economic growth collapsed during the post-election violence in 2007-2008, demonstrating the soft belly of the economy.
173. Kenya Vision 2030 was the other long-term development blueprint for the period 2008-2030. It was launched on 10 June 2008. Vision 2030 was based on economic, social and political pillars. Through the economic and social pillars, it was expected that the country would experience greater economic growth, reduced inequality and enhanced ethnic cohesion. Some of the programmes in these two pillars

¹⁴⁵ Minority Rights Group (MRG) *A poverty reduction strategy paper: failing minorities and indigenous Peoples* (2007)

¹⁴⁶ (n 190) 3

¹⁴⁷ Society for International Development (SID), *Readings on Inequality in Kenya: sectoral dynamics and Perspectives* (2008)

include expansion of human capital development, with provisions on affirmative action and increased social infrastructure

174 Even with the promises of Vision 2030, development in Kenya has remained locked in past practices and approaches that were inimical to the emancipatory transformation of rural economies practiced by minority communities in at least three ways 1) communities closest to natural resources were not viewed as beneficiaries of development outcomes, 2) environmental protection and conservations were given policy consideration, but limited commitment existed to ensure compliance beyond basic fulfilment of administrative requirement and 3) public participation was emphasised at the discourse level but remained hardly evident in programmatic interventions

175 Upholding the need for development that is not inimical to livelihoods, Justice Mary Ang'awa in *Charles Lekuyen Nabori & 9 others v Attorney-General & 3 others* held

Each Kenyan is entitled under the constitution and under the Environmental Act EMCA to a right to life, a right to a clean and healthy environment The *Prosopis juliflora* plant has seen the populace being misplaced and the development and social lifestyle being interpreted [sic]. Their right to develop and improve their lifestyle has been curtailed by the introduction of this plant The government has failed in its task to put in place a management programme or made it a national issue The petitioners have had their rights infringed when they have been deprived of the sustainable development [] I would interpret the 'right to life' using a broad meaning in this case that includes the right to be free from any kind of detrimental harm to human health, wealth and or socio-economic well-being The effect of the said plant has affected the right of the petitioners accessing their properties the government of Kenya be held accountable in damages caused by the introduction of *Prosopis juliflora* to the region¹⁴⁸

176 The court required the Ministry of Environment to produce a policy working paper on the management and eradication of the plant and present this to Parliament within 60 days for debate and interpretation Like most pro-community rights decisions, this judgement remains unenforced by the state

Lamu Port Project

177 Lamu, a marginalised area of Coast Province, has been the focus of national attention due to the anticipated development of the Lamu Port South Sudan-Ethiopia Transport (LAPSSET) Corridor and the proposed Lamu Port at Manda Bay This project is one of the priority "flagship" projects identified in the government's long-term development policy, Kenya Vision 2030

¹⁴⁸ High Court of Kenya in Nairobi: *Charles Lekuyen Nabori & 9 others v Attorney General & 3 others* (2008) eKLR

178. Lamu is the largest town on Lamu Island, which is in turn part of the Lamu archipelago. It is also the headquarters of Lamu town and became a UNESCO World Heritage Site in 2001. It is one of the oldest and best preserved living settlements among the Swahili towns on the East African coast, with origins dating back to the 12th century AD. It is home to several minority and indigenous groups including the Aweer (also known as Boni) who value the settlement's cultural, linguistic and religious heritage.¹⁴⁹ An Aweer representative spoke on behalf of the community at the Commission's public hearings in Lamu town:

We have lived in this area for many centuries. We are not Boni. Our community is called Aweer. The term "Boni" is from the time we were hunters and gatherers and a community that moved from place to place. So the Bajuni called us the Bunis and that is where the term Boni came from.¹⁵⁰

179. Despite the significant social, economic, cultural and environmental impact which the LAPSSET project is likely to have on local indigenous communities, little consultation has taken place and communities have been left to rely on the media to establish whether or not their rights to the land they occupy would be recognised. The continuing nature of historic injustices emanating from the unilateral imposition of the LAPSSET project was captured in the Aweer memorandum to the Commission:

The Aweer are a threatened minority hunter-gatherer group in Lamu [...]. Since independence, the Aweer have been highly marginalised and faced severe obstacles to our traditional way of life. Until recently, the Aweer got their livelihoods from hunting, gathering fruits, honey and medicinal plants. We have lived in harmony with our forests and partook only in subsistence hunting for our wildlife. However, with the onset of independence, we faced two enemies: the Shifta and the government of Kenya. As the Shifta moved into Lamu between 1963 and 1967, they threatened the security of our people as well as poached our wildlife for trade, such that rhinos and elephants that used to roam our forest are now extinct in the area. In response, the government forced us for the first time to live in settled villages, which the Aweer were not used to. Furthermore, we faced harassment and interrogation techniques from the security personnel where some locals sustained permanent injuries [...] To make matters worse for the Aweer, in 1977, the government made hunting illegal, although the Aweer only practised subsistence hunting. Since we did not have livestock nor farms to rely on, our community was greatly affected. Shortly after, the Boni and Dodori National Reserves were gazetted without our consultation; the boundaries of which are highly controversial. As a result of this, we were denied rights to our indigenous lands to gather fruits, medicines, honey, salt and visits to our sacred sites. [...] Whilst we can still rely on forests outside the reserves [...] these are also under threat from illegal logging, increasing settlements, and will also be threatened by the proposed Lamu Port-South Sudan-Ethiopia Transport (LAPSSET) Corridor Project.¹⁵¹

149 See KA Sing'Oei *Kenya at 50: unrealized rights of minorities and indigenous peoples* (2012).

150 TJRC/Hansard/Public Hearing/Lamu/9 January 2011/p.18

151 TJRC/Memo/005 [Submitted by Khadija Gurba on behalf of the Aweer Wildlife and Environmental Resources]

180. Given Lamu's historical inclusion in the Northern Frontier District and the burden of discriminatory legislation already discussed, it was not inconsistent for the Commission to engage with this particular development as constituting the same developmental pattern that has contributed to the poverty and exclusion of the other former NFD districts

Turkwel Hydro-Electric Power Station

- 181 The Turkwel Hydro Power Plant is Kenya's largest hydro power plant having an installed electric capacity of 106 mega watts (MW) The project was built by the Kenyan government in the early 1990s with the help of France The plan was to harness the waters of the River Turkwel so as to provide energy for the nation, local communities and provide for irrigation of the surrounding areas The project was initially supposed to cost KSh 4 billion but ended up costing more than KSh 20 billion
- 182 Information made available to the Commission indicated the dam was built on wrong information and has never operated to its full capacity¹⁵² The development of the Turkwel Dam is a case study of destructive development It resulted in virtually no benefits for the surrounding communities and created a sustained source of conflict between the Pokot and Turkana communities. An estimated 800 people were displaced as a result of the dam construction, with little or no compensation¹⁵³ Although the dam was designed to generate electricity, the surrounding districts still have no electricity as they have never been connected to the power generated by the resource developed on their land Moreover, promised irrigation schemes as a result of the dam were never completed However, flooding causes severe problems in the region on a regular basis A UN report made clear that the main threat to indigenous species of plants – the main food sources for humans and livestock – was the effect of the dam on the Turkwel River which changed flood patterns and threatened fauna habitats
- 183 Despite the massive burden borne by communities neighbouring the project, the Commission was told that little benefit accrued to them
- Turkana people who are living along the River line of Turkwel River lost their land [] Turkana people were to benefit from a downstream irrigation scheme [] We were promised jobs, health facilities, good roads, water and sanitation and so many other things, but not even one has been implemented¹⁵⁴

¹⁵² S Hawley *Turning a blind eye: corruption and the UK export credits guarantee Department* (2003) 28-30

¹⁵³ As above

¹⁵⁴ TJRC/Hansard: Public Hearing: Turkana/10 October 2011/p. 62

- 184 The Pokot community, like their Turkana counterparts, highlighted to the Commission cases of large-scale population displacement, submerged schools, loss of dry season grazing grounds and non-compensation for loss of land as immediate consequences of the Turkwel Gorge Project

The poor pastoral Pokot community had trading centres that were displaced to pave way for the Turkwel Dam [] The Kenya government did not construct new schools or trading centres to replace those which had been submerged by the man-made dam. To date, the Kenyan Government has not compensated the Pokot for the communal land estimated at 100 000 acres that was used for grazing and farming

- 185 Most destructive has been the cycle of conflict created by the dam. Because of lack of participatory consultation as the dam was being constructed, the Pokot and Turkana communities regularly fight over the meagre economic benefits generated by the dam. This has led to ongoing cycles of violence throughout the dam's history and has resulted in oppressive security operations by the Kenya government. Both the Pokot and Turkana spoke passionately to the Commission regarding manipulated boundary delimitation, whose effect is to disentitle one or the other community of the resources from the Turkwel development

Geothermal Development

186. Inside Hell's Gate National Park near Lake Naivasha, the Olkaria Maasai have confronted land acquisition and natural resource development by the Kenyan government and a parastatal energy company, KenGen. The state firm began operating in the Hell's Gate area in 1982 and the national park was established in 1984. The total geothermal exploration area around Lake Naivasha is approximately 80 square kilometres.¹⁵⁵ A large proportion of park land is now being used for geothermal power generation and more development is planned.¹⁵⁷ Power stations, geothermal wells and an extensive network of transfer pipes now cover significant portions of Hell's Gate. The national park and the geothermal energy development affect multiple Maasai settlements, including some 20 000 people.¹⁵⁶
- 187 Sections of the Olkaria Maasai land are completely surrounded by the park and some community members' homes are fully within the park boundary. Those wishing to visit the community are required to pay park entry fees (US \$25 for non-Kenyans and KSh 300 for Kenyans) unless they can negotiate with the warden for a dispensation.

155 TJRC/Memo/1206 (Submitted by the Pokot Council of Elders on behalf of the Pokot community)

156 M. Martin, *Geothermal Development in Protected Areas: The Kenyan Experience* (paper presented at short course on geothermal development in Central America 25 November – 1 December 2007) 2

157 S. Simiyu, *Status of geothermal exploration in Kenya and future plans for its development* (Proceedings of the World Geothermal Congress 2010) 2-4

158 *The case of the Olkaria Maasai: harmful development processes and the culpability of the state* (CEMIRIDE undated)

They employ people from other communities but nobody is employing any member of the Maasai community. That is why we keep on engaging in demonstrations in this area. We feel that it is not right for people to come into somebody's compound, benefit and leave the owners of the compound without any benefit.

Vehicle entry fees are also charged. Only a few specially registered community vehicles are authorised to travel to the community without paying a fee and community members who use other forms of transport, such as a taxi, are forced to pay vehicle entry fees in order to access their own homes.

- 188 The Commission heard from the Maasai community on the need for benefit sharing of proceeds from energy resource exploitation

KenGen and other private companies operating in this area should plough back part of their profit into Maasailand. Nowadays we even sell waste from goats to people. Why should they come and benefit from the steam that is emitted from here when the original owners of the land do not benefit in any way? [] We have noticed that many people have been employed to work in KenGen but the Maasai people are not at all employed by that company. They employ people from other communities but nobody is employing any member of the Maasai community. That is why we keep on engaging in demonstrations in this area. We feel that it is not right for people to come into somebody's compound, benefit and leave the owners of the compound without any benefit.¹⁵⁹

- 189 The situation of the Olkaria Maasai reflects a common trend in the way that minorities and indigenous communities who resist the acquisition and exploitation of their lands for large-scale dam, energy, mining or tourism concerns are treated. They are often displaced, harassed and forced to become legal adversaries of the state or large corporations. The exploitation of local resources without corresponding benefit to communities is a common refrain. For the Endorois, the lack of benefits in relation to wildlife conservation in Lake Bogoria was attributed to non-existent institutional arrangements to facilitate such transfer of revenue from the national government to communities. In their submissions to the Commission the Endorois stated thus

We have one lake called Lake Bogoria. We were supposed to get 5 percent of the revenue generated from the activities relating to the lake (wildlife conservation) but up to now, there is no clear mechanism through which to access the revenue.¹⁶⁰

159 TJRC/Hansard/Public Hearing/Naivasha/26 September 2011/p. 71-72

160 TJRC/Hansard/Public Hearing/Kabarnet/24 October 2011/p. 16

Political Participation

190. Minority groups recognise the benefits that come with political power.¹⁶¹ A multitude of government services are highly politicised and are distributed through ethno-political networks in order to increase loyalty and power bases for political elites. Minority groups often are left out of this equation because of their small numbers or because of the way in which political boundaries have been drawn to split or marginalise minority groups' voting power. One report noted that, '...few indigenous people hold positions in the government, even at junior levels (e.g. as chiefs or assistant chiefs). They have little representation even as local government councillors, let alone at higher political levels and are thus administered and represented by members of other communities.
191. Communities noted that decisions on everything, from education tuition scholarships to community development choices are made based on political calculations. Minority groups believe that they are marginalised in large part because they have no access to political positions that would grant them decision-making power. Under the former Constitution, a substantial outcome of the marginalisation of minority groups and indigenous peoples was their lack of access to Constituency Development Fund (CDF) funds. Because of MPs' direct influence over CDF fund allocation, small communities had little say in allocation given that they had little influence during the electoral process.¹⁶²
192. Over the decades Sengwer and Maasai have been spread across different administrative and electoral units. This limits their ability to effectively advocate for their interests as a collective entity and to elect members of their community into positions of authority. The divisions can also provide an excuse for local administrative officials to ignore minority group claims. A Maasai elder discussing the plight of his community having been split between two administrative districts said: "No chief can listen to our grievances. The government of Naivasha has rejected us."¹⁶³ An Ogiek elder interviewed for the same 2011 human rights report noted: "Even now, the chiefs and all the assistant chiefs are from other communities.
- Not a single person has ever come to know our problems. We should have God as our MP, not a person, because at least God knows us."¹⁶⁴
193. While the Endorois have had political representation within local councils they told the Commission that 'we have only five councillors [...]. This gives us a raw deal

¹⁶¹ Y Ghai *Public Participation and Minorities* (2003) 5

¹⁶² *Report of the Special Rapporteur Rodolfo Stavenhagen*.

¹⁶³ LYoung & Sing'Oei *Land, livelihoods and identities: Inter-community conflicts in East Africa* (2011).

¹⁶⁴ As above.

when it comes to policy making and employment¹⁶⁵ Similar concerns were voiced by the Ilchamus

We do have councillors but they are few They are about five in a county with 60 councillors, so their voice is again marginalised. We also have an MP who actually favours the other community In all the issues we talk about including insecurity, the MP has never even asked a question in parliament¹⁶⁶

194. Reports also suggest a direct link between landlessness and political participation For example, one report notes that among the Sengwer hunter-gatherer community, a portion of the community (in Talau) was granted legal title to lands and this group has effectively been able to also attain political representation The sub-chief for the location is Sengwer as is one of the elected councillors Other Sengwer (in Embobut and Kapolet), however, are not represented by a member of their own community and their tenure status remains in limbo
195. Minorities' political representation has been litigated in the Kenyan courts Members of the Ilchamus community in 2004 brought a case claiming that they had been denied their constitutional right to participation in the political system, given that the chances of any member of the Ilchamus community ever being elected in their district were effectively zero (and noting that not a single member of the community had ever been elected in the 40 years preceding the case)¹⁶⁷
196. The community asked that a member of the community be specially appointed to Parliament to represent their unique interests or that the Baringo constituency be divided so as to increase the chances that an Ilchamus community member could be elected in a regular election cycle The community argued that they were an indigenous group in Kenya, and a distinct community numbering about 20 000 to 30 000 In a landmark judgment, the High Court directed the defunct Electoral Commission of Kenya (ECK) to supervise the appointment of nominated MPs to ensure compliance with the constitution and to take into account the Ilchamus community's interests in the next boundary review
197. The court's recognition of the unique challenges of minority political participation in Kenya is a critically important one that is relevant to many minority groups However, the decision was never implemented¹⁶⁸ and the Ilchamus and other communities remain excluded from political decision-making As previously described, lack of political participation continues to be a flashpoint for multiple groups Despite this

165 TJRC/Hansard/ Public Hearing/Kabarnet/24 October 2011/p 16

166 TJRC/Hansard/ Public Hearing/Kabarnet/24 October 2011/p 9

167 *Rangal Lemeigurari & others v. Attorney General* High Court of Kenya in Nairobi 2006)

168 *Submission to the Committee on the Elimination of Racial Discrimination in Response to the Periodic Report of Kenya* (2011) Available at www2.ohchr.org/english/bodies/cerd/docs/ngos/KNCHR_Kenya_CERD79.pdf

precedent, many groups remain excluded from what they see as the only means of access to benefits and services that are channelled through the state. Boundary reviews for electoral constituencies remain some of the most contested decisions in Kenya.

Access to Justice

198. Access to justice is a fundamental human right enshrined in the International Bill of Rights, African regional instruments, as well as the Constitution of Kenya, 2010. Kenyan minority groups and indigenous peoples have been excluded from accessing justice on multiple levels throughout the Commission's mandate period. As stated in Kenya's APRM report of 2006, "the Kenya legal system does not adequately protect the poor and marginalised groups."¹⁶⁹ Access to justice is the means through which individuals and groups vindicate their other human rights. For marginalised communities in particular, effective access has multiple pillars that should operate holistically to ensure that the most vulnerable groups in society can make use of the multiple systems they need to protect their rights. Accordingly, access to justice for minorities and marginalised groups encompasses customary justice systems, formal justice mechanisms, administrative mechanisms, legal aid policy and legal awareness. These multiple aspects of access to justice will be described below.

Knowledge of rights

199. Rights-based education and legal literacy development is a critical component of access to justice for minority and indigenous groups in Kenya. Because of their marginalisation and exclusion from many mainstream initiatives, minorities in Kenya are often unaware of their rights under the formal laws and the international human rights system. In contrast to some studies that indicate a relatively high level of legal literacy among Kenyans generally¹⁷⁰, this is not the case with minority groups. Minorities, especially in remote areas, have little exposure to and minimal understanding of the formal justice system.¹⁷¹ They may be uninformed of new legal developments that could substantially benefit them as individuals and as a community.
200. The two cases of the Endorois and Nubian minority groups discussed earlier highlight the importance of rights-based information and legal literacy for minority groups. Both communities were engaged in litigation or legal advocacy

¹⁶⁹ APRM Kenya Report, 78.

¹⁷⁰ P Kameri-Mbote and M Akech, *Kenya justice sector and the rule of Law* (2011) 56

¹⁷¹ Y Ghai & J Cottrell, *Marginalized Communities and access to Justice* (2010) 189

but with no success. The Endorais began litigation over their forced eviction from the area surrounding Lake Baringo, but very few in the community understood their legal options or the full array of rights at issue. The Nubians have to date not yet entered into litigation but worked with little success for years to lobby administrative officials around discrimination in the issuance of citizenship and identity documents.

201. The Centre for Minority Rights Education's (CEMIRIDE - a local NGO working with minority and indigenous peoples) worked with both communities specifically focused on legal literacy education and knowledge of rights under Kenyan law and international human rights norms. Rights-based education engaged the entire community, not just the elders or the elite who had started the cases. Both communities have been significantly transformed, not only because they have achieved successful decisions on their cases at the regional level, but because as communities they have been empowered to advocate on their own behalf using their understanding of their rights as a group and the Kenya government's duty to protect, promote and fulfil those rights.

Barriers to access to justice

Physical access to formal mechanisms

202. Minority and indigenous communities face major barriers in accessing the formal courts because of a nationwide lack of court infrastructure and because of a failure to equitably distribute court services in all parts of the country. This is particularly a problem in rural areas of Kenya and in the northern arid and semi-arid regions of the country. For instance, in the arid lands of Northern Kenya, the only formal courts are Magistrates' courts and even these are located only in the district capital. As one researcher noted, the geographic spread of the courts does not correspond to peoples' realities.¹⁷² This finding was echoed by a government report that found courts in Northern Kenya are located as far as 500 km from some users.¹⁷³ Taking into account the time and limited availability of transport, the costs of travel, lodging and food as well as court costs, there is little incentive for people in the arid lands of Kenya to access formal justice. The dearth of courts translates into a lack of all types of legal services. For instance, in 2010 it was reported that only one lawyer maintained an office in Isiolo and even that attorney did not actually live there.¹⁷⁴

172 Ghai & Cottrell (n 171 above) 188

173 Kameri-Mbote & Akech (n 170 above) 157

174 Kameri-Mbote and Akech (n 170 above) 188

- 203 Despite the fact that in other regions courts may be more numerous and lawyers more readily accessible, this may not always have a meaningful impact on access for minorities and indigenous peoples. Marginalised groups often view the formal legal system with suspicion, as an instrument of the state that has consistently been used to empower the rich and politically connected at the expense of historically marginalised groups. As a result, even if they have physical access, marginalised groups may have little interest in using the courts. In Kenya, decades of corruption, backlog and delays have contributed to this perception and made the formal courts unattractive to many.
- 204 Nevertheless, several communities, including the Endorois, Ogiek, Maasai, and Samburu have litigated property rights cases in Kenyan domestic courts. Unfortunately, their experience has been less than encouraging. The Endorois were forced to move their petition to the African Commission on Human and Peoples' Rights, where their communication was admitted on the grounds that the Kenyan courts had failed to provide the community with any meaningful hearing after almost a decade of litigation. A multitude of Ogiek claims in domestic courts have not successfully vindicated Ogiek land claims after many years.¹⁷⁵ Indeed, some claims have taken more than seven years to come before the court for a hearing and the Ogiek view the outcomes of several of the cases as providing unjust benefits to individuals who have illegally occupied Ogiek lands.¹⁷⁶
- 205 Finally, the Olkaria Maasai ostensibly were successful in their domestic court claim related to land near Hell's Gate National Park in that the court recognised their title to the land. However, the remedy that the court has ordered has been destructive to the community because the court ordered individual allotment of the land in contravention of Maasai tradition and group wishes that the land be governed communally.¹⁷⁷
- 206 The Nubian community has litigated citizenship claims in domestic courts as well, and also, ultimately resorted to a regional mechanism because of lack of action on their claim in domestic court. The claim was delayed for more than five years without being listed for substantive hearing and the litigants were subjected to unreasonable procedural requirements. They also resorted to the African Commission as well as the African Committee of Experts on the Rights and Welfare of the Child which subsequently rendered a decision in their favour.

