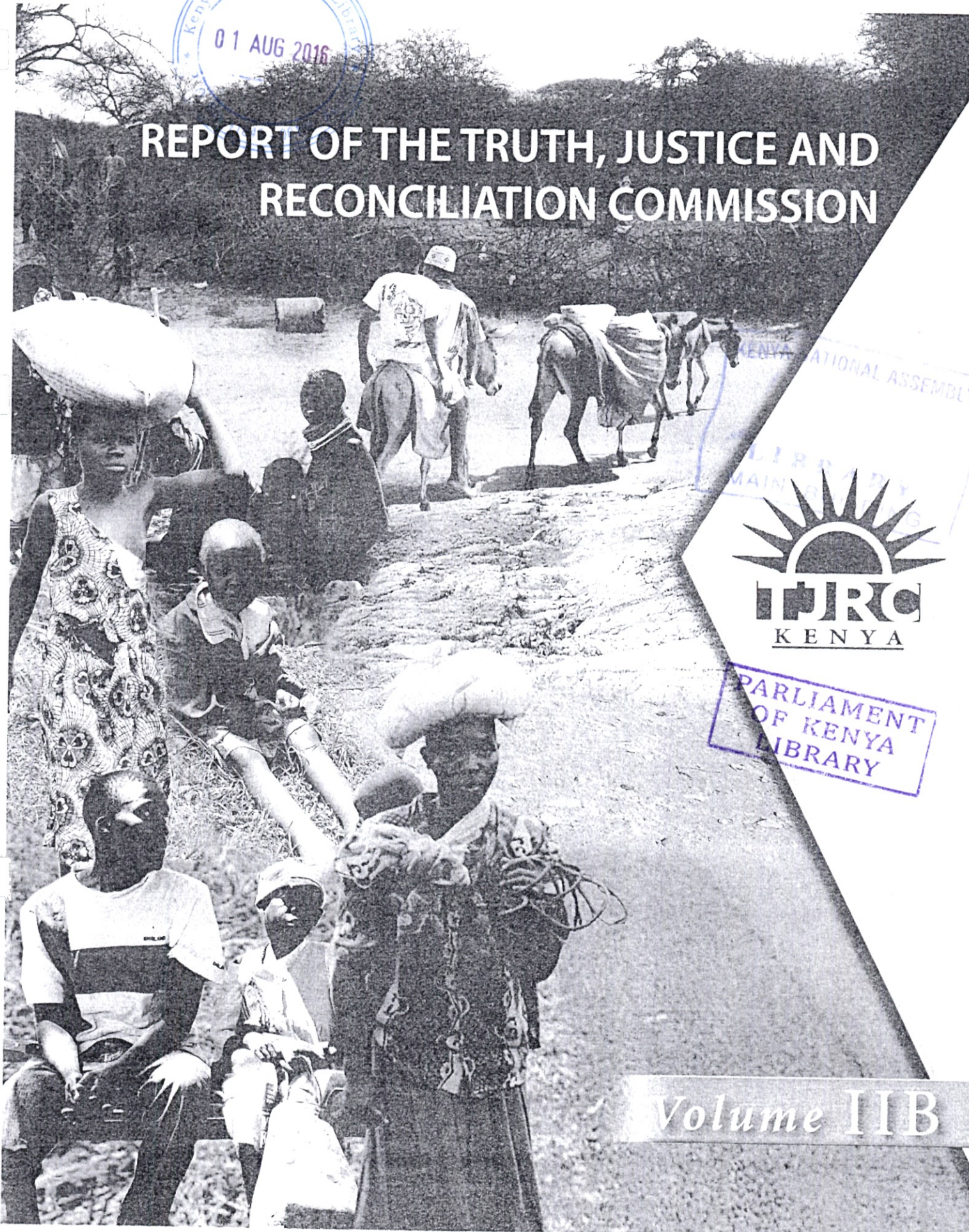


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REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION



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Volume IIB



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

Volume IIB

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Published by Truth Justice and Reconciliation Commission (TJRC), Kenya

ISBN: 978-9966-1730-3-4

Design & Layout by Noel Creative Media Limited, Nairobi, Kenya

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

Nairobi

3 May 2013

LETTER OF TRANSMITTAL

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

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

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

Amb. Bethuel Kiplagat
Chairperson

B. A. Kiplagat

Tecla Namachanja Wanjala
(Vice Chairperson)

Tecla Namachanja Wanjala

Judge Gertrude Chawatama

Judge Gertrude Chawatama

Amb. Berhanu Dinka

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Maj. Gen (Rtd) Ahmed Sheikh Farah

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Foreword

This volume focuses on some of the unique parts of the Commission's mandate concerning historical injustices related to land, socio-economic rights, economic crimes and grand corruption. This part of the mandate is unique not because there have been no previous investigations into these violations (though some of the violations have not been subject to much attention). Nor is this part of the mandate unique because there have been no previous commissions of inquiry with respect to them (though many of these violations have not been subject to previous commissions of inquiry). Rather, this part of the mandate is unique because the Commission is the first truth commission to have an express obligation to look at such a broad range of violations, including land, socio-economic rights, and grand corruption.

Because truth commissions in the past have not focused on these violations – though some did address them in part in their reports – the Commission was forced to think creatively about how to capture the narratives and experiences of Kenyans with respect to these violations. Statement takers discovered, for example, that when asked to talk about human rights violations within our mandate, most statement givers focused on bodily integrity violations (such as killings, torture, massacres, etc.) and most focused on the most immediate and traumatic violations they had experienced, which invariably were such acts of violence. Yet even in those statements, one can discern elements of violations related to socio-economic rights. For example, a woman would testify about being raped and then indicate that she was still suffering from the physical and mental effects of the rape because she had little or no access to health care facilities.

Faced with this challenge of eliciting individual experiences, perspectives, and narratives with respect to these violations, the Commission undertook a series of focus group discussions. The discussions were led by an individual trained in socio-economic rights, and provided an opportunity for a more focused and detailed discussion of such rights and their violation in a specific community. (For more on these discussions, see the chapter in Volume 1 on Methodology and Process.)

The first chapter in this Volume, on economic marginalization and violations of socio-economic rights, addresses an issue that people in each region of the country raised with the Commission (economic marginalization), as well as violations that effect at a fundamental and profound level, the quality of life available to most Kenyans (socio-economic rights). There is no question that at a particular historical moment most Kenyans

have perceived their region, or their community, as being the subject of a deliberate government policy of economic marginalization. It is also clear that during different periods in Kenyan history, some regions of the country benefited more from economic development and assistance from the central government than other regions. Despite, or perhaps in part because of this, the Commission witnessed areas of under development in all regions of the country. The former North Eastern Province is, for example, a province with virtually no tarmacked roads, making travel in the region at the best of times difficult and in the worst of times dangerous.

This was made particularly evident to the Commission when our Acting Chairperson's car hit a particularly bad patch of road and rolled into the adjoining ditch (miraculously the Vice Chairperson and those in the car suffered minor injuries). Yet, the Commission experienced dirt roads and treacherous conditions in most of the other regions of the country. While access to water is a particular challenge in the arid parts of the country, many residents in all regions of the country have little or no access to clean water. The same, unfortunately, can be said for the other basic necessities of life: shelter, health care, food, education, employment, etc. While acknowledging that all parts of the country have suffered marginalization at one point in time, the Commission has identified four regions that have perennially suffered marginalization: North Eastern and Upper Eastern, Coast, Nyanza, and North Rift.

The second chapter in this Volume focuses on the issue that many identified as the most important: injustices related to land. There is no question that land is at the heart of many of the other violations experienced in most parts of the country, and our collective failure to "resolve the land question" has continued to fuel the commission of such other violations. The Commission does not claim here to provide 'the' solution to historical injustices related to land in Kenya. The centrality of the land question to so much of the nation's unity, health, and future appropriately led the drafters of the 2010 Constitution to include a permanent commission whose sole focus is on land, and the mandate of which includes addressing claims related to historical land injustices. Instead we have provided what we hope will be a succinct, yet thorough, description of the current perception of land injustices as reported to the Commission, including proposed solutions suggested by those most directly involved.

Lastly, this volume ends with a discussion of economic crimes and grand corruption. While most understand land as at the root of many historical injustices, corruption, and particularly grand corruption, also has a profound and far reaching effect on the rights of Kenyans. When it is brought to light and made the subject of criminal prosecutions or other legal proceedings, the public becomes aware of the extent of such corruption. Yet the effects of such corruption in even in the case of those scams made public is

harder to see. Land injustices are often easy to see and experience, as many times they involve lack of access to a resource that is visible every day to those who have been displaced. Corruption, on the other hand, involves the siphoning off of public resources for private gain. The result is less money for infrastructure, education, and health care. The relationship, however, between such corruption and such deprivations is often hard to see. The Commission hopes that the content of this chapter will make it more apparent the profound cost the nation is paying through corruption. Corruption is not just a crime that provides an undeserved benefit to a private individual (often an enormously large such benefit). It is a crime that lessens the availability and access to the fundamental needs of human life—food, education, health care, shelter, etc. In other words, the crime of corruption is directly related to the violations of socio-economic rights and economic marginalization discussed in the previous chapter.

As with land, the Commission did not attempt to provide ‘the’ solution to the problem of corruption. Like land, there is a permanent commission which has as its sole mandate the combatting of corruption, including grand corruption. That commission has had its own challenges, including political interference by Members of Parliament. Therefore, the first step for the government to address the scourge of corruption effectively is to have genuine political will to tackle the problem.

List of Abbreviations

ABET	Alternative Basic Education for Turkana	HMIS	Health Management Information Systems
ACECA	Anti-Corruption and Economic Crimes Act	IBEAC	Imperial British East African Company
ACHPR	African Charter on Human and Peoples' Rights	ICCPR	International Covenant on Civil and Political Rights
ADR	Alternative Dispute Resolution	ICESCR	International Covenant on Economic, Social and Cultural Rights
AG	Attorney General	IEBC	Independent Electoral and Boundaries Commission
ALFC	Anglo Leasing & Finance Company	IEC	Information, Communication and Education
ASAL	Arid and Semi Arid Lands	IIBRC	Interim Independent Boundaries Review Commission
AUCPCC	African Union Convention on Preventing and Combating Corruption	IPPG	Inter-Parties Parliamentary Group Reforms
BVR	Biometric Voter Identification Kits	KACA	Kenya Anti-Corruption Authority
CBK	Central Bank of Kenya	KACC	Kenya Anti-Corruption Commission
CDF	Constituency Development Fund	KADU	Kenya Africa Democratic Union
CFA	Commission for Africa	KANU	Kenya African National Union
COK	Constitution of Kenya	KCPE	Kenya Certificate for Primary Education
CRC	Convention of the Rights of the Child	KCSE	Kenya Certificate for Secondary Education
CSOs	Community Based Organizations	KDHS	Kenya Demographic and Health Survey
DC	District Commissioner	KES	Kenya Shilling
DEO	District Education Officer	KESSP	Kenya Education Sector Support Programme
DO	District Officer	KIPPRA	Kenya Institute for Public Policy Research and Analysis
DOI	Department of Immigration	KNBS	Kenya National Bureau Statistics
DPP	Director of Public Prosecutions	KNBS	Kenya National Bureau Statistics
EAC	East African Community	KNCHR	Kenya National Commission on Human Rights
EACC	Ethics and Anti-Corruption Commission	LAICO	Libyan Arab African Investment Company Kenya Limited
EBDA	Eastleigh District Business Association	LIA	Leadership and Integrity Act
ESP	Economic Stimulus Programme	MAAIC	Meridian Arab African Investment Company
EWS	Early Warning Systems	MLAA	Mutual Legal Assistance Act
FBO	Faith Based Organizations	MOH	Ministry of Health
FDSE	Free Day Secondary Education		
FT	Face Technologies		
GEMA	Gikuyu Embu and Meru		
GIL	Goldernberg International Limited		

MP	Member of Parliament	PPOA	Public Procurement Oversight Authority
NARC	National Rainbow Coalition	PS	Permanent Secretary
NCIC	National Cohesion and Integration Commission	RIM	Registry Index Map
NDP	National Development Party	SER	Social and Economic Rights
NEP	North Eastern Province	TI	Transparency International
NFD	National Frontier District	TJRC	Truth Justice and Reconciliation Commission
NGO	Non-governmental organizations	NHIF	National Hospital Insurance Fund
NHIF	National Hospital Insurance Fund	UHDL	Uhuru Highway Development Limited
NSAs	Non-State Actors	UK	United Kingdom
PAC	Public Accounts Committee	UNCAC	United Nations Convention Against Corruption
PEV	Post Election Violence	UNEP	United Nations Environment Program
PIO	Principal Immigration Officer	UNODC	United Nations Office on Drugs and Crime
POEA	Public Officer Ethics Acts	UPE	Universal Primary Education



A Somali man heading towards a TJRC public hearing.

CHAPTER

01

Economic Marginalisation and Violation of Socio-Economic Rights

Introduction

1. At the opening of the Truth, Justice and Reconciliation Commission (TJRC)'s Thematic Hearing on Economic Marginalisation on 13 February 2012 at the NHIF Auditorium, Nairobi, Commissioner Tecla Namachanja made the following remarks, which aptly summarise the Commission's task in relation to the issues of economic marginalisation:

Ladies and gentlemen, as you may know, it is almost a year now since the Commission started going around the country, listening to individual Kenyans who have experienced the violations that this Commission is investigating. Members of the Commission have come face-to-face with issues of economic marginalisation. We have been to some areas in this country where the people feel that they are not part of Kenya. So, we have parts of this country where people consider themselves as coming from 'Kenya Four', 'Kenya Three' and 'Kenya Two', and we wonder what is 'Kenya One?' We have experienced it. They feel so because when you look at issues of infrastructure, it is pathetic.

We have come across children taking their lessons under a tree, yet they are expected to compete favourably with the rest of students from other parts of this country who

are endowed with all the facilities. We have toured places where you cannot get even a single tarmacked road in almost the entire county. We have met Kenyans who are not internally displaced persons (IDPs), yet they are landless. We have come across areas where the residents come from a region which is very productive, but even for the crops they produce, there are no factories. The factories are elsewhere.

For those of you who live around Nairobi, I once lived in Madaraka and I used to watch fellow Kenyans, especially from Kibera hit the road very early in the morning, very energetic, walking to Industrial Area. It would not be until eight in the evening that you would see them walking back, very tired. So, they work as hard as their fellow Kenyans. However, when you go to Kibera and Mathare, you wonder what conditions give birth to people living under such a situation.

We have been in counties where with the creation of counties, there are fears from minority groups of continued marginalisation, especially when it comes to sharing leadership positions.¹

2. This Chapter of the Commission's report deals with economic marginalisation and violations of socio-economic rights. It provides an analysis of the perceptions and reality of economic marginalisation. As required by the TJR Act, the Chapter documents perceptions of economic marginalization and backs the same with facts.
3. In particular, it documents narratives of economic marginalisation relating to four regions. The Commission is aware that since the adoption of the Constitution of Kenya, 2010, political and administrative units in the country have changed fundamentally, and in particular, provinces have ceased to be points of reference, both for administrative and analytical purposes.
4. However, since provinces were the main political and administrative units during the Commission's mandate period, and perceptions of economic marginalisation are aligned along these units, it was found necessary to use provinces as its point of reference.
5. The four provinces or parts thereof that have been identified in this chapter as having suffered economic marginalisation during the Commission's mandate period are as follows:
 - a) North Eastern (including Upper Eastern)
 - b) Nyanza

¹ TJRC/ Hansard/ Thematic Hearing on Economic Marginalisation and Minorities / Nairobi/ 13 February 2012/ p. 1



Samburu women getting together for a TJRC session.

- North Rift
 - Coast
 - Western
6. The choice of these regions was informed by popular narratives relating to marginalisation. The Commission then tested these perceptions to establish whether they could pass the 'reality test', that is, whether in fact these regions are economically marginalized. The reality test entailed weighing regional perceptions against the extent to which residents of these regions enjoy and access socio-economic rights.
 7. Valid questions could be posed relating to why the other regions (Nairobi, Central, other parts of Rift Valley and Lower Eastern) are not profiled in this report, yet economic marginalisation (insofar as it manifests in poverty) is seen as a national phenomenon. It is acknowledged that the state of material lack of our people that manifests in poverty is indeed a national phenomenon as reflected in the

information the Commission received. However, it understood its mandate relating to economic marginalisation in a much narrower sense, that is, marginalisation as understood from inter-regional perspectives. Nevertheless, it is acknowledged that even in regions that may not be regarded as economically marginalized, perceptions of marginalisation exist.

- 8 Firstly, some residents of regions that are not profiled here consider themselves to have been marginalised at one point or another in history. The Commission acknowledges and affirms these perceptions. In the case of Central Province, testimonies were received to the effect that the region's fortunes dwindled under the then President Moi, with social infrastructure being degraded and the vast majority of elites excluded at the top, at least after the 1982 coup attempt.
- 9 A similar narrative to that heard in Central was recounted by residents of Rift Valley region, who see themselves as the main 'victims' of marginalisation under the Kibaki administration, at least as far as appointments to key positions in the public service are concerned.
- 10 Secondly, in its travels around the country, the Commission witnessed poverty all over the land. Thus, a sense of marginalisation exists even in regions regarded as relatively more endowed in resources than others. In certain regions, there exist intra-regional narratives of marginalisation that are blamed on regional and local rather than national forces. This is true of Nyanza, as it is for Central and other regions. For instance, in Central Province, residents of Nyandarua, where the assassinated leader JM Kariuki hailed from, considered themselves marginalised by others within the region.
- 11 The analysis on Nyanza Province demonstrates that residents of Kuria see their counterparts in the broader region as somewhat advantaged *vis-a-vis* themselves and that they (Luo and Kisii) are in some way part responsible for their situation. In Western Province, a region that appears to share Nyanza's political and economic fortunes, narratives of marginalisation are not uniform. Evidence shows that certain parts of Western that have been close to power, in particular Bungoma and Vihiga appear to be the main beneficiaries of the limited social goods due to co-optation, at least under the Moi regime. It is notable that within these sub-regions, narratives of marginalisation do exist.
- 12 In North Eastern and Upper Eastern, sub-regional claims of marginalisation invariably assume an ethnic or clan flavour. For instance, the Commission recorded testimony from members of the Ajuran clan who see themselves as victims of the

Degodia clan, and with complicity from the Provincial Administration and central government. Claims of economic and political marginalisation made by the Ajuran - in part due to loss of land to the Degodia - had indeed been the subject of claims submitted to the executive and proceedings in the courts for many years before the Commission was created.

- 13 While Lower Eastern is often not regarded as a marginalised area at least not in popular narratives, this silence (to the extent that it is) obscures shocking levels of poverty and lack of social facilities in parts of this region. Cases of drought, famine and starvation in parts of Ukambani have become a staple of national news and shame. This state of affairs is in part due to policies of marginalisation by past regimes. Other than the harsh climatic conditions, the failure by successive regimes to take measures to arrest the perennial food insecurity situation and enhance access to basic goods such as potable drinking water must be acknowledged as a key factor.
- 14 The South Rift region, in particular the current Kajiado County, presents a curious case of economic marginalisation. While Kajiado is perhaps rightly ranked as the richest county (based largely on asset-based assessment), its residents have some of the lowest levels of access to social goods such as education, health, water and sanitation and physical infrastructure such as roads and can rightly claim marginalisation. In the Commission's view, however, this phenomenon seems to present a case of mismanagement of resources or outright corruption. Resources that could improve the socio-economic condition of locals have either not been tapped, or have been diverted to other extraneous issues.
- 15 This brief summary of trends convinced the Commission that economic marginalisation was indeed a national and cross-cutting theme in so far as the poor and other disadvantaged groups such as women, ethnic minorities and indigenous groups are concerned. Issues related to marginalisation of these groups are dealt with elsewhere in this report. This chapter focuses only on the regional dimensions of the phenomenon. It is a synthesis of secondary and primary data that was available to the Commission. Primary data was drawn from statements submitted by or on behalf of victims in the prescribed form, testimonies made during hearings (individual and thematic), interviews with key actors, personalities and experts; memoranda submitted by individuals and groups; and reports of focus group discussions on economic marginalisation conducted in January and February 2012 in all the eight regions of the country. Secondary sources relied on include academic writings and reports by governmental and non-governmental actors or agencies.

Legal and Conceptual Framework

Statutory mandate

- 16 As already noted, the subject matter mandate given to the Commission by Parliament was very broad. It entailed investigating, documenting and making recommendations in relation to human rights violations that fall not only in the category of civil and political rights, but also violations of what are cumulatively and popularly known as socio-economic rights. In relation to socio-economic rights, section 5(a) of the TJR Act requires the Commission to 'establish an accurate, complete and historical record of violations and abuses of human and *economic rights*'. Section 5(b) continues to provide that it should establish 'as complete a picture as possible of the causes, nature and extent of the gross violations of human rights and *economic rights* committed between 12 December 1963 and the 28 February 2008'. Perhaps more importantly, section 5(f) requires the Commission to
- Inquire into and establish the reality of otherwise of perceived economic marginalisation of communities and make recommendations on how to address the marginalisation
- 17 In essence, the TJR Act accorded the Commission a clear mandate to deal with issues relating to socio-economic rights. While other truth commissions have had the chance to look at socio-economic rights, none have been required to analyze them in as much depth as Kenya's TJRC has. The small numbers of truth commissions that have looked at socio-economic rights have understandably been limited in their scope, given the other violations that they were required to examine.
- 18 Apart from the Liberian truth commission, none of the other commissions that examined socio-economic rights had any explicit mandate to do so. That they proceeded to do so is indicative of the reality that human rights violations - civil and political rights as well as socio-economic rights - cannot be compartmentalized in truth-seeking without compromising the truth itself. As one author has said, 'not only does this compartmentalization oversimplify the relationship between those un-redressed legacies (of human rights violations) but it also does not reflect the reality of the societies that seek to address them'.²
19. Thus, whether as part of their mandate or because there was simply no way in which to compartmentalize human rights violations that took place over a significant period of their histories, truth commissions in East Timor, Morocco and

² Ruben Carranza 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 *International Journal of Transitional Justice* 310 pp. 314-315

Peru ended up approaching socio-economic violations in ways that were organic to their context

- 20 In East Timor, the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR - the Portuguese acronym), was not explicitly mandated to investigate socio-economic rights, but did a credible and comprehensive effort at examining violations of these rights not only during the Indonesian invasion and occupation of East Timor, but even during the immediate post-colonial period just prior to the invasion. The CAVR heard victims' statements and conducted thematic hearings on socio-economic rights violations.
- 21 It utilized field and academic research, government and public records, and used them to scientifically extrapolate the number of violations and victims that could be attributed to socio-economic rights violations.
- 22 Morocco's Truth & Reconciliation Commission (IER) made findings regarding socio-economic rights that were directly and specifically related to both the periods and targets of repression by the regime whose rule it was investigating. Consequently, the IER had a basis to recommend reparations that were specifically meant to respond to socio-economic rights violations committed against eleven (11) named regions in the country.
- 23 The work of Peru's Truth and Reconciliation Commission (in Spanish: Comisión de la Verdad y Reconciliación (CVR)) is especially relevant to this Commission. While CVR did not have the mandate to investigate socio-economic rights, it arrived at conclusions that explicitly and strongly indicated that marginalisation was not only part of what took place in the conflict that it examined, but that the victims of physical integrity violations in that conflict were already and simultaneously victims of economic and social rights violations, and of marginalisation. The Peruvian truth commission said:

The TRC has been able to discern that the process of violence, combined with socio-economic gaps, highlighted the seriousness of ethno-cultural inequalities that still prevail in the country. According to analysis of the testimonies received, 75 percent of the victims who died in the internal armed conflict spoke Quechua or other native languages as their mother tongue. This figure contrasts tellingly with the fact that, according to the 1993 census, on a national level only 16 percent of the Peruvian population shares that characteristic. The TRC has shown that, in relative terms, the dead and disappeared had educational levels far inferior to the national average. While the national census of 1993 indicates that only 40 percent of the national population had failed to attain secondary school education, the TRC has found that 68 percent of the victims were below this level. The TRC concludes that the violence fell unequally

on different geographical areas and on different social strata in the country. If the ratio of victims to population reported to the TRC with respect to Ayacucho were similar countrywide, the violence would have caused 1,200,000 deaths and disappearances. Of that amount, 340,000 would have occurred in the (capital) city of Lima.

- 24 Thus, by including a clear mandate to analyze socio-economic rights, the drafters of Kenya's TJR Act adopted a modern holistic approach to human rights that did not distinguish between bodily integrity rights and socio-economic rights. It is an approach that more accurately reflects the reality of people's lives, seen in the testimony of individuals and organizations that allows the Commission to more accurately describe the antecedents, circumstances, factors and context of violations and abuses.
- 25 Other than the statutory requirement to focus on socio-economic rights, there are several reasons of a historical, practical, and conceptual nature why the Commission considered focus on socio-economic rights and economic marginalisation as an important element of its mandate. From a historical and contextual perspective, violations experienced in Kenya were not limited to those in the category of civil and political rights. State action or inaction negatively impacted the economic lives of millions of Kenyans in a variety of ways described in different parts of this chapter.
- 26 Evidence shows that while the majority of Kenyans may not have been detained without trial or subjected to torture and other physical integrity violations, government's exclusionary economic policies and practices in the distribution of public jobs and services inflicted suffering on huge sections of society at different historical moments. As the Commission traveled the country collecting statements and conducting public hearings, the pervasiveness of socio-economic violations was evident and have been outlined in several parts of this chapter. It would have been odd to ignore this historical reality and the legacy of poverty that lives on today.
- 27 Indeed, as a function of history, the Commission noted that economic marginalisation in the Kenyan context was part of a set of violations or injustices often referred to as 'historical injustices' in popular discourse.

Conceptual approach

- 28 The TJR Act mandated the Commission to investigate, document and make recommendations in respect of 'gross violations of human rights'. The Act provided a partial list of what violations met the standard of 'gross violations'. As discussed earlier in Chapter Two, Volume 1 of this report, the Commission defined gross violations of human rights to include violations of socio-economic rights. The

standard applied in determining whether a violation of a socio-economic rights is 'gross' depends largely on the structural nature of the violation and the impact of the violation (those violations that affect larger groups of people are more likely to be considered 'gross') However, in this chapter, the gross violations test is not applied

- 29 Although the TJR Act, 2008 mandated the Commission to investigate violations of socio-economic rights and to make various findings and recommendations in this regard, it is worth noting that socio-economic rights were not recognized as rights under Kenyan law until the adoption of the new Constitution on 27 August 2010. Despite the absence of domestic recognition of socio-economic rights, Kenya had ratified relevant international instruments that recognized these rights. These treaties include the International Covenant on Economic, Social and Cultural Rights (ICESCR) which Kenya ratified in 1972 and the African Charter on Human and Peoples' Rights (ACHPR) ratified in 1992.
- 30 The absence of socio-economic rights in the old constitution, coupled with a dualist practice in terms of which international treaties had no direct application in Kenya, meant that socio-economic rights were not justiciable and courts were not a forum where any socio-economic rights related claims could be adjudicated. The consequence was that individuals and groups could not hold government to account for failure to meet its obligations undertaken at the international level.
- 31 Thus, in its determination of the state's obligation relating to socio-economic rights, the approach adopted has been that taken by the United Nations Committee on Economic and Social Rights (the ESR Committee) in its determination of whether the state had. The ESR Committee has clarified the nature of a state's obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- 32 The Commission has thus taken into account the ESR Committee's interpretation of these obligations, in particular through its General Comment No. 3 which established a 'minimum core' of obligations in relation to socio-economic rights.

A minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the covenant. If the covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the

same token, it must be noted that any assessment as to whether a state has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each state party to take the necessary steps “to the maximum of its available resources.” In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.³

- 33 For a truth commission examining violations of economic and social rights, the fulfillment by a state of minimum core obligations under the ICESCR is not only a normative but is also a practical standard. It provides basis for the truth commission in question to examine whether, in relation to Article 2(1) of the ICESCR, the state has ‘take(n) steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization’ of socio-economic rights.
- 34 Using the ESR Committee’s standard in General Comment No. 3 of how ‘progressive realization’ should be understood, the Commission has examined whether the state has taken those steps ‘within a reasonably short time after the covenant’s entry into force’ with respect to Kenya, and whether those steps were taken ‘in a deliberate, concrete (way) and targeted as clearly as possible towards meeting the obligations’ in the ICESCR.
- 35 Equally important and particularly relevant to the Commission’s mandate to investigate marginalisation is the obligation of the Kenyan state under Article 2(2) of the ICESCR to ‘guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind’. This non-discrimination obligation, it must be emphasised, is one that must be fulfilled immediately. In the words of the ESR Committee, ‘non-discrimination is an immediate and cross-cutting obligation in the covenant’. Article 2(2) requires state parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the covenant and can only be applied in conjunction with these rights. Discrimination constitutes ‘any distinction, exclusion, restriction or preference or other differential treatment directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of covenant rights’. Discrimination also includes incitement to discriminate and harassment. The Commission considered whether economic marginalisation in Kenya over the period covered by its mandate is the outcome

³ CESCR General Comment No 3, paragraph 10

of discrimination, and whether in itself - apart from the specific violations of ESR that comes with it - is a violation of the ICESR

36. Moreover, the Commission notes that states have three levels of obligation in relation to human rights: the obligations to respect, to protect and to fulfill provided for under both international law and national law
37. Firstly, the obligation to respect imposes a negative obligation requiring the state to refrain from any measure that may deprive individuals of the enjoyment of their rights or their ability to satisfy those rights by their efforts. This type of obligation is often associated with civil and political rights (e.g. refraining from committing torture) but it applies to socio-economic rights as well. With regard to the right to adequate housing, for example, states have a duty to refrain from forced or arbitrary eviction. Secondly, the obligation to protect requires the state to prevent violations of human rights by third parties
38. The obligation to protect is normally taken to be a central function of states, which have to prevent irreparable harm from being inflicted upon members of society. This requires states: (a) to prevent violations of rights by individuals or other non-state actors; (b) to avoid and eliminate incentives to violate rights by third parties, and (c) to provide access to legal remedies when violations have occurred, in order to prevent further deprivations
39. The obligation to fulfill requires the state to actively take measures towards 'the actual realization of rights'.⁴ With respect to SERs, this obligation could 'consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security)'.⁵ Some consider that state obligations relating to human rights include a fourth level: the obligation to promote. The obligation to promote (usually subsumed in the obligation to fulfill) entails actions such as 'promoting tolerance, raising awareness, and building infrastructures'.⁶
40. The Constitution of Kenya, 2010 recognizes socio-economic rights.⁷ It also captures the aforementioned obligations by stating that the state shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43 on economic and social rights.⁸ In addition, the government is required to use maximum resources

⁴ The Social and Economic Rights Action Centre and the Centre for Economic Rights v Nigeria Communication 155/96 (Hereinafter: SERAC Case)

⁵ See SERAC para 46

⁶ SERAC para 46

⁷ Constitution of Kenya 2010 sec 43

⁸ Constitution of Kenya 2010 sec 21(3)

available and in an effective and accountable way, to ensure the attainment of maximum levels of enjoyment of rights for all. Resources include funds, people, skills, good management and other assets

Definitions

- 41 While the TJR Act mandated the Commission to inquire into and establish the reality or otherwise of economic marginalisation, the Act did not define the term 'economic marginalisation'. As such, the Commission had to adopt a working definition to guide its work by considering various academic writings on the subject in different contexts

Marginalisation is the social process of becoming or being made marginal (especially as a group within the larger society). 'Marginality' is seen in two dimensions: societal and spatial. While spatial marginality relates to geography – existence at the fringes, or at a distance from the centre – societal marginality 'focuses on human dimensions such as demography, religion, culture, social structure (e.g. caste, hierarchy, class, ethnicity, and gender), economics and politics in connection with access to resources by individuals and groups.'

- 42 For some scholars, the concept of 'marginality' is generally used to analyze socio-economic, political, and cultural spheres, where disadvantaged people struggle to gain access to resources and full participation in social life¹⁰. Others define socio-economic marginality as 'a condition of socio-spatial structure and process in which components of society and space in a territorial unit are observed to lag behind an expected level of performance in economic, political and social well-being compared with the average condition in the territory as a whole'¹¹. As such, marginalisation is a process that denies opportunities and outcomes to 'those living on the margins', while enhancing the opportunities and outcomes for those who are 'at the centre'.
- 43 In the Kenyan context, those at the centre would be those in power, those connected to power through client-patron networks and those favoured by the state in terms of distribution of the benefits of economic development that should otherwise flow equitably to all citizens. While in the economic sphere individuals and groups could be pushed to the margins by the operation of market forces, which is perfectly legal, it is the insertion of the state and its agents in a variety of ways to tip the balance in favour of particular groups, or its failure to intervene to prevent the pulverization of the vulnerable, that is blameworthy.

9 See G Gurung & M Kollmar *Marginality: Concepts and their limitations* (2005)

10 Gurung & Kollmar (n 9 above)

11 L Sommers et al. Towards typologies of socio-economic marginality: North/South comparisons in H Jussila et al (eds) *Marginality in space: Past, present and future – theoretical and methodological aspects of cultural, social and economical parameters and critical regions* (1999) pp. 7-24

- 44 Against this background, the Commission adopted the following definitions of key terms used in this chapter
- **Marginalisation** a process that denies opportunities and outcomes to those ‘living on the margin’, while enhancing the opportunities and outcomes for those who are ‘at the centre’
 - **Economic marginalisation** a situation that is produced by the process through which groups are discriminated directly or indirectly, in the distribution of social goods and services
 - **Discrimination:** any distinction, exclusion, restriction or preference based on any ground such as race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life¹²
- 45 On discrimination, the Commission looked at both direct and indirect discrimination - both those actions committed with the clear intent to discriminate and those actions that are not, regardless of their intent, having the effect of discriminating. In other words, the Commission adopted both an intent and effects test in establishing whether certain conduct (actions or omissions) were discriminatory
- 46 Direct discrimination could be instituted by laws or policies in various sectors that keep certain groups at the margins. In Kenya, some of the laws that have been cited as overtly discriminatory relate to citizenship as it applied to women by denying them the ability to donate citizenship to children borne of foreign husbands, and the prohibitive procedures that applied to certain ethnic minorities only (e.g. Somalis, Nubians and people from the former Northern Frontier District in general)
- 47 With respect to indirect discrimination, certain conduct, policy or law may lack a discriminatory intent, but its application has a discriminatory effect¹³. The removal of the Endorois community from their land to make room for a public park to generate foreign exchange for the country is a good example of an action that results in indirect discrimination. Regardless of the intent of the

12 See article 2, CESCR, article 2 ICCPR and article 2 ICERD. See also Human Rights Committee General Comment 18 adopted under article 2 paras 6 and 7 of the ICCPR, article 1 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which defines discrimination against women as ‘distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’. See also CERD, General Recommendation 30.

13 See Committee on Elimination of all Forms of Racial Discrimination (CERD), General Recommendation 32 para 7.

state, it is clear that the effect of their removal with no or minimal compensation had the effect of impoverishing the community. Removed from their lands and the source of their livelihoods, members of the community live in extreme poverty.¹⁴ Perhaps as evidence of direct discrimination, the spread of economic development, distribution of social infrastructure and jobs in the public service to particular regions vis-a-vis others has over the years tended to coincide with occupancy of the presidency by a member of a community from such regions/communities (and associated regions and communities). This role of the state in economic marginalisation is considered in greater detail further below.

- 48 In looking at economic marginalisation, the Commission also considered social and cultural marginalisation because of the complex relationship that exists between economic, social and political marginalisation. It agrees with the view that economically marginalized groups tend to be socially marginalized as well, so that they are disadvantaged with respect to both resources and power.¹⁵ In the Kenyan context for instance, because minorities have historically lacked effective political representation, they by extension, lacked the ability and avenues through which to articulate their concerns. In the broader political context, the reality of lack of democratic space in Kenya was that, even where there was political representation, power was wielded by others in an exclusionary setup. For this reason, possibilities for agitation for economic inclusion were largely absent.
- 49 In the Commission's view, marginalisation combines discrimination and social exclusion and is often used interchangeably with 'social exclusion'. Social exclusion is a process by which certain groups are systematically disadvantaged because they are discriminated against on some basis.¹⁶ This definition emphasises discrimination as a marker of social exclusion. While some largely associate social exclusion with poverty, other scholars consider that social exclusion is a broader concept than poverty, encompassing not only low material means, but the inability to participate effectively in economic, social, political and cultural life and in some characterizations alienation and distance from mainstream society.¹⁷ Social exclusion is in fact, 'a combination of linked problems, such as discrimination, unemployment, poor skills, low incomes, poor housing, high crime and family breakdown'.¹⁸

14 On the Endorois see *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 of 2003)

15 R Kanbur and L Squire *The Evolution of Thinking About Poverty: Exploring the Interactions* (1999) pp. 196-206

16 C Gaynor & S Watson *Reducing Poverty By Tackling Social Exclusion*. DFID Evaluation Working Paper 22 (January 2007)

17 K Duffy *Social Exclusion and Human Dignity*. Background Report for the Proposed Initiative by the Council of Europe. CDPS (1995) p. 1

18 Social Exclusion Unit (UK DPM Office) *Breaking the Cycle: Taking Stock of Progress and Priorities for the Future* (2004)

- 50 In a nutshell, marginalisation has three dimensions: political, economic and social-cultural. In terms of political marginalisation, a group can be regarded as politically marginalized because it is disempowered in terms of participation in the democratic process and in decision-making. This could be because such a group is inadequately represented (despite its numbers) or lack representation altogether. Since political empowerment is one of the most important tools for accessing other social and economic privileges, such groups lose the ability to access every social, economic, and political benefit. People who are socially marginalized are deprived of social opportunities. According to Duffy, discriminatory social policies and practices have the effect that these individuals, groups or communities have relatively limited access to social resources such as education, health services, housing, income and work.¹⁹ Most marginalized communities are also associated with poverty. Poverty is now more frequently defined as a type of 'social exclusion'.²⁰

Conceptual and practical challenges

- 51 While the Commission benefited from a variety of sources in completing this Chapter, documenting economic marginalisation presents numerous problems. The study of economic marginalisation and inequality is a complex exercise involving issues of causality, multiple dynamics and other technical aspects. A seminal report on inequality in Kenya identified several issues entwined in studying inequality, which is in part produced by marginalisation.²¹ Firstly, does one look at vertical (income) and horizontal (group, regional) inequalities simultaneously? Secondly, how are questions of causality and its directions (the role of institutional and non-institutional factors in creating opportunities and determining outcomes) resolved? Thirdly, how does one measure inequality (whether Gini-coefficient, an approach that is used in disciplines such as sociology, economics, and agriculture, is a good choice and whether focus on assets-based measurements is ideal)? Fourthly, what is the role of international trade in skewing incomes? These questions have no straightforward answers.
- 52 The Commission, aware of the complex issues involved in analyzing the causes and effects of economic inequality and marginalisation, was guided by the TJR Act and chose to adopt a more targeted approach focusing on two aspects of economic marginalisation:
- 1) The role of the state in respect to marginalisation, whether in increasing or decreasing inequality, and

¹⁹ See Duffy (n 17 above).

²⁰ D Narayan, R Chambers, MK Shah and P Petesch, *Crying Out for Change: Voices of the Poor* (World Bank Publication) World Bank Publications, 01 November 2000.

²¹ SID *Putting apart: Facts and figures on inequality in Kenya* (2004).

- Inequality between groups and regions (horizontal inequality) rather than vertical inequality (income differences within social groups, e.g. the poor and the rich).
53. While the limited presence or absence of a particular group in the formal economy could be indicative of economic marginalisation, this chapter goes beyond participation in the economy - whether formal or informal - to assess a set of indicators derived from socio-economic rights such as health, housing, education, access to land, access to food and water, employment (especially state employment) as well as physical infrastructure (roads and social amenities).
54. Beyond conceptual problems posed by the notion of economic marginalisation, the Commission faced numerous other challenges at a practical level. The most challenging related to availability, reliability and quality of data, especially financial data relating to state expenditures on social programmes and infrastructure over the years in respect to the regions identified as economically marginalized. This gap in the data is reflected here.



- 55 Until recently, poverty and health studies or surveys done in Kenya excluded certain regions such as North Eastern. For instance, the 2003 Kenya Domestic and Household Survey (KDHS) was the first survey in the Demographic and Health Surveys (DHS) programme to cover the entire country, including North Eastern Province and other northern districts that had been excluded from the prior surveys (Turkana and Samburu in Rift Valley Province and Isiolo, Marsabit and Moyale in Eastern Province)²²
- 56 In later studies, the reliability of data is questionable in part because the studies often do not include rural areas in the region because of the sparse population and difficulty in accessing them. To compensate for this shortcoming, the few studies conducted often oversample urban areas. The challenges of researching North Eastern have been aptly captured by one researcher who, in lamenting the difficulty of studying poverty notes that
- The quantitative poverty reports produced in Kenya have varied geographical and population coverage. The quantitative reports have emanated from sample surveys (rather than censuses), with some covering smallholder households, while others are national but normally omit the sparsely populated districts of North Eastern province and the North Rift²³
- 57 The Commission is of the view that the state's lack of data and collection of data in respect to North Eastern and North Rift only perpetuated marginalisation of these regions. In other words, the failure to statistically track development in these regions pushed them even further to the margins.
- 58 The Commission is not the first to lament the failure of successive Kenyan governments to collect sufficient data relating to access to socio-economic goods. The Committee on Economic, Social and Cultural Rights similarly lamented the absence of disaggregated statistical data in the initial report submitted by Kenya in 2007, making it difficult for that committee to evaluate Kenya's compliance with the international obligations it undertook by ratifying the ICESCR Covenant²⁴. There is also paucity of academic literature on the subject of economic marginalisation²⁵.

22 See Kenya Demographic and Health Surveys of 2008 (2009) 6

23 JT Mukui, *Poverty analysis in Kenya: Ten years on* (2005). This is a study conducted for the Central Bureau of Statistics (CBS), Society for International Development (SID) and Swedish International Development Agency (SIDA).

24 The Committee on Economic, Social and Cultural Rights considered the initial report of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/C.12/KEN/1) at its 34th, 35th and 36th meetings held on 6 and 7 November 2008 (E/C.12/2006/SR.34-36) and adopted it at its 51st meeting held on 19 November 2008.

25 Available studies include reports done by SID *Pulling Apart* (2004) and *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives* (2006). See also KIPRA, *Inequality, poverty and the environment in Kenya* (Institute for Economic Affairs, *Youth Fact book* (2010)).

Context of Economic Marginalisation

- 59 According to one commentator, horizontal inequalities - the socio-economic and political differentiations based on socio-cultural identities such as ethnicity, religion or race - remain the single most important determinant of political contests in Kenya, fueling much of the sometimes violent contests during elections²⁶ In his essay, Muhula rightly argues that the socio-economic and political inequalities in Kenya are rooted in both historical as well as structural characteristics of the Kenyan state Four major factors account for this ethno-regional political patronage, dominance of the Kenyan state, colonial legacy, and historical grievances and inter-ethnic rivalries
- 60 Indeed, economic marginalisation experienced by various regions, groups and communities in Kenya since independence has occurred in a historical, socio-economic and political context marked by certain factors These include an overly centralised state both in terms of power and resources; ethnicisation of politics and public life in general; an all-powerful 'imperial' presidency marked by lack of accountability, lack of judicial independence, weak rule of law and personalization of power, bad governance and rampant corruption, a stunted economy in which the state was the main dispenser of largesse, and conflicts revolving around land with large swathes of the population unable to access this important resource All these evolved against a backdrop of historical irredentist/secessionist struggles marked by the 'Shifta War' and its aftermath in Northern Kenya as well as independence claims borne out of perceived marginalisation in the former Coast Province While some of these factors were the root cause of marginalisation, they produced distortions that worsened the effects of economic marginalisation Some of these are discussed in turn

Colonial legacy

- 61 An important force that has shaped social, economic and political life in post-independence Kenya is the colonial intervention between 1895 and 1963. Politically, it resulted in the implantation of a Westphalia-style state, with a constitution designed largely on the traditional liberal model which places emphasis on checking state power among the arms of government and comes fitted with strong property rights²⁷ As outlined next, economically, the capitalist model introduced by the white settler community would take root in succeeding

26 R Muhula 'Horizontal Inequalities and Ethno-regional Politics in Kenya' 1 (1) *Kenya Studies Review* (2007) 85 See also Stewart F. Crisis Prevention Tackling Horizontal Inequalities, 28 3 *Oxford Development Studies* (2000) 245-262

27 On the design of the post colonial state, see H. W. O. Okoth-Ogendo 'Law and Government in Kenya: An Official Handbook (1988) 27-35

years with a newly-created African capitalist class playing a significant role. Overall, the colonial experience has had a far-reaching impact on our people. It is accurate to suggest that the seeds of inequality and marginalisation were planted by the colonial administration.

- 62 The colonial project was accompanied by, or rather based, on massive dispossession of black African communities in Kenya. The Task Force on the Establishment of a Truth, Justice and Reconciliation Commission created in 2003 noted with respect to the state that

[s]ince its creation by the British in 1895, the Kenyan state has largely been a predatory and illiberal instrumentality, an ogre defined by its proclivity for the commission of gross and massive human rights violations. Little need be said of the colonial state, which was specifically organized for the purposes of political repression to facilitate economic exploitation.²⁸

- 63 The loss of lands and livestock by Africans in what was an agrarian society through predatory legislative machinery would produce widespread destitution. The failure of subsequent governments (in particular the Kenyatta government), to correct this injustice by restoring communities to their lands from which they had been forcibly evicted by the colonial government can be said to be largely to blame for inequities in land ownership and access in many parts of Kenya (especially in Central, Rift Valley, Western and Coast provinces).

- 64 While post-independence governments have had a role in skewing economic empowerment in favour of certain ethnic communities, certain communities – in particular sections of the Kikuyu community – got a head start by virtue of their proximity to centers of settler economy. In addition, as the focus of early missionary activity, they had early contact with formal education. Although many, as historical inhabitants of the fertile central belt lost their land to the white settlers, they would find themselves inserted into the capitalist settler economy as farm workers who would later benefit from that experience. Among this community would be created a new class of large-scale farmers and capitalist entrepreneurs, when in the 1950s the colonial administration found it expedient to undertake reforms that created a ‘buffer community’ of black landed bourgeoisie between white settlers and the agitating masses.²⁹ It is largely from this group that the new capitalists in post-independence Kenya would emerge.

²⁸ Government of Kenya. Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003): 19.

²⁹ On land reforms relating to that period, see S. Wanjala (ed.) *Essays on land law* (2000).

65. The policies of the Kenyatta regime would entrench the economic hegemony of the Kikuyu community based on this core group.³⁰
66. There is another reason why apart from the distortions introduced by the colonial administration, economic marginalisation took root in post-independence Kenya: the preservation of the colonial state beyond the departure of the colonial authority through laws, culture and practices. On economic marginalisation, the structures that had promoted inequality and marginalisation in the colonial period remained in place. In this regard, the regional coordinator for Society for International Development, Ali Hersi, gave expert testimony at the Commission's Thematic Hearing on Economic Marginalisation stating
- There was the structure of the colonial state itself and the mechanisms that it put in place to prefer certain groups over others. However, with the end of the colonial period, issues of inequality did not just go with colonialism. Unfortunately, the first government that came into power continued some of those policy choices in the post-independence era that not only enhanced it but, in many instances, even deepened the inequality.³¹
67. If the post-colonial state internalized the practices of the colonial state, then marginalisation experienced in post-independence Kenya is not surprising. This is particularly telling because the colonial state has been described rightly as 'a state of exclusion' in the sense that 'it divided the society between those who had rights of citizenship and those who did not – the urban and the rural respectively'.³² The problematic economic policies pursued by the post-colonial government are discussed in detail below.

Ethnicity

68. The problem of 'negative ethnicity' also has colonial roots.³³ Other than creating and co-opting some local elite through bribery, one method used by the colonial government to maintain control was the 'divide and rule' approach. One commentator has described this approach as 'the conscious effort of an imperialist power to create and/or turn to its own advantage on the ethnic, linguistic, cultural, tribal, or religious differences within the subjugated colony'.³⁴ The practices of the colonial administration planted the seed for ethnic divisions that was to be further instrumentalised by the new rulers in Kenya.

30 See K Kanyinga 'Governance institutions and inequality in Kenya' in SID (eds) *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives* (2006) 345-347-348 discussing the role of the colonial state in creating capital among the Kikuyu.

31 TJRC/Hansard/Thematic Hearing on Economic Marginalization and Minorities/13 Feb 2013/p. 18.

32 Kanyinga (n 30 above) 351 discussing Mamdani's view of the post colonial state in Africa. See Mamdani, *M. Citizen and the Subject: Contemporary African and the Legacy of colonialism* (1996).

33 See Chapter One of Volume Three of this Report.

34 See generally Morrock R. 'Heritage of strife: the Effects of Colonialist "divide and rule" strategy upon the colonised peoples' *Science & Society* Vol. 37, No. 2 (Summer 1973) 129-151 at pp 133-137.

69. In Kenya, evidence tends to show that the distribution of public goods such as education facilities, health, water and physical infrastructure has followed patterns of access to political power, with Central and parts of Rift Valley that have produced the three presidents for the last 48 years enjoying the bulk of economic benefits. Favouritism practiced by those in power meant that members of their ethnic groups were favoured in the distribution of social infrastructure and employment in the public service, creating an exclusionary state.
70. In the previous constitutional dispensation, which established a 'winner-takes all' system, the quest for the presidency became a zero-sum game. According to one commentator, outcomes shaped competition and a high price would be paid for losing because 'losing almost meant economic ruin, fringe existence or oblivion'.³⁵ Each ethnic community believed that capturing the presidency would guarantee almost exclusive access to national resources and public sector jobs, since the president controlled their distribution.³⁶ These practices resulted in inequalities and regional imbalances. Such inequalities are manifested in social, economic and political exclusion as well as disproportionate access to key services. They are also reflected in poverty patterns.³⁷

Centralised state and personalisation of power

71. Both the structure and preeminence of the state in the political and economic sphere is central to understanding economic marginalisation in Kenya. Although the independence constitution provided for a decentralised federal government with checks and balances, its progressive demolition under President Jomo Kenyatta produced an overly powerful 'imperial' presidency. President Daniel arap Moi, who succeeded him, completed the process of centralizing power, eventually establishing a legal ban on multi-party politics in 1982. The ban on political parties that made Kenya a *de jure* one-party state was a big blow to development and democracy in Kenya. Power was personalized in the president following numerous constitutional amendments that strengthened the presidency to the detriment of other arms of government and civil liberties.
72. The struggle to hold onto power produced many casualties, with those outside power relegated to the fringes of social, political and economic life.³⁸ Due to the centralization of power and limited economic opportunities, the state became

35. M Akech *Institutional reforms in the new Constitution of Kenya* (2010) p. 12.

36. Akech (n 35 above).

37. Development Policy Management Forum (DPMF), *Social Policy: development and governance in Kenya* (2009) Report also Available at <http://www.dpmf.org/dpml/downloads/Evaluation%20&%20Profile%20of%20Education.pdf>. See also M B Mutuma *Case for the Introduction Of Wealth Transfer Tax In Kenya* World Bank Policy Paper.

38. See GM Musila *A Preliminary Assessment of the Kenyan Truth, Justice and Reconciliation Commission Bill, 2008* Pretoria Institute for Security Studies (2008) 40-41 and see generally M Aseka *Transformational Leadership in East Africa: Politics, Ideology and Community* (Kampala: Fountain Publishers, 2005) for an exposition on the authoritarian and repressive tendencies of the Kenyatta and Moi regimes of government.

the main dispenser of largesse and those unconnected to it through client-patron networks were condemned to economic marginalisation. The ensuing struggle to control economic production and wealth gave rise to numerous human rights violations. It is thus not surprising that since the opening of democratic space in the early 1990s, economic issues became central to most victimization accounts in Kenya.³⁹

Client-patron relations and corruption

73 Corruption has been cited as one of the three major problems that afflict African states, the other two being patronage and tribalism.⁴⁰ In Kenya, the scourge of corruption has followed successive Kenyan governments since independence. Corruption has manifested in a variety of ways. The client-patron political relationships that formed the basis of the exercise of political power were built on and sustained by corruption.⁴¹ Mismanagement and misappropriation of state resources by political leaders led to the collapse of key state firms established to provide important services or to lead the fight against poverty.

74 In addition, there have been major financial scandals that deprived the state of huge amounts of money, and as in the case of the Goldenberg scandal, dealt a major blow to the economy. The Goldenberg scandal, which involved the facilitation of the exportation of gold and diamonds from Kenya, is estimated to have cost the country 10 percent of its GDP under the Moi regime.⁴² More recently, the 'Anglo-leasing' scandal in 2005, which in many ways resembled Goldenberg and was apparently aimed at marshaling election funds for a faction within the NARC government, is said to have lost the country billions of shillings.⁴³

Land and economic marginalisation

75. Many commentators and witnesses who spoke to the Commission assert, and it is widely acknowledged even in government circles, that one of the main problems that has bedeviled Kenya since independence revolve around land.⁴⁴ In discussing the colonial legacy, it was noted that the dispossession of Africans by the colonial government in favor of white settlers, coupled by the failure by

39 See Peter O. Asingo, 'The Political Economy of Transition in Kenya', in W. Oyugi et al. (eds) *The Politics of Transition in Kenya: KANU to KADU* (2003).