175 T Kimariyo *Ogiek land cases and historical injustices 1902-2004* (2004)

176 As above

177 Young and Sing oei (n 163 above)

Financial access and legal aid

- 207 Poverty is a major factor limiting access to courts across Kenya¹⁷⁸ For minority groups and indigenous peoples, who often rank among the poorest of the poor because of historical marginalization, financial barriers to court, are simply multiplied. Communities are often forced to divest their meagre assets, usually livestock, in order to fund litigation in the expectation of compensation through the courts. As one Maasai advocate stated, "The community is spending all its time running around trying to find money for legal claims – it's bankrupting them"
- 208 The provision of legal aid is designed to address this problem, but sources agree that legal aid services in Kenya are inadequate and inequitably distributed, both geographically and on the basis of the subject matter of the claim. One study noted that among 20 paralegal projects operating in 2005, 15 of them operated within 250 km of Nairobi, leaving a substantial gap in outer lying areas¹⁷⁹
- 209 Moreover, of the multiple non-governmental organisations that provide legal assistance, few have offices outside Nairobi and even fewer have offices in the arid or semi-arid regions of the country. There is lack of expertise and experience in handling the often complex group claims that impact minority and indigenous communities. Historical injustice claims, communal land claims, and claims of environmental degradation require specific expertise and are expensive to litigate, which further limits the ability of legal aid agencies to take on the number of cases that communities wish to raise
- 210 In addition to legal aid for civil and criminal cases, when considering the needs of minority and indigenous communities it is clear that many of their claims relate to administrative processes, such as district level decision-making, administrative tribunals, administrative applications for services, budgetary processes and licensing bodies. For example, many indigenous communities could benefit from accessing the National Environmental Tribunal or Public Complaints Committee both of which hear environmental management claims. Providing communities with assistance at these administrative stages could have significant impact on the number of cases that later need to go to litigation. Unfortunately, legal aid policy generally does not contemplate provision of services for individuals or communities at this level
- 211 Access to justice also encompasses the involvement of other components of the justice sector, such as police, investigators and medical personnel to complete P3 forms, victim-witness support and other services. These services are inequitably distributed throughout Kenya, with rural areas and arid areas suffering disproportionately from

¹⁷⁸ Kameri-Mbote & Akech (n 170 above)

¹⁷⁹ Kimaiyo (n 175 above)

lack of services to facilitate the justice process. This inequitable distribution has a disproportionate impact on minority and indigenous groups.

Cultural barriers to justice

- 212 In many minority and indigenous communities, notions of justice, whether criminal or civil are governed by customs, relationships, context, ritual and other factors that the formal courts are ill-equipped to incorporate or even consider. Indeed, the separation between civil and criminal matters that is a foundation of formal justice systems can be much less relevant in many minority and indigenous dispute resolution frameworks.
- 213 In Kenya, most cases are heard first at the Magistrates' court level. Magistrates are civil servants who are rotated through different postings every few years. Depending on their background and their current posting, magistrates may have little or no understanding of the cultural context in which they are working, in addition, they generally are given no training on dealing with cases that have substantial cultural or contextual overlay and they have no overarching policy directive related to balancing customary law and processes with Kenya's formal laws.¹⁸⁰ As a result, the justice delivered in the formal court system may have little relevance for the communities who are supposedly beneficiaries of the just result. On the contrary, the result in court may be viewed as destructive by the community and lead to a resulting backlash against formal justice mechanisms.
- 214 Results such as this that are perceived as contrary to community norms often further distance communities from the formal justice sector. In the arid lands of Kenya, community elders regularly try to withdraw cases from court so that they can be settled in alternative dispute resolution forums that will be more acceptable to community members.¹⁸¹
- 215 An example of these multiple barriers converging is the systematic harassment of pastoralist communities and hunter-gatherers when they try to access ancestral lands from which they have been dispossessed. Community members are regularly picked up by police for trespassing – this has been a significant issue for the Maasai, the Sengwer and the Samburu in recent years, but is a tactic regularly employed by the police and by those in litigation against communities. Communities are forced to sell livestock or other assets in order to pay bond and legal fees. Lack of understanding of the system often prevents them from recovering their assets, even if cases are dismissed. Police also use the opportunity to extort payments from individuals and communities by using the threat of a trespassing charge.

¹⁸⁰ Ghai and Cottrell (n 171 above) 188-89.

¹⁸¹ Kimeri-Mbote and Akech (n 170 above) 190-191.

against them. Lack of legal representation often results in individuals languishing in jails or being convicted without adequate representation.

Institutional arrangements

216. Some of the barriers to justice in the formal sector may be ameliorated by the development of specialised institutions to deal with particular types of claims. The newly-created Environment and Land Court, if sufficiently supported and funded, could provide significant improvements in access for community land claims. The legislation creating the new court repeals the Land Tribunals Act and gives jurisdiction to all issues pending at the Land Tribunals to the new institution. This is a substantial improvement, given that there were substantial problems with taking cases through the land tribunal system. Development of small claims courts has also been recommended by several institutions and could have a positive impact for individuals and groups who are unable to afford the high fees of the regular courts.

Customary systems

217. Customary systems have been recognised under Kenya's constitution since 1963, but the application of customary laws and judgments was limited subject to the constitution and written laws of the republic. Multiple alternative and customary systems operate in Kenya on a spectrum from the relatively formalised Kadhis courts to a multitude of traditional, community-sanctioned justice mechanisms, such as elder's councils - the *Kokwo* of the Marakwet, the *Lkiama* among the Samburu, and the *Ng'ekelok* among the Turkana are examples.
218. Traditional, ethnically-based dispute resolution mechanisms are an important part of Kenyan life. Dispute resolution is often integrated into broader community governance systems and thus forms an important component of the right to self-determination of peoples in Kenya. Customary justice mechanisms address disputes ranging from murder to land and natural resource management. The diversity of traditional mechanisms precludes full inclusion here but most systems have common characteristics that place elders, most often male, at the centre of community governance and dispute resolution. Women, especially married women and elderly women can sometimes influence justice processes or community decision-making but the channels are different in various communities as to how they do so. Justice systems generally are focused on compensation and are ritually-based - the goal often is to repair community relationships and reinforce social norms.
219. Customary resolution of disputes, from criminal violations such as rape and murder, to "civil" claims such as inheritance, land management and water allocation, often conflict with the formal justice system. Regarding the criminal law, communities may not view crimes under the formal law (such as illegal possession of a firearm)

as a crime at all, or they may see formal sentences as overly punitive compared to norms within the community that would compensate the victim's family and reintegrate the offender through ritual.¹⁸² These customary remedies for crimes such as rape and murder, as well as many other illegal behaviours, are in tension with international human rights norms and with the Kenyan constitution

- 220 Murder for example often is punished using collective punishment in customary systems. For example, the Pokot use collective punishment (*lapay*) in the case of murder – the victim's family confiscates the property of the accused's extended family.¹⁸³
- 221 Tensions between customary systems and the formal law are particularly problematic for crimes of violence against women and children, which under international guidelines demand criminal prosecution and incarceration as a penalty, but where many customary systems use fines, social exclusion or physical punishment. For instance, in the Pokot community, researchers have reported that the community's traditional dispute resolutions system does not accept that the crime of rape exists but instead speaks only of adultery, whether force was used or not. Those who are confirmed as adulterers must be cleansed through ritual involving goat intestine, milk and honey. The guilty man will also be heavily fined and the guilty woman will traditionally be beaten by her husband.
- 222 Penalties in customary systems that involve physical punishments such as beatings or ordeals also contravene human rights protections against inhuman and degrading treatment or punishment. As discussed above in relation to the right of minority and indigenous women, states have a duty to work collaboratively and consultatively with communities to protect individuals from violence, inhuman treatment and other violations, while also respecting traditional institutions. Across Africa, many customary institutions are evolving to be more protective of individual rights. Consultation and negotiation of these tensions can reduce conflict and increase awareness of human rights norms amongst marginalised groups.
- 223 In regard to land and resource management disputes, communities have internally managed land allocation and natural resource use over the centuries according to agreed norms. This has been the case in indigenous communities, in particular those whose relationship with specific territories is completely integrated with governance and culture. For example, the Samburu use the *Lkiama* system to administer traditionally held lands. The land tenure system is communal and community members have the right to use the land, but no rights to permanently dispose of

¹⁸² Ghai and Cottrell (n 171 above) ch 9

¹⁸³ R Pkalya, M Adan and I Masinde, *Indigenous democracy: traditional conflict resolution mechanisms: Pokot, Turkana, Samburu and Marakwet* (2006) 65

land. Land is considered an inter-generational asset. *Lkiama* elders administer the use of common property so that no one is denied access to land and resources to the detriment of others. The principle that *Lkiama* uses "is use according to need". Land is acquired through negotiation between clans and conditions for land holding and use are mutually agreed upon. Then agreements are sealed through communal ritual, including sharing a meal of goat. Although the decision making process was largely hierarchical with male elders at the top, women (especially married women) were also engaged in the decision-making around land use and allocation.

- 224 This customary process has been used not only within the Samburu community, but also for negotiations with other ethnic communities including Tugen, Pokot and agricultural communities such as the Kikuyu. Binding peace agreements, called *Imumai*, have bound together these communities. For example, an *Imumai* between the Pokot and Samburu lasted for more than a century and is currently being renegotiated.¹⁸⁴
- 225 Hunter-gatherer cultural and governance systems also focus on management of resources and land allocation. The Ogiek organised the forest into clan territories. Through a totem system, each clan was allocated an animal to protect and no member of that clan would hunt that animal. Ogiek had strict rules about hunting across clan boundaries in the forest, designed to assure equitable resource allocation and to prevent conflict between clans. Indigenous bee-keeping by the Ogiek also helped pollinate and regenerate the forests.¹⁸⁵ Conflict resolution was through negotiation between elders of each Ogiek family-based clan.
- 226 It is important to note that customary land allocation and management systems, such as the *Lkiama* system described above developed under conditions of less land and resource scarcity than currently exist in Kenya.¹⁸⁶ These systems have been flexible and adaptable over time but current conditions of land scarcity, high monetary value for land and state intervention are straining or obliterating customary management regimes in many communities. In addition, customary management regimes are based on negotiation between parties with generally equal power – such as two neighbouring communities or two clans. However, when communities are faced with conflicts with the state or corporate entities over land, they have little power to force the opposing party to be bound by decisions of the council of elders.
- 227 As described in other sections of this chapter however, states are under a clear obligation to ensure that communities participate in decisions that affect them directly, from the beginning of the process. In order to fully guarantee the right

184 Pkalya et al (n 183 above) 85

185 O Nyang *On Kenya's castaways: The Ogiek and national development Processes* (2003)

186 H Chris and J Clover *From the ground up: land rights, conflict and peace in sub-Saharan Africa* (2005) 58



to participation, states and their designees such as corporations, must engage with communities through their own institutions like customary governance and justice processes.

Kadhis' courts

228. The Kadhis courts have been an important recognition of the unique identity of Kenya's Muslim community and state support for the institution helps Kenya to meet its obligation under Article 27 of the ICCPR to promote the practice of minority cultures and religions.
229. The Muslim community in Kenya has raised a number of concerns related to the relationship between the state and the Kadhis courts however. The status of the courts remains unclear, given that it is not fully-recognised by the state as a part of the formal justice system, yet is controlled and funded by the government.
230. Kadhis do not receive adequate training nor does the state provide the courts with sufficient resources to carry out their tasks.¹⁸⁷ Muslim community members feel there is insufficient funding for the courts, which limits the number of available courts and Kadhis, leading to accessibility problems.
231. The appointment process for Kadhis was also an area of concern for many Muslims, who felt that they had been excluded from the process and that government officials were colluding with certain segments of the community in selection matters.¹⁸⁸

¹⁸⁷ Enhancing access to justice for women through Kadhis courts. at <http://www.gendergovernancekenya.org/component/content/article/50-judiciary/366-enhancing-access-to-justice-for-women-through-kadhis-courts.html>.

¹⁸⁸ Young and Sing'oei (n 163 above)

Minority and Indigenous Women

232. Minority and indigenous women and girls are some of the most vulnerable groups in Kenya.¹⁸⁹ Minority and indigenous women therefore deserve special attention because they often suffer from multiple forms of discrimination. Indigenous and minority women participated in the Commission's processes through women's public hearings in an environment where they did not feel coerced to conform either to traditional patriarchal values or to values that did not reflect their social and cultural contexts or experiences.
233. Both inadequate security and oppressive security have negative impacts on minority and indigenous women, ranging from loss of life, to sexual violence, to decreased access to traded goods and food.¹⁹⁰ Violence against women is a major concern amongst many minority communities in Kenya. Violence against women has traditionally been considered an acceptable practice in many groups.¹⁹¹ Violence was used as a form of punishment for women who "disobeyed" their husband or other male relative's prerogative.
234. Inter-ethnic conflicts affect women whose casualties are rarely factored into the matrix of conflict losses. As narrated to the Commission in Rumuruti:
- Here at Lolora, when there were fights between the Pokot and the Samburu, women suffered in one way or the other, because when we say that people died, they do not count women. An example is when they say that certain people have been killed, they come and count the number of men killed and then they say 'In addition, there were women and children'. So, they come to discover that the women have not been identified as human beings."¹⁹²
235. In customary systems that enabled violence against women, there also were strict customary controls for women's protection.¹⁹³ Women had supportive networks within the community to which they could appeal for help and protection from violence. Under colonial rule, customary systems in general were undermined, which also undermined protection of women through customary norms. This pattern continued in large part after independence. At the same time as customary systems have been in decline, the formal sector provides little protection for women, especially in rural and remote areas. Violence thus has in some respects become more dangerous for women, especially minority and indigenous women,

189. Beijing Declaration of Indigenous Women. Fourth World Conference on Women. Beijing, China, 1995, para. 5.

190. Young & Sing'oei (n 163 above).

191. Pkalya *et al* (n 183 above) (describing wife-beating as a form of traditional punishment in some communities).

192. TJRC/Hansard/Public Hearing/Rumuruti/14 November 2011/p. 24.

193. P. Mbote, *Violence against women in Kenya* (2000).

who rarely access the formal system as a result of marginalization but who also have less recourse for assistance in severely weakened customary systems.¹⁹⁴

236. The customary practice of bride wealth also can have an exacerbating effect on violence within the family, as men who pay substantial sums in bride wealth may feel that they own their wife as purchased property. This perception tends to validate any type of treatment of the “owned” woman, and can also undermine a woman’s natal family’s ability to assist her when she seeks protection.
237. Apart from confronting violence in their own communities, violence against minority and indigenous women also is perpetrated by security forces and other communities. Killing women and children, as well as sexual violence against women and children that would have been strictly taboo under traditional norms has become increasingly common during inter-communal conflict. Moreover, the security forces that often are dispatched ostensibly to protect communities also engage in violence against women. One of the most egregious instances of such behaviour occurred during the 1980s and 1990s when more than 1 400 Maasai and Samburu women were raped by British soldiers stationed on their lands.¹⁹⁵ The rapes resulted in unwanted pregnancy, HIV transmission and other negative health consequences, as well as these women being ostracised from their communities. Incidences of violence against women and children in the hands of Kenyan security forces were narrated to the Commission, including this testimony from Taita:

They even stripped me naked. They took off my *hijab*. They knocked me against the wall. They took KSh15 000. Outside there were children ...my own child was one of the people who were shot and died. There are very many of them... the bodies were taken to the mortuary.¹⁹⁶

The security forces that often are dispatched ostensibly to protect communities also engage in violence against women. One of the most egregious instances of such behaviour occurred during the 1980s and 1990s when more than 1 400 Maasai and Samburu women were raped by British soldiers stationed on their lands.

¹⁹⁴ Pkalya *et al* (n 142 above) 4

¹⁹⁵ TJRC/Hansard/Public Hearing/Rumuruti/14 November 2011/p.49.

¹⁹⁶ TJRC/Hansard/Women’s Hearing/Wundanyi/24 January 2012/p. 6

The Plight of Sengwer Women¹⁹⁷

I would like to talk on behalf of the Sengwer Women. I want to highlight some of the problems that are faced by Sengwer indigenous women

The Sengwer, as most people know, are marginalized. Our marginalization began during the colonial time when we were moved from our ancestral land, and now we live in Pokot County. Some of us are in Pokot County, others are in Marakwet County while others are in Trans Nzoia. Now, because of this, we are the minority group in each of these counties, and because of this, we face so many problems. One of them is discrimination. Sengwer women are discriminated against in many areas. In the counties where we live in, because we are not the dominant group, we are treated like second-class citizens.

Another issue that touches Sengwer women is education. Sengwer women are not educated because of so many reasons. One of them is poverty, and another one is that we have cattle rustling, which is very rampant in our area. Owing to this, we have become very poor, most women used to depend on the milk from animals, which they used to sell and then they join the merry-go-rounds which, at least, enabled them to become economically empowered. But when animals are taken, they just remain poor and their status declines. During cattle rustling, we, as women, also lose our sons. So, we feel very bitter and something should be done, so that we do not continue losing our sons.

We have also the issue of land in our community, it is like in all other communities – women are not entitled to land. So, if there is no heir – that is a son – girls are not able to inherit that land. It is the kinsmen who can inherit the land.

We have another problem, it is political. Sengwer people are so few, we are very few in West Pokot, Marakwet and even in Trans Nzoia, so we cannot muster a majority vote in order to take one of us to Parliament. So, we do not have representation in Parliament. Even in civic representation, especially for women, we have not had any woman being a councillor or even getting nominated. So, we have that problem.

Another problem that we face is our culture. As an ethnic minority, our culture is endangered because the dominant communities that surround us are on the verge of assimilating us. So, as women, who are the custodians of the culture, we feel that we should be protected, so that we do not lose our culture. The government should, at least, help the Sengwer people to maintain their culture, they should not lose it.

Access to socio-economic rights

- 238 Women's role in procuring basic goods and services for the family such as water and food and their primary role in ensuring care for children means that lack of access to these varied basic services disproportionately impacts minority and indigenous women. The APRM process for instance, reported that in Tana River, chronic insecurity and lack of access to food significantly aggravated the plight

¹⁹⁷ TJRC/Hansard/Women's Hearing/Kapenguria/15 October 2011;p. 22

of women. Marginalised minorities and indigenous peoples in Kenya are poorer than the rest of the population. One report noted that indigenous peoples in Kenya only have about one third the incomes of other rural Kenyans.¹⁹⁸ Poverty is associated with lack of access to government and other services. The arid and semi-arid lands of Kenya, while making up 80 percent¹⁹⁹ of the national land mass, present the highest incidences of poverty and the lowest level of access to basic services in the country.²⁰⁰ More than 60 percent of the population lives below the poverty line, which is above the nationwide average.

239. Access to education in pastoralist areas is a serious human rights issue as reflected in low literacy rates. An estimated 1.7 million children remain out of school, the majority of them living in marginalised pastoralist communities.²⁰¹ According to the UN Human Development Report, enrolment rates in North Eastern Province were especially low: only 9.8 percent for primary school and 4.8 percent for secondary school.²⁰² This data was mirrored by a 2006 survey which indicated that 93 percent of the respondents in North Eastern Province had never been to secondary school, substantially higher than in any other province.²⁰³
240. Access to education is a problem not only in the arid lands, but also for forest-dwelling indigenous groups. Ogiek community members have described in various human rights reports of their difficulty in accessing education. One report stated, for example, that the government banned Ogiek children from accessing the local school near the Kipkurere Forest where they were residing.²⁰⁴
241. Lack of access to other services has also been documented in marginalised areas across Kenya. Kenya's APRM process highlighted the fact that the legacy of colonial policies still negatively impacts service provision in North Eastern Province.²⁰⁵ The problem of lack of access however cuts across minority communities and is not limited solely to North Eastern Province. Communities from Turkana to Tana River reported substantial lack of government services during the APRM process.²⁰⁶
242. Lack of health services, in particular maternal health facilities and providers, is a major concern in the remote rural areas of Kenya where many minority communities

198 See Republic of Kenya, *Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project* (2006).

199 Kenya: *An alternative report to the UN Committee on Economic, Social and Cultural Rights* (2008).

200 Report of the Special Rapporteur Rodolfo Stavenhagen.

201 Report of the Special Rapporteur Rodolfo Stavenhagen, para. 69.

202 Report of the Special Rapporteur Rodolfo Stavenhagen.

203 GJLOS Reform program: *national integrated household baseline survey Report* (2006) 10.

204 See Republic of Kenya, *Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project* (2006) available at http://www.ogiek.org/indepth/2006_Kenya_WKDD_NRMIPPF.pdf (accessed 12 July 2012).

205 Africa Peer Review Mechanism *Country Review Report of the Republic of Kenya* (2006) 113.

206 As above.

reside. The Orma for instance estimate that 30 percent of their women die during pregnancy and labour because of lack of access to health care.²⁰⁷ In the chapter on 'gender and gross violations of human rights' it was shown how public health facilities have for decades failed to take culture into account when delivering reproductive health services. This has impeded many minority and indigenous women from seeking maternal health services from public health facilities.

Marriage and inheritance

- 243 The previous constitution created a legal pluralist regime that specifically allowed discrimination. Section 82 of the constitution outlawed discrimination but a claw-back provision in the clause allowed for discriminatory legislation regarding adoption, marriage, divorce, burial devolution of property on death and personal law matters and laws affecting members of a particular tribe or race in matters exclusively concerning them.²⁰⁸ Despite progressive judicial decisions over the decades regarding women's right to property in the contexts of both formal and customary marriages, in reality, the enforcement of such principles depends entirely on access to the formal courts.²⁰⁹
- 244 Legal pluralism in Kenya often has had a disproportionately negative impact on minority and indigenous women. Because minority and indigenous women are more likely to live in rural, marginalised areas, they also are more likely to govern their affairs through customary systems. A study found that in rural communities, parties are most likely to go to a community elder or an extended family member for dispute resolution.²¹⁰ Customary systems often are patriarchal and do not sufficiently protect the full array of women's rights. Even when customary systems do protect women's rights, they may be subject to manipulation by male relatives.
- 245 Although the statutory system of regulating marriage and inheritance rights may be more protective of women on paper, formal justice systems also often discriminate against minority women on the basis of language, geographical, financial and other barriers. Moreover, it often is the ability of male relatives with financial or educational advantages to forum-shop between the formal and customary systems that significantly disadvantages women. Because males are more likely to have the resources to both manipulate the customary system and to access the formal justice system, they are in a position of significant advantage over women trying to vindicate their rights under either customary or statutory law.

207 *Report of the Special Rapporteur Rodolfo Stavenhagen*, para 75.

208 Ikdahl et al. *Human rights formalisation and women's land rights in southern and Eastern Africa* (2005) 86 (available at www.ielrc.org/content/w0507.pdf).

209 *Report of the Special Rapporteur Rodolfo Stavenhagen*, para 88.

210 *GJLOS Reform program: national integrated household baseline survey Report* (n 277 above) 34.

Access to land

- 246 Women make up less than five percent of the holders of land titles in Kenya, nevertheless African women produce the vast majority of food from the land.²¹¹ In rural areas and in marginalised communities in particular women are responsible for planting and harvesting of crops, preparing food, accessing fuel (wood or charcoal) and water, as well as childcare, all of which are very land-dependent activities. Rural women essentially manage the environment for the sustainable productive use of their families, but their control over the land is minimal leading to food insecurity and poverty.²¹²
- 247 Land-tenure policy has had a very negative impact on minority and indigenous women's rights. Since the 1960s the government of Kenya embarked on a policy of converting trust lands into group ranches and then converting them into individual ownership. While under the trust lands and group ranch systems women's access to lands would have been protected at least in some respects by community custom, which often protects usufruct rights for women, when land was converted to individual ownership, it was generally registered in the name of a male head of household.²¹³ Under the Registered Land Act, women accordingly were cut out of formal land ownership and their usufruct rights were also suppressed as the land transferred from customary management to individual ownership.²¹⁴
- 248 For instance among the Ogiek living in the Mau Forest, land was allotted under the Registered Lands Act, mostly to male heads of households. Accordingly, women lost all control over land they had worked and used once it was registered in their husbands' names. The former Act provided that first registration, even if fraudulent, cannot be challenged in court. The community also lost substantial land during this process as individual members sold off property before the registration process was complete and before they had an understanding of the actual market value of the land. Loss of customary usufruct rights and customary rights to influence the sale and transfer of family land had disadvantaged minority women such as the Ogiek.
- 249 Although attempts have been made to address this problem through some legislation and programming, laws prohibiting discrimination or providing for redistribution of land, on their own are not sufficient to secure equality for women, especially minority women. Research in Southern and Eastern Africa indicates that culturally accepted male dominance disadvantages women under customary and

211 Ikdhah in 208 above;

212 P. Kamen-Mbote and J. Oduor (ed) *Following God's Constitution: Gender Dimensions of the Ogiek Claim to the Mau Forest Complex in Paths are made by walking: human rights interfacing gendered realities and plural legalities* (2006)

213 *Report of the Special Rapporteur Rodolfo Stavenhagen* para 96

214 See also Chapter on Gender and Gross Violations of Human Rights: Focus on Women

formal systems and results in poor access to information among women, thus reducing their participation and the exercise of their rights in land programs.²¹⁵

250. In addition to concerns over potential individual property rights, minority and indigenous women are also impacted when the community as a whole loses land, either through government takings, illegal acquisition or when the community's tenure is under threat. According to a government report most indigenous households are landless and lack legal access to natural resources or other assets for income-generation.²¹⁶ Moreover, they lack the political power and often the community organisation to protect the small remnants of ancestral territory over which they may have some remaining control. The loss of community land and insecurity of retention of such land has serious impacts on women.
251. Maasai women in the Olkaria community near Hell's Gate National Park are confronting major tenure insecurity in relation to their traditionally inhabited lands. The community has been threatened with eviction and individual allotment of property. Ongoing legal disputes over the land have resulted in a situation in which no one is able to develop the property, such as building new homes, schools or other structures and because of the insecure future of the land, the community remains in limbo and women reported constant stress from fears about impending eviction.²¹⁷
252. Minority women also face challenges above and beyond those of the larger community. Women who attempt to engage in politics face double discrimination. For example, a young woman politician in the Ogiek community described the multiple barriers that she faced including the community's perception of women as property, community taboos against women wearing trousers, traditional rules against women speaking in front of men and against young women greeting older members of the community and general lack of financial resources.²¹⁸ These community perceptions are common across many communities, especially in marginalised areas, and remain substantial barriers to the political participation of minority and indigenous women.

Conclusion

253. This Chapter has demonstrated that minority and indigenous communities in Kenya have suffered specific gross violations of human rights on account of their membership in these communities.

²¹⁵ Ikdhah (n 208 above).

²¹⁶ Republic of Kenya *Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project* (2006) 25 available at http://www.ogiek.org/indepth/2006_Kenya_WKCDD_NRMIPPF.pdf (accessed 12 July 2012).

²¹⁷ Young and Sing Oei (n 164 above).

²¹⁸ Kameri-Mbote & Oduor (n 212 above).

Appendices

Appendix 1:

Report of The Presidential Special Action Committee



REPUBLIC OF KENYA

RESTRICTED

REPORT

OF THE

**PRESIDENTIAL SPECIAL ACTION COMMITTEE TO
ADDRESS SPECIFIC CONCERNS OF THE MUSLIM
COMMUNITY IN REGARD TO ALLEGED HARASSMENT
AND/OR DISCRIMINATION IN THE APPLICATION/
ENFORCEMENT OF THE LAW**

PRESENTED TO:

**HIS EXCELLENCY HON. MWAI KIBAKI, CGH, MP,
PRESIDENT AND THE COMMANDER IN CHIEF
OF THE ARMED FORCES OF THE REPUBLIC OF KENYA**

31ST MARCH, 2008

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LETTER OF TRANSMITTAL

31st March, 2008

His Excellency The Honourable Mwai Kibaki, CGH, MP,
President and Commander-in-Chief of the Armed
Forces of the Republic of Kenya
State House
NAIROBI

Your Excellency,

**THE FINAL REPORT OF THE PRESIDENTIAL SPECIAL ACTION COMMITTEE TO ADDRESS
SPECIFIC CONCERNS OF THE MUSLIM COMMUNITY IN REGARD TO ALLEGED HARASSMENT
AND/OR DISCRIMINATION IN THE APPLICATION/ENFORCEMENT OF THE LAW**

We have the honour to submit to you the final report of the above committee, which you appointed on 15th October, 2007 to look into and address specific concerns raised by the Muslim community. The mandate of the Committee was to address specific concerns of Muslims with regard to alleged harassment and/or discrimination in the process of the application of the Law, particularly, as regards to security issues. We are pleased to inform you that the Committee has successfully completed its mandate.

We now forward to you the final report.

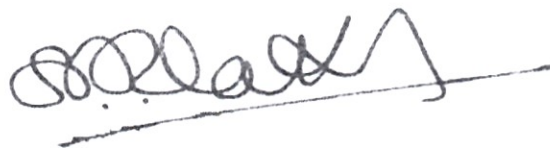
We take this opportunity to thank Your Excellency for the honour and trust which you bestowed upon us.

Accept, Sir, the assurances of our highest regard.

Yours Faithfully,



ENG. ABDULLAHI M. H. SHARAWE, CBS, EBS, FIEK
CHAIRMAN



HON. S. AMOS WAKO, EGH, FCI Arb, SC, MP
ATTORNEY GENERAL
MEMBER



PETER OKWANYO
REPRESENTATIVE OF THE PERMANENT SECRETARY
MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY
MEMBER



ELISHA NYAKINYA
REPRESENTATIVE OF THE PERMANENT SECRETARY
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MEMBER



LILIAN MAHIRI-ZAJA
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MEMBER



JAMES W KIHWAGA
REPRESENTATIVE OF THE PERMANENT SECRETARY
MINISTRY OF FOREIGN AFFAIRS
MEMBER



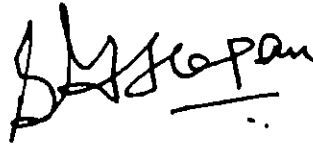
SHEIKH ABUBAKAR A ABUBAKAR (ABU HAMZA)
MEMBER



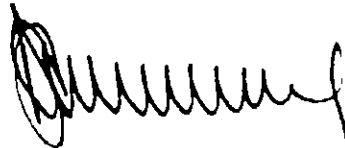
AMBASSADOR YUNIS MAALIM MAHAT
MEMBER



HASSAN LAKICHA
MEMBER



SHIRAZ MAGAN
MEMBER



AMBASSADOR AMINA CHAWAHIR MOHAMED
SECRETARY

ACKNOWLEDGEMENT

The Presidential Special Action Committee to address specific concerns of the Muslim Community in regard to alleged harassment and/or discrimination in the application/enforcement of the Law wishes to thank His Excellency the President for having appointed the Committee

The Committee also wishes to thank the Permanent Secretary, Secretary to the Cabinet and the Head of Public Service Amb Francis K. Muthaura and his entire staff for the assistance accorded to the Committee

Our special gratitude also goes to Hon. S. Amos Wako, the Attorney General, and the Permanent Secretaries of various Ministries who assisted the Committee with valuable professional support: Mr. Cyrus Gitui, Permanent Secretary, Ministry of State for Provincial Administration and Internal Security, Mr. Emmanuel M. Kisombe, Permanent Secretary, Ministry of State for Immigration and Registration of Persons, together with his officers, Ms. Dorothy N. Angote, Permanent Secretary, Permanent Secretary, Ministry of Justice and Constitutional Affairs, and Mr. Thuita Mwangi, Permanent Secretary, Ministry of Foreign Affairs

The Committee wishes to thank the following Permanent Secretaries who appeared before the Committee for consultations: Prof. Karega Mutahi, Permanent Secretary, Ministry of Education and his Officers, Mrs. Alice Kemunto Mayaka, Permanent Secretary, Ministry of State for National Heritage, Office of the Vice President, the Permanent Secretary, Ministry of Lands and Settlement, Mr. Kombo Mwero, and his staff, and the Permanent Secretary, Ministry of Local Government, Mr. Solomon Boit and his staff

We also wish to acknowledge and thank many individuals, professional groups and Muslim organizations who gave useful contributions to the Committee. We wish to single out the following for their views and written memoranda -

- 1 The Chief Kadi – Sheikh Hamad Mohamed Kassim
- 2 Supreme Council of Kenya Muslims (SUPKEM)
- 3 Kituo Cha Sheria
- 4 Muslim lawyers
- 5 Muslim Human Rights Forum (MHRF)
- 6 Muslims for Human Rights (MUHURI)
- 7 Young Muslims Association
- 8 Muslim Education and Development Network
- 9 National Education Muslim Trust
- 10 Islamic Foundation
- 11 Ummah Foundation
- 12 Kenya National Commission on Human Rights (KNHCR)

We would like to recognize the great work and assistance that the Committee received from various Provincial and District Administrators throughout the country, during the public hearings

The Committee expresses its gratitude to Ms. Jeannette Mwangi, Mr. Patrick Okoth and Mr. Ahmed M. Mahmoud (Assisting Counsel) for their technical support. Without their support the Committee's mandate would have been difficult to achieve

The Committee also wishes to acknowledge the work of the Legal Researchers Ms Elizabeth Thuo and Mr Maurice Muiema, for their invaluable support in the Secretariat

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We are grateful to the following for their co-operation and logistical support in the Secretariat -

Ms Marie Kinigonda Odera, Ms Rose Boit, Ms Jacqueline Okoth, Mr Idriss Abdi Hassan, Ms Joyce Nduku, Mr James Katoni, Ms Philomena Wambui, Ms Beatrice Chepkurui, Sergeant Charles Mwangi, Corporal Boniface Mueke, Corporal Francis Galundu, Mr Richard Muthama, Mr Haron Njenga, Mr Henry Muhia and Mr Felix Mumo

Finally we wish to pay tribute to all who in one way or another contributed to the successful completion of the Committee's work

CONTEXT OF THE FORMATION OF THE COMMITTEE, CHALLENGES AND LIMITATIONS

METHOD OF WORK

The Committee has used several methods to collect data on which this report is based. These include public hearings and review of written memoranda, Laws of Kenya, official reports, literature reviews, consultative meetings with public officers and professional bodies and Muslim organizations and other relevant reports.

The Committee held Public hearings from the 5th of November to 6th of December 2007, in all the Provinces of the Republic. A detailed schedule of the hearings is annexed to this report. During the hearings, the Committee provided the public with the opportunity to express themselves both in public and in private.

1. Challenges and Limitations

The Committee experienced a number of challenges in the course of carrying out its mandate.

The Committee was generally viewed with suspicion due to the political environment and impending Elections. The Committee's work was deemed to be a stop-gap measure to appease the Muslim community and woo their votes for the then incumbent administration. This perception had the effect of dissuading some of the people from presenting their views to the Committee hence the low turn out of the public in certain areas.

A second challenge arose from outright condemnation of the Committee by some Muslim Organizations who questioned the appointment of the Committee and doubted its capacity to deliver a credible report.

2. Organization of the Report

This report is organized in two parts and five Chapters as Volume I. Part One consists of the Executive Summary and context of the Formation of the Committee, and the other consists of the Chapters as here below detailed. In addition, there will be a volume II which will contain selected memoranda submitted to the Committee.

Chapter One deals with the Background and Historical perspective. Chapter Two deals with the Public Hearings and Analysis thereof. The Third Chapter deals with Security Issues. Chapter Four deals with Thematic Issues, Findings and Analyses, and, Chapter Five is on the Recommendations and the Conclusion.

EXECUTIVE SUMMARY

INTRODUCTION

His Excellency the President of the Republic of Kenya, Hon. Mwai Kibaki CGH MP, under Section 23 (1) of the Constitution of Kenya pursuant to the Kenya Gazette Notice Number 10008 dated 16th October 2007 appointed the Committee to look into and address the specific concerns raised by the Muslim community with regard to alleged harassment and/or discrimination in the process of the application of the law particularly as regards security issues

Terms of Reference

The Committee was mandated to

- a) receive individual complaints of alleged harassment and/or discrimination in the treatment of persons who profess the Muslim faith with regard to security issues
- b) ascertain whether on the face of it, there is merit in a complaint, and whether to act on the complaint appropriately which may include channelling it to the responsible Department of Government for action
- c) inquire into allegations of wrongful or illegal denial of entry into or exit out of Kenya by Kenyan citizens who profess the Muslim faith
- d) take immediate action as far as is possible to solve the problem disclosed in (a) (b) and (c) above,
- e) oversee coordinate monitor and follow up specific action on identified problem cases
- f) review regulations codes of conduct processes and procedures in the Public Service and recommend changes necessary to avoid or reduce similar complaints
- g) prepare advisory opinions or proposals on appropriate remedial action to be taken by the Permanent Secretaries or Chief Executives of responsible Ministries or public bodies,
- h) Recommend appropriate policy and legislative reforms

The Composition of the Committee

Chairman Eng. A. M. H. Sharawe

Members: Attorney General,

Permanent Secretary Ministry of State for
Provincial Administration and Internal Security,

Permanent Secretary Ministry of State for Immigration and
Registration of Persons,

Permanent Secretary Ministry of Justice and Constitutional
Affairs

Permanent Secretary Ministry of Foreign Affairs

Sheikh Abu Hamza,

Amb. Yunis Maalim Mahat

Hassan Lakicha,

Shiraz Magan,

Amb. Amina Mohamed (Secretary)

The Terms of Reference were set out and the Committee members were required to carry out the functions stated in the citation with all due diligence and speed and submit two reports - an Initial Progress Report and a Final Report

In accordance with the powers granted to the Committee under Gazette Notice Number 10008 Sections 3(b) and (e) the Committee developed Rules of Procedure for the Conduct and Management of Committee meetings as well as public hearings

The Procedure

The Committee acknowledges that it is neither a judicial nor a quasi-judicial tribunal. However it set out the Rules of Procedure for the Conduct and Management of its proceedings to enable it to have a standard method for the receiving of complaints from the public.

The Committee relied on both oral and documentary evidence of alleged acts of discrimination against Kenyan citizens who profess the Muslim faith. The Committee heard all the complaints in public save for two which were heard in private.

Main Findings of the Committee

The Committee established that there are discriminatory practices against Kenyan Muslims in the issuance of national Identity Cards and Passports. In fact, there exists a special Vetting Committee for Muslim Passport applicants at the Ministry of State for Immigration and Registration of Persons Headquarters.

The operations of security agents and especially the Anti-Terror Police Unit came under serious criticism from the Muslim community for operating without due regard to the existing law of the land.

There was evidence that Kenyan Muslims have been unlawfully removed from Kenya to foreign countries without due process of the law.

Past historical injustices and human rights violations in Northern Kenya, including the Wagalla massacre, have not been addressed to date.

The Committee found that Muslims in urban settlements who have occupied land allocated to them for generations have not managed to acquire Title Deeds for their land. The classic cases are those of Nubians in Kibera and Mjini Village in Muranga.

The Committee established that there is a serious shortage of IRE Teachers particularly in areas where Muslims are a minority. In various learning institutions, the freedom of worship as guaranteed in the Constitution is not observed.

Another finding of the Committee was that the institution of Kadhi's Court lacks both human and financial resources to effectively undertake its constitutional mandate.

With respect to access to justice, the Committee established that the entire Northern Kenya has no High Court and adequate Subordinate Courts.

The Committee found that the majority of Muslim inhabited areas lag behind in development due to lack of public and private investments from years of marginalization. The banning of international Islamic NGOs has further aggravated the situation.

In Public Service appointments, at the level of policy and decision-making, there is a visible absence of Muslim representation.

Conclusion

The Committee found substance in most of the complaints raised by the Muslim community and therefore recommends that the Government urgently address the issues in order to restore public confidence, fully integrate the Muslim community in the mainstream development so as to build national cohesion.

ACRONYMS

AG	Attorney General
ATPU	Anti-Terror Police Unit
CDF	Constituency Development Fund
CRE	Christian Religious Education
CIPK	Council of Imams and Preachers of Kenya
DDC	District Development Committee
DEB	District Education Board
DLCB	District Land Control Board
EA	East Africa
EALA	East African Legislative Assembly
ECK	Electoral Commission of Kenya
FBOs	Faith-Based Organizations
HELB	Higher Education Loans Board
ICCPR	International Covenant on Civil and Political Rights
ICU	Islamic Courts Union
ID(s)	Identification Cards
IRE	Islamic Religious Education
KACC	Kenya Anti – Corruption Commission
KAR	Kings Africans Rifles
KLRC	Kenya Law Reform Commission
KRA	Kenya Revenue Authority
KNCHR	Kenya National Council on Human Rights
LATF	Local Authority Transfer Fund
HRF	Muslim Human Rights Forum
MUHURI	Muslims for Human Rights
NACADA	National Campaign Against Drug Abuse
NEP	North Eastern Province
NFD	Northern Frontier Districts
NGOs	Non-Governmental Organizations
SUPKEM	Supreme Council of Kenya Muslims
TFG	Transitional Federal Government
TOLs	Temporary Occupation Licences
VAT	Value Added Tax

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background and Historical Perspective on the Situation of the Muslim Community in Kenya

The arrival of Islam on the East African coast is documented as early as the days of the second Caliph Umar and archaeological evidence confirms the existence of a thriving Muslim town in Kenya on the Island of Manda before the 10th Century A.D. It is certain that the pre-Islamic contacts of the coast with Arabia were reinforced during the Islamic era. This contact led to the rise of many Muslim city states on the Kenyan coast whose inhabitants were ethnically mixed from the outset – Arabs, Africans and Asians.

Before the establishment of colonial rule, Islam had remained confined to the coastal strip and a few areas of the interior, in the northeast amongst the Somalis and at Mumias in Western Kenya, but after the establishment of the colonial rule, expansion of Islam spread systematically to the rest of the country.

The Muslim Community in Kenya has faced harassment and discrimination both prior to and post independence. Reflection of this was and is found in the application of the law particularly as regards security and land issues. Land expropriations and misappropriations were and remain rampant. This Committee notes with great concern that the above scenario reflects the historical policies and legislation of systematic discrimination and marginalization pursued both by the colonial and post colonial authorities. This in turn contributed to the community being alienated politically, socially and economically.

Notwithstanding the above factors, Muslims have contributed significantly to the economic development of Kenya. However, as a result of these discriminatory legislations, policies and practices, large sections of the Muslim society remain impoverished.

The Committee established from the public hearings that Muslims who have settled in urban centers throughout the country for over 100 years to date do not hold title documents to the land they occupy. The most glaring example is that of Mjini village in Muranga town, where the Muslim community has lived since 1906.

From the foregoing, it is clear that Muslims in Kenya are a minority vulnerable group despite being the second largest religious community in the country, with an estimated population of 10 million.

The following issues have been identified as being of great and urgent concern to Muslims,

1. Security
2. Land Rights
3. Citizenship (issuance of Identity Cards and Passports etc)
4. Marginalization (unemployment, under-representation, under development, discrimination)

- 5 Access to justice
- 6 Education

This Committee's report is based on an analysis of the various views collected during the public hearings and the research carried out in accordance with its mandate. The Committee also makes recommendations on the above issues with the view to finding appropriate mechanisms to redress the grievances of the Muslim Community in Kenya.

CHAPTER TWO

2.0 PUBLIC HEARINGS

2.1 Introduction

This Chapter is a presentation of public views from all the public hearings the Committee held in the following towns: Nairobi, Mombasa, Garissa, Kisumu, Kakamega, Eldoret, Nakuru, Nyeri and Isiolo. The schedule of visits as shown in Table 1 below.

The main terms of reference for the Committee were -

1. To receive individual complaints of alleged harassment and/or discrimination in the treatment of persons who profess the Muslim faith with regard to security operations,
2. To ascertain whether on the face of it there is merit in a complaint and thereafter to act on the complaint appropriately which may include channeling it to the responsible Department of Government for action.

At the time the Committee was appointed, the country was preparing for the general elections of 2007. This context proved to be quite a challenge to the Committee as it affected the overall attendance during the public hearings. Many organizations that were represented at the hearings spoke through selected spokespersons and submitted written memoranda to the Committee.

Apart from the low audience turnout at the hearings, it is worth noting that due to the political climate at the time, most people who spoke were of the view that the Government was using the Committee as a campaign platform to lure the Muslim vote. The Muslim vote appeared to have been a crucial determinant in the political equation.

Most people who turned up sought clarification on whether the Committee was independent or it was being used by the political class to woo voters from the Muslim community. It was generally felt that the Committee was to provide a temporary pacification to Muslims and that after elections, Muslims would be relegated to the back burner and their issues forgotten. This view held sway in all the Provinces.

The Committee was told that in all sectors of development and governance structures, Muslims are under-represented. The general belief is that the Muslim community has been neglected in the allocation and distribution of resources.

The views expressed by Muslims in the North Eastern Province were very categorical that the Government has perpetuated the colonial Government's policies of marginalization and discrimination. In this regard, there was a proposal from some of the presenters that the Government should develop and implement an affirmative action plan.

Having observed in general what the Committee found, this chapter will now proceed to present a synopsis of the views of the public from each Province.