40 Bruce J. Berman, 'Ethnicity, patronage and the African state: the politics of uncivil nationalism', *African Affairs* (1998): 97, 305-341 at 306.

41 See Part II of this report.

42 On the Goldenberg scandal, see Government of Kenya, *Report of the Commission of Inquiry into the Goldenberg Affair* (2005). See also, LA Cherolich, *Corruption and Democracy in Kenya* (Unpublished MA Thesis, University of Oxford).

43 Cherolich (n 42 above) 44.

44 See Kenya Land Policy.

the post-independence government to rectify the injustice, has been one of the main sources of economic marginalisation and a trigger of conflict. Dispossession of certain communities has left strong feelings of unfair treatment among these communities.

- 76 As shown in this report's chapter on land, the Kalenjin and Maasai communities feel that they were cheated out of their ancestral land through the resettlement programme instituted by the colonial government and later by the Kenyatta government. Similar sentiments continue to brew among inhabitants of the former Coast province who for a long time have been deprived of their rights. Policies by the colonial administration and independence government condemned them to near-permanent squatters.⁴⁵ While accurate data is difficult to come by, the Kenya Land Alliance (KLA), a group that has worked on matters relating to land for many years and have done various studies has claimed that more than 65 percent of the arable land in Kenya is owned by less than 20 percent of Kenyans.⁴⁶ It is asserted that these are largely politically-connected individuals.
- 77 For those without access to political power, politically-driven exclusion from owning land has bred deep resentment, especially where the political patrons and administrators who control access to land are perceived to favour members of their own ethnic communities.⁴⁷
- 78 With respect to public land, a weak legal regime led to massive 'grabbing' and misallocation by those legally entrusted with this important asset.⁴⁸ The vesting in the president of powers to alienate public land and to grant title by section 3 of the Government Lands Act (Cap 280) became one of the main avenues of theft of public land. Under the Agriculture Act, provisions that enabled the Agriculture minister to take away land that lies idle and give to 'others' to farm provided an avenue for the grabbing of prime land owned by the Agricultural Development Corporation (ADC).
- 79 Various studies have shown that Kenya has a complex land regime, yet the administrative framework that oversees it is poorly coordinated and gives excessive power to administrators without establishing mechanisms to ensure that they not only perform their duties but also do not abuse their powers, thus breeding corruption in relevant agencies.⁴⁹

45 K. Kanyinga, *The Land Question in Kenya: Struggles, accumulation and Changing Politics* (1988) PhD Thesis.

46 Kenya Land Alliance, *Draft report of a consultation on land tenure and conflict in Kenya* (2005).

47 M. Akech, *Institutional Reforms in the New Constitution of Kenya*, Nairobi: International Centre for Transitional Justice (2010) p 24.

48 On the illegal and irregular allocation of public land see *Government of Kenya: Report of the Presidential Commission of Inquiry into Illegal and Irregular Allocation of Public Land* (2005).

49 Akech (n 47 above).

Historical irredentist/secessionist struggles and state sovereignty

- 80 The Kenyan authorities have from a historical perspective discriminated against the Kenyan-Somalis and Somali refugees. This may be attributed to the long-standing conflicts between Kenya and Somalia, and the Kenyan authorities' reaction to what they perceived as a 'credible threat' from the North-Eastern Province (formerly the Northern Frontier District - NFD). The conflict has its origins in the colonial era when the British extended their control to the semi-arid area, acquiring it from the Italians.
- 81 New policies established by Britain escalated Somali resistance to British colonialism.⁵⁰ During the Lancaster House Constitutional Conference on Kenya's independence (February to April 1962), the thorny issue of Somali self-determination was raised by members of the NFD and Somali delegations. The NFD delegation and the Somali government, the latter not officially a party to the conference, demanded that the NFD question be addressed before Kenyan independence. KANU and KADU categorically rejected the secessionist proposal, and some members of KANU issued a rejoinder that the Somalis in the NFD could immigrate to Somalia if they did not want to accept Kenyan administration. The British government had promised to resolve the matter, but later on through the Report on the Regional Boundaries Commission, deliberately recommended (not taking into account the fact that many of the people in the NFD wanted the region to rejoin with Somalia), that the region should be kept within Kenya by simply redrawing regional borders.
- 82 While massacres (subject of a separate chapter in this Report) constitute a different category of violations, its prevalence in the former NFD has some relevance for economic marginalisation for at least one reason. As is shown later, massacres in this region were often accompanied by wanton destruction of property, livelihood sources and houses.
- 83 The Commission found that there is a perception, at least among residents of the former NFD, that the claims of secession by a group of Somalis explains, at least in part, how the region and its residents have been treated by government over the years. Residents of this region complain of discriminatory laws, regulations, practices and procedures that apply to them only and not to other Kenyans.
- 84 This is especially so in the area of citizenship and immigration laws. Their complaints centred on the fact that they have to produce more documents than other Kenyans. The screening exercise of Kenyan-Somalis and their issuance with

⁵⁰ O. Otunnu *Factors Affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A Historical Overview* Refuge Vol 12 No 5 (November-December 1992)

pink cards by the government in November 1989 is also cited as a clear case of discrimination. The Commission heard testimony from residents who are unable to obtain work because of their inability to obtain identity cards.

85 Information gathered from hearings, investigations and interviews with experts (including government officials) led to the conclusion that these claims are indeed credible. Residents of the former NFD have in the past been subjected to a discriminatory process in the application for national identity cards.

86 Jarso Forole's testimony discloses a typical story. Speaking on behalf of the Inter-Ethnic Consultative Group representing largely all ethnic groups based in Marsabit County purposely formed to consult on the historical injustices faced by local residents for presentation before the Commission, Forole stated:

[] we are facing a dilemma in terms of citizenship. We are suffering. 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. However, my application would be rejected because there was no conclusive proof that I was a Kenyan.⁵¹

87 With respect to the Coast province, it has been noted that land tenure issues in the 10-mile coastal strip of East Africa are intertwined with the early Swahili settlement in the region and the Indian Ocean trade. In Kenya, this area covers a strip of land of 1,900km stretching from Vanga in the south coast to the Lamu archipelago in the north. Since the conquest by Omani Arabs of the East Coast of Africa in 1660 A.D., the ownership of land in this area has changed hands severally between the Sultan of Zanzibar, the Imperial British East African Company (IBEACO), and later the British and Kenya governments in 1963.⁵² The British recognized the claims of the Sultan of Zanzibar on his 16km coastal strip.

88 Only the Sultan's 'subjects' (referring mainly to those with some ancestral links outside the protectorate) could register land in this area. As a result, up to 25 percent of the indigenous Mijikenda were turned into landless squatters, unable to register the land they had lived on for generations. The Mijikenda are the nine ethnic group (Digo, Chonyi, Kambe, Duruma, Kauna, Ribe, Rabaj, Jibana

51 TJRC/ Hansard/Public Hearing/Marsabit/4 May 2011,p. 11

52 G Wayumba, *A Review of Special Land Tenure Issues in Kenya*. Department of Surveying, University of Nairobi pp. 7-8

and Giriama) residing along the coast from the border of Somalia in the north to Tanzania in the south⁵³

89. Although some of the land was adjudicated under the Land Titles Act and registered as private land, mostly by 'outsiders' and 'absentee landlords'; the prevailing situation is that land occupied by the indigenous Kenyans is still held under communal customary tenure, as most of the land has not been adjudicated to determine the individual land rights. Further, although several settlement schemes have been established over the years by government, they have not always benefited the locals. The resulting squatter problem has been the source of a deep feeling of injustice. The land tenure issues remains one of the most sensitive issues as the local communities feel they were cheated by different initiatives. The inability of the locals to use the land on which they live for economic purposes has led to extreme levels of poverty. Thus, lack or limited government investment feeds an already rooted perception of economic marginalisation of the region⁵⁴

The Role of The State in Marginalisation

90. One of the specific actions required of the Commission in terms of section 5(a) of the TJR Act is to establish 'an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the state, public institutions and holders of public office, both serving and retired, between 12 December 1963 and 28 February 2008'. As previously noted regarding state responsibility for human rights, the state can be said to be responsible, whether directly or indirectly, in the marginalisation of certain regions, communities and groups such as women and ethnic minorities
91. Other than section 5(a) of the Act, there is conceptual basis and a necessity for the focus on the state when discussing responsibility for gross violations of human rights. Under international human rights law, the framework of responsibility is primarily state responsibility. This means that the obligation to implement human rights treaties and to ensure that the rights protected therein are realized belong to the state
92. Under the framework of state responsibility, human rights obligations apply to all branches of government (executive, legislative and judicial) and at all levels (national and county). The broad role (with illustrative cases) of successive

53. WRI and Landesa Rural Development Institute. Kenya. Lesson 3. History of Land Conflicts. in *Focus on Africa brief*, March 2011. p. 3

54. Wajumba (n 52 above) pp. 7-8

governments (the state) in economic marginalisation during the mandate period is hereby outlined and sets the stage for the discussion relating to the economic marginalisation of particular regions in the next section

The Kenyan State and economic marginalisation

- 93 In discussing the role of the colonial administration in creating economic marginalisation through a variety of mechanisms, it is noted that the legacy of the pre-independence situation can be traced to the years before independence because of the near wholesale appropriation of the methods, ethos, culture and practices of that administration by the post-independence governments. According to the Task Force on the Establishment of a TJRC, '[i]n spite of the liberal [independence] constitution, the post-colonial state was autocratic at its inception because it inherited wholesale the laws, culture, and practices of the colonial state'⁵⁵
- 94 While it is true that the post-colonial government adopted an economic policy framework based on 'African Socialism', which came imbued with values of inclusion, human dignity, brotherhood and social justice and could have anchored equitable development, certain aspects of the policy, in particular its implementation, carried the seeds of inequality and economic marginalisation that would characterize the Kenyan state in succeeding years. Other than justifying prioritization of investment in certain regions to the exclusion of others, the implementation of the economic policy contained in Sessional Paper No. 10 of 1965 took a decidedly capitalist slant, with a limited welfare component.
- 95 In addition, the restructuring of the state by the Kenyatta government soon after independence did not match, and in fact undermined the vision articulated in the economic policy based on African Socialism. The systematic dismantling of the independence constitution (abolishing of regional governments, the strengthening of the presidency while emasculating parliament and the judiciary) was inimical to the stated goals of African Socialism that underpinned economic policy. As at 1966 when Kenya became a *de facto* one-party state, the oppressive and exclusionist practices of the state largely mirrored those of the colonial state.
- 96 Evidently, within the Kenyan context, horizontal manifestations of inequality (between groups and regions) point to the role of state institutions and policies in creating or nurturing inequalities. Both in the political and economic contexts, state institutions have played a key role in mediating access to economic opportunities and allocating resources.

⁵⁵ Government of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003): 19

- 97 As noted earlier, economic marginalisation, and by extension horizontal inequality, is considered by many as a 'historical injustice'. According to some accounts, the reasons for the permeation of the language of 'historical injustice' into the discourse on horizontal inequities is not far to seek, but it poses particular challenges. In a country where for a long time economic and political power has been heavily centralised, where the state appropriated for itself the role of being the agency for development, and where politics is highly ethnicised, the hypothesis of unequal treatment can be misused⁵⁶
- 98 Therefore, the Commission notes that while its focus is to look at the role of the state, there are multiple factors that have produced inequality between regions and within regions. Clearly from testimonies made during the hearings, it is emphasised that inequalities do exist even within regions regarded as relatively advantaged over others. For anyone studying horizontal inequality, the challenge is to identify with clarity elements of that inequality that are attributable to the state. Nevertheless it is clear that economic marginalisation by the state can take place in various ways, through the diverse institutions, legislation, policies, administrative arrangements, and regulations and practices
- 99 The practices of the colonial administration, mostly through its 'divide and rule' strategy planted the seeds of inter-ethnic rancour, but also set off a process that would produce economic marginalisation. One aspect that is worth discussing is how those policies determined the outlook and position of certain regions within the economy
100. When discussing the role of indigenous capital in the economy, one commentator, cites several writers and posits that the colonial state facilitated the accumulation of Kikuyu capital in ways that placed an elite group of the community in a position to dominate economically in later years. It is asserted that
- [p]rior to independence, state-led initiatives played significant roles in promoting the formation of the Kikuyu capital and therefore laying the basis of ethnic inequalities. Proximity to the capital city Nairobi and the White Highlands scheduled for the white settler economy provided the Kikuyu with opportunities for investment and accumulation of capital, which other groups could not have⁵⁷
- 101 The apparently advantaged position occupied by certain members of the community, did not change at independence, adds the commentator

⁵⁶ On this issue see Society for International Development (SID) Introduction to *Readings on Inequality in Kenya* (2004)

⁵⁷ Kanyinga (n 30 above) 347

[t]he post-colonial state framework nevertheless simply facilitated further accumulation of Kikuyu capital in both finance and agricultural sectors. Thus, Central Kenya, the heartland of the Kikuyu, evolved from the colonial period far more advanced than others⁵⁸

- 102 Although the impact of marginalisation of other large groups and the implications of capitalist development were not addressed in the initial analysis of the Kenyan political economy, both phenomena contributed to growing regional disparities and inequalities in development⁵⁹

Sessional Paper No. 10: African Socialism as the anchor of economic policy

- 103 The Commission takes the firm view that in post-independence Kenya, the seeds of economic marginalisation of certain regions were planted by the first formal economic blueprint, Sessional Paper No. 10 titled 'African Socialism and its Application to Socialism' published in 1965. The purpose of the policy paper was to outline both the theory and practical application of African Socialism to economic planning

- 104 As Tom Mboya - evidently one of the main ideological architects of Sessional Paper No. 10 written while he was Economic Planning and Development minister explained - , the adoption of the philosophy of 'African Socialism' was a necessary measure to anchor the newly-independent state, both in economic and political terms

- 105 Writing in 1963, two years before the Sessional Paper No. 10 was published, Mboya justifies resort to the philosophy of African Socialism as a choice driven by the need to respond to contextual demands in African society

Africans are struggling to build new societies and a new Africa and we need a new political philosophy - a philosophy of our own - that will explain, validify and help to cement our experience⁶⁰

- 106 Having narrated the travails of newly independent African states and the need to transition from colonialism on a firm philosophical basis that was authentically African, Mboya offered his understanding of African Socialism, which would later reflect in Sessional Paper No. 10. He noted that

[w]hen I talk of 'African Socialism' I refer to those proven codes of conduct in the African societies which have, over the ages, conferred dignity on our people and afforded them security regardless of their station in life. I refer to universal charity which characterized our societies and I refer to the African's thought processes and

58 Kanyinga (n 30 above) See also Rothschild D. Ethnic inequality in Kenya *Journal of Modern African Studies* 7 4 (1969) pp. 689-711

59 Kanyinga (n 30 above) 348

60 Tom Mboya 'African Socialism' Transition No. 8 (March, 1963) pp. 17-19

cosmological ideas which regard man, not as a social means, but as an end and entity in the society⁶¹

107. Sessional Paper No 10 identified several objectives that are of relevance to the issue of economic marginalisation. It noted that newly independent Kenya placed particular emphasis on the following objectives: political equality, social justice, human dignity including freedom of conscience, freedom from want, disease, and exploitation, equal opportunities, and high and growing per capita incomes, equitably distributed.⁶² The policy expressed that applying African Socialism to economic planning was the best framework of achieving the stated objectives

108. The policy noted that African Socialism was based on two African traditions: political democracy and mutual social responsibility. Political democracy implied that each member of society is equal in his political rights and that no individual or group would be allowed to exert undue influence on the policies of the state. The state can never become the tool of special interests, catering to the desires of a minority at the expense of the majority. Accordingly, the policy contained a pledge to the effect that 'the state [would] represent all of the people and would do so impartially and without prejudice'⁶³ Mutual social responsibility was regarded as 'an extension of the African family spirit to the nation as a whole. . . it implies a mutual responsibility by society and its members to do their very best for each other'. The state acknowledged that it bore an obligation 'to ensure equal opportunities to all its citizens, eliminate exploitation and discrimination and provide needed social services such as education, medical care and social security'⁶⁴

109. One of the main forces that drove the adoption of the policy was to respond to equity demands, mainly from the black African population and thus to address race related discrimination and exclusion within the economy. While Africans were restricted to native reserves, the white settlers occupied fertile swathes of land all over the country. Moreover, Africans performed most of the unskilled jobs, while Europeans held many of the management, professional, and higher technical posts in the public and private sectors

110. For their part, Asians thrived and dominated middle-level clerical, technical and commercial positions. The category of Asians refers essentially to Indians, most of who initially came to East Africa (more accurately brought in by the British at the end of the 1800s) to work on the Kenya-Uganda Railway. Later, they had

61. As above

62. Sessional Paper No 10 para 4

63. Sessional Paper No 10 para 8

64. Sessional Paper No 10 para 11

established themselves in business. In a segregated system, Asians were second-class citizens (with Africans at the bottom). They had better opportunities across the board. Unlike Africans, their children had access to better education. Before independence, some could attend school with Europeans, which was the best education one could get.

111 It is against this background that Sessional Paper No. 10 was developed. President Kenyatta, when introducing the Sessional Paper, noted with regard to the adoption of African Socialism – a philosophy that had already been contained in the ruling party KANU's manifesto – that '[o]ur [the government's] entire approach has been dominated by the desire to ensure Africanisation of the economy and public service'⁶⁵

112 Writing in 1970, Rothschild described the state of affairs inherited by the independence government that provoked African claims for greater opportunity at independence:

Whereas the statistics on Europeans in the key occupational groups showed 42 percent in professional and managerial posts and 17 percent in technical and supervisory posts, those for the Asians were 23 percent and 4 percent respectively and for Africans were approximately one per cent in the two categories combined. As to the distribution of earnings, a similar lopsided pattern was evident, in 1962, the small Asian and European communities earned £46.8m in a total annual wage bill of £88.8m. In the private sector, 29 percent of the regularly employed European males earned more than £1,800 per annum and another 29 percent earned between £1,200 and £1,799. Comparative statistics for the other communities showed 18 percent of Asian males earning £720 and over, and one per cent of the African.⁶⁶

113 The Africanisation programme therefore targeted a range of sectors: education (requiring 50-50 enrolment in schools previously the preserve of Europeans and Asians), agriculture (introducing state involvement in several areas including breeding; land transfers, a resettlement programme that entailed buying land from non-Africans and resettling Africans on a willing-seller-willing-buyer basis; providing access to finance; promoting creation of cooperatives and training) and, public service (affirmative action to increase numbers of Africans)⁶⁷

114 While the policy articulated the right principles – social democracy entailing equal rights of participation and mutual social responsibility (which not only entailed

65 Sessional Paper No. 10 p. 1

66 Rothschild, D. 'Kenya's Africanisation Programme: Priorities for Development and Equity' 44 *The American Political Science Review* (1970) 737-752, 738, citing Kenya Population Census 1962, Vol. III (Nairobi: Ministry of Economic Planning and Development, 1966) at 45-52 and Republic of Kenya Statistical Abstract 1965 (Nairobi: Ministry of Economic Planning and Development).

67 Sessional Paper No. 10 para. 82

social justice but also an obligation on the government to intervene in favour of the disadvantaged), there were serious flaws that laid the foundation for economic marginalisation in later years, building as well on a number of distortions that existed in society

How Sessional Paper No. 10 fostered economic marginalisation

115 It is the Commission's considered view that the post-independence government largely got the broad ideological framework and the fundamentals of economic policy right. In particular, the policy correctly expressed the state's obligation thus

The state has an obligation to ensure equal opportunities to all its citizens, eliminate exploitation and discrimination, and provide needed social services such as education, medical care and social security⁶⁸

116 However, there are several elements that transformed the policy into a facilitator of economic marginalisation rather than a mitigator of inequality. Firstly, although it was recognized that land was previously owned communally with access regulated through membership in a particular group (clan, ethnic group), Sessional Paper No. 10 asserted that a system of secure private title to land was necessary to anchor economic growth. Yet, the diversity of claims (that included communal title that governed property in most communities in the pre-colonial era) as well as the effects of dispossession during the colonial period does not appear to have been taken into account. Private individual title was the only recognized title through laws adopted soon after independence. This became one of the main reasons why the Sessional Paper No. 10 was heavily criticized

117 Expressing surprise (in respect to non-recognition of communal title to land), one of the most vehement critics of the policy decried the fact that 'one of the best African traditions is not only being put aside but even the principle is not being recognized and enhanced'⁶⁹. Those who testified during the Commission's hearings or made written submissions on issues related to pastoralists and economic marginalisation blamed the land tenure system for many ills experienced by communities because of the non-recognition of communal land tenure. Describing the dispossession that pastoralist communities have suffered over the years, Michael Tiampati, who testified before the Commission on behalf of Pastoralist Development Network of Kenya noted

⁶⁸ Sessional Paper No. 10 para 11

⁶⁹ See for instance Barak H Obama 'Another critique of Sessional Paper No. 10' *East Africa Journal* July 19 26-33 at 29 expressing surprise (in respect to non-recognition of communal title) that 'one of the best African traditions is not only being put aside but even the principle is not being recognized and enhanced'

There is also the aspect of land tenure. In these areas, essentially most pastoralists do not own land individually, they own them on communal basis. Management is through traditional institutions, but individualization of land ownership has come to undermine these principles and has also brought about problems.⁷⁰

- 118 Acknowledging serious abuses that occurred under the land tenure system since independence, Chapter Five of the 2010 Constitution recognizes three categories of land holding, including communal land. The other two are public land and private land. This is partial justice for communities that have suffered dispossession and other injustices because of non-recognition of communal title since 1963. The Commission is of the view that appropriate measures must be taken under the Constitution to address and correct injustices that have occurred under the previous land regime that excluded communal form of land ownership.
- 119 The resettlement programme undertaken under Sessional Paper No. 10 was similarly problematic. The resettlement programme operated on a willing-seller-willing-buyer basis, a policy which subsequently condemned many to perpetual landlessness.⁷¹ While it is difficult to access accurate data, it is often anecdotally suggested that there are hundreds of thousands, of squatters and landless people in the country, largely concentrated in the former Coast and Rift Valley provinces.⁷²
- 120 It is the Commission's view that in part because of the deep-rooted distortions introduced in society by the colonial dispensation and in particular the widespread destitution created by policies of dispossession and selective empowerment, newly-independent Kenya would have needed a period of adjustment after independence to correct the ills of colonialism and address inequalities before introducing a capitalist market with limited state intervention in social programming.
- 121 Unfortunately, the structures that had promoted inequality and marginalisation in the colonial period remained in place, as an expert witness noted

There was the structure of the colonial state itself and the mechanisms that it put in place to prefer certain groups over others. However, with the end of the colonial period, issues of inequality did not just go with colonialism. Unfortunately, the first government that came into power continued some of those policy choices in the post-independence era that not only enhanced it but, in many instances, even deepened the inequality.⁷³

⁷⁰ TJRC/Hansard/Thematic Hearing on Economic Marginalization and Minorities/13 Feb 2013/p. 28

⁷¹ Sessional Paper No 10 paras 28-31

⁷² See Chapter on Land in this Volume of the Report

⁷³ TJRC/Hansard/Thematic Hearing on Economic Marginalization and Minorities/13 Feb 2013/p. 18

122 In part because of the injustices visited on our people by the colonial administration, the post-independence government should have taken concrete measures not only to restore rights of the dispossessed, but also to institute measures that would have corrected existing imbalances in order to place different sections and regions in society on an equitable footing as the country embarked on constructing itself after the end of colonial administration. Investment policies should have aligned to at least these two objectives.

123 With respect to land for instance, rather than commercializing resettlement that skewed access in favour of those who had money or could access loans, resettlement should have been anchored on restoration of rights. This would entail assessing the claims of those forcibly removed from their land and restoring them to it while finding alternative settlement in cases where for a limited number of reasons - third-party interests, sustainability in the use of resources - restoration to specific land was impossible.

124 Those who presented their views on the question of historical land injustices to the Commission appeared aware that remedying such injustices would not entail restitution of land in all cases, especially where third-party interests are involved. Speaking on behalf of Pastoralist Development Network of Kenya, an organization that seeks to push for the integration of pastoralist issues in the national development agenda, Michael Tiampati reiterated the practical solutions to land injustices that have been made in the past by various aggrieved communities:

At the Bomas Conference on the new constitution, I heard pastoralists say that 'You do not need to carry your skyscrapers in Nairobi and leave our land. You have the skyscrapers because they work for you, but what is there that is benefitting us?' So you do not need to carry the skyscrapers from Nairobi and leave land in order to address historical injustices with regard to ancestral land. The question to address is what we want. If the takeover was by the settlers, yes, a case was raised during the Lancaster House Conference. They said that they wanted to buy back the land from the settlers who had developed on that land. That did not come to be. Those are some of the painful issues that will have to be addressed. They cannot be addressed in a hushed tone. They have to be addressed in an open and transparent manner so that everybody accepts whatever wrong that was done. We need to ask the question the Swahili way *Kosa hufanyika, tufanyeje?*⁷⁴ (A mistake has been made, how do we correct it?)

125 Secondly, the implementation of the Africanisation programme – which was aimed at increasing African representation in various sectors including education, industry and public service – also left much to be desired. One commentator has

⁷⁴ TJRC/Hansard/Thematic Hearing on Economic Marginalization and (n 73 above) p. 35

noted that among the deliberate actions undertaken by political elites between 1964 and 1970 that 'undermined the liberal democratic constitution and the values it underpinned' was the blatant 'ethnic and nepotistic approach to the Africanisation of the public service'⁷⁵

- 126 As shown below in the regional assessments, the perception that over the years, the composition of the public service or at least the higher echelons has mirrored the regional extraction of the president is widely held. And while the Commission was unable to access complete data on the composition of the public service over the years, some tables and figures are included at the end of this section that point to this phenomenon.
- 127 In addition, while the philosophy that underpinned the economic policy (African Socialism) appeared to reject both Western capitalism and Eastern communism - pragmatically preferring to locate Kenya in the middle by adopting a non-aligned stance during the Cold War divide - in practice, the manner in which African Socialism was applied followed a decidedly capitalist path, with Kenya remaining non-aligned in political terms only. Elements of the policy that would have anchored a welfare state such as provision of social services like education, health and social security remained unimplemented. This was explained in the policy on grounds of lack of resources and skilled human resources.
- 128 The Commission asserts that the elements of the policy of African Socialism that include social justice, equity and 'brotherhood' could have anchored a welfare state had this path been chosen consciously. As has been shown by the experience of many western liberal democracies, a welfare state is not incompatible with the tenets of a capitalist economic orientation.
- 129 Equally, with respect to affirmative action, the Africanisation programme that sought to address absence of Africans in the public service and various sectors of the economy soon after independence should have been implemented in a more inclusive manner, and with due regard to issues of diversity.
- 130 From a historical perspective, it is partly the turn to the West and unbridled capitalism that was one of the main sources of the rift and subsequent fallout between President Kenyatta and Vice President Oginga Odinga in 1966. While the socialist Odinga urged that the government should look East for inspiration, President Kenyatta opted for capitalism and the West. While the conflict was partly ideological, Odinga had accused President Kenyatta of 'betraying those

⁷⁵ C. Odhiambo-Mbari, 'The rise and fall of the autocratic state in Kenya' in W. Oyugi (eds) *The politics of transition in Kenya: From KANU to NARC* (2003) 59.

who struggled for a nationalist, inclusive cause' The departure of Odinga from government, his banishment and the sidelining of his supporters would cement the liberal economic policies only three years after independence

- 131 Thirdly, and perhaps more importantly, the deliberate decision expressed in the policy to prioritize investment into 'high potential regions' to the exclusion of 'low potential' ones is key to economic marginalisation of the regions profiled here The policy stated at paragraph 133 of Sessional Paper No 10 reads as follows

One of our problems is to decide how much priority we should give in investing in less developed provinces To make the economy as a whole grow as fast as possible, developmental money should be invested where it will yield the largest increase in net output This approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities and people receptive to and active in development ⁷⁶

- 132 Many who made representations to the Commission identified this investment policy as the root of inequity and economic marginalisation of certain regions According to Ali Hersi, the policy paper left the colonial structures of inequality intact

[T]his policy paper did not deconstruct the colonial logic that led to basis for inequality by advocating a discriminatory policy investment of government resources

- 133 Part of the problem was that what constituted 'high potential' areas was defined very narrowly Paragraph 133 of Sessional Paper No 10 stated that development would be directed to areas having abundant natural resources, good land and rainfall, transport and power facilities and people receptive to and active in development These happened to be areas previously designated as 'White Highlands', largely in Central and parts of Rift Valley regions The effect of the narrowly defined 'high potential area' has been that any area that cannot grow certain crops is considered wasteland more or less Testimonies, including those from participants in FGDs countrywide were very critical of the state's historical preference for cash crop farming to the detriment of livestock keeping that is the mainstay of the economy in arid and semi-arid lands (ASALs) regions classified as 'low potential'

- 134 The ASALs constitute about 80 per cent of the country's land mass and it is home to about 10 million people Noting that the policy excluded and led to the neglect of pastoralist areas and productive economic activity, Abdikadir Kaaru Gullet stated

The Sessional Paper No 10 of Kenya of 1965 clearly distributed the resources of Kenya to regions considered to be high potential areas The benchmark for high potential areas is agricultural land producing coffee, tea or pyrethrum or cash crops That is where Kenya

⁷⁶ Sessional Paper No 10 para133

distributed its resources. Northern Kenya was not considered as one of the high potential areas in terms of livestock and livestock production. In other words, areas that do not produce coffee, tea or pyrethrum are considered to be low potential areas with no much benefit to the government. Therefore, there is no much need to invest in them in terms of education, water and other infrastructure.

- 135 It is important to note that some regions that would fall into the classification of 'high potential' areas because they meet at least some of the conditions set in Sessional Paper 10 have suffered marginalisation for other reasons. These are explored in section three of this chapter. In addition, it is worth noting that the view that certain regions, in particular the former 'White Highlands' benefitted in their entirety from the investment policy is inaccurate. Within these areas, there are pockets that benefitted more than others, with some not benefitting at all. An expert witness stated:

Over time, it was recognized that there were gaps in this [the policy of prioritizing investment in certain areas]. What was intended was that even in these areas that were being targeted, the resources did not necessarily go towards ensuring equitable development in that area itself. There were groups that benefited a lot more than others.⁷⁷

- 136 Where there has been investment in marginalized regions over the years, planning has been driven by wrong priorities or by considerations that do not assist the intended beneficiaries, in part because decisions have been made in Nairobi. Speaking in relation to misplaced investment in certain pastoralist areas, another expert witness observed:

This is what my colleague alluded to in terms of development initiatives for pastoralist areas being decided in Nairobi. I do not know whether you went to Laikipia to a place called 'Mugogodo', where there is a very big cereal store and yet those people do not grow any cereals because they are pastoralists. Essentially, you see the level of disorganization in terms of planning for certain communities. So, we feel that these are some of the aspects that have brought about economic marginalisation.⁷⁸

- 137 What is clear is that African Socialism – albeit under a different name, *Nyayoism* or Nyayo philosophy – would remain relevant as an ideological framework continued to inform government economic planning and the government's approach in general. Soon after taking over from Kenyatta in 1978, President Moi had declared that '*nitafuata nyayo*' (I will follow the (Kenyatta's) footsteps) meaning that he would ensure continuity of the principal ideals, policies and philosophy pursued by Kenyatta.

⁷⁷ TJRC/Hansard/Thematic Hearing on Economic Marginalization and Minorities/13 Feb 2013/p. 19

⁷⁸ TJRC/Hansard/Thematic Hearing on Economic Marginalization and Minorities/13 Feb 2013/p. 28

138. The Nyayo philosophy would later be expressed in an acclaimed book by Moi.⁷⁹ Critics have argued that the manner in which the philosophy of *Nyayoism* was practiced led Moi to perfect most of the negative practices predominant in the closing years of the Kenyatta era, such as neo-patrimonialism and corruption.⁸⁰

139. In his communication to the Commission, former President Moi rejects the idea that any part of the country was marginalized under his rule. He writes that the central plank of his regime was inclusive development:

The biggest agenda of my government was to distribute resources equitably to all parts of the country. I cannot agree, even for a fleeting moment, to make reference to a so called 'socio-economic marginalisation' of any part Kenya, by my government.⁸¹

140. With respect to specific regions — Nyanza, Northern Kenya (former NFD) and North Rift— that have often dominated narratives on marginalisation in the past, Moi cites various projects and the various personalities (especially from Nyanza) who served in key positions in his administration as part evidence of inclusion. For North Eastern and North Rift, Moi denies marginalisation, while affirming that all was done to include Kenyans from those parts of the country. He attributes challenges faced by residents of those regions largely to natural causes:

As the other areas namely Northern Kenya and Rift Valley Province, these areas faced a natural drawback of being dry and arid. The speed of development in areas where the climate and weather are not conducive cannot be compared to areas where land is arable and accessible by road. Despite these natural impediments, my government made a big effort to reach our people there, and today, despite all the challenges, the people of the dry areas feel as Kenyans, as the rest of the citizens. I created the Reclamation of Arid and Semi-arid Lands ministry and appointed Hon Justus Ndotto as its first minister. This was one of my attempts to speed up development in the arid areas.⁸²

141. While some initiatives were launched to uplift these regions, especially the ASAL regions, it appears that measures taken were both inadequate and in some cases inappropriate. Creating structures does not always translate into results on the ground. The assertion by the former president that the residents from Northern Kenya feel like Kenyans today does not reflect the perceptions recorded by the Commission. While expressing optimism that the situation could change under the new Constitution, the majority of those who spoke from these regions (as is

79. For more on Nyayo philosophy, see generally Daniel arap Moi, *Kenya African Nationalism: Nyayo Philosophy and Principles* (1986).

80. Asingo, Peter O. *The Political Economy of Transition in Kenya*, in Walter O. Oyugi, Peter Wanyande and Odhiambo Mbari (eds) *The Politics of Transition in Kenya: From KANU to NARC* (2003) 22. See also Kyule, L. *The Politics of the Independence of Kenya* (1999) 203 who notes that 'the scope for criticism and free debate' already limited, was continually narrowed, civil society crippled and human rights infringed.

81. Written Submission by Former President Daniel arap Moi to the TJRC (2012) p 20.

82. Written Submission by Former President Daniel arap Moi to the TJRC (2012) p 23.

shown in testimonies in this chapter) categorically stated repeatedly that even today, their experiences have made them feel 'less than Kenyan', 'as foreigners' or 'unwanted outsiders in their own country'

- 142 Quite clearly, it appears that President Moi was and remains out of touch with the lived realities of Kenyans across the country

Political power and economic empowerment

- 143 In part because of the nature of the state (power and resource concentration at the centre) and in part because of ethnicity, a clear link can be seen between economic fortunes of particular regions and control of political power. Hold onto power allowed ethnic elites to accumulate wealth, invariably within the group. In reference to the Kenyatta regime, it is noted that 'power was increasingly concentrated in the Kikuyu elite who increasingly excluded elite from other ethnic groups from the centre'⁸³ While the Commission is unable to confirm these statements, similar sentiments have been expressed at different times with respect to the Moi and Kibaki administrations. Concentration of political power in the hands of the Kikuyu elite also provided opportunities through which the group could accumulate capital. Politics and economy became intertwined. This is a phenomenon that has continued to underpin Kenyan politics

- 144 The circumstances under which Daniel arap Moi assumed power in 1978 – amid jostling among the ruling elite to succeed President Kenyatta – and how his 24-year presidency evolved is explained thus: 'wielding political power meant economic prosperity for the ruling group, which can be aptly described in terms coined by Joseph Karimi and Phillip Ochieng as 'The Family', referring to rather close political confidants and business people tied closely to power as opposed to 'family', blood relatives.'⁸⁴ Throup and Hornsby observe

Under Kenyatta, the Kikuyu had come to dominate business and commerce, the civil service, many of the professions and, of course, politics – with a comparatively elaborate communications and power infrastructure, Kikuyu land lay at the heart of the Kenyan economy in a way that the Kalenjin areas, the core of President Moi's new coalition, did not.⁸⁵

- 145 Karimi, Ochieng and Asingo recount the intrigues surrounding attempts towards the end of Kenyatta's life by members of 'The Family' to undermine the accession by

⁸³ Kanyinga (n 60 above) 348. Bates RH *Beyond the miracle of the market: The political economy of agricultural development in Kenya* (1989)

⁸⁴ See Joseph Karimi and Philip Ochieng *The Kenyatta Succession* (1980)

⁸⁵ Throup, D & Hornsby C *Multiparty Politics in Kenya* (1998) 26-27. Asingo 23

Moi, the constitutionally designated heir, to power⁸⁶ While rewarding those who had supported him among the Kikuyu elite (in particular Mwai Kibaki and Charles Njonjo (Kibaki became Vice-President, while Njonjo was retained as Attorney-General, only to be ousted four years later for alleged links to the 1982 coup attempt and his rumoured clandestine attempts to seize power) as the limited data available to the Commission shows (see tables at the end of this section), Moi found it necessary to create room for the Kalenjin elite not only by expanding the patronage network beyond Central Kenya, but also by purging the public service

- 146 As Moi embarked on this endeavour of including the Kalenjin, the casualties were inevitably Kikuyu. Moi's response to increasingly critical and 'uncooperative' Kikuyu elite was 'swift and economically damaging to the uncooperative Kikuyu elite, who began to lose out state-mediated economic opportunities to the Asians and a few Kalenjin front-runners'⁸⁷ Complaints leveled against President Kibaki at the end of his first term and which were expressed to the Commission suggest that a similar pattern was repeated, with the main casualties being Kalenjin
- 147 Commentators attribute Moi's recourse to authoritarian rule at the start of the 1980s – only two or three years after assuming power – to his inability to 'rule through consensus due to the recalcitrance of the Kikuyu elite' The attempted coup in 1982 appeared to remind Moi of the insecurity of his rule and he would immediately move to destroy any opposition and to strengthen his hold on power. In succeeding years, the Moi regime is said to have attempted to deny Kikuyu businessmen opposed to its rule state-mediated economic opportunities and instead elected to work with Asian businessmen to undercut what was perceived as threat derived from the economic power of this elite.⁸⁸ Leaders who worked closely with the administration are said to have flourished economically
- 148 The intersection of politics and power in a context where the private sector remained insignificant over the years heightened political competition and increased opportunities for conflict over resources because the state had positioned itself as the main agency of development and 'dispenser of largesse'. In the Commission's view, this situation has had particular importance for economic marginalisation or inclusion, it meant that economic fortunes of individuals and groups depended on their acquisition, holding and wielding power or proximity to it
- 149 Political competition, as noted earlier, became a zero-sum game win and be rewarded, lose and be marginalized, unless you could find some relevance in the ruling elite struggles to hold onto power. One commentator notes rightly that

⁸⁶ Peter O. Asingo (n 80 above) 20-22, Throup and Hornsby (n 85 above)

⁸⁷ Asingo (n 80 above) p. 24

⁸⁸ Asingo (n 80 above) p. 23. Kasfir, N., ed. *Civil Society and Democracy in Africa: Critical Perspectives* (1998) 116

'the state became the institution critically necessary for changing the economic fortunes of individuals and their ethnic constituencies'⁸⁹ This struggle in turn led to the growth of client-patron political relations on which the political structure was constructed. In some degree, this explains why, upon the easing of the authoritarian one-party structure, political contest in Kenya has been a violent affair from the 1990s.

- 150 Having identified the three factors that created and strengthened class divisions in Marx's Europe (the concentration of economic power, absolute and unrestricted private ownership and, the close relationship between economic power and political influence) Sessional Paper No. 10 proposed that the application of African Socialism would eliminate these problems, asserting,

[t]he concept of political equality in Africa rules out in principle the use of economic power as a political base. The vigorous implementation of traditional political democracy in the modern setting will eliminate, therefore, one of the critical factors promoting class divisions. The policy of African Socialism to control by various means how productive resources are used eliminates the second of the factors supporting a class system. Without its two supporting allies, the concentration of economic power cannot be the threat it once was.⁹⁰

- 151 It can be argued that although Sessional Paper No. 10 rightly identified the danger of concentrating economic power in political hands and pledged to combat it, history bears out the fact that there has been complete failure in this regard. Kenya is ranked as one of the most unequal countries in Africa. While the Commission cannot confirm this, views were expressed that economic power is concentrated in particular elites who have held political power at one point or another and invariably, some of the richest Kenyans have either been part of the ruling elite, senior public servants or businessmen who at one time had a close association with power through various networks. This is not to suggest that association with power has been or is the sole origin of economic fortune.
- 152 As shown subsequently, history depicts that there have been clear links between politics and economic fortunes/development of ethnic communities and regions over time. One indicator that is a good marker of economic marginalisation or inclusion is physical infrastructure, in particular roads. Anecdotal evidence suggests that by the time of Kenyatta's death in 1978, of all regions, Central Kenya had the most well-developed social infrastructure, including roads. These would later suffer neglect and deteriorate under Moi, while Rift Valley gained the advantage in this regard.

⁸⁹ Kanyinga (n 30 above) 348

⁹⁰ Sessional Paper No. 10 para 31

153. Under Kibaki, Central Kenya arguably has the best road network in Kenya with the old ones having been replaced and new ones built. While there could be an economic rationale, and while it is true that some other regions have seen an improvement in part of their road infrastructure under Kibaki (with Northern Kenya getting its first tarmac/all-weather road since independence the incomplete Isiolo-Moyale highway), the fact that the first 'Super- highway (Nairobi-Thika) leads to Central Kenya perhaps confirms the links between politics and economic development that became a norm in post-independence Kenya. It has been suggested that it is a continuation of the flawed and biased policy (contained in Sessional Paper No. 10 of 1965) that prioritized development of 'high potential areas' over 'low potential areas'

Instrumentalising ethnicity and patron-client political relations

154. In reviewing academic literature when attempting to diagnose the problem of the post-independence African societies, Berman cites three main issues: patronage, corruption and tribalism to which he refers to as 'the evil triumvirate'⁹¹. Of tribalism, he writes as follows.

[o]f the three, 'tribalism' appeared to be the underlying basis of the other two, the foundation of the power of the 'Big Men' and the catch-all explanation in academic analysis, as well as the mass media, of catastrophic political failure on the [African] continent.⁹²

155. As is evident so far, the relationship between ethnicity and social, economic and political opportunities in Kenya has been clearly pronounced over the years.⁹³ Ethnicity has over the years been manipulated for political and economic gains. Because of weak democratic and accountability institutions, the attitude that the elite have towards state power (that is to be used towards personal enhancement, prestige and social status rather than in the service of some ideal or public good) has persisted.⁹⁴ Political manipulation of ethnicity is almost a tradition in Kenyan politics.⁹⁵ It has been a common practice for politicians and officials to use state power and institutions to promote their own interests or those of their ethnic groups.⁹⁶ This is achieved through intimidation, violence and other forms of terror against real and imagined enemies.⁹⁷ Nowhere is ethnicity more at play

91. Introduced in an article by John Slackhouse titled 'Are the Big Men Coming Back?' published in *Globe and Mail* (Canada) 6 April 1996.

92. Berman, Bruce J. 'Ethnicity, patronage and the African state: the politics of uncivil nationalism' *African Affairs* (1998) pp. 305-341, 306.

93. 'Ethnic Inequalities in Education in Kenya' *International Education Journal* Vol 5, No 2, 2004 Centre for Development Studies.

94. PA Nyong'o *State and Society in Kenya* (1989).

95. See Kenya Human Rights Commission 'Warlord Democracy', December 2002.

96. PA Nyong'o *Popular struggles for democracy in Africa* (1987).

97. G Hyden *African politics in comparative perspective* (2005).

than in the political arena. Ethnicity has become, not only a basis of political support, but also of political marginalisation⁹⁸

- 156 The political class has, since independence been accused of manipulating ethnicity in the capture, consolidation and hold onto power⁹⁹. Jomo Kenyatta built his power base among the Kikuyu, Embu and Meru (GEMA) communities, excluding the majority not only from the political, but also from the social and economic spheres of the state. Former president Moi, once in power, proceeded to consolidate it with the Kalenjin community, resulting in its ethnic domination and hegemony over state institutions. The collapse of the National Rainbow Coalition (NARC) that swept Kibaki into power only two years into his first term was largely due to the exclusion, or perceived exclusion, of non-GEMA players who had contributed to Kibaki's victory in 2002. In the 2007 and 2013 General Election, both dominant sides appealed to ethnic bases.

Limiting spread of economic empowerment: Control and selective impoverishment

- 157 According to one author, the heavy reliance of private capital on political patronage and state-mediated commercial opportunities for economic advancement tended to curtail the scope for a large-scale private enterprise sector. Indeed most of the large capitalists who emerged were mainly Kikuyu elites with close links to the Kenyatta regime. Their interests had been secured by the formation of GEMA in 1971. GEMA was created to secure the social and economic interests of Central Kenya communities. While Kenyatta was the patron of the organization, leading ministers served as officials (Julius Kiano, Mwai Kibaki, Jeremiah Nyagah, Jackson Angaine, Maina Wanjigi and Nguret) but were later replaced by businessmen notably Njenga Karume and Kihika Kimani to lower the political profile of the organisation following public uproar. GEMA is said to have become the main vehicle for organizing capital and acquisitions, including land purchases.
158. Commentators note that the state had an interest in maintaining a tight control over the size of the private sector. State control over the size, nature and mix of the emerging African capitalist class appears to have been hinged on the premise that an 'expansive capitalist class would deprive the political leaders of the ability to mobilize economic opportunities and resources for political patronage purposes'¹⁰⁰.

98 O. Juma & M. Munene 'The Colonial Policies of Segregating the Kikuyu' (2002) 2 *International Journal of the School of Social Sciences* 36

99 O. Anthony & J. Dan *Back to the Future: The 2007 General Election* (2007)

100 Kasfir (n 88 above) 112-113



A section of a trading center in Northern Kenya.

159. With hindsight, and in the context of client-patronage political relations described here and elsewhere, it can be concluded with certainty that the composition of the Cabinet appointed by presidents over the years since independence have been a good marker of inclusion across several sectors (political, social and economic). The tables below reflect the evolution under the administration of the first three presidents.
160. For President Kenyatta, while his first Cabinet reflected a national outlook, there would be a dramatic shift only three years after independence, especially after the fallout between the President and the Vice-President Oginga Odinga, which would intensify in the 1970s as the elite around Kenyatta (largely from his Kiambu turf) consolidated power and plotted Kenyatta's succession. Five major events would punctuate and affect this evolution: the fallout, expulsion, and banishment of Odinga from politics (1966);¹⁰¹ an unreported heart attack suffered by Kenyatta (1966); the assassination of Tom Mboya (1969); the assassination of JM Kariuki in 1975 (a former confidant of Kenyatta from Nyeri who was apparently seen as a challenge to the Kiambu group) and; 'Change the Constitution' campaign (mounted allegedly to prevent the then Vice-President Moi from succeeding President Kenyatta). These events were to dictate changes in the Cabinet and government in general as the group around President Kenyatta took measures to consolidate power.

¹⁰¹ Odinga would never contest election again until 1992 when multiparty politics was re-introduced. Kenyatta, and subsequently Moi would — under the one party rule — deny him and his close allies the opportunity to contest any political seat

Table 1: First (Republican) Cabinet in Independent Kenya (1964)

MINISTRY	NAME	ETHNICITY
President	Jomo Kenyatta	Kikuyu
Vice-President	Oginga Odinga	Luo
Justice and Constitutional Affairs	Tom Mboya	Luo
Attorney-General	Charles Njonjo	Kikuyu
Finance and Economic Planning	James Gichuru	Kikuyu
Foreign Affairs (previously State in PM Office)	Joseph Murumbi	Goan-Maasai
Internal Security and Defence	Njoroge Mungai	Kikuyu
Education	Mbiyu Koinange	Kikuyu
Health and Housing	Vacated by Njoroge Mungai	Kikuyu
State, Pan African Affairs	Joseph Otiende	Luhya
Agriculture	Bruce Mackenzie	White Settler
Local Government	Samuel Ayodo	Luo
Commerce and Industry	Julius Kiano	Kikuyu
Works, Communications and Power	Dawson Mwanyumba	Taita
Labour and Social Services	Eliud Mwendwa	Kamba
Natural Resources	Laurence Sagini	Kisii
Information, Broadcasting, Tourism	Achieng Oneko	Luo
Lands and Settlement	Jackson Angaine	Meru
Home Affairs	Daniel Moi	Kalenjin
Cooperatives and Marketing	Paul Ngei	Kamba

Source: State House website (dominion cabinet) with amendments by the Commission to reflect the republican cabinet

161 It should be noted that as Prime Minister during the 6 months 'dominion status', Kenyatta had appointed a cabinet, largely a Kikuyu-Luo coalition (the two largest ethnic groups at independence and the dominant players in KANU). When Kenya became a republic on 12 December 1964, changes were made to the constitution and new ministries were created (Internal Security and Defence) The cabinet was reorganized slightly to consolidate power in Kenyatta's Kikuyu confidants held core ministries in government Kenyatta would accommodate only two from the opposition when KADU (the party of minority tribes dominated by Coastal groups, the Kalenjin and Luhya was dissolved) These two were Daniel arap Moi of KADU and Paul Ngei of the African Peoples Party (largely a Kamba-dominated party) Ronald Ngala (Coast), the leader of KADU who had been left out when the parties merged, would be brought into cabinet in 1966 to broaden the political base after the sidelining of Odinga and the Luo from government

- 162 Kenyatta would reorganize his cabinet in 1969 (after Mboya's assassination) and again in 1975 (after JM Kariuki's assassination) Out of a cabinet of 22, there would be 7 Kikuyu holding the core ministries of security, energy, finance and foreign affairs (he retained his key people from the last cabinet); 2 from their allied communities within GEMA (1 Meru and 1 Embu), 2 Luo, 2 from Coast; 2 Luhya, 2 (Kalenjin), 2 Kisii, 2 Kamba and 1 European It is interesting to note that in Moi's first Cabinet, there were 10 GEMA (8 Kikuyu, 1 Embu and 1 Meru), 3 Kalenjin, 3 Luo; 3 Luhya, 2 Kamba, 2 Kisii; 2 Coast (1 Digo and 1 Taita), and 1 Maasai In fact, Moi had decided to retain all ministers from the Kenyatta Cabinet who won elections. Bucking the trend that came to reflect in all post-independence cabinets (where all 'power'/establishment/core ministries of Finance/Economy, Security, Energy and Trade/Commerce) have been held by members from the president's ethnic group (or close confidants), only one ministry out of a cluster of 5 was held by a Kalenjin (Nicholas Biwott) in 1979 This was to change in later years
- 163 Moi's last cabinet (January 1998) when he was serving his last term, secured after divisive and acrimonious elections, was the perhaps least inclusive (of all his governments since 1979) For the first time since independence, there was no single Kikuyu or Luo in the cabinet In the ethnically charged 1997 presidential election, while GEMA communities voted solidly for Kibaki (1.9 million) catapulting him into second position behind President Moi (2.4 million), the Luo, Luhya and Kamba also voted along ethnic lines with Raila Odinga obtaining (660 000), Kijana Wamalwa (500 000) and Charity Ngilu (400 000) respectively The only member of the cabinet from the GEMA communities was Joseph Nyagah, son of Jeremiah Nyagah from Embu, who himself was a long-serving cabinet minister from 1963 to 1992¹⁰²
164. The outlook of the last cabinet would change several times over three years as Moi maneuvered to muster a winning formula in his succession plan On 11 June 2000, the cabinet was reshuffled when KANU entered a coalition - the first since 1963 - with Raila Odinga's National Development Party (NDP). Raila Odinga and 3 others from NDP would join the cabinet but resign in 2002 together with other long-serving KANU ministers when Moi designated Uhuru Kenyatta as his successor. With an eye on the succession, Moi would make further changes to the cabinet in November 2001 Having earlier nominated Uhuru Kenyatta to Parliament (he had lost the contest in 1997), Moi would elevate him to cabinet, together with several other GEMA leaders

¹⁰² It is notable that even with the banishment and exclusion of the Luo politically and economically during Kenyatta's time, there would always be at least single Luo in his Cabinet During Moi's time, his contests with Kikuyu elite notwithstanding, Moi would include several Kikuyu in cabinet Kibaki would serve as his VP for 11 years since 1978 when he was succeeded by Karanja another Kikuyu Karanja would be succeeded by Saitoti Saitoti who has rumoured Kikuyu roots would serve for 13 years before his dismissal in late 2002 just a few months before elections