TABLE 1: PUBLIC HEARINGS

NO	PROVINCE	VENUE	DATE
1	Nairobi	KICC	5 th to 6 th November, 2007
2	Coast	Aga Khan Hall, Mombasa	7 th to 8 th November, 2007
3	North Eastern	Normad Palace Hotel Garissa	13 th to 14 th November, 2007
4	Nyanza	Municipal Hall Kisumu	27 th November, 2007
5	Western	Municipal Social Hall Kakamega	28 th November, 2007
6	Rift Valley (North)	Municipal Hall Eldoret	29 November 2007
7	Rift Valley (South)	Municipal Hall Nakuru	4 th December 2007
8	Central	PC's Information Hall Nyeri	5 th December, 2007
9	Eastern	Rural Agriculture Training Centre Isiolo	6 th December 2007

2.2 NAIROBI

The following issues were presented before the Committee -

- 1 Discrimination against Muslims when applying for national Identity Cards, where one is subjected to a vetting process and harassment. The majority expressed great concern that this was likely to disenfranchise many people in the forthcoming elections.
- 2 Many presenters decried the general harassment of Muslims being labeled terrorists, arbitrary arrests and the ruthless operations of the Anti-Terrorism Police Unit (ATPU). The unit appears to operate outside the law and without due regard to human rights. Many expressed fear of victimization of the community due to recent cases of disappearances of Muslims taken out of Kenya by security forces on allegations of terrorism.
- 3 Non-recognition of the Nubians (a Muslim Community) in Kibera by the Government as a Kenyan community. They live with the fear of being repatriated to Sudan, despite having lived in Kenya for decades.
- 4 Lack of title documents for Mosques and land in Kibera.
- 5 Many Nubians were concerned that there was no compensation for people who lost their homes through Government demolitions to pave way for the construction of Government facilities (e.g. Kibera Law Courts).
- 6 For the purpose of public appointments and to achieve equity, there was a feeling that the Government should distinguish between North Eastern

Province Muslims and the Coast Province Muslims as they are separate groups.

7. The public were concerned that there are no adequate Kadhis to deal with Islamic personal law. This has caused unnecessary expenses and other constraints on affected parties seeking the services of Kadhi's Court. At the time of writing this report, it was reported officially that the Attorney General had already gazetted 32 Assistant Registrars of Marriage and Divorce to serve the Muslim community. This however, does not in any way solve the shortage of Kadhis in the country.
8. Muslims are not considered for scholarships and besides scholarships targeted/ marked for Muslims are diverted to other communities by politicians for their own personal gain and political ambitions. A case in point was reported by a Muslim NGO regarding the diversion of the Morocco Government scholarships.

On education, Muslims were concerned that students are forced to study Christian Religion Education (CRE) in Schools because the Government does not provide for IRE trained Teachers, yet IRE is an examinable subject. Further, students are denied the right to dress according to their faith in Schools thus denying them their constitutional right of freedom of worship.

The Committee was informed that where Muslims are a minority, they are not usually represented in governance programmes and/or structures e.g., Constituency Development Fund (CDF), District Development Committee (DDC), District Education Board (DEB), District Land Control Board (DLCB) etc.

The presenters told the Committee that in the Kenya Law Reform Commission, there is no Muslim representation both at the Commissioners level and the Secretariat. The stakeholder consultative process on the Marriage Bill was cited as a glaring anomaly, which would have taken a different development had there been adequate Muslim representation in the Commission.

International Islamic charitable institutions (NGOs) have been banned. Even those seeking fresh registration are denied registration by NGO Coordination Board.

Most people complained that Muslims applying to go for Hajj are issued with restricted Passports stamped to Saudi Arabia only and with one year validity.

Another issue that was of great concern was that Muslim youth who leave Kenya for greener pastures abroad are unable to re-enter Kenya as they are labeled terrorists.

There was concern that land allocated to Muslims in the past has to date not been registered despite efforts to address this issue with past and present regimes.

Muslims also told the Committee that most Islamic educational institutions have been taken over by the Government without duly considering that they can be managed by Muslims. This, the Committee was told, appears to be a systematic way to exclude Muslims on the development agenda.

The Committee was informed that Muslim residents of Lamu who settled there during the 10th Century have no Title Deeds for the land they occupy whereas the recently settled non-Muslims have acquired Title Deeds (Mpektoni).

The above issues resonate with all the other hearings. The question of land is sensitive and outstanding in all the Provinces. It is the feeling of most people who spoke to the Committee that the allocation of land countrywide was done in a discriminatory manner.

2.3 MOMBASA

There were many cases of people who had made several attempts to apply for Passports without success. The Committee received a complaint from one Said Omar Abdallah (ID No. 20378763) who alleged that he submitted his application for a Passport in 2001 at the Mombasa Passport Control office and despite his numerous appeals he has not been issued with a Passport. There were many other similar cases presented to the Committee on rejection of applications for Passports and national Identity Cards. Most people complained of unnecessary regulations/procedures (vetting) applied by the Immigration/registration Officers and which seem to target Muslims. In the opinion of many, the procedures should be clarified to the public so as to ease unwarranted anguish.

There was a general discontentment with the public recruitment system. Many people said it is unfair particularly to Muslims at the Coast who claim that they have not been accorded equal employment opportunities with other regions as they are perceived to be "illiterate", "under-developed" or "unexposed" by the system.

The procedure for the appointment of the Chief Kadhi was raised and people sought to know the criteria used in the recruitment process. The complaint was that the appointments are usually from the Mazrui family yet there are many qualified Muslims. The hearing had the benefit of an instant response from the Honourable Attorney General who was in attendance and informed the public that the appointment of Chief Kadhi is on merit rather than family background consideration. There was also concern regarding the appointments and the numbers of other Kadhis in the country. The Honourable Attorney General assured the public that the scheme of Service is currently under review.

The public raised the issue of the Wakf Commission which they pointed out has custody of properties worth over KSh. 4 Billion. The amount is meant to benefit the community but the Commission does not operate efficiently thereby hindering access to the funds by Muslims. Again, the Attorney General was able to clarify to the public that the role of the Attorney General is to appoint Commissioners for the Wakf on recommendation of the Coast Provincial Commissioner and advice from the local community. This happens after every five years. It was noted by the Attorney General that the Commission needs to be reformed and all relevant stakeholders will be consulted on this process.

The public told the Committee that the vetting process for national Identity Cards and Passport application is not clear and leaves a lot of grey areas and wide discretionary powers which are often abused by public officers to the detriment of the public. The public wondered why the vetting took place at the local levels yet applications are rejected or delayed at national levels. The public sought to know the relevance of the vetting process and the Vetting Committees, including the composition of the Committees.

A complaint was raised with respect to the harassment of local people in public offices. It was felt that this is because the local people have no representation in Government offices. In addition, the lack of job opportunities has forced many young people to seek menial jobs abroad.

There was the view that there is an urgent need for law reform in many areas with respect to Muslim laws. It was pointed out that Muslim laws are to-date still referred to as Mohammedan laws, a misnomer.

The lack of civic education on rights pertaining to service delivery was identified and it was felt that the Government should intervene in this regard.

Some presenters were dismayed that to-date the Government does not seem to recognize the Swahili community of the Coast. In fact, the perception is that all Muslims in Kenya are from the North Eastern Province. This is a historical factor where Coast people are deemed to come from the Mijikenda tribe yet Coast is composed of other communities who are Muslim. It was observed that this has in effect reduced opportunities and positions for Coastal Muslims in Government because they are lumped in one category with people from North Eastern Province.

There was reference by some people to Parliamentary Bills which they felt are being drafted without any consultations with the Muslim Community. The examples given were the Marriage Bill, the Anti-Terrorism Bill and the Property Bill. The public felt that since the Muslim community has a major stake in all legislation under review, their interests and input should be taken into consideration.

On matters of education, the people expressed the view that there is no commitment by the Government to register long pending applications of Muslim institutions of higher learning e.g. the Mombasa Islamic University. The Government should provide clear guidelines on the registration procedure for such institutions. It was pointed out that there are no national Schools at the Coast and there are inadequate educational institutions and facilities.

Many told the Committee about the land problem at the Coast where there has been a lot of land grabbing and double allocation of land to undeserving people. Many indigenous people have been denied their constitutional right to property ownership even where the land involved is ancestral land. The frustration is even worse because there are many 'settlers' in the region who have title documents to land yet the locals have none. The Lamu people of Mpekotoni were given as an example of a community struggling to reclaim its ancestral land and preserve its culture.

There was a general complaint on corruption in public offices which has affected service delivery. The public felt that the Government should take appropriate action to improve the working conditions of public servants so as to reduce or minimize the incidence of corruption.

The Committee was told by many who spoke about cases of the disappearance of many youth who had been taken outside the country on allegations of terrorism. One man who identified himself as Salmin Mohamed Khamis, told the Committee he was arrested at Kiunga border as he was fleeing Somalia during the war between Islamic Military forces and Ethiopia. He claimed that all his identity documents were confiscated and he was later rounded-up at his home and harassed by the Police. He was incarcerated for 27 days and released without any charges preferred against him. This case and many others that were presented to the Committee are based on allegations and/suspicions of anti-terrorism activities.

There was a general feeling that the Government is not doing enough to revive or open up business opportunities for the Coastal people. The closure of Ramisi Sugar Factory and

Kenya Meat Commission were cited as businesses which are not operational and could benefit the local people. This also applies to the fishing industry and mangrove cutting in Lamu. The fact that most people do not have Title Deeds to land and property has been an impediment to credit access.

The banning of some International Islamic Organizations (NGOs) was of great concern to many who were of the view that it has now impoverished the community even more. In some instances aid was stopped because Government was levying VAT yet the aid was not for commercial purposes. The community is now unable to complete some of the projects that were affected.

It was noted that health standards at the Coast are very low. This is compounded by the fact that there are no adequate health facilities and people have to travel for long distances to access medical attention.

On land issues, the problem of squatters was raised and there was a general feeling that the Government should intervene and help in their resettlement. This has been exacerbated by the question of absentee landlords. Witu Settlement was cited as the only area in Tana River with titles.

The rampant problem of drug abuse at the Coast was highlighted. It was felt that the National Campaign Against Drug Abuse (NACADA) was limited to upcountry regions and left out the Coast which has a big problem. The frustration of the youth being unable to get employment has inevitably led to the escalation of this situation.

General development for Muslims was seen as lacking due to unequal distribution of national resources. This is in terms of bursaries (education), micro-finance and other grants to the public by the Government, and the lack of appropriate policies on agriculture for the Coastal region.

2.4 GARISSA

Generally, there were complaints about delays and/or denials of applications for national Identity Cards and Passports. The public was dismayed at the length of time it took for one to be issued with an Identity Card or a Passport. This is particularly so amongst the Somalis who complain that upon application for a national Identity Card one is issued with the waiting card, locally known as "Kusug" which is not recognized by the Police upon search.

The Committee heard that the problem of Police harassment often results in demands for bribes from members of the public. The public was incensed by the denial of Identity Cards for Kenyan Somalis yet through corruption refugees have been able to obtain Kenyan Identity Cards. The problem is exacerbated by middle men who work in cahoots with Civil Servants to defraud innocent people under the pretext of fast tracking their applications.

It was also pointed out to the Committee that procedures for applying for a national Identity Card or Passport are not clear. The registration officers have assumed powers not conferred upon them by law to deny Kenyans of their rights. Many observed that public officers interrogate applicants to authenticate very obvious facts and still reject applications for instance, whether one understands and speaks Kiswahili or whether the applicant bore the inoculation scar on the right arm.

The public expressed discontent at the high likelihood of their delayed applications and 'misplaced' documents being used for issuance of Identity Cards or Passports to foreigners

Insecurity and anti-terrorism matters were of great concern. The Committee heard that when civil war broke out in Somalia in 1991, the Government did not immediately address the ensuing border security concerns. Consequently, this led to the proliferation of small arms and light weapons as well as the massive influx of refugees. This resulted in the region being a high risk security zone and subsequently subjecting the resident to arbitrary security operations and anguish. This was compounded by the global threat of terrorism and particularly the impact of 9/11 which has negatively profiled the Muslim Community.

The recent outbreak of conflict in Somalia between the Islamic Courts Union (ICU) and Transitional Federal Government (TFG) backed by the Ethiopian Government further complicated the security situation in the region. One of the presenters told the Committee how he was arrested in Liboi on claims that he was an Al-Qaeda operative on 6th January 2007. He was incarcerated for 25 days during which time he was beaten and mistreated. The security agents accused him of fraudulently obtaining Kenyan documents. His documents were confiscated and he lost business contracts with World Food Programme and Red Cross.

Police harassment the Committee heard is a rampant problem in Garissa. Some of the glaring and thorny issues with the Police are -

1. The forcing of women to remove their veils (*hijab*) while giving statements during interrogation.
2. While conducting searches at the barriers, the Police usually order all Muslim passengers to disembark from buses in single file and display their national Identity Cards. This was specifically so at the Garissa bridge. It is at this bridge where one is "presumed" to be crossing into Kenya. Many people feel that their citizenship rights and other constitutional rights are grossly violated.
3. Complaints were raised on the number of barriers between Liboi and Garissa. At all these barriers, there were allegations of constant Police harassment.

The Committee was also told that for those people who lose their Identity Cards, on re-application, a letter is written by the local registration office to Nairobi on the issue, but no copy is issued to the applicant as evidence of loss. Many confirmed that even with a Police abstract one is vulnerable to harassment by the Police.

Complaints were also raised to the Committee on how School rules have interfered with freedom of worship by adopting inappropriate School uniforms which contradict Islamic values.

The presenters also lamented that places of worship are not demarcated in town plans as is the case with churches. This has forced Muslims to purchase land for construction of mosques.

The lack of access to justice in the whole of North Eastern Province was highlighted. The question of access to justice is a nationwide challenge, however, in North Eastern Province, the public said that there are only 3 subordinate courts in the whole Province.

- Garissa, Wajir and Mandera, and they are 300 Kms apart. The Province does not have a High Court and the nearest court is in Embu, Meru or Nairobi for filing High Court matters.

The Committee heard that the Province does not have a land registrar and that no land adjudication has ever been done in the Province.

Those who spoke noted that although the land is not productive, the Government has not made any effort to woo investors in other activities that could generate income. An example was given of Ijara which has the potential of attracting tourists because of its fauna and flora.

There was a proposal that the Government should set up a Commission on minority rights to look into specific issues of the community so as to integrate them into national development plans.

There was bitter complaint from the people that the perpetrators of the Wagalla massacre have not been brought to book despite numerous pleas to the Government to take action to redress this past atrocity. The view was that such atrocities of the past must be addressed by the Government through a Commission of inquiry. The Report of the Task Force on the establishment of a Truth, Justice and Reconciliation Commission (2003) found from the North Eastern Province that "Exposing and publicizing these gross violations of human rights is important for posterity so that the country's shameful past may never be repeated against the people."

The public expressed its concern over the banning of Islamic NGOs in the area which were receiving aid and assistance from friendly Islamic countries for the benefit of local communities. There was dismay that the Government had banned the NGOs without providing any alternative means of support for the affected people.

In conclusion, Garissa people expressed the view that they are discriminated against and marginalized. The Government has not made any changes in the governance structures from colonial times; policies are the same and not serving the interests of the community. They generally feel that they are treated like second-class citizens and that the Government is not doing enough to ensure that they enjoy their constitutional rights as Kenyan citizens.

2.5 KISUMU

The attendance in Kisumu was fairly good and there was representation from as far as Kisii and Migori.

A representative of the Kisumu Muslim Association pointed out to the Committee several issues including discrimination, harassment on allegations of terrorism, wrongful detentions (renditions) and arbitrary searches by Police. This presenter was of the view that the media is being used to discriminate against Muslims by reporting negatively on Muslims "engaged" in criminal activities.

The Committee was told that Mosques are charged land rates yet this does not apply to churches. One presenter lamented that the Nubian Mosques had been grabbed and the Kariakor Muslim Cemetery had been encroached by a third party. It was reported

to the Committee that Muhoroni Cemetery had been taken over by the Municipal Council and as a result Muslims are now forced to pay for burial land. It was sadly noted that a Muslim Cemetery had been taken over by the Kenya Breweries which has built a beer plant on it.

The Committee was told that many settlement areas that are predominantly inhabited by Muslims have no Title Deeds. These include Manyatta - Arab, Mukendwa, Kibos and Kaloleni.

On the Education sector, the Committee heard that although Islamic Religious Education (IRE) is an examinable subject the Government has not provided Teachers for it. Muslim students are compelled to study Christian Religious Education (CRE) and attend church. In addition, female students are not allowed to wear *hijab* (veil); examples of Schools given were Kisumu Girls High School, St. Teresa Girls, Ahero Girls and a host of other public Schools. It was noted that Kisumu Girls High School, which was the top School in national examinations does not have a full-time IRE Teacher and parents are forced to pay a private IRE Teacher.

With regard to the issuance of national Identity Cards, the public informed that Muslims are asked to produce baptismal cards for registration. Since baptismal cards are not applicable in Islam, Muslims are forced to improvise a "baptismal" card so as to complete the application process. A practice they found tantamount to harassment.

In highlighting the problems Muslims face when applying for the hajj Passports, one presenter said that even though the Government had created the special Hajj desk, it appeared a strategic move in view of the fact that elections were due. The presenter recommended that the Government should issue Passports to Muslims without any conditions such as the time limit of one year validity.

There were suggestions made to the Committee on the expansion of the Kadhi's Court so as to create a three-tier court – Lower Court, High Court and Court of Appeal. In addition, the Committee was told that it will be necessary to have another office which will work in consultation with the Attorney General's office on the concerns of the Muslim community.

The Committee was also told of slaughter houses which are run by municipalities but have practices that are harmful to those who profess the Muslim faith. The Committee was informed that in this regard, Muslims have started their own initiative of certification of products and the presenter on this matter proposed that the Government should assist in strengthening this initiative. It was noted that most establishments do not prepare food in accordance with Islamic rites.

The marginalization and under-development of North Eastern Province was also raised, particularly the poor road network and the insecurity problem.

The Committee heard that during the month of Ramadhan the Police harass Muslims especially when they attend evening prayers.

The speakers lamented that religious materials donated by foreign countries and foodstuff are usually detained for payment of taxes by the Kenya Revenue Authority. Most of the food stuff goes to waste. It was proposed that the Government should waive any tax.

It was pointed out to the Committee that female applicants for Identity Cards or driving licenses are not allowed to wear the veil (*hijab*) and are usually asked to remove them so that they can be identified "properly" when taking the photograph. The presenter also complained that applicants in Kisumu who are born and raised in Kisumu are sometimes referred to process their Identity Cards in Busia. Many youths in Kisumu do not have Identity Cards because they are unnecessarily harassed by registration officers.

The Committee also heard that job opportunities for Muslim are scarce unless someone has a "god-father" to assist them.

It was reported that religious Teachers from foreign countries are given harsh conditions in applying for Work Permits. Consequently, most of them end up going to neighbouring countries e.g. Uganda and Tanzania.

The Committee was told that there was undue delay in the registration of Islamic organizations. One presenter gave an example of a pending application since 2005 for a society for Imams and Teachers in Kisumu.

A presenter from Kisii stated that there was no Muslim representation in District Development Committees (as a minority group). Therefore, the views of Muslims are never heard particularly in matters of town planning and development. Representation of Muslims at all levels was proposed.

The same presenter told the Committee that there were no Islamic Schools in Kisii and the Getembe Primary School which was built by the Nubian community in 1960 has been taken over by the Government, without consultation with the community.

The Nubian community in Kisii lacks Title Deeds for the land they were allocated by the colonial Government and as a result the community cannot develop permanent structures on the land.

The entire Kisii District has a two (2) acre cemetery which has no Title Deed despite a letter of allotment having been issued in 1998. The same applies to a Mosque built in 1945 and now requires expansion but cannot proceed due to lack of proof of ownership.

The squatter problem in Kaloleni in Kisumu was raised with presenters lamenting that to-date there are no Title Deeds. They also complained that Kaloleni Muslim Primary School, which was built by Muslim parents and managed by Kisumu Muslim Association, has been taken over by the Kisumu Municipal Council and now managed by a non-Muslim Organization.

It was observed that Government policies on nursing, birth delivery and other sensitive health issues should be gender sensitive and alive to religious concerns.

The Committee heard that most educational institutions did not allocate worship areas for Muslim students. A presenter gave the example of Migori Teachers Training College which has no place for worship for Muslims whereas Christians have one.

There were suggestions that more Kadhis be appointed in Nyanza Province. It was further suggested that the Kadhis jurisdiction be enhanced.

2.6 KAKAMEGA

This was the best attended public hearing. There was representation from all over Western Kenya from as far as Bungoma and Busia.

Once again, the public expressed strong resentment of harassment and discrimination, especially on matters pertaining to security and terrorism. They told the Committee that the Government should not be hasty to enact laws that are insensitive to the rights of citizens. Security agents were accused of arbitrary arrests and unfair treatment and isolation of Muslims during incarceration.

There was concern raised over the high drop-out rate of Muslim students in Schools and there was a proposal that the Government should address this issue.

Other issues raised at the hearing include the following -

1. Prohibition of wearing of hijab (veil) in public and private Schools
2. Studying CRE instead of IRE for Muslim students, compulsion in attendance of church service in public and missionary Schools. Examples given include St. Mary's Mumias, Butere School, Kisembe Muslim School and Weremba School.
3. The problem in the educational institutions has left some parents with no alternative but to take their children to Uganda. The presenters were disturbed by the fact that Christians are trained to teach IRE yet there are trained Muslim Teachers.
4. The taking over by Government of Muslim Schools.
5. Discrimination in issuance of Passports and national Identity Cards.
6. Wearing of hijab (veil) is not allowed when taking photographs for women applicants.
7. Employment and lack of opportunities for Muslims, especially youth and women.
8. Need for Government to introduce policies which will address the problem of inequality in the society and participation in governance and decision making processes.
9. Government to facilitate reinstatement of banned International Islamic NGOs.
10. The Committee was told about the issue of Muslim organizations being charged rates for public utility land. An example was given of Muslims at Lubao who had to pay rates for the plot which was allocated for a Mosque.
11. The presenters decried the fact that media has been highlighting Muslims as "criminals" which in effect has victimized and criminalized them unfairly in society.
12. The lack of representation of the Muslims in local authority boards was pointed out to the Committee. Legally, even in the CDF which requires 2 religious leaders in their local Committees, Muslims have no representation.

The squatter problem reared its ugly head in Kakamega as well. The Committee was told of Kambi Somali, Majengo and Mjini settlements which have since colonial times

been inhabited by Muslims. The Committee heard that the Mjini settlement had its name changed to Amalemba and has been invaded by squatters who have displaced the original Muslim inhabitants.

Despite several disputes relating to the following mosques namely Chavakali Jamia, Ndalu Srakhalu and Nailiri having been resolved, no titles relating thereto have been issued.

It was reported that the law enforcement agencies target and harass Muslims who wear beard and Islamic attire.

There was a call for affirmative action to address the development agenda amongst Muslims. It was noted that Muslim Youth are unable to access the National Youth Fund as some of the conditions for application are not in compliance with the Islamic practice. The same applies to the National Fund for Women.

The Muslims of Western Province, despite forming 35% of the Muslim population in Kenya, complained of being left out in the appointments of Kadhis in preference to the Coast Province.

There was a complaint raised concerning the Prisons Department and especially the remand institutions. It was stated that most institutions lack places of worship for Muslims and that this problem should be addressed by the Commissioner of Prisons.

One presenter raised the Wagalla Massacre, which he noted with great disappointment, that the Government has not addressed to-date.