- 165 One of the main issues around which the coalition cobbled together by Raila Odinga mobilized votes in the 2007 presidential elections (and perhaps served to heighten chances for the violence experienced after the 2007 elections, was that although Kibaki had assumed power on a popular multi-ethnic platform, he had reverted to the practices of old by packing government and the public service with people from his ethnic origin region
- 166 In part because members of the Kalenjin community had thrived at high levels of government under President Moi, they became the main casualty under the new administration as Kibaki created room for a new group. Other than historic land injustices (largely blamed on Kenyatta and Moi by those who testified), it is possible that the disenchantment with Kibaki over perceived marginalisation of certain elites would translate into the bitter conflict that transformed the Rift Valley into the worst theatre of the post-election violence (PEV) in 2007/2008
- 167 The composition of cabinets and other key government positions (shown in the tables above and below) appears to reflect the client-patron political relations described elsewhere. But it also, as noted, serves as a relatively good measurement of political and economic inclusion. The practices of exclusion by successive post-independence governments across sectors would result in inequalities and regional imbalances described in part in the following section
- 168 The effects of inequalities attributable to the government are visible today in various regions. While poverty is a national problem, overall, economic marginalisation is marked by disproportionate burdens of poverty for certain regions
- 169 According to a report by the Ministry of Medical Services,¹⁰³ poverty rates in 2006 were ranked as follows: North Eastern 73.9 percent, Coast (69.7), Western (52.2), Nyanza (47.6), Eastern (50.9), Rift Valley (49), Central (30.4) and Nairobi 21.3 percent. This reflects, for some regions that have suffered marginalisation throughout the independence period, the cumulative effects of economic neglect. Specifically, the effects of economic marginalisation include lack of social infrastructure and limited or no access to key services such as health facilities, schools, food and water, shelter and social welfare

103 Ministry of Health: Facts and Figures on Health and Health Related Indicators (2008)

Table 2: Ethnic composition of the government, 1969

Ethnic group	Ministers*	Permanent secretaries	Assistant ministers	Population, 1969 census
Kikuyu	7(30%)	8 (38%)	8 (21%)	20%
Luo	3	3	2	14%
Luhya	2	2	8	13%
Kalenjin	2	2	4	11%
Kamba	2	2	2	11%
Gusii	2	2	2	6%
Mijikenda	1	1	2	5%
Taita and Taveta	1	1	0	1%
Meru and Tharaka	1	0	2	5%
Embu and Mbeere	1	0	1	1%
European	1	0	0	0%
Somali	0	0	2	2%
Masai	0	0	2	1%
Asian	0	0	1	1%
Other	0	0	2	9%
Total	23	21	38	100

*Ministers include the President and the Attorney-General

Source: Hornsby C, *Kenya: A History Since Independence* (2012) p. 221

Table 3: Last Kenyatta Cabinet (1978)

MINISTRY	NAME	ETHNICITY
President	Jomo Kenyatta	Kikuyu
VP and Home Affairs	Daniel Moi	Kalenjin
Attorney-General	Charles Njonjo	Kikuyu
Finance	Mwai Kibaki	Kikuyu
State, Provincial Admin	Mbiyu Koinange	Kikuyu
Defence	James Gichuru	Kikuyu
Foreign Affairs	Njoroge Mungai	Kikuyu
Local Government	Julius Kiano	Kikuyu
Agriculture	Bruce MacKenzie	White
Lands and Settlement	Jackson Angaine	Meru
Information	Jeremiah Nyagah	Embu
Health	Omolo Okero	Luo
Natural Resources	William Odongo Omamo	Luo
Power and Communication	Ronald Ngala	Coast

Tourism	J Shako	Coast
Social Services and Cooperatives	Masinde Muliro	Luhya
Commerce and Industry	James Osogo	Luhya
Education	Taaita Toweett	Kalenjin
Works	James Nyamweya	Kisii
Economic Planning	Zachary Onyonka	Kisii

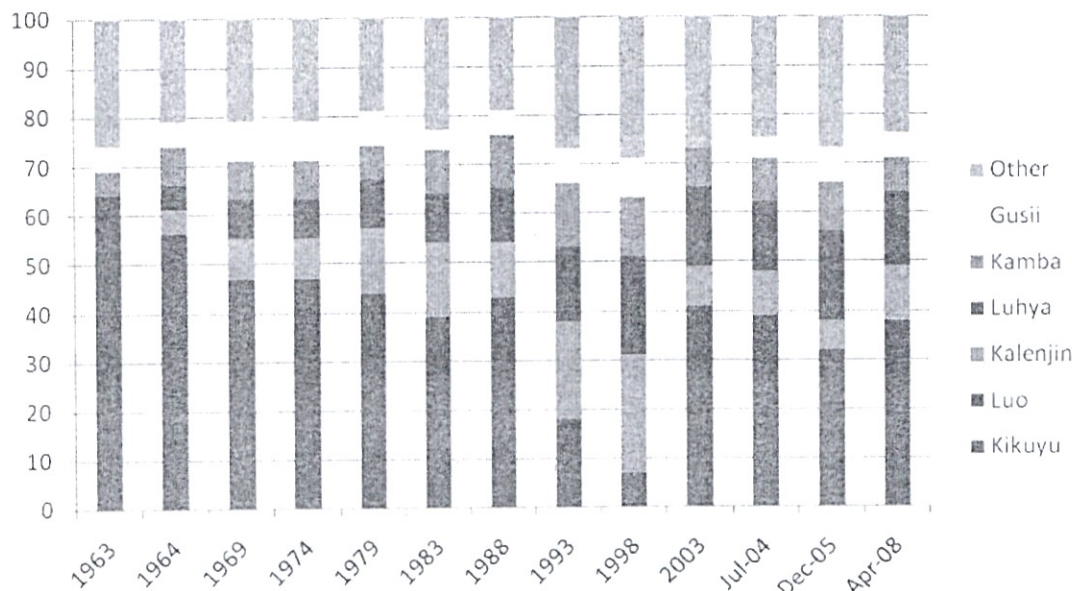
Source Constructed by TJRC largely from Hillary Ng'weno's *A Political History of Kenya and DP Aluhwalia's Post-colonialism and the politics of Kenya (1996)*

Table 4: First Moi Cabinet after the 1979 General Elections

MINISTRY	NAME	ETHNICITY
President	Daniel Moi	Kalenjin
Vice-President	Mwai Kibaki	Kikuyu
Agriculture	James Osogo	Luhya
Attorney General	Charles Njonjo	Kikuyu
Basic Education	Moses Mudavadi	Luhya
Commerce	John Okwanyo	Luo
Cooperative Development	Mathews Ogutu	Luo
Economic Planning	Zachariah Onyonka	Kisii
Energy	Munyua Waiyaki	Kikuyu
Foreign Affairs	Robert Ouko	Luo
Health	Arthur Magugu	Kikuyu
Higher Education	Joseph Kamotho	Kikuyu
Home Affairs	Stanley Oloitiptip	Maasai
Industry	Eliud Mwamunga	Taita
Information and Broadcasting	Daniel Mutinda	Kamba
Labour	Elijah Mwangale	Luhya
Livestock	Jeremiah Nyagah	Embu
Local government	Charles Rubia	Kikuyu
Environment and Natural Resources	Andrew Omanga	Kisii
Social Services and Housing	Robert Matano	Digo
State, Office of the President	James Gichuru	Kikuyu
State, Office of the President	Nicholas Biwott	Kalenjin
State, Office of the President	Godfrey Kariuki	Kikuyu
Tourism	Gilbert M'Mbijwe	Meru
Transport and Communication	Henry Kosgey	Kalenjin
Water and Development	Jonathan Ng'eno	Kalenjin
Works	Paul Ngei	Kamba

Source *Weekly Review, Nairobi 30 November 1979 as cited in DP Aluhwalia (1996)*

Ethnicity of Cabinet Appointments 1963-April 2008



Source: Hornsby C, Kenya: A History Since Independence (2012) p 221 and 699 (integrated)

Table 5: Military Heads from 1964-2011

ROLE	NAME	DATES	ETHNICITY
Chief of General Staff	Major-Gen. R.B Penfold	1966-1969	British
	Brigadier Joseph Ndolo	1969-1971	Kamba
	Gen Jackson Mulinge	1978-1986 (retired)	Kamba
	Gen Mahamoud Mohamed	1986-1996	Somali
	Gen Daudi Tonje	1996-2000	Kalenjin -Tugen
	General Joseph Kibwana	2000-2005	Mijikenda
	Gen Jeremiah Kiang'a	2005-2011	Kamba
	Gen Julius Karangi	2011 onwards	Kikuyu
Commander of Kenya Army	Maj-Gen Ian Freelend	1963-1964	British
	Brigadier A.J Hardy	1964-1966	British
	Brigadier Joseph Ndolo	1966-1969	Kamba
	Maj-Gen Jackson Mulinge	1969-1980	Kamba
	Lt-Gen John Sawe	1981-1986	Kalenjin-Keiyo
	Lt-Gen James Lengees	1986-1993	Samburu
	Lt-Gen Daudi Tonje	1993-1994	Kalenjin -Tugen
	Lt-Gen Augustine arap Cheruiyot	1994-1998	Kalenjin - Nandi
	Lt-Gen Abdullahi Aden	1998-2000	Somali

ROLE	NAME	DATES	ETHNICITY
Deputy Commander of the Army	Lt-Gen Lazarus Sumberiywo	2000-2003	Kalenjin - Keiyo
	Lt-Gen Jeremiah Kianga	2003-2005	Kamba
	Lt-Gen Augustino Njoroge	2005-2008	Kikuyu
	Lt-Gen Jack Tuwei	2008-2010	Kalenjin
	Lt-Gen Njuki Mwaniki	2010-2011	Kikuyu
	Lt-Gen John Kasalon	2011 onwards	Kalenjin
	Col Joseph Ndolo	To 1966	Kamba
	Lt Col Jackson Mulinge	1966-1969	Kamba
	Col Peter Kakenyi	1969-n/a	Kamba
	Brigadier Lucas Matu	1972-1974	Kikuyu
	Majr-Gen James Lengees	1983-1986	Samburu
	Maj-Gen Daudi Tonje	1986-1992	Kalenjin -Tugen
	Maj-Gen Jeremiah Kianga	2000-2003	Kamba
Maj-Gen Augustino Njoroge	2003-2005	Kikuyu	
Maj-Gen Jones Mutuu	2005-2008	Kamba	
Maj-Gen Njuki Mwaniki	2008-2010	Kikuyu	
Maj-Gen Maurice Oyugi	2010 onwards	Luo	
Commander of Kenya Air Forces	Group Capt Ian Stockwell	1964-1967	British
	Group Capt Fred Rockwell	1967-1971	British
	Group Capt John Edwards	1971-1973	British
	Colonel Dedan Gichuru	1973-1980	Kikuyu
	Lt-Gen Mahamoud Mohamed	1982-1986	Somali
	Maj-Gen Dedan Gichuru	1986-1989	Kikuyu
	Maj-Gen DK Wachira	1989-1994	Kikuyu
	Maj-Gen Nick Leshan	1994-2000	Maasai
	Maj-Gen Simon Mutai	2000-2003	Kamba
	Maj-Gen Julius Karangi	2003-2005	Kikuyu
	Maj-Gen Harold Tangai	2005 onwards	Taita
	Maj-Gen Joff Otieno	2011	Luo
	Commander of Kenya Navy	Commander EMC Walker	1964-1967
Commander Pearce		1967-1969	British
Commander Hall		1969-1972	British
Colonel Jimmy Kimaro		1972-1978	Taveta
Maj-Gen Simon Mbilu		1978-1988	Kamba
Maj-Gen Joseph Kibwana		1988-1998	Mijikenda
Maj-Gen Aboud Rauf Raouf		1998-2001	Bajuni
Maj-Gen Pasteur Awitta		2001-2003	Luo
Maj-Gen Samson Mwachethe		2004-2011	Mijikenda
Maj-Gen Ngewa Mukala		2011 onwards	Luhya
Chief of Staff at MoD	Colonel Lucas Matu	1969-1972	Kikuyu
	Brigadier Peter Kakenyi	1972-1974	Kamba

Table 6: Police and internal security heads, 1969-2008

ROLE	NAME	DATES	ETHNICITY
Commissioner of Police	Bernard Hinga	1965-1979	Kikuyu
	Ben Gethi	1978-1982 (sacked)	Kikuyu
	Bernard Njiru	1982-1988	Kikuyu
	Philip Kilonzo	1988-1993	Kamba
	Shadrack Kiruki	1993-1996	Meru
	Duncan Wachira	1996-1999	Kikuyu
	Philemon Abong'o	1999-2003	Luo
	Edwin Nyaseda	2003-2004	Luo
	Mohammed Hussein	2004-2009	Somali
Head of Special Branch	James Kanyotu	1965-1991	Kikuyu
Deputy-director of Intelligence	Stephen Muriithi	1965-1982	Kikuyu
Head of the GSU	Ben Gethi	1967-1978	Kikuyu
	Peter Mbutia	1978-1982	Kikuyu
	Erastus M'Mbijiwe	1982-1987	Meru
	Jackson arap Kosgei	1987-1993	Kalenjin-Nandi
	Charles Kimurgor	1993-1999	Kalenjin
	Samson Cheramboss	1999-2002	Kalenjin
	David Kimaiyo	2002-2003	Kalenjin
	Lawrence Mwadime	2003-2005	Taita
	Mathew Iteere	2005-2009	Meru
Head of the CID	Peter Okola	1965-1973	Luo
	Ignatius Nderi	1973-1984	Kikuyu
	Noah arap Too	1984-1999	Kalenjin-Kipsigis
	Francis arap Sang	1999-2003	Kalenjin
	Daniel Ndung'u	2003-2004	Kikuyu
	Joseph Kamau	2004-2006	Kikuyu
	Simon Karanja Gatiba	2006-2010	Kikuyu
Head of the Presidential Escort Unit	Bernard Njiru	1964-1980	Kikuyu
	Elijah Sumbeiywo	n/a	Kalenjin-Keiyo
	Stanley Manyinya	n/a	Kalenjin-Nandi
	Charles Kimurgor	n/a-1993	Kalenjin-n/a
	Samson Cheramboss	n/a -1999	Kalenjin
	David Kimaiyo	1999-n/a	Kalenjin
	Nixon Boit	n/a-2003	Kalenjin
	Mathew Iteere	2003-2005	Meru
	Benson Githinji	2005-2010	Kikuyu

ROLE	NAME	DATES	ETHNICITY
Permanent secretary for internal security	James Mathenge	1983-1986	Kikuyu
	Hezekiah Oyugi	1986-1991	Luo
	Wilfred Kimalat	1991-1998	Kalenjin
	Zakayo Cheruiyot	1998-2003	Kalenjin
	Dave Mwangi	2003-2006	Kikuyu
	Cyrus Gituai	2006-2008	Embu
Head of Military Intelligence	Lazarus Sumbeywo	1986-1988	Kalenjin-Keiyo
	Wilson Boinett	1988-1990	Kalenjin-Keiyo
Special Branch/NSIS Head	William Kivuvani	1991-1995	Kamba
	Wilson Boinett	1995-2006	Kalenjin
	Michael Gichangi	2006 onwards	Kikuyu

Table 7: Kenyatta's key Provincial Commissioners

NAME	POSITION	BACKGROUND
Paul Boit	PC Central, Western and Nairobi 1964-1980	Kalenjin-Nandi, son of chief
Isaiah Cheluget	PC Nyanza Province 1969-1980	Kalenjin-Kipsigis
Charles Koinange	PC Central and Eastern 1967-1980	Kikuyu from Kiambu, son of Senior Chief Mbiyu Koinange's brother and Kenyatta's brother-in-law
Elud Mahihu	PC Eastern and Coast 1964-1980	Kikuyu from Nyeri, colonial administrator and ex-Home Guard
Isaiah Mathenge	PC Coast, Rift Valley and Eastern 1965-1982	Kikuyu from Nyeri, ex-Home Guard and detention camp warden
John Mburu	PC Coast, North Eastern, Nairobi and Western 1964-1979	Kikuyu from Murang'a
Simeon Nyachae	PC Rift Valley and Central 1965-1979	Gusii, son of Senior Chief Nyandusi

Table 8: Senior Kikuyu parastatal Heads in the 1970s

NAME	ROLE	BACKGROUND
Ephantus Gakuo	Director-general of East African Railways (later Kenya Railways), 1967-1970s	Murang'a
Bethwell Gecaga	Chairman, Industrial Development Bank, 1976-1979	Murang'a
Julius Gecau	Managing director, East Africa (later Kenya) Power and Lightning Company, 1970-1984	Kiambu
James Karani Gitau	General Manager, Kenya National Trading Corporation, 1969-1979	Kiambu
Stanley Githunguri	Executive chairman, National Bank of Kenya, 1976-1979	Kiambu
Charles Karanja	General manager, Kenya Tea Development Authority, 1970-1981	Kiambu
John Matere Keriri	General manager then managing director, Development Finance Company of Kenya, 1972-1982	Kirinyaga
Peter Kinyanjui	Chairman of East African Harbours Corporation (later Kenya Ports Authority), 1970-1980	Kiambu
John Michuki	Executive chairman, Kenya Commercial Bank, 1970-1979	Murang'a
Philip Ndegwa	Chairman, Agricultural Finance Corporation to 1974	Kirinyaga
Matu Wamae	Executive director, Industrial and Commercial Development Corporation, 1969-1979	Nyeri

Profile and Status Report of Economically Marginalized Regions and Communities

North Eastern and Upper Eastern

There is one half of Kenya about which the other half knows nothing and seems even to care less.

Leslie Farson, describing the Northern Frontier District (NFD)

Before we started the session, the National Anthem was sung I want to tell you that we have never been part of the National Anthem The National Anthem talks of justice, fellowship, awareness, good life, abundance, among other things These things have never been experienced in this region. In totality, I can say that we have never been part of this country¹⁰⁴

Testimony of a Somali Elder in Garissa

One thing that surprised me was how a soldier, a government officer, the president of this republic, who equally took the oath of allegiance that he would protect the interests of his people, would persecute his own people for 40 years and show no regard for their human rights.¹⁰⁵

Testimony of a witness in Wajir

Background

170 This part of the report relates to economic marginalisation of what was previously known as the Northern Frontier Districts (NFD) The NFD consisted of Upper Eastern Province (Marsabit, Moyale and Isiolo) and the former North Eastern Province that consisted of four districts namely Mandera, Wajir, Garissa and Ijara These three have now been consolidated into three counties Garissa, Mandera and Wajir, with Ijara having been subsumed into Garissa County North Eastern has primarily been inhabited by ethnic Somalis, Garre/Garri and the Sakuye/Boran while in Upper Eastern there are the Boran, Rendille, Gabra, Burji, Somalis, Garri/Garre, Turkana and Samburu

104 TJRC/ Hansard/ Public Hearing / Garissa/ 14 April 2011/ p 3
105 TJRC/ Hansard/ Public Hearing / Wajir/ 18 April 2011/ p 5

The law and economic marginalisation

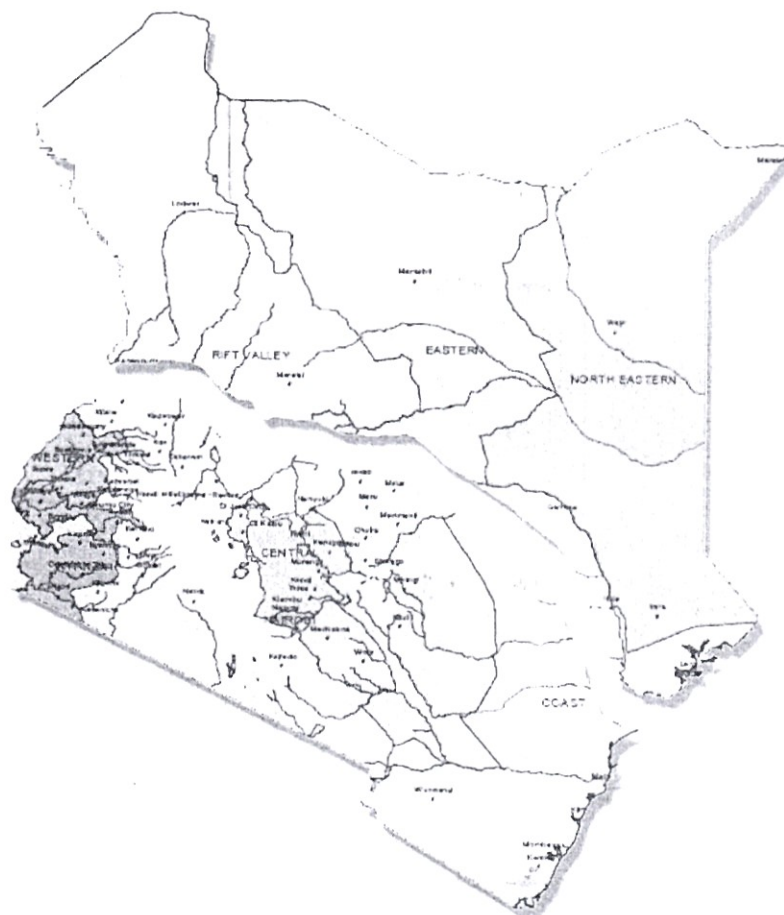
- 171 The marginalisation of the North Eastern region is marked by four key developments. the carving off of the NFD; the enactment and application of separate laws to the region, the Shifta War (1963 to 1967) waged by separatist ethnic Somali forces and; the application of discriminatory development policies by post-independence governments. The marginalisation of the communities in the former NFD, who are largely pastoralists, goes back to the colonial era¹⁰⁶
- 172 During both the colonial and post-independence administrations, the government enacted several laws targeting only the North Eastern region. First, largely driven by security concerns, the Outlying District Ordinance of 1902 declared the Northern Frontier District (NFD), made up of Wajir, Mandera, Ijara, Garissa, Isiolo, Moyale and Marsabit districts, a closed area
- 173 This meant that movement in and out of the region was only possible when using a pass. This had the effect of cutting off the area from the rest of the country not just physically, but also in terms of policy implementation. Coupled with a government policy of neglect, these laws and others enacted later created what can be regarded as a 'Kenya of two halves, not just in terms of security but also in terms of development
- 174 Residents attributed the closure of the NFD to the rest of the country and the imposition of a separate legal regime by the colonial administration to security, economic and religious concerns. Ali Dubat Amey, an elder who testified before the Commission, summarises these sentiments as follows

This NFD was ruled differently by the white man. We had two different sets of laws. Nobody could go out of NFD to other parts of Kenya. This resulted in us being segregated, isolated and being kept away from other Kenyans. It was done for two reasons. One, the white man wanted to protect the Asian businessman. They knew Somalis were very aggressive businessmen, so they were protecting the Asians and the white men who were helping them colonize this country. The other thing they were protecting is that they knew the Somali were Islamic evangelists. We could easily convert Kenyans, who were mostly traditionalists. So, they created a buffer zone.¹⁰⁷

106 For readings on NFD see Taya Weiss, *Guns in the borderlands: Reducing the demand for small arms* ISS Monograph No 95. Onjuje P. *Wild Barrel, Incompatible Regimes: The case of violence in Isiolo Central Division* Nairobi: PeaceNet 2002. Ahmed Issack Hassan. *Legal Impediments to the Development in Northern Kenya*. A paper presented at the Consultative Meeting for Members of Parliament in Naivasha, Kenya 22-23 August 2008.

107 TJRC/ Hansard/ Public Hearing / Garissa/ 14 April 2011/ p. 3

The development divide: A country of two halves



Source: KHRC *Foreigners at home: The Dilemma of Citizenship in Northern Kenya*, p. 20

175. The Special Districts (Administration) Ordinance of 1934, together with the Stock Theft and Produce Ordinance of 1933, gave the colonial administrators 'extensive powers of arrest, restraint, detention and seizure of properties of what was described as hostile tribes'. This provision also introduced the possibility of using excessive force on residents. These powers were often abused when government operations were carried out.
176. The preamble of the Stock Theft and Produce Ordinance provided 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' This provision appears to have legalised collective punishment of ethnic communities and constitutive clans for the offences allegedly committed by their members, once the Provincial Commissioner declared such a tribe hostile

177 At independence, the government enhanced, rather than diminished the discriminatory and oppressive laws applying to Northern Kenya. Collective punishment previously applied by the colonial administration remained a common feature of the post-independence governments' dealings and operations in Northern Kenya. Some of the serious episodes of gross human rights violations such as the 'Wagalla Massacre' described elsewhere in this report fit this collective punishment mould

178 One resident of the region, Abdikadir Kaaru Gullet summarises their sentiments in this regard

The legislation which led to this life of marginalisation and gross violation of human rights under the seal of the law is explained here. In other words, the independent government of Kenya subjected its citizens to retrogressive colonial legislation that was inherited by our independent government of Kenya just to punish the citizens of Northern Kenya. The colonial legislation eventually became the Kenyan law

179 Indeed, many of the laws remained in force after the departure of the colonial master. For example, the Restricted Districts Ordinance of 1902 became Cap 103 of the Laws of Kenya. This Act, as its predecessor, declared Northern Kenya a closed district, meaning that that movement in and out of the district was prohibited and was only possible with a special permit. Under section 127 of the independence constitution, the president was granted powers similar to those previously exercised by the governor-general of ruling the northern region by decree. This was in addition to the 1934 law whose continued application was recommended by the Committee on the Bill of Rights at the Lancaster House constitutional talks¹⁰⁸. Three subsequent amendments to the independence constitution strengthened the legal regime applicable to the region.

180. First, the third amendment to the constitution reduced the parliamentary majority required to approve a declaration of a state of emergency from a two-thirds majority to a simple majority.¹⁰⁹ It also extended the period after which a parliamentary resolution must be sought from 7 to 21 days. Declaration of the state of emergency was made valid for three months instead of two

108 KHRC *Foreigners at home: The dilemma of citizenship in Northern Kenya* p. 21

109 Third Amendment Act No 14 of 1965

- 181 Second, the fourth amendment extended the president's power to rule the NEP by decree to districts outside the NFD. These districts, described as 'outlying districts', are Marsabit, Isiolo, Tana River and Lamu.¹¹⁰ These 'outlying districts' would later be included in the Indemnity Act of 1970 that was aimed at providing immunity to security officials and government officials from criminal and civil liability related to the 'Shifta War'
- 182 Third, the sixth amendment effectively enlarged the government's emergency powers by removing parliamentary oversight over emergency legislation.¹¹¹ The amendment allowed the president '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'¹¹² With the granting of absolute, unchecked powers in relation to emergencies and public order in general, the president had discretion to apply any significant amount of force, where deemed necessary and invoke the provisions of various laws in enforcing security in the region
- 183 In addition to constitutional amendments, the Preservation of Public Security Act (1960) was amended to define the full scope and operation of the new powers granted to the president. A distinction was made between 'public security measures' and 'special public security measures'. The president could institute 'public security measures' without approval of Parliament. In order to cover public officials and members of the security forces who could be responsible for abuses during the 'Shifta War', the government passed the Indemnity Act in 1970. The objective of the Indemnity Act was stated in the preamble as 'to restrict the taking of legal proceedings in respect of certain acts and matters'. The Commission found that there is a perception in northern Kenya and the Coast that the Indemnity Act is part of the machinery of oppression and marginalisation because in their view it precludes any form of inquiry or justice, including by this Commission. The opposition and boycotts of the Commission by some residents of these regions was due in part to the perception that it could not legally inquire into gross violations of human rights perpetrated in these regions
- 184 It is notable however that the Commission took the view early on that the Indemnity Act neither prevented it from investigating gross violations during the 'Shifta War' nor from making appropriate recommendations relating to reparations.¹¹³

110 Fourth Amendment Act No 16 of 1966

111 Sixth Amendment Act No 18 of 1966

112 See KHRC (n 108 above) 24

113 See Legal Opinion Relating to the Application of the Indemnity Act (1970) [Annexed to Report]

Security and economic marginalisation

- 185 In view of the security challenges posed to the region and the country at large, it is perhaps not surprising that both the colonial and post-independence administrations have regarded the North Eastern region through a security lens. The Commission finds that policy and approaches to issues in Northern Kenya (and parts of Coast region) have been securitized
- 186 Before independence, the colonial administration regarded the region as inhospitable and occupied by people it regarded as hostile. Having voted to secede from Kenya in a referendum held shortly before independence in 1963, the inhabitants of the NFD took up arms when the results were ignored by the colonial administration. Residents of the region recounted with bitterness how their right to self-determination was ignored
- 187 The incoming government considered the NFD as firmly part of the newly-independent Kenya. With the support of Somalia that harboured aspirations of a 'Greater Somalia' that would encompass not only Northern Kenya but also the Ethiopian Ogaden region and Djibouti, Somalis in the NFD led by the Northern Province Peoples's Progressive Party (NPPPP) would wage a three-year secessionist war that ended around 1968¹¹⁴
- 188 A mixture of secessionist insurgency, inter-ethnic and clan warfare based on the struggle for resources, and banditry has characterized the region ever since. In addition, the civil war in Somalia has contributed greatly to insecurity in Northern Kenya over the years. These developments have often prompted the government to respond with armed force in ways that occasion serious violations and disrupt the economic lives of those involved
- 189 In our view, there is a clear link between the government's policy that has regarded every issue in the North from a security perspective and the economic marginalisation suffered by the region. Many residents attribute the marginalisation the region suffered in subsequent years to the fact that they had expressed an affirmative voice in favour of secession from Kenya that was brutally muzzled. According to a witness from Garissa

First and foremost, there was the emergency during the 1967 period. The declaration of that emergency led to serious crimes against humanity. The people of this province were subjected to unfair treatment. For instance, pastoralists were not allowed to graze

¹¹⁴ See KHRC (n108 above) 21 citing B Baker *Escape from domination in Africa: Political disengagement & its consequences* (2003) p. 7

within a three-kilometre square area. That led to the loss of 90 percent of the basic livelihood - livestock of the pastoralists of NFD. Otherwise, had that not been there, today the people of NFD would be the richest in Kenya.¹¹⁵

- 190 In some cases, the state has been guilty of doing too little in responding to insecurity generated by inter-ethnic or inter-clan conflicts over scarce resources and cultural practices such as cattle rustling that deprive citizens of resources vital for their survival and economic welfare. The generalized sense of insecurity in the region or parts of the region has had a far-reaching impact in limiting advancement in education and investment in the region.
- 191 The state has also been directly responsible for economic marginalisation as a result of deprivations visited on residents because of policies aimed at enhancing security. In particular the numerous security operations conducted in this region has often resulted in loss and confiscation of property, especially cattle, by state security agents.
- 192 The securitization of every aspect of life in the region meant that discriminatory policies were applied with the effect of seriously undermining the economic welfare of the inhabitants. In addition, the failure by the government to take measures to remedy the situation - especially after 1997 after many laws were repealed and recognition emerged that the legal regime applied had produced gross violations of human rights - compounds the responsibility of the state for the economic marginalisation of the region.
- 193 While much of the oppressive legislation has since been repealed, the consequences of discrimination still lingers. The enforced isolation since the pre-independence period through all post-independence regimes, and the discriminatory development policies retarded the development of the region, resulting in social and economic under-development. Economic marginalisation manifests in high levels of poverty, insecurity, high illiteracy rates and poor education facilities, under-developed human resources, inadequate and poor infrastructure, and high morbidity and mortality rates.
- 194 The perception is that even though democratic space may have opened up in Kenya, nothing much has changed in the former NFD and that there have been no significant improvements in the socio-economic circumstances of the inhabitants.

¹¹⁵ TJRC/ Hansard/ Public Hearing / Garissa' 12 April 2011/ p. 13

195 Insecurity and lack of stability has also remained a major challenge to development. Conflicts arise mainly as a result of scarce resources, violent armed ethnic conflicts, external incursions from unstable neighbouring countries and inter-clan rivalries. Government security operations that target the region have also been a source of insecurity. A combination of famine (in part attributable to periodic droughts) and poor social services have made life in Northern Kenya generally difficult for the inhabitants of the vast, remote region with a largely harsh environment.

Recognition, citizenship rights and belonging

196 One of the main complaints expressed by the residents of North Eastern Kenya and the entire former NFD relates to recognition of their citizenship rights. Discrimination is a major complaint. The residents rightly wonder why they have to be subjected to procedures (when applying for formal documents like birth certificates, particularly national identity cards and passports) from which similarly placed applicants (in other border areas) are exempt.

197 The discriminatory procedures to which the residents were, and are still subject were described to the Commission. Previously, applicants for birth certificates, national identity cards and passports from the former NFD were subject to procedures applicable to aliens. Omar Shurie described this experience:

In that same period, the issue of citizenship was a major cancer in the throat. *Jambo la kusikitisha sana, kwa mfano*, (the most saddening thing) when we were applying for citizenship papers, - the identity card, passport and birth certificates, we were subjected to fill a third form called 'PP7'. That is the name of the form. The rest of Kenyans were only to fill the other two forms. In this particular form, the 'PP7', above it was written 'To be filled by aliens and those claiming to be indigenous Kenyans'. So, where do we fall? The people of NFD fell under the latter part.¹¹⁶

198 Following a much-publicised petition to the then Attorney-General Amos Wako by a group called the 'NFD Youth Movement', the requirement for residents of North Eastern to fill the third form, the PP7, was abolished. However, residents from that part of the country would continue to be subjected to discriminatory procedures they described as 'triple-vetting' when they apply for national identity cards and passports. In respect of the 'triple vetting procedure', Omar Shurie testified that:

[] we are vetted three times. The one that disturbs me a lot is after we are vetted here in Garissa from the sub-location to the location and the district administration that is not the end of our process. Documents are sent to Nairobi and the Director of

¹¹⁶ T.J.R.C./Hansard/ Public Hearing 'Garissa/ 12 April 2011' p.13



Somali men standing at the start of a TJRC hearing.

Intelligence must endorse them under the pretext that we cannot differentiate Kenyan Somali from Somalia Somali. That statement is untrue. Any Kenyan can differentiate a Somali from Somalia from a Kenyan Somali only by their accent. It is not a matter of that they can disturb anybody. Ironically, there are other communities living along Kenyan border points who are not subjected to this type of treatment.¹¹⁷

199. There is a sense in which the difficulties encountered by residents of this region in having their citizenship recognised, acquiring identity documents and passports goes to the core of the economic marginalisation that they have experienced. Without citizenship, the people could not claim their rights. They became vulnerable to abuse. The Commission heard many heart-wrenching stories about lives that have been destroyed for lack of national identity cards and by extension passports. Pupils who passed their Form Four exams in very difficult conditions were unable to advance to university because they could not secure identity cards. Some Kenyans could not travel abroad to take advantage of scholarships because they could not obtain identity cards and passports. Other Kenyans cannot access the employment market because they lack the most basic identity document: the national ID Card.
200. While government has had legitimate concerns related to security arising from aliens acquiring Kenyan nationality, the measures undertaken were disproportionate and in many cases inappropriate. These measures created a sense of impunity among

¹¹⁷ TJRC/ Hansard/Public Hearing/Garissa/12 April 2011/p. 14

immigration officers and the security forces. The Commission heard of a Provincial Commissioner who allegedly nullified 3 000 identity cards in Garissa, apparently because aliens had infiltrated the system. The applicants remain in limbo, their lives on hold.

201. Many stories falling in one or other of the categories capture the plight of the majority of the region's residents and merit attention. Beka Hidfhi's testimony, narrated by Hassan Omar Shurie, has particular resonance in a region that has felt victimised and marginalized in part because of the religion professed by the majority - Islam. This story highlights a number of issues, one of which is that denial of formal identity documents has resulted in violation of a multiplicity of rights, including the right to practice religion freely.

Madam Acting Chair, my evidence is that - the people know and will bear me witness - when hundreds of applicants are waiting for identity cards to come, they normally go to the office to confirm whether they have arrived. It is in that same office which, without fear, will tell them that the identity cards were cancelled by the PC. I have a case in point of an old mother who is very religious by the name Beka Hidfhi. I assisted this lady to the office to apply for an identity card because she wanted to visit Mecca. She had been told that she could not travel without a passport. To do that, she had to first get an identity card. The Muslim religion does not force someone to take a document. Initially, she thought the identity card was not necessary. So, she had never applied for one, although she is a Kenyan and also her father was a Kenyan. We prepared an affidavit and attached photocopies of her mother's colonial passport. The father used to travel to Tanzania and Mecca. Unfortunately, they were in that block of 2009. Today, she cannot trace the photocopies. It is now a problem because she might never make it to Mecca. Maybe she could use a camel to Ethiopia, Sudan, Egypt and then to Mecca. It is just clear and everybody in Garissa knows that the identity card applicants for 2009 were cancelled. You can get that information in the registration office. The reason they give is that there were many aliens among the applicants. Is that the applicants' mistake? If aliens slip into the system by bribing, how is a student who completed Garissa high school affected? I have a brother who completed high school and got a B+ but could not get an identity card in 2009. In 2010 there was lack of materials at the head office in Nairobi. Up to now, he is tarmacking and he is frustrated.¹¹⁸

202. The measures taken to curb abuse in the process of registration have also fostered corruption, which enhances abuse of the rights of legitimate applicants. The Commission heard narratives of people having to buy forms in order to apply for official documents and having to pay a bribe in the process, with no

¹¹⁸ TJRC/ Hansard/ Public Hearing /Garissa/ 12 April 2011/ pp 18-19

guarantees. It was alleged that government officials collect a minimum of Sh1 500 to issue birth certificates, which is required when applying for a national ID card. For this reason, aliens can obtain documents with ease. Yet it is the possibility of infiltration of the system that has been used by the government to justify stringent application procedures. It is indeed unfair for circumstances to be created where the system is compromised, then genuine Kenyans suffer because of this.

- 203 Because of the manner in which they have been treated over the years, the sense of alienation created among residents of former NFD is palatable. In view of our findings, we do not find this surprising. Even in the wake of the adoption of the new Constitution, the perception remains that this part of the country (North Eastern Kenya) has been forgotten. The words of elder Dubat Ali Amey from Garissa encapsulate the views expressed by many of the region's residents:

Before we started the session, the National Anthem was sung. I want to tell you that we have never been part of the National Anthem. The National Anthem talks of justice, fellowship, awareness, good life, abundance, among other things. These things have never been experienced in this region. In totality, I can say that we have never been part of this country – we have never been considered as part of the diversity of this country. We have never been considered part of this country as a community, our culture, lifestyle and partly our religion.¹¹⁹

- 204 The idea that the former NFD is not part of Kenya is fully ingrained in popular narrative. Many recounted how, when travelling to Nairobi one would tell you that they were travelling to Kenya. The statement by Jarso Forole, who presented a memorandum on behalf of an inter-ethnic group from Marsabit County aptly demonstrates this sentiment of alienation:

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 roadblocks 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. This scenario does not stop in Isiolo. In our own country, I feel the indignity of being stopped at a public office and being subjected to security and other checks simply because from my looks, I am a dangerous person or a terrorist. This is the kind of pain we have been living in since Kenya attained its independence.¹²⁰

119 TJRC/ Hansard/ Public Hearing /Garissa/ 14 April 2011/ p.3

120 TJRC/ Hansard/ Public Hearing/Marsabit/ 4 May 2011/ p.11

effects. This increased dependency has had a negative effect on agro-pastoralism, with some farmers declining to engage in crop production since they are assured of relief in case of any deficit.¹²⁵

- 207 It was explained earlier that state responsibility relating to economic marginalisation arises either where there is overt discrimination in the distribution of social goods or when the state fails to take measures in favour of groups who are disproportionately disadvantaged in terms of access to services vis-a-vis other groups and regions. With respect to the food security situation in Northern Kenya, recurrent famines and depletion of livestock through effects of drought show that successive governments have consistently failed to take measures to enhance food production and to address vulnerability of populations to broader effects of drought. Although reliable predictions of climatic conditions and in particular rainfall patterns have been provided, government's response has consistently been reactive rather than preventive. Such responses have often been themselves ineffective in responding to resultant famine.
- 208 The districts generally are sparsely populated. The population density for example in Mandera falls below 35 persons per square kilometre except the Central division, which has 436 persons per square kilometre. In Wajir, settlement patterns indicate that Central division has the largest population density of 21 persons per square km. According to the 2009 Census Report, North Eastern Kenya has a total of 2.3 million people, although questions have been raised in relation to this figure, which is 65 percent higher than the projected number of 1.3m.¹²⁶ The low population density in the region poses serious challenges for planning and service delivery.
- 209 The population in arid districts is relatively young. According to the National Bureau of Statistics, the mean age in North Eastern was 20.2 years in 2008, the lowest in the country compared to a slightly higher national average of 22.5 years. Ten of the districts with lowest mean age come from ASALs, with six of them from the northern districts.¹³² Along with this, the population in NEP is most fertile, with a total fertility rate of 7.2 percent (against a national average of 5.0 percent).
- 210 The impact of the drought on the sensitive pastoralist livelihood has been extensive. Pasture continues to decline, herds are forced to walk at least 40km between water points and remaining pasture areas. Pastoralist households derive 40 percent of their nutrition from livestock meat and milk and declining herds are jeopardizing this critical food source.

¹²⁵ Save the Children (n 123 above) p. 7

¹²⁶ Government of Kenya, 2009 Population and Housing Census: Volume II, at 19

Socio-economic indicators of economic marginalisation of North Eastern

Employment

- 211 Over 70 percent of the population practice nomadic pastoralism and drought has impacted negatively on them. Several pastoral families have fallen back to sedentary life and moved to peri-urban areas, increasing the population of peri-urban poor. This results in high unemployment rates. Employment is mainly provided by the public sector, which absorbs less than 2 percent of the labour force. Most of the labour is unskilled, due to high illiteracy rates. There is a need to start income generating activities and small-scale industries targeting unskilled labourers.
212. The majority (nearly 70 percent) of the population in North Eastern Kenya is below 25 years of age. This has significant impact on resources as more services and employment opportunities are needed to cater for this group. The population growth is also rapid, probably due to socio-cultural practices, which are common to the pastoralist society. Polygyny probably explains the prevailing high population growth rate. The dependency ratio is high, thereby retarding development activities.
- 213 The ability of the province to house, feed, educate, provide health and security for its people is constrained, as most of the infrastructure facilities were planned for a smaller number of people. Institutional development has been slow and inconsistent. North Eastern Province is not well endowed with industrial, manufacturing and informal sectoral activities. These sectors facilitate employment opportunities and their absence aggravates unemployment.

Land

- 214 North Eastern Province has no medium or high potential land. All the land in the province is classified as low potential.¹²⁷ The lack of Lands Registries in the region is one of the major impediments to the economic progress of the people of the region. Under the Registered Land Act, Chapter 300, Laws of Kenya, there are established Land Registries in every district to empower the District Lands Registrar to issue title deeds for properties in that district. Once land has been allocated, surveyed and a letter of allotment issued, every allottee is required to meet the conditions on the letter of allotment to be able to get a title deed. Title to land or property is the legal proof of ownership. This enables the owner to offer such title as security to access financial loans, guarantee payment of goods and services and give surety for bail or bond in Court.¹²⁸
- 215 The entire Northern Kenya does not have a single Lands Registry where a title can be processed, or sales, transfers and charges can be registered. In the first place,

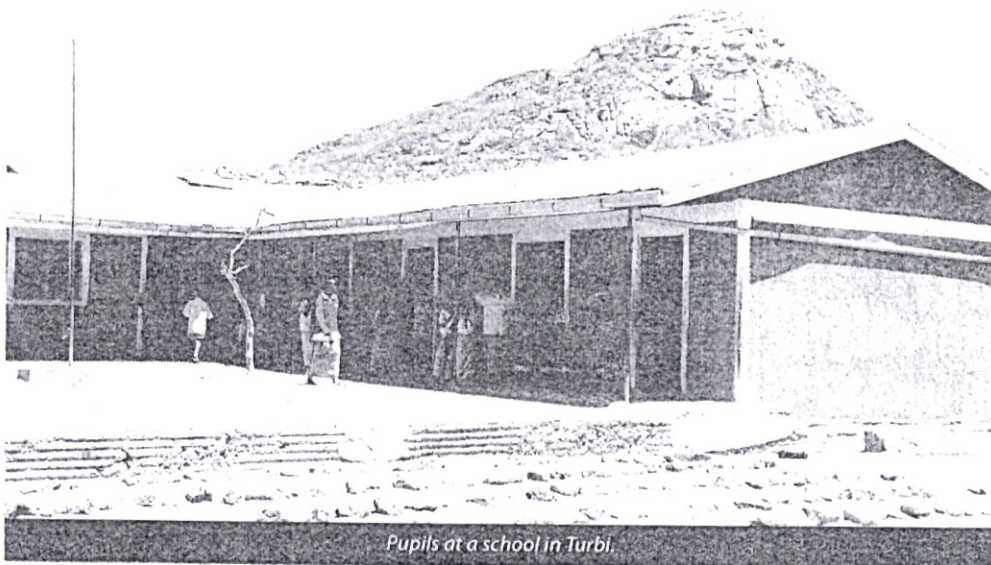
¹²⁷ See Society for International Development (SID) *Pulling Apart: Facts and Figures on Inequality in Kenya* (2004) 16

¹²⁸ Ahmed Issack Hassan, *Legal Impediments to the Development in Northern Kenya*. A paper presented at the Consultative Meeting for Members of Parliament in Naivasha, Kenya 22-23 August 2008 p. 17

most of the properties in the urban centres in the region have not been properly surveyed and very few people have titles to their land. Even then, the few with titles to their properties have to travel all the way to Nairobi to transact any business on their land. This is because the Registry Index Map (RIM) for Northern Kenya, which captures the properties that have been surveyed and registered, is held in Nairobi. It is therefore imperative that the system of land registration be effected in the region and land registries established in every district headquarters. As noted by Hassan, if a person can sell and transfer his lands with a title in Kajiado without coming to Nairobi, there is no reason why another person from Moyale, Ijara or Mandera is forced to come to Nairobi to do such mundane things as pay land rates or apply for official search.¹²⁹

Infrastructure

216. Access to infrastructure is a major determinant of overall well-being. This is because infrastructure helps to diversify production, expand trade and lower the cost of production. Infrastructure includes public utilities such as power, telecommunications, piped water supply, sanitation and sewerage systems. There are wide disparities in the density (length of roads per square km) across the provinces. According to the 2004 SID report, Nairobi had the highest density of roads in the country at 3.2 compared to 0.1 in North Eastern. There is no tarmac road beyond Garissa town. The first tarmac road since independence is the Isiolo-Moyale road, currently under construction. Despite the spread of mobile phones, wide disparities have been evident in access to telephony,



129 Hassan (n 128 above).

with available data indicating North Eastern as the province with the least telephone connection per population followed by Western and Eastern provinces ¹³⁰

Poverty

217. Poverty is a serious problem in the whole of the North Eastern Kenya region and is caused by poor natural resource development, a high population growth rate and limited employment opportunities outside the livestock sector. Other causes of poverty include cyclic droughts, lack of a fully developed livestock market, diseases (livestock and human), illiteracy, lack of proper planning, reduced government spending in projects that require subsidies, unemployment, land tenure problems, over-reliance on a pastoral economy and lack of innovativeness
218. These problems are exacerbated by insecurity. In a report published in 2002, the Kenya Institute for Public Policy and Research Analysis (KIPPRA), which processed data from 1994, noted that there were great regional variations in poverty rates, with North Eastern Province having the highest of its rural population (73.06 percent) living below the poverty line, compared with 35.32 percent for Central Province ¹³¹. In the same study, Homa Bay (Nyanza), with 87.20 percent of its population living below the poverty line, had the highest poverty level, followed by Mandera District in North Eastern
219. In Wajir, poverty is severe and more than 65 percent of the population lives below the absolute poverty line ¹³². Poverty in Wajir is mainly distributed among pastoralists, small-scale farmers who constantly face crop failure, peri-urban poor (who sell firewood and charcoal), and extended families, among others ¹³³. The pastoralists are under constant threat of poverty during drought. Severe drought leads to livestock deaths, which are the pastoralists' main livelihood. These communities keep on moving in search of pasture and water and do not settle to carry out other activities. Furthermore, this constant movement over the vast and harsh terrain has consequences in terms of education for their children, thus cyclic poverty seems to persist endlessly. The population is poor also due to insecurity as a result of frequent attacks from cattle rustlers. Poor livestock markets contribute to low incomes as middle men take advantage of the situation and offer low prices ¹³⁴.

¹³⁰ SID (n 127 above) 18

¹³¹ Paul Kimalu et al. 'A Situational Analysis of Poverty in Kenya', KIPPRA Working paper Series Paper no. 6 (2002) p. 32

¹³² National Coordinating Agency for Population and Development (NCAPD), *Wajir district Strategic plan for the implementation of the national population policy for sustainable development 2005-2010* (2005) p. 9

¹³³ National Coordinating Agency for Population and Development (n 136 above) p. 9

¹³⁴ National Coordinating Agency for Population and Development (n 137 above) p. 10

- 220 The situation is no better in Mandera. Apart from Mandera town which is fairly served with infrastructure including electricity, piped water and telephones, all the other centres lack these facilities. Lack of economic facilities except petty trade in livestock products and handicrafts, which provide a livelihood for some households residing in these centres, further drives them deeper into poverty. Due to constant drought, lack of market for livestock and unemployment, most people, especially the poor, are dependent entirely on relief food of maize rations and water. Based on the Early Warning Systems (EWS) and community-based food aid targeting and distribution, about 76 percent accounting for 170 336 persons in 2002 in Garissa are poor. Other poverty-stricken groups are female-headed households, orphans, widows, street children, beggars, the physically challenged and the handicapped. The same patterns of poverty are replicated in Garissa, where the situation is worsened by the presence of a larger population as a result of the refugee camps. This inadvertently places more pressure on already over-stretched social amenities and infrastructure. Levels of poverty among women and children are very high since they are the least capable of fending for themselves. Cases of abuse, neglect and diseases are also very high. Education and health are hampered, further compounding poverty levels.
- 221 While Kenya is generally poor, this poverty is not evenly distributed countrywide and varies by ecological zones with the arid areas bearing the brunt of its negative impacts. Part of the reason for this scenario is the lack of diversification of economic activities in arid areas as opposed to high potential districts. In arid areas, there is over-dependence on the livestock economy, which is challenged by several factors, including natural weather and incessant ethnic conflict.
- 222 These indicators generally show the relative poverty in arid districts compared to high-potential districts like Uasin Gishu, Kakamega, Machakos, Kericho and Nyandarua. Comparing Wajir to Nyandarua, the absolute poverty level of the former is 57 percent while that of the latter is 27 percent. The life expectancy is almost the same, with Wajir having 52 and Nyandarua 54, but the average family size in Wajir is much bigger than that of Nyandarua, as it stands at six family members in contrast with 4.6 in Nyandarua.¹³⁵
- 223 Although there is variation in high potential districts, their absolute poverty rates tend to be much lower compared to those in arid districts. Dependency ratios also vary, with high-potential districts having lower levels of dependency.

¹³⁵ Republic of Kenya. *Kenya National Development Plan 2002-2008*. Nairobi: Ministry of Planning and National Development, 2002. Table 1: Poverty related indices for selected arid districts and Table 2: Poverty related indicators for selected high potential districts in Kenya.

compared to arid districts. This can be explained by the fact that there are less economically active people than there are dependents and this is linked to the fact that unemployment levels are higher and that there are fewer economically viable outlets. The main economic activity is pastoralism, which is adversely affected by the harsh prevailing droughts and the need to constant migration. Absolute poverty levels in high-potential districts are lower than those registered in arid districts, with the implication that the latter are poor.¹³⁶

- 224 The life expectancy in arid districts is lower than that of high-potential districts, mainly as a result of the harsh geographical conditions, malnutrition, poor health and insecurity. It is also an indicator of the lack of basic social services such as health amenities and hospitals. Populations in arid districts have slightly larger family sizes compared to high potential districts. This situation adds to the pressure exerted on social amenities, as most of the population also tend to be dependents rather than being economically active.

Food security

- 225 Low rainfall aggravates the drought conditions, which in turn have severe effects on the people in North Eastern Kenya. Sometimes households rely on three to eight litres of water per person per day. Water pans and dams have dried up in most of the centres. Malnutrition rates are very high. Clashes - related to decreased resources - often take place and livestock migrations are high because of declining pasture areas. As a result of drought, there is constant deterioration of food security, which in effect reduces the purchasing power in food and non-food commodity prices. Insecurity in the region has continued to pose problems for organizations such as the UN's World Food Programme (WFP) that run food assistance programmes.

Institutional framework and capacity

- 226 Economic and social development hinge on institutional capacity and a fragile institutional framework compounds the problems of such development. Such institutional support comes from schools, hospitals and clinics, viable economic activities (banking, commerce, and manufacturing plants), all of which are in short supply in North Eastern Kenya. The presence of such institutions opens up avenues for employment and economic development.
- 227 In North Eastern, the institutional framework is inadequate. There are very few schools and hospitals, leaving the inhabitants in a desperate situation. Economic activities are limited and there is little industrialization and manufacturing activities.

¹³⁶ Ministry of Planning and National Development (n 139 above)

in the region. The poor institutional framework is further compounded by the poor road network, with most rural roads being inaccessible, especially during the rainy season. Some improvements on the road network, especially the feeder roads, were done through the Fuel Levy Fund, but there is still substantial work required to facilitate accessibility.

- 228 The continuous drought affects long-term plans to develop water structures. Most funds were diverted to emergency water trucking and other activities to save lives. Access to infrastructure and social services in the arid areas is far below the national average. In 2006 for example, there were 69 public secondary schools in Kitui District but only 28 public secondary schools in the whole of North Eastern. In addition, in 2001, there were 86 secondary schools in Uasin Gishu District, but only 16 such schools in both Turkana and Wajir districts. Closing such a gap and achieving higher levels of service provision of quality education remains an enormous challenge.