The Committee was informed by one presenter that the Masinde Muliro University has no Mosque on site because the Muslim student population is small. This was not an acceptable excuse for the administration to deny the "few" students their right to worship.

2.7 ELDORET

There was very good attendance of the public hearing and many people showed a lot of enthusiasm about the Committee's mandate.

The Committee was told that historically, the Muslim community was marginalized and isolated by colonial the Government, particularly the North Eastern Province.

The war on terrorism has had a negative impact on Muslims who are now labelled terrorists on the basis of their dress code.

The operations of the ATPU were criticized as being extra-judicial and the public is apprehensive that this Unit is foreign-funded to serve external ulterior motives to the detriment of Kenyan Muslims.

The Committee was informed that the Youth and Women Enterprise Fund follow procedures that are contrary to Islamic Law. As a result, Muslim youth and women are unable to access the funds.

On issuance of Identity Cards and Passports, many complained of delays and that Hajj Passports should not be limited for Hajj purposes only. On Identity Cards, there was a complaint on the vetting process – that applications are rejected even after the local vetting is approved. The prevailing conditions are discriminatory against Muslims.

The banning of Islamic Philanthropic organizations/NGOs by the Government was cited as a set back to the many activities the banned organizations were involved in e.g. education, construction of Mosques etc. Unwarranted deportations of officials of the Islamic NGOs have to a great extent affected their operations and this has in turn adversely impacted the welfare of the local beneficiaries.

Kenya Revenue Authority (KRA) restrictions on international aid to Muslims raised great concern with presenters feeling that the Government has not given clear guidelines on tax waiver policies.

The role of the media was again termed as divisive in society as it has been used to cause hatred amongst and against Muslims. The public was of the view that the Government should intervene in this matter.

There was the view that the office of the Chief Kadhi should be strengthened and expanded to cover areas occupied by Muslims.

The challenge of the unavailability of trained IRE Teachers was raised and the Kapyemil Primary School was quoted as an example where 900 students are taught by one trained Teacher. At other Schools such as Laboret Secondary School, Muslim students are forced to study CRE, for lack of IRE Teachers.

It was reported to the Committee that ATPU placed Muslim students at Al Abraha Secondary School under constant surveillance on the allegation that the School was associated with terrorism activities.

There was a serious complaint raised on the Kambi Somali plots which were allocated to the Muslim community in 1930s. The owners are currently being harassed by powerful people who have grabbed the land. The rightful owners claim that the plots were given to them during the colonial regime. The Council's promise to compensate the owners has not been honoured.

Islamic preachers complained of Police discrimination in the issuance of permits for "Muhadhara" –public propagation of Islam, which is a violation of freedom of worship.

There was also a complaint that projects undertaken by Muslims are frustrated by Christian organizations which are usually consulted by the local authority to give views on the impact/effect of such projects on the local community.

It was noted that in Schools with large Muslim student population, the Muslim community is not allowed to employ their own IRE Teachers where Government has not provided Teachers. Examples given were Uasin Gishu Primary School, Uasin Gishu Secondary School, Harambee Secondary School, Hill School - Primary and Secondary, 64 Secondary School.

There was concern expressed that the health care system does not take into account interests of Muslims.

The Committee was told that Muslims lack access to bursary funds and most of them are referred to their mosques for assistance.

The Muslims proposed that they be given adequate representation in both the Universities Joint Admissions Board and Higher Education Loans Board in order to enhance their access to education.

2.8 NAKURU

There was a complaint about lack of IRE Teachers in Nakuru. A total student population of 1 500 in 73 Schools has only one IRE Teacher. In addition, out of the 73 Head Teachers, only two are Muslims, and out of the 1 300 P1 Teachers, 5 are Muslims.

The dress code for girls in Schools was cited as a big problem, while the Friday classes prevent students from attending Friday prayers. Some presenters lamented that Muslim Madrassas are not recognized by Government.

There was a complaint that there is discrimination in issuance of bursaries, Constituency Development Fund and Local Authority Transfer Funds to the Muslim community.

It was claimed that Islamic international universities and higher institutions of learning, e.g. Medina and Khartoum Universities have been denied registration in Kenya.

It was asserted that Muslims are perceived negatively in society because of their attire and labeled as terrorists. At workplaces, Muslims are discriminated for wearing 'Kanzus' and keeping beards. The presenter complained that on arrest, Muslims are never booked in the occurrence books at Police Stations nor arraigned in Kenyan Courts. One such case cited was that of Abdul Malik who was illegally removed from Kenya and taken to Guantanamo Bay.

The Committee heard again of discrimination against Muslims in issuance of Identity Cards, Birth Certificate and Passports, and delays in processing of the same. It was also pointed out that Muslims at border towns are unnecessarily screened.

Muslims of Somali origin complained of the screening cards, an exercise which they viewed as discriminatory and unfair.

The Committee was told that no Title Deeds have been issued in settlement areas inhabited by Muslims, e.g. Eldama Ravine, Gilgil, Mogotio etc. The following are some of the concerns that were highlighted on the issue of land:

- 1 Landlessness and squatter problem
- 2 No access to clean water and drainage
- 3 Public utility land for Muslims has been grabbed, e.g. St. Joseph's Catholic Church in Racecourse, Githurai and Shabab Mosque, Section 58, Islamia Estate, Karima Farm, Njoro, Corner Tatu and Bondeni in Nakuru and Nubian Village in Eldama Ravine.

On the health sector, the Committee heard that the Government has not employed female Muslim midwives to assist in delivering mothers in accordance with Islamic practice.

The presenters also complained that the dead are usually taken to mortuaries against Islamic faith.

The ban and deregistration by the Government of some Islamic International NGOs which were providing aid and essential social services to the community was cited as having negatively impacted on the local community, without an alternative means of support.

The presenters complained of lack of regulation of media against negative portrayal of Muslim teachings and morals.

It was reported to the Committee that there is lack of adequate representation and recruitment of Muslims at national level, for instance in the Cabinet and other high level Government appointments.

On access to justice, there was the view presented that the Kadhi's Courts should be restructured and strengthened so as to conclusively handle Muslim personal law. The presenter pointed out that is no appellate system in the Kadhi Court.

2.9 NYERI

The attendance in Nyeri was very good. It was argued that the timing of the appointment of the Committee was inappropriate due to the impending general elections.

The Committee was presented with a Memorandum on the following concerns from the Muslim Community of Murang'a: The Muslim population in Murang'a Mjini which is currently over 4,000 on more than 100 plots without Title Deeds despite having settled there over 102 years ago. Due to the increase in their population, the land is not adequate and they have no space for Mosques and graveyards.

The above situation obtains in Majengo where inhabitants cannot construct permanent dwellings on their plots. They have no Title Deeds and still hold Temporary Occupation Licences (TOLs) under the jurisdiction of Municipal Council.

Muslim sponsored Schools in Muranga had been taken over by the Government without consultations. Cases in point are Mjini Primary School and Mumbi Muslim Girls Secondary School which were initially funded by Muslims. These Schools are no longer under the management of Muslims despite efforts to reclaim them.

The IRE issue was revisited here. Presenters told the Committee that Mumbi Muslim Girls School does not teach IRE because of lack of Teachers. And the School prohibits girls from wearing the hijab. This is the same scenario at Wambaa Primary School, formerly Muslim Primary School. It was constructed for Muslims and management has changed to Government.

Discrimination in issuance of national Identity Cards was cited as a major problem with Muslims having to wait as they go through the vetting process. One, Mr. Suleiman Mwangi Kimani, a Muslim related his personal experience, where his brother, John Mwangi Kimani, a Christian, got an ID much quicker than himself because of his Christian identity.

The Muslims concerns on political representation in the local authorities are not taken into account. As a result resources allocated for upgrading of Mjini in Muranga have been misappropriated.

Muslims bitterly complained about the presence of drugs and miraa stalls in their residential areas, which have a negative impact on the youth and security.

The presenters made a case for affirmative action for the Muslim community, a vulnerable minority group in Kenya.

Many felt that there is urgent need to develop a proper scheme of Service for the Kadhis in order to attract and retain qualified persons. The current rules of procedures of the Court need to be reviewed to make them compatible with Islamic Law.

The Committee was told that plots approved by the Municipal Council for change of user from commercial to places of worship were subsequently levied with rates

The Committee was informed that Muslims in central Kenya face discrimination in the allocation of plots because of the general public perception that a "Mswahili" does not need plots. The same discriminatory practice is common in public job recruitments. This profiling of Muslims has been detrimental to the development of the community.

The Committee was told that Nyeri has more than five Mosques built on purchased land. However, part of the land of one of the Mosques has been irregularly allocated to a Medical Training Institute.

The presenters were of the opinion that the Government should take responsibility for undertaking civic education on land matters especially in the settlement areas like Majengo where legitimate owners have been displaced.

The presenters stated that public health institutions should be sensitive to the religious beliefs and practices of all the patients.

It was reported to the Committee that the Muslim recruits at the Kiganjo Police Training College have difficulties accessing the Mosque adjacent to the college for their daily prayers.

2.10 ISIOLO

The attendance in Isiolo was good, although most lamented that the timing of the Committee did not reflect good will on the part of the Government and that it was seen as a public relations exercise due to the imminent general elections.

Presenters argued that the problems of the region started during the colonial times when the divide and rule principle was applied. This is further compounded by lack of security, infrastructure, public utilities and social amenities in Northern Kenya.

The security of the region is especially of great concern. The many road barriers and Police checks have caused frustrations and exposure of the public to corruption and unnecessary harassment by law enforcement agencies.

Issuance of national Identity Cards is of great concern. There appears to be a different system for people of Northern Kenya which has emanated from the Somali screening exercise of 1989.

International Islamic Organizations based in the region cannot easily secure Work Permits for their staff due to cumbersome processes and procedures. The same applies to applications for registration as Kenyan citizens by non-Kenyan Muslims.

The Committee was told of the operations of the Anti-Terrorist Police Unit which seems to target only Muslims and operates outside the law. The Unit was accused of harassing and conducting searches at odd hours of the night at residential premises. Further, the Unit has been blamed for removals of Kenyan Muslims to foreign countries.

Presenters argued that surveillance on Islamic organizations countrywide has instilled fear in those managing them which has resulted in some relocating to neighbouring countries or opting to close down to the disadvantage of local beneficiaries.

Some people were concerned that if a law on anti-terrorism is enacted, it will cause more fear and anxiety amongst Muslims should the prevailing trend be maintained.

Again here the Kadhi's Court was revisited and it was proposed that the Court should be reviewed so as to expand it and increase the number of Kadhis.

On education, it was noted that the available IRE and Arabic Teachers are unqualified and not of Islamic faith.

It was argued that there is need for affirmative action for the people of Northern Kenya by the Ministry of Education in awarding Government scholarships.

The presenters were concerned that the agricultural development of the productive areas of Northern Kenya has been neglected yet they could improve the living standards of people.

The discrimination of Muslim students in Christian sponsored Schools was decried and the following Schools were cited as examples:

1. The Sacred Heart (Catholic) Secondary School and St. Mary's Girls Secondary School in Merti where Muslim students are forced to go to Church.
2. At the Sacred Heart Secondary School, one of the requirements on admission is for a student to buy a Bible and Muslim students are forced to attend Church service on Sundays.
3. At the St. Mary's School, Muslim students are not allowed to worship in accordance with their faith.
4. In fact at the time of the hearing, ten students at the Sacred Heart School had been expelled for practicing their religion. Other affected Schools are Mwangaza Primary School and Machi Girls Secondary School.

The presenters complained about the de-registration of Al Hamein, an International Islamic NGO which had operated in Isiolo for over seven years and provided assistance to orphans and other needy persons. Since its de-registration in 1998, its beneficiaries have been neglected.

Some presenters appreciated the vetting system for application of IDs as a good initiative but suggested that it should be reviewed regularly to check malpractices. However, they singled out the discriminatory practice which requires students from the region to travel to their home for application of Identity Cards.

The Committee heard that the history of the Northern Frontier Districts contributed to the marginalization and impoverishment of the region. The past massacres of Wagalla Bagalla and Malka Mari in the region have to-date not been addressed and have further aggravated the situation.

The disparities in prices for livestock products have discouraged many livestock farmers from developing their trade. The presenters were of the view that the Government should develop policies for the livestock industry and market for livestock products.

The Committee heard from Muslims from Meru on the following issues:-

1. Lack of Title Deeds for Muslim settlements

- 2 Lack of Muslim representation at the local level
- 3 Low education standards
- 4 High levels of poverty among the Muslims
- 5 Lack of IRE Teachers in Schools
- 6 Allocation of land to landless Muslims
- 7 High unemployment levels among the Muslim youth
- 8 Muslims should be considered for allocation of stalls in local markets

CHAPTER THREE

3.0 THE APPLICATION OF THE LAW AND THE IMPACT OF SECURITY OPERATIONS ON THE MUSLIM COMMUNITY

3.1 Introduction

During the colonial administration the Governor was empowered by the existing laws to declare a state of emergency in the country or any part thereof. During the same period the Governor was vested with absolute discretionary powers to determine the law applicable to the North Eastern Province and other adjoining Districts (Lamu, Tana River, Marsabit, Isiolo and Moyale). Such laws were The Special Districts Ordinance and Special Districts Administration Ordinance. The objective of these special laws was to regulate movement into and out of these areas and the zones were referred to as prohibited zones. This in effect alienated, marginalized and isolated the people of the area from the rest of the country. This colonial policy created discontent among the population of the affected areas.

At independence there was agitation from the area to secede from Kenya and join Somalia given the history of isolation. In 1962, the British Government appointed a Commission which found that five of the six Northern Frontier Districts (NFDs) favored secession and union with the Republic of Somalia. However, this issue was left unresolved for the Independent Kenya.

The oppressive laws which hitherto were vested in the Governor in the colonial administration were literally transferred to the President of independent Kenya in the promulgation of Northern Eastern Province Contiguous District Regulations of 1966. These regulations remained in force till they were repealed in November 1991. During this period the fundamental rights and freedoms guaranteed by the Kenyan Constitution were virtually suspended in the Province.

3.2 The Effects of the 1966 Regulations on Security

These regulations created new sets of crimes other than those in the Penal Code and laid down punishments for these crimes. These Regulations were able to achieve the following in the North Eastern Province (NEP) and the adjoining Districts. Firstly, they created a new set of crimes. Secondly, they laid down punishment for these crimes. Thirdly, they empowered certain officials with extra judicial powers. Fourthly, they singled out a community in Kenya in which to exclusively apply these Regulations.

The region was divided into two, namely, "**Prescribed area**" and the "**Prohibited Zone**". To the former being the whole of NEP, Isiolo, Marsabit, Tana River and Lamu Districts and the latter being nearly all the areas that run parallel to the international boundary dividing Kenya and Somalia. With regard to areas that came under the Prescribed Area, the

law was concerned with firearms. It prescribed punishment for being in possession of firearms, for example, it was considered a grave offence for one to possess a firearm without any lawful authority. Such an offence carried a death sentence¹ once there was a reasonable doubt that such firearm had been or was intended for use against the preservation of public security.²

The law stated further that if an individual is found guilty of harboring a person with intentions against the preservation of the public security, such individual will be imprisoned for life.³

As for the Prohibited Zone, the law was more concerned with entry into this area. Only members of the security forces or those in their company were allowed entry. Anyone else outside this category, if found in the area, became subject to imprisonment for life.⁴ The law gave extraordinary powers to members of the security forces and administrative officers to enter and search any premises without warrant and detain any person, stock, conveyance, vehicle found entering or leaving the area.

Within the Prohibited Zone, the law gave powers to security and administrative officers to arrest, without warrant, anyone suspected of associating with someone whose presence in the area is considered prejudicial to the preservation of public security.⁵ Furthermore, any member of the security forces, provided he or she was not below the rank of Corporal, was empowered to destroy any building or structure in the interest of public security within the Prohibited Zone. Within the prescribed area, members of the security forces were given similar powers.

These draconian laws breached every tenet of fundamental human rights, the Bill of Rights under the Kenyan Constitution and International Human Rights and Humanitarian Law. Moreover, these laws were applied discriminatorily, only to a certain community in the country. From the public hearings, the Committee concluded that the Anti-Terrorism Police Unit in carrying out its operations seems to borrow heavily from the repealed laws.

To date, the security forces still operate in the area as if the repealed regulations are still in force. During the hearings, the issue of the Garissa bridge barrier was singled out as an obstacle to the freedom of movement in and out of the Province. The Committee found it disturbing and retrogressive that at the barrier point, Kenyan Muslims were required to undergo a humiliating and degrading inspection by disembarking and embarking in a single file whilst displaying conspicuously their Identity Cards.

This situation was confirmed to the Committee by the North Eastern Provision Administration who indicated that the barrier check was a necessary security measure aimed at curbing the proliferation of small arms and light weapons into the "other parts" of the country. The Committee found this explanation to be absurd and insensitive to the security and human rights of the people Northern Eastern Province. It in effect means that the security agents are only concerned with the entry of the arms beyond the bridge yet their prime responsibility should be more at the Kenya – Somali border and within the province. This scenario and attitude is replicated at the numerous security barrier check points throughout Northern Kenya.

1 The Preservation of the Public Security Act Cap 57 (Part I, sec 1, par 1)

2 Ibid (Part II, Sec 3)

3 Ibid (sec 4)

4 Ibid (sec 4)

5 (Part III, sec 8)

6 (Part IV, Sec 10)

7 (Part V, sec 12)

The same level of harassment, same security checks at Police barriers into and out of the Province, same lack of regard for the inhabitants, and the same excessive discretionary powers of the security forces continue to be exercised with impunity. The Committee was informed that nothing has changed since the repeal of the regulation save minor cosmetic changes, such as change in the Police uniform from combat gear to regular "blue" uniform.

3.3 Impact of the War against Terrorism

In the fight against terrorism, the country has witnessed a persistent, deliberate and unwarranted erosion of fundamental human rights of the Muslim Community that are guaranteed by the Kenyan Constitution and International human rights instruments. The Kenyan Anti-Terror Police Unit (ATPU) has come under intense criticism in its operations and collaborations with foreign agents in subjecting the Muslims to arbitrary arrests, detention, torture and renditions without regard to due process of the law.

Drawing on interviews with alleged terror suspects and human rights organizations, this report shows credible evidence of abuse and mistreatment of suspects. The suspects have been subjected to custodial interrogation without access to lawyers and family members, prolonged arbitrary confinement, including detention without charge, not to mention deplorable conditions – including solitary confinement – as well as physical and mental abuse.

The effect of the foregoing has been to negatively profile the Muslims based on their attire and religious practice. This reflects the general perception that ATPU has a "policy" of presuming members of the Muslim Community guilty contrary to the Constitution.

The ATPU unit has often withheld the suspect's names from public domain and held them incommunicado in the name of preserving national security. The veil of secrecy the Police has wrapped around terrorist suspects cases reflects a stunning disregard for democratic principles of public transparency and accountability and erodes the public confidence in the security organs.

3.4 Renditions, Arbitrary Arrests and Detention

One of the most serious complaints received by the Committee against the Government is the rendition of Kenyan and foreign Muslims suspected in the involvement of terrorism activities to foreign jurisdictions. Rendition is the act of transferring terror suspects to detention camps outside their countries for interrogation. Amnesty International uses the term "rendition" to refer to a variety of practices by the United States authorities involving transfers of individuals from one country to another without any form of judicial or administrative process such as extradition. This practice, usually carried out in secret, includes transferring "war on terror" detainees into the custody of other states, assuming custody of individuals from foreign authorities and abducting suspects on foreign soil.

The Committee was informed by the Department of Immigration that it had processed 96 deportation orders of persons who had fled from the Somali conflict of January - February 2007 on the recommendation of the Police. Further, the Department informed the Committee that it was not directly involved in the arrest of the individuals. The Department further confirmed that the sole reason for these deportations was the absence of any

documentary evidence from the 96 individuals proving Kenyan citizenship at the time of the removal. The Department of Immigration alleged that the said individuals had failed to co-operate with the arresting agency. Therefore, according to the Department, no Kenyan was deported.

The Committee, however, received credible evidence of the rendition of at least 19 Kenyans to Ethiopia, Somalia and Guantanamo Bay, Cuba. Flight manifests availed to the Committee show that in January and February 2007, chartered planes left Nairobi with about 80 people on board suspected of links with Al-Qaeda to Somalia's capital Mogadishu and the town of Baidoa. The flights left at night, and the manifests appear to have deliberately omitted important details.

The terror suspects were allegedly interrogated by foreign security agents while in Kenyan custody. The Committee received reports from the Muslim Human Rights Forum (MHRF), that the foreign agents had direct access to the prisoners.

The report cites the case of one detainee, Amir Mohamed, who was taken out of his cell at the Kileleshwa Police Station by American agents in a US registered motor vehicle and taken to a local hotel for interrogation. MHRF witnessed him being brought back to Kileleshwa from one interrogation session on February 5, 2007, in a US Embassy vehicle registration number Z9 CD 389K. The detainee confirmed to the MHRF that he was interrogated by FBI agents and questioned about links to Al-Qaeda training military camps in Mogadishu. Another detainee Mohammad Ezzouek told MHRF that he has been interrogated by British intelligence agents at the Kileleshwa Police Station between the 3rd and 5th of February 2007.

MHRF also reported that during a fact finding mission to Kiunga, Lamu District, the residents of the area reported seeing foreign security personnel together with Kenyan security forces in the hunt for people fleeing from Somalia fighting seeking refuge in Kenya.

A Kenyan citizen, Abdulmalik Mohamed, suspected of being involved in the bombing of Paradise Hotel in Mombasa, was arrested in Kenya and rendered to foreign agents in Guantanamo Bay, Cuba, after being held in Mombasa and Nairobi, in Police custody for one month. The MHRF report quotes a statement released by the US Department of Defense on March 26th, 2006, indicating that Abdulmalik had admitted his involvement in terrorist attacks in Mombasa in 2002 and the US Embassy bombings in 1998.

According to the MHRF, the renditions were conducted in an inhumane manner, with captives blindfolded, feet shackled and handcuffed to their back. One suspect who appeared before the Committee, Fatma Ahmed Chande, a Tanzania national married to a Kenyan, narrated her ordeal as she and her husband, Salim Awadh Salim, were fleeing from Somalia. She stated as follows:

"It was so chilly and drizzling. We were bundled into pick-ups and driven to the runway. I saw very many people, including women kneeling. The lady called Tuwei Kamilya was sitting down crying. The men were blindfolded and had their hands handcuffed behind their backs and their feet were chained. I was led to the group of women and ordered to kneel there too. An armed man came to me and pulled down my veil to cover my face. Some of the detainees were crying loudly. The men had black hoods covering their heads. We stayed kneeling there for quite sometime, till our knees ached. We were taken

up to the plane, still blindfolded. I could, however, see through my veil as it was of a light material. It was very scary, cold and wet."