Education

- 229 Both internal and external factors influence the uptake of education in North Eastern Kenya. Internally, cultural practices and stereotypes have continued to hamper education uptake. Parental attitudes towards education, cultural practices and beliefs are partly to blame for the low levels of literacy among nomadic pastoralist communities of Kenya. School dropout rates are high for both boys and girls and at all levels of the educational stages. The foregoing is generally worse for the girl child, given the conspicuous subordinate status of women among nomadic pastoral ethnic groups. Statistics show that about 93 percent of North Eastern women have no education at all, compared with only about 3 percent in Central Province.¹³⁷ Furthermore comparatively, of the 92 percent women in Nairobi who are literate, only 6.4 percent are literate in North Eastern. For men, corresponding figures for Nairobi and North Eastern Province are 94.2 percent and 29.5 percent respectively.
- 230 In addition to their multiple domestic responsibilities, certain cultural practices such as female genital mutilation and infibulations among some of the ethnic groups, early marriage and the parental preference for boys' education, greatly curtail girl child education.¹³⁸ Indeed, girl children often lose out to boys when parents have to prioritize who to educate.
- 231 Girl children often find themselves trapped: teenage pregnancy, early marriage, motherhood or transactional sex with the possibility of contracting sexually

137 See Society for International Development (SID) (n XX above) VIII. Kenya Demographic and Health Survey (2003) Table 3. Gender Disparities in literacy and Educational Acquisition.

138 DN Sifuna. Increasing access and participation of pastoralist communities in primary education in Kenya. *International Review of Education* 2005. p 51. p 499-516.

transmitted infections (STIs) including HIV/AIDS. Education is perceived as not important for girls and therefore they are withdrawn from school so that they can contribute their labour at home

- 232 External factors such as the pastoralist lifestyle that entails frequent migrations has influenced access, participation and achievement in education. Other factors are linked to institutional development and capacity. Schools are in short supply and this has contributed to lowered access of children to both primary and secondary school education. The cost of schooling is also prohibitive and due to the high levels of poverty in the region, many parents cannot afford the extra costs that schools demand. Because of frequent mobility, educational trajectories are not strictly followed and dropout rates tend to be very high. There are also very few youth polytechnics and skill training centres to absorb some of these children. There is need to establish more day secondary schools that are cost-effective. These factors mean that school enrolment rates for North Eastern are far below those of other provinces and the national average
- 233 Gross enrolment rates for primary school and secondary school stand at 17.8 percent and 4.5 percent respectively in North Eastern, way below the national average of 87.6 percent and 22.2 percent. North Eastern has the highest school drop-out rate, which stands at 12.6 percent compared to Nyanza which has the lowest drop-out rate in the country standing at 6.8 percent and the national average drop-out rate of 8.1 percent. The inadequacy at the school level can be best captured by the non-proportional pupil-teacher ratio in North Eastern, indicating a shortage of teachers and skills¹³⁹
- 234 Data from the Kenya National Bureau of Statistics (KNBS) in 2008 on enrolment rates (for boys and girls) indicates that only 32.3 percent in North Eastern have ever enrolled in school against the national average of 76.8 percent. In Central Kenya for example, 92 percent of the population has attended school. Worse still, only three percent (and only 0.5 percent of women) in NEP have attended secondary schools, against a national average of 8.7 percent. Notably low is the population that has attended any post-secondary institutions, at only 0.6% (KNBS, 2008).
- 235 When it comes to nomadic districts in Kenya including Isiolo, Tana River, Wajir, Moyale and Turkana, the Kenya National Statistics Plan 2002-2008 figures highlight the differences in literacy rates, primary school enrolment and dropout rates, secondary school enrolment and dropout rates in the above regions. From the data, it is indicative that Wajir has the lowest primary and secondary school

¹³⁹ See Ministry of Education Statistics Division *Table 3.8 Access to education 2002 and Table 4 National Gross Enrolment, Pupil-teacher Ratio and Drop-Out Rates*

joint enrolment rates (boys and girls), standing at 14.5 percent and 4.6 percent respectively, while Moyale has the highest enrolment rates standing at 63.2 percent and 8.5 percent respectively. Out of the 4.6 percent of students who enrol in secondary schools in Wajir, over 50 percent of them drop out before completion of the approved four-year secondary school course¹⁴⁰. Wajir also has very low literacy rates, which impacts the ability to access the job market. For example, the modest educational achievement registered among pastoral-nomadic children cannot allow them to compete with those from other communities on an equal footing when it comes to securing jobs and other self-actualizing opportunities. They may therefore be left with the option of engaging in banditry, cattle theft, drug abuse and trafficking, or casual and unskilled manual work.¹⁴¹

- 236 Some of the undertakings they engage in are not only poorly paid, but also erratic. Compounding this situation is the incessant ethnic conflicts and cattle raids that complicate livelihoods and access to social services such as education. Indeed, the proliferation of small arms - fuelled by the long armed conflict in Somalia - and the apparent commercialization of livestock theft, have heightened insecurity in the region. These conditions have far-reaching implications on children's socialization, development and education. In addition, it has the effect of entrenching and institutionalizing inter-generational poverty transfer.
- 237 In Kenya's high-potential areas, the story is markedly different, which is telling of the sorry state of the country's social service provisioning and welfare system. As such, the corresponding figures on literacy among sedentary communities, especially in the high-potential areas, are substantially different from those registered in arid districts. Data from arid areas compare unfavourably with that from high-potential districts.
- 238 It can perhaps be hypothesized that in the absence of sustainable economic opportunities, education remains the best option for nomadic pastoralists. The present education uptake, even with the application of mobile schools in the province is less than satisfactory. There are numerous technical and operational problems that confront the region in terms of accessing, participating and achieving desired educational outcomes. Because of poor performance in transition exams (the Kenya Certificate for Primary Education - KCPE and Kenya Certificate for Secondary Education - KCSE), mobility within the education system remains very low. In particular, poor performance in KCSE - in part marked by the region's lowest representation in the top 100 students ranking in national exams (together with the Coast region - means that very few transition to university and tertiary level education.

140 Kenya, Republic of Kenya. *Kenya National Development Plan 2002-2008*. Nairobi: Ministry of planning and National Development 2002. Table 5. Literacy Indicators in Selected Nomad-Inhabited Districts of Kenya.

141 Ezekiel Mwendwa and Eric Masese. *From Dim to Full Light: Spotlighting the Education Concerns of Nomadic Children in Kenya*.

239. While the quota system applied in admissions into certain fields such as medicine has ensured a level of representation in those professions, more appropriate interventions are required. These interventions should target primary and secondary levels to increase transition rates and performance.
240. The failure of the education system is largely due to the aggregate nature of its administration and authorities need to customize education for the circumstances of a particular region, keeping in mind pastoralism, drought, food insecurity, crisis and conflicts experienced in North Eastern and the implication of these factors on education access and retention.

Health, water and sanitation

241. Multiple factors of poor infrastructure, low population density and limited institutional capacity cement low service delivery on water and sanitation in North Eastern Kenya. A large percentage (95 percent) of children in NEP are born at home, against a national average of 69.5 percent. Only 11.8 percent of infants in this province have an immunization card, against a national average of 63.7 percent. Nearly a third of all infants are underweight.¹⁴²
242. According to a 2004 report, there are great inequalities as to the doctor-patient ratio in Central Kenya, which is about 1:20,700, compared to North Eastern (around 1:120,000).¹⁴³ In terms of disposal of human waste, the 2009 Census shows that out of a population of 248,000 in North Eastern sampled, only 220 have access to a main sewer, 212 of these use a septic tank, 62,678 use a pit latrine, while the majority (184,425) relieve themselves in the bush, equating to 74 percent.¹⁴⁴
243. More than 50 percent of the population either draws water from unprotected wells (25.4%) or from rivers (25.6%). Only 5.7 percent of the households in the arid districts have access to piped water, and most of these are concentrated in the urban areas.¹⁴⁵ Low nutrition and poor access to medical and related services poses life-threatening challenges to the population. Women's health needs special attention and maternal health care centres need to be increased to reduce morbidity and mortality. There is need for maternity amenities and child care services in the district hospital in order to improve maternal and child health care services.

¹⁴² Kenya National Bureau of Statistics. *Well-being in Kenya: a Socio-economic profile*. Nairobi, 2008.

¹⁴³ SID (n 127 above).

¹⁴⁴ Kenya Population and Housing Census Report, volume II: Population and Household distribution of socio-economic characteristics (2009), p. 359.

¹⁴⁵ Kenya National Bureau of Statistics. *Kenya Integrated Household Budget survey*. Nairobi, 2007. See also 2009 Census Report (above), p. 339.

Economic marginalisation and access to social-economic goods in North Eastern

Testimony by Jarso Forole

What evidence do we have for being marginalized? I am sure that for those who have travelled by road, after crossing Merile River, you must have had a feeling of what we have been feeling since 1963. We have our road to this area. Unfortunately, this is a road classified as A2 and runs all the way from Cairo right through Addis Ababa all the way to Cape Town. Until recently, there is one section of that road which had no single piece of tarmac. This is the section before you get to Moyale, about 500 kilometers. We are told that there was a time when funds were kept aside to reconstruct that road but due to the influence of some individuals in the government, the funds were diverted to other areas. It is recently that the government decided to do something. We are yet to see the job being completed.

We have very few public health facilities. The existing ones are not fully equipped and, at the same time, they are under-staffed. We also have very limited maternal and child health services. Sadly, we do not have any facilities in a county that spans over 15 percent of the total land mass of Kenya. For instance, if you take the southern part of Laisamis constituency, you will see that there is no single health facility that has been established by the government. We have very few that were established by missionaries. If this is not marginalisation, then what is it?

Illiteracy levels are very high. For instance, close to five decades after independence, there are statistics which show that Moyale has only 10 secondary schools. Those schools serve an area which takes up 15 percent of the country's land mass. There is no school that gives proper education to secondary school-going children. Moyale started in 1920 when it was established by the colonialists. However, compared to other areas which were established recently, you will see that we are highly marginalized. Take an example of Makueni. We only have 10 secondary schools but Makueni, established in the late 1990s, has more than 230 public secondary schools. I do not want to go further into that.

Access to safe water is a luxury for us. Most of the facilities we have were established during the colonial period to serve the population that existed during that time. For instance, in Marsabit, we have the Bakuli water supply which was established to meet the demands of just about 2 000 people. Today, we have gone beyond the 60 000 mark. So, while other Kenyans turn around and turn on a tap to have clean water, in Marsabit, people have to travel more than 80 kilometers to look for water. If you were to travel 80 kilometers a day to look for water, would you have time to do things to gain economically? We have been complaining about chronic poverty. However, in my considered opinion, one of the factors that have greatly contributed to the continued poverty is the water crisis. If a 20-litre jerrican goes for almost a dollar

(Sh70) and we are talking about a poor person who lives below a dollar a day, what picture are we trying to portray? I have vast experience working in the humanitarian assistance field and going by the CF Standards, even in a humanitarian situation, a person needs at least 15 litres of water a day. Just think how much money does a household need to meet the daily requirement? So, as much as we are facing water problems, we are cheating ourselves when we say that we are fighting poverty in Marsabit.

More worrying is the situation of our children. The World Health Organization (WHO) has established a threshold to determine the nutritional standards among children below five years of age. One of these standards is the so-called acute global malnutrition rate, which the WHO worries about when it permanently remained at 15 percent, always. At times, it goes as high as 30 percent. You can paint the picture of what the local child goes through.

In a nutshell, I would like to make reference to the Millennium Development Goals (MDGs). Every year, Kenya conducts a review of its progress. If we were to conduct that review in Marsabit, we would not know for sure if we are on the right track towards achieving those eight goals. This is a largely livestock-based economy. Our expectation is to have services just like our colleagues who are farmers. While our Kenyan government has established special funds and subsidies for farmers in Kenya, we are yet to have any action taken in our favour. We have the Coffee Board of Kenya, the Pyrethrum Board of Kenya and a sisal board and a sugar board. I am yet to hear of a board that addresses the needs of pastoralists.

The only industry that is there to serve our interests is based in Nairobi; the Kenya Meat Commission (KMC). Food security is also a major problem here and we have evidence of it. If you look through the window or as you were coming from Isiolo, you must have seen some huge silos, less than a kilometre from where we are.

The silos were established in the 1990s to receive local produce from this area. During that period, Marsabit was second after Kitale in terms of cereals production. The need for additional silos was felt because there was a lot of produce. Similar structures were erected along the way. At that time, we were self-sufficient in terms of food production. However, today, there is no grain from the local area that can be traced in those silos. Instead of having local produce, today, it is housing humanitarian aid. That has led us to claim that the state provides us with food. At this moment, if you go off the road, you will encounter very serious humanitarian situations of emaciated lactating mothers, chronically malnourished children and people queuing at food distribution centers on a daily basis.¹⁴⁶

146 TJRC/ Hansard/ Public Hearing / Marsabit/ 4 May 2011/ p.13

Nyanza Province

The question that has repeatedly been asked is 'Who is responsible for the sorry state of the Luo people in Kenya?' The answer to this question reveals a litany of systematic official policy to oppress, subjugate and dehumanize the Luo people, which would have largely been profiled as follows: economic emasculation, mental and psychological warfare, utilization and murder of Luo leaders and political marginalisation.¹⁴⁷

I cannot agree, even for a fleeting moment, to make reference to a so-called 'socio-economic marginalisation' of any part of Kenya, by my government.¹⁴⁸

- 244 One of the main narratives in the context of Kenyan politics, development, and gross violations of human rights, is that Nyanza Province has suffered socio-economic marginalisation under successive post-independence governments. Like North Eastern Province and the NFD in general, Nyanza could be placed in the category of 'politically dissident' regions.
- 245 Speaking during the Commission's hearings in Kisumu, Phoebe Asiyo, a former MP for Karachuonyo, provided a moving testimony that summarised the prevailing perceptions about the economic and political marginalisation of Nyanza, especially what is popularly known as 'Luo Nyanza':

The role of the Luo community in the struggle for independence of Kenya cannot be over-emphasised. At independence, the whole of Kenya saw the Luo as the most educated community, with probably the highest number of university graduates, faculty heads and professionals in almost every other field. The Luo community produced who was who in all sectors of the economy, political, economic and intellectual fabric in the Kenyan society. Fifty years down the road, the Luo community is bedevilled with every other conceivable societal ill, languishing at the bottom of the ladder of progress.¹⁴⁹

- 246 The disintegration of the Kikuyu-Luo coalition that formed the core of KANU at independence and the eventual fallout between Kenya's first President Jomo Kenyatta and first Vice-President Oginga Odinga in 1966 over differing visions for the country as described earlier forms an important context within which to contemplate the marginalisation of Nyanza. It was noted that the fallout between Kenyatta and Odinga in 1966, the assassination of prominent Luo politician Tom Mboya in 1969 and the banning of Odinga's opposition party, the Kenya People's Union (KPU), and Odinga's eventual detention earlier in 1969, consigned Nyanza

147 TJRC/Hansard/ Public Hearing / Kisumu/ 14 July 2011/ p. 20

148 Written Submission by Former President Daniel Arap Moi to the TJRC (2012) p. 20

149 TJRC/Hansard/ Public Hearing / Kisumu/ 14 July 2011/ p. 20

Province to enduring conflict with the Kenyatta regime¹⁵⁰ The same would continue during the Moi regime.

247. In her testimony, Asiyo pinpoints 1969 as the year when the marginalisation of Nyanza started "It was soon after the assassination of Tom Mboya in 1969 and the detention of Jaramogi Odinga that the real marginalisation of the Luo started"¹⁵¹ Although Moi had in 1980 as president attempted to 'rehabilitate' Odinga and his KPU colleagues politically by restoring their KANU membership and offering state jobs to some, this attempt was aborted when it became evident that Odinga's ideological inclinations and his attitude towards KANU rule - which he perceived as corrupt and exclusionary - had not changed in his 14 years of political banishment. It is reported that Moi changed his mind when Odinga publicly criticised Kenyatta for his alleged exclusionary policies while explaining why they had fallen out.
248. While there have been prominent personalities from Nyanza who served in successive regimes, the region has been associated with opposition politics since independence, save for a few years in the 1960s. As explained earlier, the structure of the Kenyan state and the nature of politics has been such that the economic fortunes of communities were largely linked - although not exclusively - to their standing with the regime of the day. Because of the centralised nature of the state, patronage, corruption and the politics of exclusion and negative ethnicity had taken root in Kenyan politics. In this context, the political banishment of leading political figures coincided with, and meant economic isolation of the entire region. However, the co-option of leaders from regions that had been marginalised presented a semblance of inclusion at the centre. Both Kenyatta and Moi made sure that Nyanza was represented in their governments over the years, especially in cabinet. Former President Moi rejects the idea that Nyanza was marginalised under his rule and cites names of prominent Luo leaders who served in his government. President Moi writes:

The biggest agenda of my government was to distribute resources equitably to all parts of the country. I cannot agree, even for a fleeting moment, to make reference to 'socio-economic marginalisation' of any part Kenya, by my government. I had a cabinet for many years which had a proportionately large number of ministers from the said Nyanza region. [In fact], one of the jokes in Nyanza in the late 1980s was that every MP was either a minister or assistant minister except James Mbori, MP for Kasipul Kabondo.

150 Odhiambo-Atieno, E.S. 2002. Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya, *African Studies*, 61 (2) pp. 223-249.

151 Written Submission by Former President Daniel arap Moi to the TJRC (2012) p. 20.

249. To emphasise his point, President Moi lists the following who served at different points in his 24 year rule

Ministers [and Assistant Ministers]:

- 1 William Odongo Omamo
- 2 Robert Ouko
- 3 Wilson Ndolo Ayah
- 4 Peter Oloo Aringo
- 5 John Okwanyo
6. Dalmas Otieno
7. Stephen Ondiek
- 8 Raila Amolo Odinga
9. Adhu Awiti
- 10 Peter Nyakiamo

Permanent Secretaries

- 11 Joab Omino
12. Hezekiah Oyugi
13. Leo Odero

14 Valentine Opere

15 Peter Wambura

16 William Ochieng

17 Richard Muga

Envoys

18 Michael Okeyo

19. Noah Okulo

20 Maurice Omwony

21 Pamela Mboya

22 Frost Josiah

23 Green Josiah

24 Bob Jalang'o

25 Daniel Mboya

26 Ochieng Adala

27. Prof Thomas Ogada

- 250 With respect to the Armed Forces over which successive regimes have often sought to have tight control, President Moi compares his administration and that of his predecessor, Kenyatta. He states that 'by 1978, the joke of the town was that no Luo could rise beyond the rank of a major in our armed forces'. He lists the following to demonstrate that during his tenure, members of the Luo community were appointed to high positions in the military

- Lt-Gen Daniel Opande
- Maj-General Pasteur Awita
- Maj-Gen Maurice Oyugi
- Maj-Gen Sam Suero
- Maj-Gen Barrack Onyango
- Brigadier Fred Sidondo

- 251 The President also cites the names of other senior personalities that he appointed as follows

- ┆ Police Commissioner: Philemon Abong’o
- ┆ Heads of Parastatals
 - Prof Bethwell Ogot
 - Prof Simeon Ominde
 - Prof David Wasawo
 - Prof Otieno Malo
 - Prof Ojany
 - Phillip Okundi
- ┆ Vice-Chancellors
 - Prof Douglas Odhiambo
 - Prof Shellemiah Keya
 - Prof Fredrick Onyango
- ┆ Directors of Medical Services
 - Dr Joseph Oliech
 - Dr James Nyikal
- ┆ Chief Architect Joel Nyaseme
- ┆ Chief Engineer Roads Engineer Otonglo

252 The Commission takes the view that while the listing of Luo personalities who served in the Moi regime is evidence of a level of inclusion of people from Nyanza, the co-option of elites did not necessarily translate into economic inclusion in a broad sense. As shown below, other indicators assessed by the Commission, such as social amenities and infrastructure, seem to reflect a different reality.

253 It appears to the Commission that the inclusion of certain elites also had a political goal under both post-independence administrations. It served to politically isolate Odinga who had taken a hard-line stance against both the Kenyatta and Moi governments since the 1966 fallout and his eventual banishment in 1969.

254 In 2003, just as Nyanza leaders appeared to find a new footing at the centre of power following the formation of the National Rainbow Coalition (NARC) a year earlier, commentators note that similar disagreements within the Kibaki regime (between Kibaki and Raila Odinga) would likewise lead to the blacklisting of Nyanza both in terms of access to capital development and also in terms



Miss Phoebe Aslyo (centre) testifying in Kisumu on economic marginalisation of the Nyanza Region.

of appointments to public positions.¹⁵² Indeed, following the fallout between Kibaki and Odinga, Kibaki would sack Odinga and his allies from government in 2003. After the hotly contested and divisive constitutional referendum of 2005, Odinga would later form the Orange Democratic Movement (ODM) and contest the 2007 elections against Kibaki, largely on a platform that held out Kibaki as a practitioner of the old politics of exclusion.

255. Odinga and the Nyanza elite would be catapulted to the centre of power following the negotiated National Dialogue and Reconciliation Process in 2008 that produced a government of national unity after the post-election violence (PEV) of 2007-2008. Odinga's proximity to power (in his capacity as Prime Minister and co-principal) certainly tempered narratives and perceptions of exclusion, especially as appointments into public service from Nyanza increased.
256. It is fair to state, as asserted by many who spoke to the Commission, that, Nyanza has been in the political and economic cold for all but 10 years since independence in 1963. The systematic isolation of Nyanza since 1966 by successive governments as narrated by those who made testimonies has led to the heightening of poverty in the region in general and various social and economic problems that have gone unaddressed. Some of these issues are discussed below.

¹⁵² R Muhula 'Horizontal Inequalities and Ethno-regional Politics in Kenya' *Kenya Studies Review* (2009) 85-105 pp 99-100

Socio-economic indicators of economic Marginalisation in Nyanza

Poverty

257 An assessment of poverty is germane to the discussion of economic marginalisation because poverty is regarded as the inability to access basic human needs by segments of the population. This inability could be attributed to a set of factors but does, in our historical context, reflect a legacy of economic marginalisation, although not exclusively. Poverty assessment reports classify poverty in terms of food poverty, hardcore poverty, and absolute poverty.¹⁵³

258 At 63.1 percent, Nyanza Province is said to have the highest incidence of absolute poverty in the country.¹⁵⁴ The national average is 52 percent. Kisumu District, one of the poorest districts, has an absolute poverty rate of 65.44 percent.¹⁵⁵ Kisumu experiences a food poverty level of 54.9 percent, which indicates that food insecurity is another major problem.¹⁵⁶ According to a World Bank Report published in 2008, incomes of rural households in Nyanza are the lowest of all the provinces, but have risen over time, while the 'Gini-coefficient' increased until 2004 and then moderated. The report also notes that livestock ownership is lowest in Nyanza and that average land size fell rapidly, to become lowest across all regions by 2007.¹⁵⁷ Asiyo's testimony summarises the outlook of Nyanza across various relevant indicators:

Luo Nyanza, as Joseph Kaguthi, former Provincial Commissioner called it, is today one of Kenya's most under-developed, with all the development indicators grim. Poverty is rife in Luoland. The disease burden is very high, the mortality rate is higher than it is in most provinces and life expectancy is low. All health indicators are at their worst compared to the national indicators.¹⁵⁸

259 Many other witnesses testified that this grim picture is not restricted to Luo Nyanza but appears to be common to other parts of Nyanza region as well, especially to Kuria. According to a report by the National Coordinating Agency for Population and Development (NCAPD), 49 percent of the district population in Kuria lives in absolute poverty, whereas a large percentage experience food poverty. The District Poverty Assessment Report for the year 2000 identified the main factors that engender poverty in the district as rapid population growth, economic and environmental factors, HIV/AIDS and socio-cultural practices and attitudes such as polygamy.

153 See National Bureau of Statistics, *Second Report on Poverty in Kenya: Welfare indicators atlas* (2000).

154 KS Njonjo and Institute of Economic Affairs, *Youth Fact Book: Infinite Possibility of Definite Disaster?* (2010).

155 See S Dosker, *What Makes the Difference? Socio-economic and demographic determinants of orphan primary school enrolment in Kisumu District, Kenya* (Unpublished MA thesis, University of Amsterdam & Great Lakes University of Kenya, 2006) p13. See also Central Bureau of Statistics, *Department of Kisumu District: Demographical data* (2001).

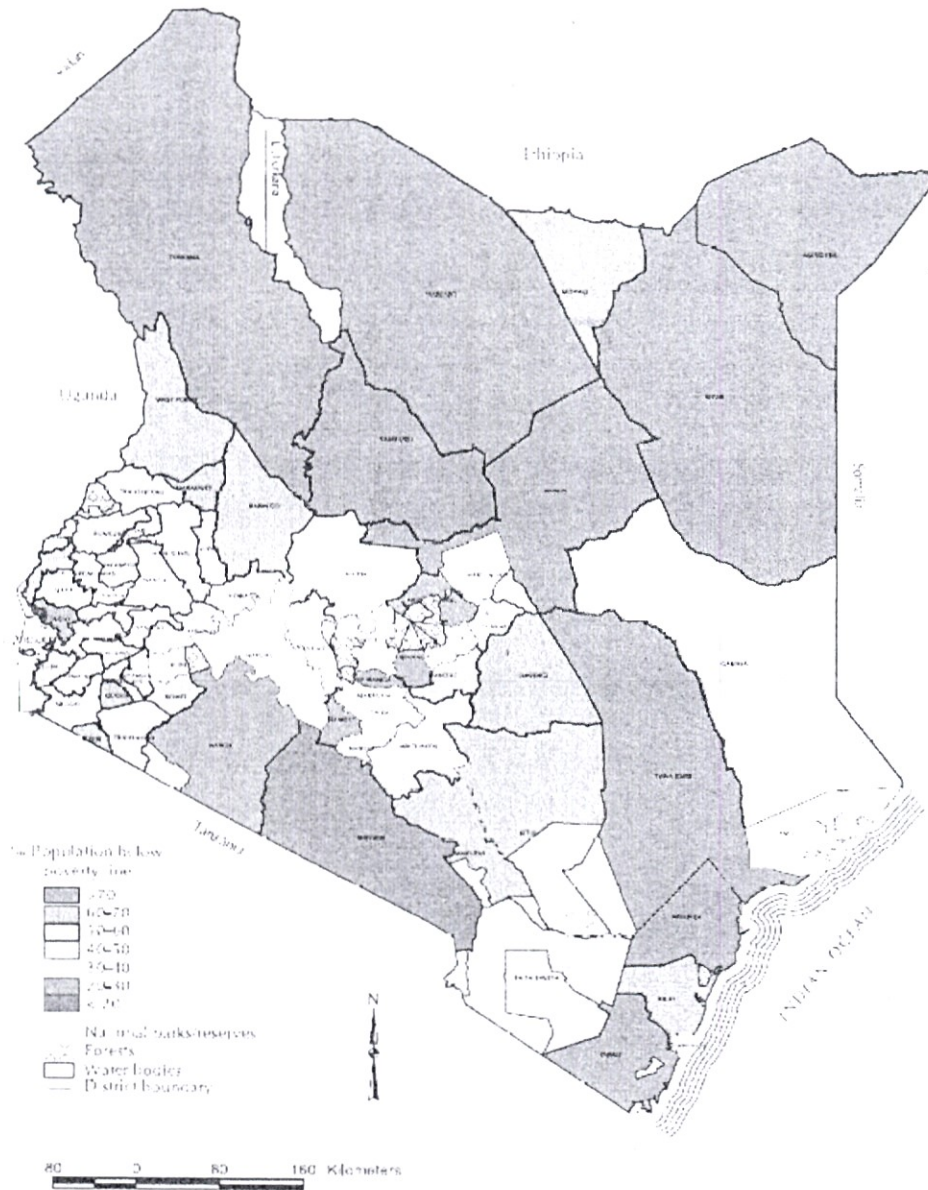
156 KS Njonjo and Institute of Economic Affairs, *Youth Fact Book: Infinite Possibility of Definite Disaster?* (2010).