Fatma's statement confirms the report by MHRF that her husband, Salim Awadh Salim, a Kenyan, was removed from Kenya to Ethiopia, where he is still being held.

The Committee received reports that on 31st March, 2007, heavily armed Policemen cordoned off a whole residential area at Kongowea, Mombasa, and harassed everyone in sight as they sought terror suspects. After the ordeal, the ATPU arrested two people and later released them without any charges.

Still on the heavy handedness of the unit, the Committee received further reports that on the night of 24th and 25th April, 2007, heavily armed hooded ATPU personnel carried out a similar raid in the Guraya area of Mombasa. Again, they cordoned off the area and blocked off the adjacent Jomo Kenyatta Highway, and proceeded to break doors to all the homes and paraded all residents, including children and the elderly, in the rain at 3am. It was alleged that the Police ransacked their homes and took away valuables and cash, arrested 11 residents, out of whom 10 were later released without any charges, while one was deported to the Comoros. These raids carried by ATPU have been a common occurrence among the Muslims.

The Committee also heard from Noor Sheikh Hassan, a Kenyan citizen who was together with five others arrested in Liboi, a town on the Kenya-Somali border on 6th January, 2007, and later transferred to Langata Police Station in Nairobi, where he was held in solitary confinement for 25 days. He was denied access to a lawyer and family members and could not make any phone call. He informed the Committee he was physically and mentally tortured and questioned about links to the terrorist organizations.

This case of Noor Sheikh Hassan seems to reveal a grim picture of the treatment of those while in Police custody.

As of today, none of the arrests have yielded any prosecution for crimes connected with terrorism. Some of those arrested were later released without any charges whereas others were prosecuted for minor immigration offences and deported.

The rendition of the terror suspects is illegal under the Kenyan Constitution and international law because it disregards all judicial and administrative processes.

Most Kenyan victims of rendition were arrested and illegally detained while others were abducted and denied legal representation. It also violates a number of other human rights safeguards, for instance, victims of rendition have no opportunity to challenge their detention, or the arbitrary decision to transfer them to another country.

The Kenyan security agents have continued to defend themselves with regards to the rendition by stating that those rendered to foreign countries are not Kenyans. International human rights law, however, does not permit countries to discriminate between citizens and non-citizens with regards to fair trial and due process.⁸ The fact that a person is not a Kenyan Citizen should not be used as an excuse to undermine their internationally recognized rights. The Committee established that at least 19 of those rendered by the security agents to foreign countries are indeed Kenyans as shown in table 2 below -

8. ICCPR art. 14: "All persons shall be equal before the courts and tribunals..."

Table 2: List of Persons Removed From Kenya

NO	NAME	PLACE	DATE
1	Aden Abdullahi Sheikh	Ethiopia	20 01 07
2	Saidi Shifa	Ethiopia	20 01 07
3	Salam Ngama	Ethiopia	20 01 07
4	Bashir Hussein Chirag Mohammed Sader	Ethiopia	27 01 07
5	Said Hamisi Mohamed	Ethiopia	27 01 07
6	Swaleh Ali Tunza	Ethiopia	27 01 07
7	Hassan Shaban Mwazume	Ethiopia	27 01 07
8	Hussein Ali Said	Ethiopia	20 01 07
9	Tsuma Solomon Adam Ayila	Ethiopia	27 01 07
10	Abdi Muhammed Abdillah	Ethiopia	27 01 07
11	Salim Awadh Salim	Ethiopia	27 01 07
12	Abdulrashid Mohamed	Ethiopia	27 01 07
13	Kasim Musa Mwarusi (brother to 14 below)	Ethiopia	10 02 07
14	Ali Musa Mwarusi	Ethiopia	10 02 07
15	Abdallah Halifan Tondwe	Ethiopia	10 02 07
16	Nasru Tuko	Ethiopia	-
17	Mohammed Said Mohamed	Ethiopia	-
18	Mohamed Abdulmalik	Guantanamo Bay Cuba	-
19	Sagaawi Diin Wahab	Ethiopia	-

Kenya is party to the International Covenant on Civil and Political Rights (ICCPR), which under Article 2(1) provides that

'Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction that their rights are recognized in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Under international law, a state is deemed to have jurisdiction over all individuals within its territory under article 2(1) of the Covenant. Therefore, the measure taken by foreign agents on Kenyan soil does constitute a violation by Kenya of its obligation under the Covenant.

Given Kenya's experience with the past terrorists attacks and the contemporary global threat of terrorism, it is not surprising that the Kenya Government desires retribution against those suspected to have links with terrorist organizations.

However, as a Committee we believe the Government should not blur the line between liberty, the protection of human rights and security. The renditions are wrong, unjust, illegal and would most likely be counter-productive on the war against terrorism.

3.5 Disregard of Habeas Corpus Orders

The writ of habeas corpus, as provided in the Kenyan Laws, is a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions. It is a judicial decree ordering the appropriate authorities to bring before a Judge, a detainee so that the lawfulness of the detention may be determined. In addition, Article 9(4) of the ICCPR states " Anyone who is deprived his liberty by arrest or detention shall be entitled to take proceeding before a Court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is unlawful." Habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or keeping his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.

Muslim Human Rights Forum (MHRF) reported to the Committee that it had filed 34 habeas corpus applications at the High Court in Nairobi, while six other applications were filed in Mombasa. Despite the High Court having granted the orders in all the cases, the State defied the orders, and only released two, while rest were rendered to foreign jurisdictions.

3.6 Violation of the Vienna Convention on Consular Relations

The Committee heard that most of the non-Kenyan Muslims terror suspects arrested by the ATPU were denied access to consular officials of their Embassies here in Kenya. This is in violation of the Vienna Convention on Consular Relations, which Kenya is party to and bound to inform any foreign national detained in Kenya without delay to seek consular assistance. Moreover, the Kenya Government's ability to protect its citizens abroad can be enhanced or jeopardized by its record of compliance with the Vienna Convention.

3.7 Anti – Terrorism Legislation

Unlike many other States, Kenya has not yet enacted a specific anti-terrorism legislation, even though then Foreign Minister introduced the failed controversial *Suppression of Terrorism Bill* to Parliament in June 2003. Despite the absence of specific legislation, the Anti-Terrorism Police Unit (ATPU) was established as a division of the Kenya Police in February 2003. While the precise role of the ATPU is not clearly defined - due to the lack of definition of the term "anti-terrorism" - it appears to carry out specific investigations and arrests related to terrorism, conduct specialist operations (sometimes joining up with other units of the force to do so) and plays a major role in the interrogation of terror suspects.

The Bill came under strong criticism for its potential to violate Constitutional and human rights as well as the potential to be used to silence political opinion, discrimination against marginalized groups and curtailing freedom of expression. Among the main public

concerns were that the proposed definition of terrorism was extremely wide and thus, could allow Police to carry out arbitrary arrests and investigations under the guise of acting under the new law

Additionally a range of minor criminal offences would be classified as terrorist acts. The Bill also reversed the presumption of innocence for example requiring anyone suspected of harboring a terrorist to prove they are not, thus shifting the burden of proof. Again this would have allowed Police wide discretion to arbitrarily arrest anyone, needing little evidence to prove suspicion. Also proposed were provisions that allow officers above the rank of Inspector to hold suspects incommunicado for up to 36 hours

This contravened the constitution which protects fundamental human rights including the right to appear before a court within 24 hours and the right to legal representation. Despite the controversial provisions of the *Suppression of Terrorism Bill* not being in force human rights activists in Kenya claim that the APTU often acts as if it were empowered by similar law, acting under rules of its own that allows for disregard of fundamental human rights

Since the establishment of the APTU in 2003, there have been many complaints with respect to its use of unwritten powers to discriminate and target Muslims with harassment, arrests and detentions

CHAPTER FOUR

4.0 THEMATIC ISSUES, FINDINGS AND ANALYSIS

4.1 Education

4.1.1 Background

Formal education in Kenya began with the coming of Christian missionaries, who established missions from the coast to the hinterland. However in the predominantly Muslim areas of the country, particularly the coast and northern Kenya, formal education was introduced much later. This is because the colonial Government delegated the provision of education to the missionaries. The Muslim community did not take their children to school for fear of being converted to Christianity, since Islam had by this time taken root in these areas. As a result, the Muslim community lagged behind in education, hence the disparity in education standards.

4.1.2 Findings on Education

In the course of its work, the Commission received a number of Education related issues and complaints. Some of these were raised in public hearings while others were presented to the Committee in the form of memoranda.

The Commission heard that there was poor implementation of Islamic Religious Education (IRE) in the School syllabi. Many presenters indicated that while the Ministry of Education had an approved policy of the teaching of IRE and Christian Religious Education (CRE) as examinable subjects at both primary and secondary levels, it had failed to train and post an adequate number of IRE Teachers. This omission has resulted in Muslim students being forced to study CRE. The shortage of IRE Teachers in the Schools was confirmed by Ministry of Education officials.

Another issue presented to the Commission relates to the freedom of worship in Schools and institutions of higher learning. Many presenters stated that Muslim students were denied the right to hold prayers in some Schools while others were denied an appropriate room for prayer while others were punished for exercising their freedom. In other Schools Muslims students were forced to attend Christian prayers services.

When these issues were raised at the meeting with the Ministry of Education officials they informed the Commission that a Ministerial circular had already been issued to all School administrations, stopping the practice. An example was cited by the officials where a School in Naivasha had been instructed by the Ministry to assign a specific room for prayers. The officials also indicated that an additional circular would be issued to give directions on all aspects related to protecting the right/freedom of worship for all students including Muslim students.

The Commission received a serious complaint from the Muslim community on the Kenyatta University administration's intention to demolish a Mosque under construction. The Committee visited the University and inspected the site in the company of the Chief Kadhi of the Republic of Kenya and the affected parties. After consultations with the parties and on advice of the Chief Kadhi, the Commission directed the University to allow the completion of the construction of the Mosque without further delay.

A related issue where Muslim students were not allowed to wear Islamic attire, in particular the *hijab* for girls, was raised in many of the public hearings.

The officials of the Ministry of Education informed the Commission that Muslim students have a right to wear their Islamic attire in Schools in line with the Ministry's policy on the freedom of worship. They undertook to address any incidences inconsistent with the policy.

The issue of diversion Moroccan Government scholarships intended to benefit Muslim students was reported to the Commission by a Muslim NGO. There were complaints about other Government scholarships and allocation of bursaries to Muslim students. These matters were taken up with the Ministry officials by the Commission.

The Commission was informed that educational institutions originally built and managed by Muslims have gradually been taken over by the Ministry of Education and other FBOs without due consultations with the affected parties. The examples were cited of Mjini Primary and Mumbi Girls Secondary Schools in Murang'a, Kisii DEB School, Kaloleni Primary School Kisumu, Nyeri DEB School, just to mention a few.

Additionally, the Committee was informed that Muslim organizations had been deliberately and systematically locked out of sponsoring educational institutions.

The Commission was also informed at the public hearings that both Coast and North Eastern Provinces, unlike most provinces, do not have adequate educational facilities and national Schools. This has negatively affected the quality and standards of education in areas inhabited by Muslims.

At the public hearings, the Commission received complaints of unjustified delays and denials by the Government to confer university status on Mombasa Islamic University and the Thika Islamic College. The Commission also heard that North Eastern Province does not have a university.

A presentation was made to the Commission on the need for affirmative action for admission to institutions of higher learning for students from marginalized Muslim areas.

4.2 Citizenship and Registration of Persons

4.2.1 Introduction: Citizenship in Kenya

Citizenship in Kenya is conferred in accordance with the provisions of the constitution and other relevant statutes. The Kenyan constitution provides for acquisition of citizenship through the following ways -

- 1 By Birth
- 2 By Descent

- 3 By Registration
- 4 By Naturalization

Registration of persons in Kenya dates back to 1915 when the colonial Government enacted the Native Registration Ordinance whose objective then was to supervise and control the recruitment of male Africans into colonial labour. Currently under Cap 107 of the laws of Kenya it is mandatory for every Kenyan attaining the age of 18 years to register and be issued with a National Identity Card (ID).

Failure to register within 90 days after attaining the age of 18 years constitutes a criminal offence under the Act.

4.2.2 Relevance of Identity Cards in Kenya

The Identity Card has a crucial link to citizenship and nationality in Kenya and is at the core of determining the extent to which an individual enjoys his/her fundamental rights and freedoms within our borders.

While the human rights framework guarantees persons the right to a nationality, the language of Kenya's domestic law suggests that for one to enjoy the rights and freedoms of citizenship, he or she must register and be issued with a national Identity Card. Since an Identity Card has attained such an important role, it should be issued as matter of right for all Kenyans. Consequently, lack of or denial of an ID implies denial of the rights and freedoms accorded to citizens as detailed below.

4.2.3 Violation of the right to citizenship

Often times an Identity Card has been used to prove citizenship in Kenya. The lack of an Identity Card to eligible persons results in limited enjoyment of rights of citizens.

- 1 **Discrimination in participating in political processes** In Kenya, one needs a national Identity Card in order to register as a voter and to exercise the right to vote.
- 2 **Impedes the freedom of movement:** In certain circumstances, persons without Identity Cards are not allowed to move freely within their country. Some experience Police harassment when they fail to produce an Identity Card while traveling. The freedom of movement is curtailed also because one requires a national ID in order to obtain a Passport and other necessary travel documents.
- 3 **Denial of the right to own property** In other circumstances, a person has to produce an Identity Card in order to transfer or purchase property. Further, in order to engage in normal business transaction, e.g. in opening a bank account, one requires an Identity Card.
- 4 **Denial of the right to access basic social services** Lack of an Identity Card may mean inability to access admission to colleges and universities, acquire a driving license, access banking services, enter Government buildings and obtain services from Government offices etc. In situations of emergency, relief workers, mainly in arid areas, rely on Identity Cards as a form of identification.

- 5 **Denial of the right to seek and obtain employment** Many employers often demand an ID card without which it is extremely difficult to access employment opportunities
- 6 **Violation of the right to marry and found a family** Under existing statutory laws regulating marriages, one must submit proof of adult age-an ID card for purposes of registration of the marriage union

4.2.4 Findings on Citizenship and Registration of Persons

Special Cases

It was brought to the attention of the Commission that there are stateless persons of African origin, e.g. the Nubians, Makonde, Wachangamwe, Washirazi and other ethnic groups from East Africa, whose issues have not been resolved despite there being a constitutional provision on their right to apply for Kenyan citizenship.

Processing of Passports and National Identity Cards

- 1 Muslim applicants are being discriminated against when applying for Passports and IDs by being asked to produce additional documents and/or requirements which are not demanded from other applicants
- 2 Muslim applicants are required to go through vetting processes both at the local levels and national levels. Despite this rigorous process of vetting, applicants are not guaranteed issuance of the documents
- 3 The findings in the NEP were that applicants wait for long periods after being issued with the waiting card (**Kusug**). This situation has put them in a vulnerable position with the security agents who frequently harass them for lack of Identity Cards. The security agents do not seem to recognize the waiting card as an identification document
- 4 The public also decried the inhuman and degrading treatment by security agents during their operations. This was highlighted to the Commission in NEP where there are barrier checks at various points and the most notorious is the Tana River Bridge barrier checkpoint on the Nairobi/Garissa Road. It was alleged that at this point, the public travelling from the border of Kenya/Somalia and from within the Province in public transport (mostly buses) are usually asked to alight from the bus and hold their IDs in single file as they re-enter the bus. In the process the Police harass and manhandle them without due regard to their constitutional rights
- 5 **Discrimination in the issuance of Passports** In all the Provincial hearings the Commission was told of discrimination in the issuance of Passports with many reporting of unjustified denial of the document. The public complained that Muslims are vetted for Passports in a separate and discriminatory manner from other Kenyans, a fact which was confirmed by the Commission during its visit to the Department of Immigration Head Office. The public also complained that during Hajj festivities, Muslims are

issued with Passports that are restricted for use only in Saudi Arabia and valid for one year

- 6 **Vetting Process** There was grave concern over the vetting process in issuance of both the ID and Passport. The Commission heard that the process of vetting is not clear to members of the public and it is apparent that the Ministry does not have clear policy guidelines on the issue. The vetting for IDs is done at the local level.
- 7 **The Composition of the Vetting Committees** It was pointed out as a problem, especially at the Headquarter level where the applicant is not known to the vetting Commission and is unjustifiably and unfairly denied registration. For Passport applications, there was an issue raised as to why Muslims are vetted separately from other citizens. This is an administrative practice which the Immigration Department admitted.
- 8 **Corruption** The incidence of corruption was highlighted as a major impediment to acquisition of IDs and Passports. This is even compounded by the existence of brokers who operate in cahoots with public servants to frustrate unsuspecting applicants. This situation has given room to unscrupulous dealings in which foreigners acquire Kenyan documents provided they can pay "under the table", thus denying many deserving Kenyans their rights. This has been rampant especially at the refugee camps in the North Eastern province where Somali refugees are a majority.
- 9 **Harassment:** The public complained that Kenyan Muslims are harassed when entering the country at various border entry points.
- 10 **Restriction of movement:** The public complained that residents of the NEP feel isolated from the rest of the country and are treated like "foreigners" in their own country. There was a specific complaint that residents near refugee camps are restricted in their movement.
11. **Birth and Death Certificates** In general, there were few complaints on births and deaths registration. The complaints were that one is required to produce documents of his/her grandparents to prove he is making a genuine application.
- 12 **Discretionary powers:** The Commission found that the registration and immigration officers have assumed wide discretionary powers which they grossly abuse, especially where the law does not expressly provide direction. The officers also take advantage of applicant's ignorance of the procedure.
- 13 **Decentralization** The Commission established that the Department of Immigration is highly centralized with only three Passport issuing offices country-wide: Nairobi, Mombasa and Kisumu.
- 14 **Computerization:** The Commission also found that the Department of Immigration operates on manual systems which are slow and prone to abuse and fraud.

4.3 Land Issues

4.3.1 The History of Land Laws in Kenya

Before the coming of foreign powers, all communities in Kenya were autonomous and had internal governing orders depending on the ethnic-cultural structure of the various groups. As soon as the British rulers established themselves in Kenya, many of those independent structures were dismantled and replaced with alien systems.

The scramble for Africa in the last quarter of the 19th century at the Berlin Conference brought defined territories in Africa under various European Colonial rule.

The British legitimized their arbitrary colonization first through the declaration of 'protectorate' and later colony. The Legislative Council was founded in 1905 to provide the British rulers and settlers with a platform to make laws to further legitimize their rule over Kenya.

Loss of land, and forced labour for European settlers and the break out of first and second world wars politically sensitized Africans to forcefully drive away the uninvited colonialists. Under the camouflage of social and welfare associations, African leaders planted the seed of nationalism and patriotism. Later the armed uprising against the rulers and their collaborators forced the British to negotiate the independence of Kenya.

This led to the Lancaster House Constitution conference in 1960-63 where the independence of Kenya was agreed. Kenya became an independent state in 1963 and a republic in 1964 through the new constitutional process. The constitution incorporated the existing land law, with minor changes. The British constitutional legacy haunted and continues to haunt Kenya.

In Kenya, the colonial objective was achieved through a plethora of legislation beginning with the 1901 East African Order, which defined all land in Kenya to be invested in Her Majesty, the Queen of England.

The incorporation of land laws into the independent Kenya constitution had the effect of perpetuating the inequities suffered by the Kenyans under colonial rule. These laws amongst others can be identified as:

1. Crown Land Ordinance
2. (Native Areas) Trust Land Ordinance in Council 1939
3. Native Lands Trust Ordinance

Case law relevant to this issue can be summarized as follows:

In the cases of *Ole Njogo against A G for the E A protectorate* (1914) which is usually referred to as the *Maasai Case*, decided that the Maasai could not bring an action against the Protectorate Government for breach of the 1904 and 1911 so called 'Maasai Agreements'.

The other case was that of *Wainaina against Murito Wa Indangara* (1923) which stated that the effect of the Government Land Act (1915) was to make all Africans in Kenya Colony tenants – at-will of the Crown, with no right in land at all.

The other event was Kakamega Goldfields incident of 1933 where a portion of Kavirondo reserve in which gold had been found was excised by Government without land being provided elsewhere as was required by the Native Land Trust Act

That incident and the two earlier cases caused unease among the Kenya – Africans

As a direct result of successive independent Kenya Governments having chosen to continue with the inequitable laws the Muslims have suffered land related discriminations

4.3.2 Findings From The Hearings On Land Issues

4.3.2.1 The Squatter Problem and Urban Muslim Settlement

The Squatter problem and the Muslim urban settlement are direct consequences of the colonial land policy and law. Ever since the Supreme Court declared Africans as Tenants at Will of the Crown following the promulgation of the Crown Lands Ordinance of 1915 the problem of landlessness has never really been resolved. The dispossession of many Africans of their lands meant that only a massive resettlement programme could provide a solution to the problem of landlessness.

The colonial policies and laws fundamentally affected the land rights of certain communities including the Muslims. The decision by successive Governments to continue with this colonial legacy has meant the intensification of these problems over the years.

During the hearings the Committee found the effect of these laws as manifested in the current situation where Muslims who occupied land for the last hundred years in urban centers have not been issued with title deeds. Many of the Muslims who were allocated land by the colonial Government continue to hold Temporary Occupation Licenses (TOLs).

The following are some of the Muslim urban settlements without titles

- 1 Kibera Nubian Village,
- 2 Majengo and Kariokor in Nairobi,
- 3 Manyatta Arab and Kaloleni
- 4 Mukendwa and Kibos in Kisumu
- 5 Majengo in Nyeri
- 6 Mjini in Muranga,
- 7 Ntakira in Meru
- 8 Nubian Village in Yisii
- 9 Kambi Somali and Bondeni in Nakuru
- 10 Kambi Somali in Eldoret
- 11 Nubian settlement in Eldama Ravine and Koibatek Districts etc

The Coastal Land Problem

The colonial Government introduced a system whereby those claiming ownership rights within the Ten Mile Coastal Strip could get titles under the Land Titles Ordinance. This process gave undue advantage to the few who were aware of the office of the Recorder

of Titles. The majority of the local inhabitants at the Coast were ignorant of this procedure. They could therefore not lay any claim of ownership as envisaged in the Ordinance. All land inhabited by them was consequently declared Crown Land. Such land became Trust land at independence. Many people of Arab origin had acquired titles to vast parcels of land within the Ten-Mile Coastal Strip. To this day, they continue to collect rent from the local inhabitants. There is thus a twin problem of absentee landlordism and landlessness. During the constitutional reform hearings conducted by the Constitution of Kenya Review Commission, it emerged that this twin problem is a deeply felt grievance by the local coastal people. Many of the people are technically squatters on their own land.

Land titles have been issued to people who are not ordinarily resident in the coastal area contrary to the provisions of the constitution regarding the privatization of Trust land.

The prevailing situation in the 10-mile coastal strip is that land occupied by the indigenous Kenyans is still held under communal customary tenure as most of the land has not been adjudicated, hence there is potential for land grabbing and conflicts.

During the hearing the Commission received a complaint from a former Kadhi of Mombasa who was forcefully dispossessed of his land and could not get any assistance from the relevant authorities. This scenario is a common occurrence in the entire 10-mile coastal strip.

The Nubian Question

The Nubian Muslim community moved and settled in Kenya from the Sudan as part of the King's African Rifles (KAR) during the First World War. They were moved and settled in the Kibera area of Nairobi by the colonial Government. After the Second World War they made demands for land given the fact that their counterparts were being settled in what became known as the 'White Highlands'. The Nubians have lived in Kibera since then to the present time.

There are Nubian generations who know Kenya as their only home. However, Government policy has treated the Nubians as second-class citizens especially regarding their rights to the land they occupy. They have been denied Title Deeds to their land, yet other communities who have since moved into the area have acquired titles. As indicated above, the Nubian community, who have also settled in other regions of the country are in similar predicament:

1. The Commission found that in the Government urban development Planning policy, Mosques, cemeteries and other Muslim institutions are not provided for. The Committee was concerned that even in predominantly Muslim areas the official development plans provide for churches and do not provide for Mosques. Consequently, Muslims have no alternative but to purchase land for purposes of construction and development of their religious institutions.
2. The Commission received complaints to the effect that Muslim charitable institutions and Mosques have been paying land rent and rates, without enjoying exemption or waiver.
3. The Commission received complaints that the Wakf Commission has not been managed in a transparent manner resulting in gross loss of revenue to the detriment of the beneficiaries. Criticism was received of the manner

in which the Commissioners are appointed, and a demand was made that the Government urgently reviews the Wakf Commissions Act (Cap 109).

4. The Committee also received complaints that the entire NEP does not have a land registry restricting the economic development of the community.
5. The Committee found that in Lamu district, the indigenous people who settled in the district in the 10th Century have to date not been issued with Title Deeds whereas recent arrivals have received Title Deeds.

4.4 Adequate Representation and Effective Participation in Decision Making Process

The Muslim population, according to statistics accounts for one third of the total population in Kenya. Ideally on the basis of a fair and equitable representation, the Muslims ought to be awarded one third of all the appointments to public offices. Despite this, there have been complaints of discrimination and marginalization of Muslims both in political and administrative public appointments.

The Commission engaged Muslim audiences in various towns in the eight provinces across the country and received submissions from individuals and organizations on issues of concern to the community. Featuring prominently in nearly all the hearings was the crucial complaint regarding inadequate representation and lack of effective participation by the community in Government institutions and agencies. According to documents presented to the Commission on the issue of under – representation, the Muslim leaders have on numerous occasions raised it with relevant Government organs.

The under-representation of Muslims in Government has profoundly impacted the community's involvement in decision making processes. This in turn has resulted in the community lagging behind in all spheres of development. They feel justifiably marginalized. From the foregoing there is urgent need for affirmative actions in public appointments and especially at the decision making level; Cabinet, Permanent Secretaries, Court of Appeal Judges and High Court Judges, Heads of Departments, Heads of State Corporation, Ambassadors and other senior public appointments.

The Commission also found inadequate representation of Muslims in Government Commissions and Committees. The Kenya Law Reform Commission was singled out as a glaring example of a significant statutory body without any Muslim representation both at the Commissioners' level as well as the secretariat. The following organizations were among Government bodies cited as having inadequate Muslim representation:-

1. East African Legislative Assembly (EALA)
2. Electoral Commission of Kenya (ECK)
3. The Judiciary
4. National Constituency Development Committee
5. National Commission Against Drug Abuse (NACADA)
6. Kenya Anti- Corruption Commission (KACC)
7. Kenya Revenue Authority (KRA)

The Commission found in areas where Muslims are a minority that there was no representation in the decision making bodies at the local level. These include, amongst

others -

- 1 Constituency Development Fund (CDF)
- 2 District Development Committee (DDC)
- 3 District Education Board (DEB)
- 4 District Land Control Board
- 5 Bursary Committees
- 6 School Management Committee
- 7 Schools Board of Governors
- 8 Local Authorities

The Commission was informed that in areas where Muslims are a minority they are disadvantaged in the recruitment into the public service, especially in the disciplined forces

4.5 Under-Development and Investment

In nearly all the public hearings the Commission held one of the most critical issues raised was that of under-development and lack of incentive for investment in their areas both by the Government and the private sector. It was noted that majority of Muslims reside in the arid and semi arid land areas which constitutes more than 80 per cent of the country's land area.

This prevailing economic situation can be attributed to various historical factors through policies of political exclusion and marginalization by the colonial administration. This is further aggravated by the volatile security situation which obtains to-date.

Some of the salient concerns raised in this regard were -

- 1 Insecurity
- 2 Poor physical infrastructure (roads, water, electricity, telecommunication, air transport)
- 3 Poor health facilities
- 4 Poor education facilities
- 5 Inadequate food security
- 6 Lack of incentives for private sector investment
- 7 Lack of Title Deeds (as collateral)
- 8 Lack of market for main produce from the area (livestock, fishery, mangrove, mangoes)
- 9 Prohibitive interest-based financial system

This has led to a situation in which more than 60 percent of inhabitants of the region live in abject poverty.

In the midst of the high incidence of poverty lies an immense potential of natural resources. More than 70 percent of the national livestock population and unexploited commercial mineral wealth and tourism in Kenya are to be found in the region.

Lastly, on this issue, an appeal was made to the Commission that the Government urgently develops a Marshall plan for the area to address the under-development issue and encourage private sector investment. In addition, the Government should provide a conducive environment and incentives for investment.

CHAPTER FIVE

5.0 RECOMMENDATIONS AND CONCLUSION

It is commendable that the Government has undertaken wide reforms in the public sector which have embraced the concept of a human rights-based approach. The citizen has a role to play in governance and development and the citizen can now demand constitutional rights from the Government. Arising from the public hearings, the Commission deliberated on the issues raised and makes the following recommendations:

5.1 CITIZENSHIP AND REGISTRATION OF PERSONS

- 1 The Government should ensure that our porous borders are secured and have tight border patrols to prevent entry of illegal immigrants into the country
- 2 The Government should fast-track the formulation of a comprehensive policy to address the question of citizenship, immigration and registration of persons. There is also an urgent need for the review of all legislation affecting the same
- 3 The Government should initiate a process for the immediate return of all Kenyan Muslims who were unlawfully removed to foreign countries
- 4 The Department of Immigration should strictly comply with the provisions of Sec 8(2) of the Immigration Act in the deportations of persons and must satisfy itself beyond reasonable doubt that there is credible evidence that the person being deported is a non – Kenyan
- 5 The Government should urgently direct the Ministry of State for Immigration and Registration of Persons to eliminate all discriminative measures and practices against Kenyan Muslims with regard to the issuances of Identity Cards, Passports and Birth Certificates
- 6 The Government should direct the Ministry of State for Immigration and Registration of Persons to develop a secure waiting card for applicants of IDs with the photograph and other personal details
- 7 Discretionary powers of Immigration and Registration of Persons officers in issuance of Passports and Identity Cards should be curtailed
- 8 The Special Desk for the issuance of Passports for Muslims travelling to the Hajj should be institutionalised and strengthened
- 9 The issuances of Passports to Kenyan Muslims with restrictions on the validity period and destination should be eliminated
- 10 The provision of Passport services should be decentralized to include all Provincial Headquarters

- 11 The Ministry of State for Immigration and Registration of Persons should simplify their procedures and sensitize members of the public on the requirements for obtaining Passports, Identity Cards and birth certificates
- 12 The Government should consider granting citizenship to the following stateless Muslim communities: the Nubians, Makonde, Wachangamwe and Washirazi as provided under section 96 of the Constitution of Kenya
- 13 The Government should provide sufficient funds to the Ministry of State for Immigration and Registration of Persons to enable it adapt new technology, including automation of its services so as to eliminate corruption, fraud and brokerage
- 14 The Government should review the issuance of Work Permits and referred visas for non-Kenyan Muslims
- 15 The Department of Registration of Persons should be allocated sufficient budgetary provision to facilitate a wider coverage and a continuous process of registration
- 16 The Government should hasten the implementation of the Integrated Population Registration System within national registration agencies
- 17 The Ministry of State for Immigration and Registration of Persons should strictly adhere to its service charter in the issuance of national documents and put in place an effective monitoring and evaluation mechanism
- 18 The Government should harmonize the Citizenship Act, the Immigration Act and the Registration of Persons Act
- 19 The Vetting Committee for the Kenyan Muslims at the Department of Immigration Head Office, Nyayo House, should be abolished forthwith
- 20 The Government should establish an independent oversight body to handle complaints related to immigration, citizenship and registration of persons

5.2 SECURITY

- 21 The Government should establish an independent oversight body to handle complaints related to the operations of security agencies
- 22 The Government should ensure that our porous borders are secured and have tight border patrols to prevent terrorist and other criminal activities in the country
- 23 The security forces should not target communities for investigations or arrest on the basis of religion, ethnicity, race and origin
- 24 Due process of law should be adhered to and the law should not be deemed to be selectively applied during investigations, arrests, detentions and deportations
- 25 All searches by the security forces should be conducted with due regard to human rights

26. The Government should immediately institute independent investigations into the following:
 - a. The disappearance and the alleged kidnap of Farah Mohamed Abdullahi (ID No. 22644891) by the security forces as reported to Kasarani Police Station, Nairobi (OB 87/20/8/07) on the 20/8/2007.
 - b. Complaints of alleged human rights abuse and loss of property of Said Abeid Baswaleh (ID No. 2271116) reported at Makupa, Mombasa Police station (OB.37.25-4-2007) against the ATPU.
 - c. The alleged unlawful arrest and detention of Noor Sheikh Hassan (ID No. 20384214) by the ATPU at Liboi and Langata Police Stations.
 - d. The denial of Passport to Said Omar Abdallah (ID no. 20378763) by the security agents at Mombasa Passport Control Office.
27. The Government should strengthen its efforts in the training of security forces with respect to gender issues and provide sufficient gender desks in all public institutions.
28. The Government should officially rescind its decision to screen Kenyan Somalis and abolish the Somali Screening Cards.
29. The Government should enhance the collaboration and participation of Muslims in the community policing programme in fighting crime.
30. The Government should make it mandatory for security agencies to avail the particulars of all persons detained or arrested on suspicion of terror activities, to their families and lawyers, and any other person having a legitimate interest in the information within reasonable time.
31. The security agencies should permit independent human rights bodies, counseling, pastoral, or other services to have access to all facilities in which suspects are held.
32. The immediate cessation of the checking of National Identity Cards at the exit of North Eastern Province, particularly at the Tana River barrier bridge on the Nairobi-Garissa road.
33. The Government should review the operations and location of Tana River barrier bridge Police Check Point in Garissa.
34. The Government should, through a legislative framework, establish an autonomous multi-disciplinary body to replace the ATPU.
35. The Kenya Government should ensure that the security agencies comply with the provisions of the Vienna Convention on Consular Relations to non-Kenyan detainees.
36. The Government should review the role of security agents in issuance of Passports and IDs as well as in the registration of NGOs.

5.3 ACCESS TO AND ADMINISTRATION OF JUSTICE

- 37 The Government should restructure the office of the Chief Kadhi with the aim of strengthening it through allocation of adequate financial and human resources
- 38 The Government should transfer the office of the Chief Kadhi to Nairobi for ease of access to all Muslims
- 39 The Government should repeal all laws currently referred to as Mohammedan and replace them with Islamic Personal Laws
- 40 The Government should expand the Kadhi's Court to create an appellate system within its hierarchy
- 41 The Government should establish High Courts and more subordinate courts in Northern Kenya
- 42 The Government should be sensitive to the concerns of the Muslim community when reviewing laws, policies and regulations
- 43 The Government, as a matter of urgency, should appoint competent Muslim Lawyers as Commissioners and recruit other technical staff to the KLRC
- 44 The Government, as a matter of urgency, should review the Laws governing the Wakf Commission

5.4 LANDS

- 45 The Government should expedite the processing and issuance of Title Deeds to members of the Muslim community specifically in informal urban settlements including Kibera, Majengo, Kariakor in Nairobi, Kambi Somali in Eldoret, Mjini Village in Murang'a, Manyatta Arab in Kisumu, to mention but a few
- 46 The Government should immediately conduct a special land adjudication programme in Lamu for the purpose of issuing the indigenous Muslim inhabitants with Title Deeds
- 47 The Government should consider Muslims as a special group in its settlement programmes
- 48 The Government should urgently establish a Land Registry in North Eastern Province and issue Title Deeds in urban settlements in Northern Kenya
- 49 The Government in all physical planning and development programmes should provide land for Mosques, cemeteries and other Islamic institutions
- 50 The Government should exempt all Mosques and other Islamic charitable institutions from paying land rent and rates

5.5 EDUCATION

- 51 The Government should expedite the registration of Muslim institutions of higher learning (Mombasa Islamic University amongst others) with a view to encouraging and improving the standards of education in Muslim areas
- 52 The Government should provide sufficient Islamic Religious Education (IRE) Muslim Teachers in all public Schools so as to fully assimilate the teaching of Islamic studies into the Schools curriculum
- 53 The Government should direct the Ministry of Education to ensure that the constitutional right to freedom of worship for pupils professing the Muslim faith is not infringed
- 54 The Government should ensure that all Muslim educational institutions which were previously taken over by the Ministry of Education or other Faith Based Organizations (FBOs) do revert to the respective Muslim community
- 55 The Government should direct Kenyatta University to allow the Kenyatta University Muslim community to resume immediately the construction of the Mosque as earlier directed by this Commission
- 56 The Government in its policies should encourage all public institutions to safeguard the constitutional right to freedom of worship
- 57 The Government should review policies on scholarships from friendly countries earmarked for Muslim students to ensure that they reach the intended beneficiaries
- 58 The Government should ensure that there is an affirmative policy in place in the allocation of bursaries and admission to institutions of higher learning
- 59 The Government should set up a University in North Eastern Province as a matter of urgency
- 60 The Government should consult and involve the National Muslim Education Trust in the development of education policies and laws

5.6 REPRESENTATION AND PARTICIPATION

- 61 The Government should undertake affirmative action for Muslims in the appointments to the Public Service particularly at policy and decision-making levels with respect to the Cabinet Permanent Secretaries Court of Appeal and High Court Judges Departmental Heads Ambassadors Heads of State Corporations and other senior public appointments
- 62 The Government should also undertake affirmative action for Muslims in recruitment into the public service, especially in the disciplined forces in areas where Muslims are a minority

5.7 DEVELOPMENT AND INVESTMENT

- 62 The Government should develop a Marshal plan with adequate budgetary provision for predominantly Muslim areas to address the historical marginalization and under – development
- 63 The Government should provide the necessary incentives for private sector development and investment in Muslim areas
- 64 The Government should establish a Livestock Marketing Development Authority and construct Abattoirs in Northern Kenya
- 65 The Government should commercialize Wajir Airport for the purpose of export of livestock and livestock products
- 66 The Government should invest in the development of road infrastructure in Northern Kenya
- 67 The Government should connect the Northern Kenya region to the national power grid
- 68 The Government should create a conducive environment and establish a statutory body to exploit the existing potential in commercial minerals, tourism and livestock in Northern Kenya
- 69 The Government should review de-registration of international Islamic NGOs in order to promote development amongst the Muslim community
- 70 The Government should waive tax duty due on donations to Islamic charitable organizations in Kenya

5.8 GENERAL RECOMMENDATIONS

- 71 The Government should create a permanent advisory body to advise the state on Islamic matters and act as liaison between Government and the Muslim community
- 72 The Government should conduct civic education on a continuous basis
- 73 The Government should ensure that the media plays its rightful role particularly in its portrayal of the Muslim community

5.9 CONCLUSION

At the time of writing this final report Kenya is gradually emerging from the ashes of the recent political upheaval following the December 2007 general elections. The situation has brought to the surface the weakness of our highly centralized system of governance which has historically ethnicized politics with the effect of excluding many regions and

communities from equitably accessing national resources. From the Commission's analysis of the findings, Northern Kenya is evidently one such region and the Muslims are one such community. The impact has been to weaken national unity and disintegration of the country after the December 2007 elections.

Kenya should now seize this watershed moment in its political history to address all past injustices and ensure that there is equitable distribution of national resources. This is the focus of agenda item No. 4 of the National Dialogue and Reconciliation mediation talks which were led by H.E. Dr. Kofi Annan, former United Nations Secretary General. The mediation talks acknowledged that poverty, inequitable distribution of resources and perceptions of historical injustices and exclusion on the part of segments of the Kenyan society constitute the underlying causes of the prevailing social tensions, instability and cycle of violence. One of the main proposals of the talks was the establishment of a national Truth, Justice and Reconciliation Commission to address past historical injustices. It is the hope of the Commission that some of the findings in this report will find their way into the proposed Truth, Justice and Reconciliation Commission.

Finally, the Commission found the complaints raised by the Muslim community credible and deserving of serious redress. The Commission therefore recommends that the Government should develop specific regional policies that will seek to integrate the Muslim community with other Kenyan communities in the development agenda and build national cohesion and unity.

APPENDIX II: INITIAL PROGRESS REPORT



PRESIDENTIAL SPECIAL COMMITTEE ON SPECIFIC CONCERNS OF THE MUSLIM COMMUNITY

COMMITTEE MEMBERS

Eng. AMBISHAYO CBS CBS LDK (Chairman)
Hon. S. AMOS WAKO JCH LCAAGU SC MP
Mr. Cyrus E. GITHAU CBS
Mr. Emmanuel M. KAMUNDA CBS
Ms. Dorothy N. ANJOKI CBS
Mr. Thairu Mutinda
Sheikh Abul Karim A. Abdulaziz
Aid. Yussuf Muzalin Mabat
Mr. Hassan El Akach
Mr. Shuaib Magan
Aid. Amro M. M. Ahmad - Secretary

SECRETARIAT

2nd Floor
Kenya International Conference Centre
P. O. Box 30872-00100, NAIROBI
Tel: 254 020 341082 246278

15 November 2007

His Excellency Hon. Meadi Kibaki OGH MP
President and Commander-in-Chief of the
Armed Forces of the Republic of Kenya
State House

NAIROBI

Your Excellency

INITIAL PROGRESS REPORT OF THE SPECIAL ACTION COMMITTEE TO ADDRESS SPECIFIC CONCERNS OF THE MUSLIM COMMUNITY IN REGARD TO ALLEGED HARASSMENT AND/OR DISCRIMINATION IN THE APPLICATION/ENFORCEMENT OF THE LAW

As your excellency is a member of the above-mentioned Special Action Committee, on the 14th October 2007 I took information and a direct line to the public on the concerns of the Muslim community with regard to alleged harassment and/or discrimination in the process of the application of the law in Kenya in order to address such issues.

Part of the Terms of Reference read: "The Subcommittee is to submit to your excellency an initial report of its preliminary findings within one month of the appointment of the Committee."

We have complied our functions as appointed. We now have the honour to submit this Initial Progress Report which contains our unanimous initial findings and recommendations.

We are happy to report that I thank your Excellency for the opportunity that you have given us to do this.

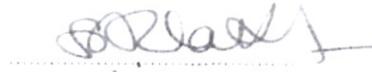
Accept, Sir, assurances of our highest regard.

Yours faithfully

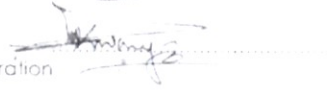
Chairman:
A. M. H. Sharawe



Committee Members:
Attorney General



Permanent Secretary
Ministry of State for Provincial Administration
and Internal Security




Permanent Secretary
Ministry of State for Immigration
and Registration of Persons



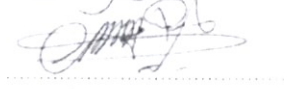
Permanent Secretary
Ministry of Justice and Constitutional Affairs

Mamini

Permanent Secretary
Ministry of Foreign Affairs



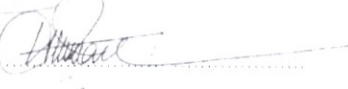
Sheikh Abubakar A. Abubakar
(Abu Hamza)



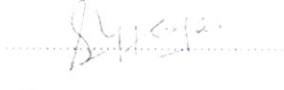
Ambassador Yunis M. Mahat



Mr. Hassan Lakiha



Mr. Shiraz Magan



Secretary
Ambassador Amina Mohamed





**Initial Progress Report of The Special
Committee to Address Specific Concerns of
the Muslim Community in Regard to Alleged
Harassment and/or Discrimination in the
Application/Enforcement of the Law**

Submitted to:

**His Excellency Hon. Mwai Kibaki, CGH, MP
President and Commander-in-Chief
of the Armed Forces of the
Republic of Kenya**

On 15th November, 2007

INTRODUCTION

Mr. A. M. H. Sharwa, the Attorney General, the Permanent Secretary, Ministry of State for Provincial Administration and Local Government, the Permanent Secretary, Ministry of Immigration and Registration of Persons, the Permanent Secretary, Ministry of Justice and Constitutional Affairs, the Permanent Secretary, Ministry of Foreign Affairs, Sheikh Ali Hariza, Ambassador Yunis M. Mahdi, Mr. Hassan Lakiibu, Mr. Shiraz Marjan and Ambassador Amira Mohamed, were appointed by His Excellency the President of the Republic of Kenya, Hon. Mwai Kibaki, under Section 23(1) of the Constitution of Kenya, as per

Gazette Notice Number 10705 dated 31 October 2002.

CITATION

To look into and address the specific concerns raised by the Muslim community with regard to alleged harassment and/or discrimination in the process of the application of the law, particularly as regards security issues.

TERMS OF REFERENCE

- a) To receive individual complaints of alleged harassment and/or discrimination in the treatment of persons who profess the Muslim faith with regard to security issues.
- b) To ascertain whether on the face of it there is merit in a complaint and whether there is any ground for complaint appropriate, which may include referring it to the responsible department of Government for action.
- c) To inquire into allegations of wrongful or illegal denial of entry into or exit out of Kenya by Kenyan citizens who profess the Muslim faith.

- d) To take immediate action as far as possible to solve the problem discussed in (a), (b) and (c) above;
- e) To oversee, coordinate, monitor and follow up specific action on identified problem cases;
- f) To review regulations, codes of conduct, processes and mechanisms in the judicial service and recommend changes, necessarily to avoid or reduce similar irregularities;
- g) To prepare advisory opinions or proposals on appropriate remedial action to be taken by the Permanent Secretaries or chief executives of responsible Ministries or public bodies;
- h) To recommend appropriate policy and legislative reforms.

Under Gazette Notice Number 10008 the Committee members Secretary and Assisting Counsel were appointed as hereunder:

Chairman

A. M. H. Sharawe

Committee Members

Attorney General

Permanent Secretary, Ministry of State for Provincial Administration and Internal Security

Permanent Secretary, Ministry of State for Immigration and the Registration of persons

Permanent Secretary, Ministry of Justice and Constitutional Affairs

Permanent Secretary, Ministry of Foreign Affairs

Sheikh Adubakar A. Abubakar (Abu Hamza)

Ambassador Yunis M. Mahat

M. H. J. Lakisha

M. S. M. Mujir

Secretary

Ambassador Amina C. Mohamed

Under Gazette Notice Number 10008 the Terms of Reference were set out and the Committee members were directed to carry out the functions stated in the citation with a duty to inquire and report and submit written reports to the Commission. The Commission's responsibility commenced from the date of the said Gazette Notice. Appendix "A" constitutes Gazette Notice Number 10008.

The Committee shall prepare and submit to the President an initial progress report on its deliberations within one month from the date of its appointment. This translates to the 1st November 2007.

In accordance with the powers granted to the Committee under Gazette Notice Number 10008 Sections 3 (b) and (c) the Committee started work from 22nd October 2007. The Rules of Procedure for the Conduct and Management of Committee meetings as well as public hearings were drawn and adopted. Appendix "B" hereof constitutes the said Rules of Procedure.

PART I THE PROCEDURE

1. The Committee acknowledges that it is not a judicial tribunal. However, it set out the Rules of Procedure for the Conduct and Management of its proceedings to enable it to have a standard method for the receiving of complaints from the public. The Committee drafted forms which all persons presenting their complaints filled in as to ensure that any equitable action to be taken would be centred on cogent evidence.
2. The Committee relied on documentary evidence of alleged acts of discrimination against Kenyan citizens who profess the Muslim faith. These documents were treated as primary evidence for purposes of resolution of complaints.

3. Where documentary evidence was not available, the Committee collected information on the particulars of the persons who submitted complaints before it.
4. Whilst conducting the public hearings, the Committee heard all the complaints brought before it. However, two of the complaints were heard in private.
5. The schedule of public hearings was drawn, adopted and published in the local press on the 11th October 2007 with reminders being published on the 26th and 28th October 2007, as well as one on the 4th November 2007. Appendix "C" hereof constitutes the said advertisement of the public hearings.

PART II THE PUBLIC HEARINGS

1. The Committee held its first public hearing in Nairobi at the Kenya International Conference Centre on the 5th and 6th November 2007. Thereafter hearings were held as scheduled in Mombasa and Garissa.
2. The hearings raised the following main areas of concern from persons who profess the Muslim faith:
 - *Crave and systematic violations of human rights by security agents in the regions visited*
 - *Discrimination in the registration of persons and in the acquisition of passports*
 - *Unlawful removal of Kenyans who profess the Muslim faith from Kenya. Annexed is Appendix D which contains a list of names of persons unlawfully removed*
 - *Mismanagement of Kenyans who profess the Muslim faith when entering the country at various entry points*

- Police harassment and brutality whilst dealing with Muslims. Of particular concern is the Anti Terrorism Police unit which was singled out as operating extra judicially
 - Discrimination in educational institutions
 - Inadequate provision of public institutions in Muslim regions
 - Discrimination in public recruitment
 - The state of affairs with regard to ownership of land is reported to be highly discriminatory
 - Grave deficiency in the provision of judicial services
 - Inappropriate and unfair treatment of the denials by Islamic governments and organisations
 - Closure of Islamic Non Governmental Organisations set up to support local communities in areas such as health, education and culture
 - The lack of investment in predominantly Muslim areas
 - The closure of the Kerwa Fomal Ebrah and its economic impact
 - Restriction of movement into and out of cities adjacent to refugee camps within the Lagdera and Fati districts
3. The Committee in accordance with Section 2 (4) of the Cairo Declaration took action immediately and addressed the core of the complaint. Others are under review and being pursued by the Committee.

PART III PERLIMINARY FINDINGS

The Committee finds substance in the complaints raised so far by the Muslim community.

PART IV. RECOMMENDATIONS

The Committee recommends as follows, **THAT**

1. The Ministry of Foreign Affairs be directed to initiate procedures for the immediate return of Kenyans who were unlawfully removed from the country to foreign countries as per the list in Appendix D.
2. The Ministry of Lands and Settlement should be directed to process and issue expeditiously title deeds to members of the Muslim community specifically in Kibera, Majengo, Karakor in Nairobi and Mombasa, Malindi, Kwale and Lamu.
3. An urgent directive be issued to the Ministry of State for Immigration and Registration of Persons to remove all discriminative measures and practices against Muslims.
4. The Special Desk for the issuance of passports for Muslims travelling for Hajj should be institutionalised and strengthened.
5. Islamic Religious Education should be integrated into the public education system with immediate effect. Pupils professing the Muslim faith be permitted to practice their faith freely in all educational institutions.
6. All security checks within the North Eastern Province and particularly at Police barriers should be done without violating the human rights of the area citizens.

7. Immediate establishment of more sub-judicate courts and a High Court in North Eastern Province.
8. The Ministry of Lands and Settlement should be opening an establishment of a Judiciary in North Eastern Province.
9. The Ministry of Education should expedite the issuance of Letters of Accreditation to Muslim institutions, and in particular to the Thika Islamic College and Mombasa Islamic University whose applications have been pending for many years.
10. The deregistration of International Islamic NGOs should be reviewed.
11. All law enforcement agents and specifically the Anti-Terrorism Police Unit should operate strictly within the law in the discharge of their mandate.
12. The Attorney General to direct the Commissioner of Police to carry out immediate investigations into the disappearance of one Mr. Farah Mohamed Abdillahi (Identity Card Number 22644891 whose disappearance was reported to Kasarani Police Station on 02nd August 2007, and entered as OB 87/20/8/07).
13. The Ministry of Foreign Affairs be directed to follow up on the case of Abdillahi Adan Sheikh Ali who is being held in Medina in Saudi Arabia.
14. Taxation on donations made to Muslim charitable organisations be waived.
15. A Judicial Commission of Inquiry be established to audit all the past human rights violations in North Eastern Province including the Wajale incident.

APPENDIX "B"

**RULES OF PROCEDURE OF THE PRESIDENTIAL SPECIAL COMMITTEE
ON SPECIFIC CONCERNS OF THE MUSLIM COMMUNITY**

The Presidential Special Committee makes the following rules for the conduct and management of proceedings of the public hearings:

1. The Committee shall hold public hearings at places and at such times as will be determined by the Committee. The public shall be admitted to all or any specified part of the proceedings. The Committee may exclude any person from any part of the proceedings if satisfied that it is desirable to do so for the preservation of order, for the conduct of the hearings, or the protection of the persons, property or reputation of any person referred to in the course of the hearings.
2. No matter shall be heard that concerns or relates to any matter prejudicial to the security of the State or the Head of State in public.
3. The Committee may hear the evidence of any individual or group in private.
4. The Committee shall have the powers to determine the duration of every individual submission before it, and subject to any such direction, every submission shall not exceed ten minutes.
5. The Committee shall require all persons making submissions before it to properly identify themselves and provide all relevant personal details.
6. The submissions by the public may be oral or in writing.

7. Any person who voluntarily says or writes anything in any matter brought before the Committee shall be entitled to make comments in rebuttal before the Committee.
8. The Committee may require the production of further information on any point relating to any matter before them and may recall any person to give further information.
9. The Committee may take immediate action as far as is possible to resolve any proven individual complaints of harassment and/or discrimination.
10. The Committee, in reaching a decision may use official reports of any previous investigations or the contents of a public notice.
11. All public hearings of the Committee shall be conducted with decorum at all times and members shall carry themselves with due respect and courtesy and refrain from unbecoming conduct during the hearings.

MEETINGS OF THE COMMITTEE

1. The Committee shall hold meetings on notice from the Secretary.
2. The meetings shall be presided over by the Chairman of the Committee. In the absence of the Chairman the members shall nominate one from amongst themselves to preside over the meeting. In the absence of the Secretary, the Acting Council shall take the minutes.
3. Meetings of the Committee shall be conducted with decorum at all times and members shall carry themselves with due respect and courtesy.

4. Members of the Committee shall treat all matters deliberated and handled within the auspices of the Committee with the strictest confidence at all times.
5. The Chairman and the Secretary shall be the spokespersons for the Committee with regard to making public statements on its matters.
6. The quorum for the Committee shall be five (5) members and/or their alternates.
7. Decisions of the Committee in meetings shall be by way of consensus.
8. The Committee shall set up sub-committees which shall be government funded and which shall perform the duties specifically allocated to them.

REPORTING

1. The Secretary shall ensure that the initial Report is prepared and made ready for presentation to the Committee on or before the 14th November 2007. The Committee shall endorse the report for onward presentation to the President of the Republic of Kenya on or before the 14th November 2007.
2. The Final Report of the Committee shall be submitted on or before the 16th February 2008 unless otherwise determined.
3. The reports shall be produced in bound hard copy copies.

GENERAL

1. Any circumstances not elaborated in the present Rules shall be determined by the Committee as and when they arise.
2. The Committee may amend these Rules at any time.

APPENDIX "C"

PRESS ADVERTISEMENT OF PUBLIC HEARINGS

PRESIDENTIAL SPECIAL COMMITTEE ON SPECIFIC CONCERNS OF THE MUSLIM COMMUNITY

PUBLIC HEARINGS

H.E. Mwai Kibaki, CUP, MP, the President and Commander in Chief of the Armed Forces of the Republic of Kenya, on 15th October, 2007, appointed a Special Action Committee to address Specific Concerns of the Muslim Community in regard to alleged harassment and/or discrimination in the application/enforcement of the law particularly as regards security issues.

Members of the Committee are -

E.H. A.M.H. Sharawe - (Chairman)

Members

- Attorney General
- ES, Ministry of State for Provincial Administration and Internal Security
- ES, Ministry of State for Immigration
- ES, Ministry of Justice and Constitutional Affairs
- ES, Ministry of Foreign Affairs
- Sheikh Abdullahi A. Abudokar (Sheikh Abu-Hamza)
- Amb. Yunis Madim Mahat
- Hussan Lakicha
- Shraz Magan
- Amb. Amina Mohamed - (Secretary)

Mandate

The Committee has been mandated to carry out the following functions:

- a) To receive individual complaints of alleged harassment and/or discrimination in the treatment of persons who profess the Muslim faith with regard to security operations;
- b) To ascertain whether, on the face of it, there is material in a complaint, and thereafter to act on the complaint appropriately;
- c) To inquire into allegations of wrongful or illegal denial of entry into or exit out of Kenya by Kenyan citizens who profess the Muslim faith;
- d) To take immediate action so far as is possible to solve the problem disclosed in (a), (b) and (c), above;
- e) To oversee, co-ordinate, monitor and follow up specific action-identified problem cases;
- f) To review regulations, codes of conduct, processes and procedures in the public service and recommend changes necessary to avoid or reduce similar complaints;
- g) To prepare advisory opinions or proposals on appropriate remedial action to be taken by the Permanent Secretaries or chief executives of responsible Ministries or public bodies;
- h) To recommend appropriate policy or legislative reforms.

Schedule of Hearings

The Committee will hold public hearings as follows -

Place	Venue	Date	Time
Nairobi	KICC	5 th - 6 th November 2007	9:00 - 12:00 2:30 - 4:30
Mombasa	Juma'at Aqa Khan Hall	7 th - 8 th November 2007	9:00 - 12:00 2:30 - 4:30
Garissa	Noroad Parade Hall	13 th - 14 th November, 2007	9:00 - 12:00 2:30 - 4:30
Kisumu	Municipal Hall	27 th November,	9:00 - 12:00

		2007		2:30 – 4:30
Kakamega	Municipal Hall	28 th	November	9:00-12:00
		2007		2:30 – 4:30
Eldoret	Municipal Hall	29 th	November	9:00-12:00
		2007		2:30 – 4:30
Nakuru	Municipal Hall	4 th	December	9:00-12:00
		2007		2:30 – 4:30
Nairobi	PC's Information Hall	5 th	December	9:00-12:00
		2007		2:30 – 4:30
Nairobi	Rural Agricultural Training Centre	6 th	December	9:00-12:00
		2007		2:30 – 4:30

The Committee appeals to Imams, other Muslim leaders, Muslim and other relevant organizations to sensitize the Muslim community on the mandate and the programme of work of the Committee.

The Secretariat
 Presidential Special Action Committee
 Kenyatta International Conference Centre
 2nd Floor
 P.O. Box 30872-00100
NAIROBI

Tel: 254-020-34 982 or 246278
 Email: psac@nrb.go.ke

Amb. Amina C. Mohamed
SECRETARY

APPENDIX "D"

LIST OF PERSONS REMOVED FROM KENYA

NO	NAME	PLACE	DATE
1	Aden Sheikh Abdullahi	Ethiopia	20/01/07
2	Saghi Saifri	Ethiopia	20/01/07
3	Salam Ngama	Ethiopia	20/01/07
4	Bashir Hussein Mohammad Sader	Chiroa Ethiopia	27/01/07
5	Said Hanisi Mohamed	Ethiopia	27/01/07
6	Swah Ali Turza	Ethiopia	27/01/07
7	Hassan Ghahani Mwalimu	Ethiopia	27/01/07
8	Husein Ali Said	Ethiopia	27/01/07
9	Tsunja Salomon Adam Avila	Ethiopia	27/01/07
10	Abdi Muhammad Abd'ulahi	Ethiopia	27/01/07
11	Salim Awarith Salim	Ethiopia	27/01/07
12	Abdi Ismail Mohamed	Ethiopia	27/01/07
13	Kasim Muxo Mwarusi (brother to 14 below)	Ethiopia	10/02/07
14	Ali Muxo Mwarusi	Ethiopia	10/02/07
15	Abdullah Halifan Tondwe	Ethiopia	10/02/07
16	Nasru Tuko	Ethiopia	-
17	Mohammed Said Mohamed	Ethiopia	-
18	Mohamed Abdulmalik	Guantanamo Bay, Cuba	-

APPENDIX III: LETTER OF EXTENSION OF THE TERM OF THE COMMITTEE



OFFICE OF THE PRESIDENT
PERMANENT SECRETARY, SECRETARY TO THE CABINET
AND HEAD OF THE PUBLIC SERVICE

Telegraphic Address: RAO
Telephone: Nairobi 227411
When replying please refer to
Ref. No. OP/CAB.17/110A
and date

P.O. Box 62345-00200
NAIROBI

11th March, 2008



Eng. A.M. H. Sharawe
Chairman
Presidential Special Action Committee on
Specific Concerns of the Muslim Community
NAIROBI

Dear *Eng. A.M.H. Sharawe*

EXTENSION OF THE TERM OF THE COMMITTEE

Reference is made to your letter Ref. No. PSC COMPLY VOL.1 of 15th January, 2008 on the above subject matter.

Following your request for an extension of Presidential Special Action Committee on Specific Concerns on the Muslim Community's term to on or before the 30th June, 2008, it is **agreed** that the Committee will be expected to conclude all its works inclusive of writing the report and presentation of the same to H.E. the President **by 31st March, 2008.**

Please take further necessary action.

Yours sincerely,

for **AMB. FRANCIS K. MUTHAURA, EGH**
PERMANENT SECRETARY, SECRETARY TO THE
CABINET AND HEAD OF THE PUBLIC SERVICE

APPENDIX IV: LIST OF PUBLIC OFFICERS CONSULTED BY THE COMMITTEE

- Office of the President, Cabinet Office**
- 1 Amb Francis K Muthaura, EGH
Permanent Secretary, Secretary to the Cabinet
and Head of the Public Service
- 2 Mr Francis K. Musyimi, CBS
Former Principal Administrative Secretary
- Ministry of State for Immigration and
Registration of Persons**
- 3 Mr Emmanuel M Kisombe, CBS
Permanent Secretary, Ministry of State for
Immigration and Registration of Persons
- 4 Mr Joseph K Ndathi
Director, Immigration
- 5 Mr Peter B Kusimba
Commissioner, Refugees Department
- 6 Mr Edward K Rintaugu
Assistant Director
- 7 Ms Jane O Nyandoro
Chief Immigration Officer
- 8 Ms Lucy N Njihia
Chief Immigration Officer
- 9 Ms Everlyn T Cheluget
Chief Immigration Officer
- 10 Mr Maurice M Anyanda
Chief Immigration Officer
- 11 Dadu s Katelo
Refugee Department, US
- 12 Anastasia Mutua
Civil Registrar
- 13 Mr Henry M Karanga
Senior Assisting Principal Registrar
- 14 Mr John M Kinyumu
Senior Registrar
- 15 Mrs Joice W Mugo
Principal Civil Registrar
- 16 Mr Reuben Kimotho
SAPR Director
- Ministry of Education**
- 17 Prof Karega Mutahi, CBS
Permanent Secretary, Ministry of Education
- 18 Prof George Godia
Education Secretary
- 19 Mr David Siele
Director of Higher Education
- 20 Mr Stephen Karaba
Ag Director of Basic Education
- 21 Mr Luka Spira
Representative, Teachers' Service Commission
- Ministry of Lands**
- 22 Mr Z Mabeya
Commissioner of Lands
- 23 Mr Augustine Masinde
Deputy Director of Physical Planning, Ministry
of Lands
- Ministry of Local Government**
- 24 Mr Reuben Rotich
Deputy Secretary of Administration, Ministry of
Local Government
- Ministry of State for National Heritage**
- 25 Mrs Alice K Mayaka, OGW
Permanent Secretary, Ministry of State for
National Heritage
- 26 Mr David Isoe
Executive Director, NGOs Co-ordination Board
- Ministry of State for Youth Affairs**
- 27 Mr Japheth K Mwanja, CBS
Director of National Youth Service (NYS)
- Office of the President, Provincial
Administration and Internal Security**
- 28 Mr Ernest Munyi, EBS
Provincial Commissioner, Coast Province
- 29 Mr Kiritu Wamae, EBS
Provincial Commissioner, North Eastern Province
- 30 Mr Paul Olando, EBS
Provincial Commissioner, Nyanza Province
- 31 Ms Clare Omollo
Personal Assistant to the Provincial
Commissioner, Western Province

32. Mr. Hassan Noor Hassan, EBS
Provincial Commissioner, Rift Valley Province
33. Mr. Japheth Rugut, EBS
Provincial Commissioner, Central Province
34. Ms Shufar Omar
Personal Assistant to the Provincial
Commissioner, Eastern Province
35. Mr. Benard Kinyua
District Commissioner, Uasin Gishu District
36. Mr. Geoffrey Mayama
Ag. District Commissioner, Isiolo District

Other Public Officers

37. Hon. Farah Maalim, MP
Deputy Speaker of the National Assembly
38. Mr. Abdi Ismail
Office of the Deputy Speaker
39. Sheikh Hamad Mohamed Kassim
Chief Kadhi
40. Mr. Kamau Muthanua
Ministry of Justice and Constitutional Affairs
41. Mr. Anthony I. Okara
State Law Office
42. Mr. Njonjo Mue
Kenya National Commission on Human Rights
(KNCHR)
43. Hassan Omar
Kenya National Commission on Human Rights
(KNCHR)

Kenyatta University

44. Prof. Olive Mugenda
Vice Chancellor, Kenyatta University
45. Prof. Daniel Mugenda
Deputy Vice Chancellor, Kenyatta University
46. Prof. Onesmus Ole Moi Yoi
Chairman, Kenyatta University Council
47. Dr. Jamleck Mutugi
Member, Kenyatta University Council
48. Ms Jennifer Muna
Member, Kenyatta University Council
49. Prof. O. Njula
Kenyatta University
50. Mr. Godfrey Mse
Registrar, Administration, Kenyatta University
51. Dr. N. M. Karagu
Registrar, (F, P & D), Kenyatta University
52. Mr. Gabriel Katana
Registrar, Academic Affairs, Kenyatta University
53. Prof. Muluvi
Kenyatta University
54. Mr. Farid R. Hamir
Kenyatta University

APPENDIX V: LIST OF MUSLIM LEADERS CONSULTED BY THE COMMITTEE

1. Abdallah Ali
Supreme Council of Kenya Muslims (SUPKEM)
2. Hussein Shariff Omar
SUPKEM
3. Hassan Ole Naado
SUPKEM
4. Ibrahim Sadala
Majlis Ulamaa (K)
5. Anas Ali Abdalah
Majlis Ulamaa (K)
6. Nura Ng'ang'a
Muslim Human Rights Forum (MHRF)
7. Mohamed Maloba
Muslim Human Rights Forum (MHRF)
8. Hussein Khalid
Muslims for Human Rights (MUHURI)
9. Dr. Ahmed Yasin
Chairman, Muslim Education and Development
Network (MEDAN)
10. Abdulatif Sheikh
MEDAN
11. Sheikh Hamad Mohamed Kassim
Chairman, National Education Muslim Trust
12. Hassan Mohamed
National Education Muslim Trust
13. Juma Ali Munga
Islamic Foundation
14. Zool Nimji
Secretary General, Ummah Foundation
15. Mohamed O. Warfa
Chairman, Jamia Mosque Committee (JMC)
16. Mahmoud Farouq Adan
Vice Chairman, Jamia Mosque Committee (JMC)
17. Abdulatif Esajee
Treasurer, JMC
18. Abdul B. Khamid
Secretary, JMC
19. Ibrahim Ahmed
Jamia Mosque Committee (JMC)
20. Dr. Ekeru Aukot
Executive Director, Kituo cha Sheria
21. Soipan Tuya
Kituo cha Sheria
22. Kigen Korir
Kituo cha Sheria
23. Riziki Omar
Kituo cha Sheria
24. Adan Mohamed
Ahmed Abdikadir & Co. Advocates
25. Ali Mahmoud
Mohamed & Lethome Advocates
26. Ibrahim Lethome
Mohamed & Lethome Advocates
27. Mohamed Bulle
Hassan, Bulle & Co. Advocates
28. Ms Rahma Jillo
NGOs Co-ordination Board

APPENDIX VI: LIST OF MUSLIM AND HUMAN RIGHTS ORGANIZATIONS CONSULTED BY THE COMMITTEE

1. Supreme Council of Kenya Muslims (SUPKEM)
2. Majlis Ulamaa
5. Muslim Human Rights Forum (MHRF)
6. Muslims for Human Rights (MUHURI)
7. Young Muslim Association
8. Muslim Education and Development Network (MEDAN)
9. National Education Muslim Trust
10. Islamic Foundation
11. Kenya National Human Rights Commission (KNHRC)
12. Kenya Human Rights Commission (KHRC)
13. Kituo cha Sheria
14. Jamia Mosque Committee (JMC)

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