157 See World Bank, *Kenya Poverty and inequality Assessment* (2008) p. 60.

158 TJRC/Hansard/ Public Hearing / Kisumu/ 14 July 2011/ p. 20.

and wife inheritance. Inadequate and unreliable rainfall patterns have immensely affected agricultural activities in some parts of the district.¹⁵⁹

District Level Estimates of Poverty, 2005/6



Source: World Bank Report, Kenya poverty and inequality assessment, 2008

159 National Coordinating Agency for Population and Development (NCPD), Kuria District Strategic Plan (2005-2010) p. 6

Health

- 260 The Kenya Demographic and Health Survey (KDHS)¹⁶⁰ of 2008 shows that the rates by province of under-five mortality rate display considerable disparities. According to this report, Nyanza Province has the highest levels of both under-5 years and infant mortality rates (import Table 8.2, pp 116). Almost one in seven children in Nyanza dies before attaining his or her fifth birthday (149 deaths per 1 000), compared with one in 20 children in Central Province (51 deaths per 1 000), which has the lowest rate. Thus, the risk of dying before age five is almost three times higher in Nyanza than in Central. Infant mortality is also highest in Nyanza (95 deaths per 1000) and lowest in Eastern (39 deaths per 1 000).
261. A comparison between the 2003 and 2008 reports shows that there have been considerable declines in child mortality rates in Nyanza over the five years, with under-5 mortality declined from 206 to 149 deaths per 1,000 births since 2003.
- 262 The KDHS report of 2003 shows that except for neonatal mortality, all childhood mortality indicators are highest in Nyanza and lowest in Central.¹⁶¹ Under-5 mortality is highest in Nyanza (206 deaths per 1 000 live births), followed by North Eastern (163 per 1000), and lowest in Central (54 per 1000) and Rift Valley (77 per 1 000) provinces. This implies that a child born in Nyanza is four times more likely than a child born in Central to die before celebrating his or her fifth birthday. The same pattern is also observed in infant mortality rates, with the highest rate in Nyanza (133 deaths per 1 000 live births) and the lowest in Central (44 deaths per 1000 live births). The figures shown for infant mortality and under-5 mortality in 2003 and 2008 are consistent with the trend in previous surveys done in 1989, 1993 and 1998.
- 263 With regard to health facilities, Kuria, one of the poorest and most marginalised of all districts has 1 hospital and 8 health centres spread across the district. The doctor to patient ratio is 1:56 913 and households are located an average of 5 kilometres from the nearest health facility. Daniel Chacha Muherei, who testified on behalf of the local MP Wilfred Machage, captured the poor state of health facilities in Kuria as follows:

We have very few health facilities, but wherever there is a health facility, the municipal council helps to open the small routes to access those health facilities. So, we have

160 The Demographic and Health Survey (KDHS) is a programme conducted after every five years by KNBS primarily to provide demographic, health and other socio-economic indicators to assist stakeholders in planning, monitoring and evaluation of population and health policies and programmes. The 2003 KDHS was the fourth to be conducted in Kenya, the others having been conducted in 1989, 1993 and 1998.

161 See Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2003* (2004) pp 114-115.

roads which are maintained by the council. However, we do not know if that council will continue after 2012. We have a sub-district hospital here. There is a road coming here, direct to that place, but this hospital has never seen an ambulance since we got a district here. Therefore, our people are suffering. So, I say it is an injustice. Our people are dying here; if we do not have money and there is a government facility here. A mother comes to deliver and dies, when you are just looking at her. Sometimes, she loses a child. It is a pity.¹⁶²

264. The most prevalent diseases in Kuria are malaria, upper respiratory tract infections (URTI) and diarrhoea. HIV/AIDS prevalence is high among the productive age group (15 to 49). It is estimated to be in the range of 13 percent and is one of the highest in Nyanza Province.¹⁶³
265. The disparities across the provinces in under-5 child mortality rates are remarkably unequal. According to the KDHS (2003), Nyanza's under-5 child mortality rate was 206, which is much higher than the national average of 115 and is 152 units above Central's rate which was the lowest. Nyanza's low child survival rate is consistent with its being a malaria-endemic area, with a modest bed net coverage of 32 percent, which includes a small 17 percent of the under-5s sleeping under a net.¹⁶⁴ According to the 2009 KDHS, Nyanza still has the highest levels of both under-5 and infant mortality rates.¹⁶⁵
266. Data accessed by the Commission from 2004 shows that there are also wide regional disparities in life expectancy. While life expectancy in Central is 64.2 years, it is in 44.8 years in Nyanza.¹⁶⁶ The death rate among the people in Nyanza is high in part because of lack of adequate medical services, particularly along Lake Victoria, where the outbreak of water-borne diseases is common. While the government cannot be blamed for these diseases in the context of economic marginalisation, these diseases compound the effects of economic marginalisation because of the burden they place on meagre incomes and limited medical facilities. In the case of HIV/AIDS - in respect of which Nyanza has led consistently in terms of prevalence - the group most affected is the productive 15 to 35 years band. While feeding on the high rates of poverty, HIV/AIDS heightens the level of poverty among the affected communities thus compounding the effects of economic marginalisation.

162 TJRC/ Hansard/ Public Hearing / Kuria/ 25 July 2011/ p.16-17

163 KNCAPD (n 159 above) 7

164 Society for International Development, *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives* (2006) p.111

165 Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2008-09* (2010) p.106.

166 See SID (n 127 above) 15, 16 & 26

Education

267. According to the NCAPD report, the total enrolment in primary schools in Kuria stood at 90.4 percent for boys and 84 percent for girls in 164 primary schools. The population in primary schools was 37,356 constituting 36 percent of the total population in 1999. It was expected to increase to 53,063 in 2008. In the 17 secondary schools, enrolment in 2001 was 2,896, which is only 18.5 percent of the total population of secondary school-going (15 to 19) youth. The secondary school population stood at 15,151 in 1999 (14.7 percent of the total population), implying that during changeover from primary to secondary schools, the drop-out rates are very high. The major challenge that has resulted is low enrolment in schools, a non-schooling gap which is wide and increasing, and the low retention in schools due as the high drop-out rate increases poverty levels.¹⁶⁷
268. Concerning public education, Kisumu District reflects national trends; a primary school enrolment of 69.7 percent and a low secondary school enrolment of 19 percent.¹⁶⁸ Data from 2006 indicates 322 primary schools, (72 in Maseno, 66 in Kombewa, 40 in Kadibo and 144 in Winam).¹⁶⁹ The teacher/pupil ratio is 1:40. Due to the introduction of free primary education in 2003, classes became overcrowded, causing increased pressure on teachers. There are slightly more boys than girls enrolled within primary education (51% boys, 49% girls). The average attendance rates by sex is similar: 8 years for boys, whereas girls only complete 7 years.¹⁷⁰
269. In the early years of independence, the government's education policy was driving manpower needs in the economy, with the desire to demonstrate to the public that independence was not a sham but brought real benefits.¹⁷¹ Colonial policies produced the result that few Africans had more than four years of schooling and as a result there was a huge skills gap that had to be plugged. For the first decade following independence, the government focused largely on expanding secondary and tertiary education. Through the Africanisation programme pronounced in 1965 through Sessional Paper No. 10, mandatory quotas (50-50) for inclusion of Africans were imposed on schools previously reserved for whites and Asians.

167 See Kuria District Strategic Plan (n 159 above)

168 Little Fact Book (2002) *Social Economic & Political Profiles of Kenya's Districts* Institute of Economic Affairs

169 S Dosker (2006) *What Makes the Difference? Socio-economic and demographic determinants of orphan primary school enrolment in Kisumu District, Kenya* (unpublished) MA thesis University of Amsterdam & Great Lakes University of Kenya

170 See S Dosker (2006) *What Makes the Difference? Socio-economic and demographic determinants of orphan primary school enrolment in Kisumu District, Kenya* (unpublished) MA thesis University of Amsterdam & Great Lakes University of Kenya p 14-15 & Central Bureau of Statistics (2002) Department of Kisumu District Demographical data

171 See Moses Okechi and Caine Rolleston *Policies on free primary school education in Eastern Africa: A review of the literature* Institute of Education University of London Monograph No 10 (2007) 10-11

- 270 Rolleston and Okech record that by 1978 when Moi took over from Kenyatta, the best secondary schools had been concentrated in Central Province, the home of Kenyatta and Nyanza¹⁷² The concentration also reflected where Christian missionaries had made their bases Central in particular had benefited from early access to education because of penetration of the earliest Christian missionaries
- 271 While the Kenyatta government placed emphasis on secondary and tertiary education to implement its Africanisation policy, it had identified "ignorance" and illiteracy as two of the problems that it needed to tackle through education, essentially by expanding primary education Consequently access to primary education became linked to the notion of development
- 272 The First National Development Plan 1964-1969 highlighted the need to expand education noting that "education and national development are so closely related that it is almost impossible to speak of one without the other" Sessional Paper No 10 included education as an instrumental part of Kenya's development strategy with emphasis placed on the economic value rather than social value of education Education was to be "regarded as the principal means of relieving the shortage of skilled manpower and equalizing economic opportunities among all citizens" Although there was rhetorical commitment to universal free primary education in the earliest government development plans, primary education was regarded as a long-term objective of the education programme, which at the time focused on furnishing manpower needs of the economy
- 273 On assuming power, Moi was to shift the education policy fully towards free primary education Under Moi, the development language had shifted from that of emphasising secondary education to that of recognising primary education as the foundation of economic and national development¹⁷³ The government would provide universal primary education (UPE) for seven years, free of charge to all children of primary-school age, abolish building and other school funds in primary schools and provide free milk to primary school children throughout the country (Republic of Kenya, 1979:155) The feeding programme was mainly to attract pupils from semi-arid areas to attend school With the economic downturn in the early 1990s, elements of UPE disappeared, with fees reintroduced (as building levies) and the milk programme ended UPE would later be reintroduced by the NARC government after the 2002 elections

172 Moses Okech and Came Rolleston (n 171 above) p 12

173 Government of Kenya Fourth National Development Plan (1979-1983) p 155

- 274 It is fair to note that the expansion in primary education instituted by Moi and investment in education generally is one of the main positive legacies of his 24-year rule. Kenya's achievement in the development of basic education was a showcase among sub-Saharan African countries at the World Conference on Education for All in 1990. However, the effect of the Moi policy of leaning towards primary education is that secondary education was undermined. The government announced that due to the high cost of secondary education, parents would be asked to contribute more and that the bursary scheme at secondary education would also be reviewed. The policy was to allow only for a modest expansion in secondary education in order to correct the imbalance between districts and between boys and girls.¹⁷⁴
- 275 This policy had the result that investment would shift from Nyanza and Central provinces. For many years, these two provinces, especially Nyanza were at the top in terms of performance both in primary and secondary level despite the political and economic isolation of the region. However, education would suffer neglect, in later years especially in Nyanza, with accusations levelled against the Moi government that it had set out to undermine education standards in that province through a variety of means, including the systematic transfer of the best teachers.
- 276 In Kuria, where education standards have remained very low, perceptions of marginalisation, which appear to be borne out of experience, persist. Testimonies attributed lack of schools and equipment in the area to "sabotage" and deliberate policies pursued since independence that benefited certain parts of the country to the exclusion of others. Residents of Kuria feel that other parts of Nyanza benefited as the neglect of their region continued. Daniel Chacha, again speaking on behalf of his local MP, stated

Let us now talk about education injustice and sabotage. While education is the key to success, Kuria was intentionally shoved off-target by our neighbours through deliberate designs schemed to obliterate our intellectual skills. Government schools were concentrated in other parts of Nyanza Province. For instance, in a memorandum dated 3 November, 1963 presented to the late President Kenyatta, the Kuria delegation complained of among other anomalies, educational marginalisation. For instance, the single administrative division in the neighbouring Nyanza Division, the then Central Division in South Nyanza District had nine government-aided schools, while Kehancha Division had only one partially-aided school, Taranganya secondary school. Our schools are extremely poor in performance as they are poorly equipped. All this is a result of marginalisation due to that Sessional Paper No 10.¹⁷⁵

174 (n 176 above p 12)

175 TJRC/ Hansard/ Public Hearing / Kuria/ 25 July 2011/ p 5

277 The Ministry of Education recognises that poor infrastructure is one of the major barriers to improving access to primary and secondary school education in Kenya. Furthermore, experience shows that physical facilities are an important factor in both school attendance and achievement. ¹⁷⁶ Often, the best performing schools in national examinations are also the best-equipped in terms of infrastructure. In 2005, the Kenya government came up with the Kenya Education Sector Support Programme (KESSP) whose vision was to provide quality education and training to all for development. The main goal of KESSP was to improve education by ensuring that there was adequate and proper education infrastructure. ¹⁷⁷ KESSP was created in response to the major backlog of infrastructure provision and the shortage of permanent classrooms, particularly in poor districts. It was also recognised that the existing infrastructure was generally in poor condition due to lack of investment capital, poor construction standards and inadequate maintenance. ¹⁷⁸

Water and Sanitation

278 According to the KDHS 2003, there are marked provincial differentials in the source of drinking water and by extension access to piped water. More than three-quarters of the households in Nairobi have piped water in their dwelling, compound, or plot compared with only 2 to 4 percent of households in Western, Nyanza, and North Eastern provinces. ¹⁷⁹ According to the same survey, only about 1 percent of households in Nyanza had water piped to their houses, compared to about 33 percent in Nairobi and about 12 percent in Central. ¹⁸⁰

279 In recent times, water supply to both villages and municipalities in Nyanza has been affected by the water hyacinth through blockage, which lowers the quantity of water pumped. Water hyacinth infestations have been reported to lower the water quality in Kenya and Uganda (in terms of colour, pH, turbidity (suspended solids) and hence increase the treatment costs.

280 Increased costs are associated with keeping the water intake points free of water hyacinth. The villages bordering the Lake Victoria have no access to the lake for their water needs at times when the beach is heavily infested with the obnoxious weed. Even if they do access the water, it is dirty and often smelly because of the rotting mats of the weed.

176 Ministry of Education, Science and Technology (2005) *Kenya Education Sector Support Programme 2005-2010*. Nairobi: Ministry of Education, Science and Technology. Pg. ix.

177 Ministry of Education, Science and Technology (n 176 above).

178 Ministry of Education, Science and Education (n 180 above) 1.

179 KDHS (2003) 24.

180 See SID (n 108 above) p 18.

- 281 Pollution is another major problem. The quality of water in Lake Victoria is threatened by the increased inflow of nutrients into the lake from surrounding areas, leading to an increase in levels of phosphorous, nitrogen and silt. Also the fivefold increase in algal growth since 1960, and the shift in its composition towards the dominant blue green algae, reduced the oxygen levels in the lake waters, increased the risks of sickness for human and animals drawing water from the lake, clogged water intake filters and increased chemical treatment costs for urban centres¹⁸¹. There has also been an increase in pollution of the lake waters as a result of disposal of domestic and industrial waste, discharge of raw/untreated sewage and discharge of agro-chemicals among others into the lake. Some of these pollutants contain heavy metals and persistent organic chemicals, which are very harmful to both human beings and animals¹⁸².
- 282 Flooding poses a serious problem for sanitation in Nyanza. The overflow of refuse from the simple pit latrines mostly in use in Nyanza has been the source of numerous outbreaks of water-borne disease. According to the Kenya Integrated Budget Survey, about 56 percent of urban households in Kenya use pit latrines compared to 79 percent of rural households¹⁸³.
- 283 According to the Annual Health Sector Statistics Report of 2008, only 76.3 percent of households in Nyanza had toilet facilities compared to 98.7 percent in Nairobi and 99.6 percent in Central. Poor sanitation is dangerous as evidenced by the health statistics from hospitals in Nyanza, which show that cases of cholera and other water-borne diseases like diarrhoea, typhoid and parasitic infections frequently occur, especially during the rainy season, when pit latrines get flooded, polluting the drinking water resources like wells and rivers¹⁸⁴.

Housing

- 284 According to the KDHS of 2003 and 2008, house ownership in Nyanza is as high as 84.6 percent of the population owning a home and 83.9 percent also owning the land on which the home stands¹⁸⁵. This is markedly high compared to Nairobi, where only 10.4 percent of the population own homes and 8.3 percent also own the land on which the home stands. Although this feature has been praised as positive, given that the percentage of house owners in Nyanza is even higher than the national average of 70.5 percent and those owning the

181 National Environmental Management Authority *Provincial Environment Action Plan Nyanza Province 2007-2011* Nairobi: NEMA, 2007 p. 39

182 National Environmental Management Authority (n 181 above) p. 40-43

183 The Water Sector Sanitation Concept- WSSC (Ministry of Water and Irrigation/MWI Kenya August 2009)

184 Case Study of Sustainable Sanitation Projects: UDDTs Implemented via CBOs and Water Services Trust Fund Nyanza Western and other Provinces Kenya Nairobi: EU, SIDA, GTZ & BMZ Available at: <http://www.susana.org>

185 KHDS (2003) pp. 24-26

land on which their home stands being at an average of 64.3 percent,¹⁸⁶ these figures are misleading because the value of the property is very low

- 285 The national survey does not appear to distinguish types of houses whether, permanent (stone built), semi-permanent (plastered mud walls with iron roof) or mud walls and grass-thatched. Although iron sheet roofs are increasingly common, the predominant houses in rural Kenya (outside Nairobi) have mud walls and floors and grass-thatched. Since the value of land in Kenya is not regulated, there are huge price differentials between land in urban areas (cities and towns) and rural (agricultural land). A metre square of land in Nairobi and neighbouring provinces of Central and parts of Rift valley is definitely of higher value than in rural Nyanza. Price differences exist even within Nairobi. While one can obtain one acre of productive land in many parts of rural Kenya for an average Sh200,000, a similar piece of land on the outskirts of Nairobi would fetch several million shillings. Although land holders may have a secure title, the low value of the land undermines its potential use to secure loans for development projects.
- 286 Access to electricity has a wide urban-rural gap, despite the country having had in place a rural electrification programme for many years. As of 2004 only 5 percent of the households in Nyanza had access to electricity. In Nairobi, 71 percent of the households have electricity. This distinctly shows an unfair distribution of electricity supply among regions and amounts to marginalisation.¹⁸⁷

Economy and Unemployment

287. Unemployment has been a persistent national problem for many years. According to Njonjo, unemployment increased from 6.7 percent in 1978 to 25.1 percent in 1998/1999 before easing to 12.7 percent in 2005/2006. Data shows a general trend of increasing unemployment rates over the years. As many people lost their jobs through the structural adjustment programs (SAPs) of the early 1990s, the informal sector became increasingly important, accounting for most of the growth recorded. The informal sector is the highest employer followed by agriculture and manufacturing. The table below reveals considerable variation in unemployment among the different age-groups, with the youth category (15 to 34) recording relatively higher rates of unemployment.¹⁸⁸

¹⁸⁶ See KHDS (2003) SID (n 108 above) 17

¹⁸⁷ See Society for International Development (SID) *Pulling Apart: Facts and Figures on Inequality in Kenya* Nairobi SID (n 108 above) p 19

¹⁸⁸ Youth Fact Book p 128

Table 9: Youth Unemployment in Kenya between 1978 and 2005/2006

Age Cohort	1978	1986	1998/99	2005/06
15 – 19	26.6	36.2	47	25
20 – 24	18.5	29.2	47.3	24.2
25 – 29	4.8	8.6	25.1	15.7
30 – 34	2	2.7	14.3	7.5
Av	12.97	19.2	33.4	18.1
35 – 39	1.8	2.1	12	7.6
40 – 44	0.7	0.7	11.2	6.4
45 – 49	1.1	2	14.7	5.7
50 – 54	1.4	0.9	18.9	4.7
55 – 59	1.5	4.1	40.6	4
60 – 64	3.2		45.2	2.5
Average	6.7	9.7	25.1	12.7

Source: GOK, Various Statistical Abstracts

288 Unemployment increased from 6.7 percent in 1978 to 25.1 percent in 1998/1999 before easing to 12.7 percent in 2005/2006. The table also reveals considerable variations in unemployment among different age cohorts, with the youth category (15 to 34) recording relatively higher rates of unemployment. According to Omolo (unpublished), youth overall unemployment has persistently been at least double the national unemployment rate.

289 Unemployment was found to be high in many areas of Nyanza, especially among a majority of young school leavers. Idleness among unemployed youth leads to crime and other vices. There are inadequate training institutions, denying youth the skills required for gainful employment, which coupled with a high rate of school drop-outs, becomes the root cause of unemployment.¹⁸⁹

290 Over the years, especially during the Moi regime, the manufacturing base, industries and cash generating farming activities in Nyanza were allowed to collapse. These included the fishing industry, rice farming, cotton and the sugar industry, which had previously thrived. Most of these sectors were mismanaged by state corporations under which they operated. The centralisation of key players in Nairobi did not serve local economies. For example, while Nyanza

¹⁸⁹ Geoffrey Njeru, *Mapping the Root Causes of Conflict: An Agenda for Sustainable Conflict Mitigation and Peace Building in Kenya*. Nairobi: KEC-CJPC and Diakonia- Sweden (2009) p. 29.

has relied on fishing and Lake Victoria was the mainstay of production, many of those who testified lamented the fact that the only fish factory in the country was located in Thika, more than 400km away

291. Moi cites several projects undertaken by his government in the Nyanza region to counter claims of marginalisation, asserting

[o]ther development projects at the time included the creation of the Lake Basin Development Authority (LBDA), with its headquarters in Kisumu. The government sourced and installed ultra-modern rice mills of the time at Kibos and Ahero, which are still operational to date. An inland container depot was built in Kisumu and a Central Bank division was also opened.¹⁹⁰

292. Despite Moi's assertions, claims of marginalisation dominated the hearings. The collapse of manufacturing linked to the agricultural sector in the Nyanza region was the subject of the majority of testimonies related to economic marginalisation. Charles Omondo Oyaya, a one-time cotton farmer and local leader stated

This region is known for a lot of potential. It has some of the best natural resources one would need in any given country. We are just sitting at the gulf of Lake Victoria, which is rich in fisheries resources. You might want to know that unlike all other resources that we have that are productive, until only five years ago, we did not have a fisheries policy. We did not have a marketing instrument or structure. The whole of the Lake Victoria circuit had no motorable road, no electricity. So, it means that their resource could not be used. This region was known for producing the best quality of cotton. I say this with confidence because I was involved in this sector. I was shocked at the quality of the produce of cotton in this Region. We know that the cotton sector died through systematic policy inaction and lack of State support.¹⁹¹

293. Witness Oyaya expressed similar views about the sugar cane industry, arguably the most expansive and potentially lucrative sector for both Nyanza and Western

We know that this is the area that produces sugarcane. All the factories are on their knees through receivership. On the contrary, the region has been presented to be unproductive, full of lazy people who cannot produce anything. The Kenya Revenue Authority records show that actually, Nyanza is number 3 in revenue generation after Nairobi, Coast and then you go to Western. In our minds, these are the poorest areas, but it does show that they produce but nothing comes back.¹⁹²

190. Written Submission by Former President Daniel arap Moi to the TJRC (2012) p 23

191. TJRC/ Hansard/Public Hearing/ Kisumu/14 July 2011/ p 22

192. TJRC/ Hansard/Public Hearing/Kisumu/14 July 2011/p. 22

294. Dr Israel Kodiaga, on behalf of a group of elders decried economic marginalisation, alluded to the collapsed textile industry and the under-performing fishing industry

On the economic front, you will realize then that a lot of industries in Luo Nyanza and specifically Kisumu have been allowed to go under as one of the many ways of dispossessing the people. Cases in point include, but are not limited to, Kicomi, Kisumu Breweries, the fish processing plants [] That there are no roads linking the lake region and the fish sources and beaches is a further manifestation of the same [marginalisation] The sugar industry or the sugar factories here are under receivership, with heavy debts, but the successive governments have always bailed out coffee farmers, tea farmers and dairy farmers in other regions to the neglect of cotton and sugar¹⁹³

- 295 While the Commission is aware of the diplomatic dimensions of another dispute, it is of the view that the manner in which the government handled the Migingo Island dispute appears to reflect attitudes towards the economic situation in the region. Those who stated that the dispute is more than just a struggle over a patch of land in the lake could be right. The waters around the island are said to be some of the richest in terms of fish, which Kenyan fishermen are prevented from accessing.

- 296 It has been noted that the government has taken action to revive most of the sectors that had collapsed in the region, in particular the cotton and rice industries. Meanwhile, the sugar industry, perhaps the single largest industry in the Nyanza and Western regions, continues to experience serious problems that hold back the region's economy. These problems include corruption, importation of cheap sugar and mismanagement.

Infrastructure: Roads

- 297 A World Bank report rightly links the state of infrastructure and economic welfare of households. It suggests that improved infrastructure access is associated with movements out of poverty. By way of example, it explains that one reason why infrastructure variables are important is that households that are closer to, among other things, a motorable road, fertiliser and piped water, grow more crops (in absolute number) and are more likely to diversify economic activities in which they are engaged and therefore move out of poverty¹⁹⁴. In rural agricultural settings, availability of motorable roads increases access to markets and agricultural services (for example, extension services). In its province by province

193. TJRC/ Hansard/Public Hearing / Kisumu/ 19 July 2011/ p 15

194. World Bank World Bank. *Kenya Poverty and Inequality Assessment* (2008) viii

analysis, a World Bank report notes that Nyanza starts off worst on motorable roads in 1997, but ends up better than Coast and Rift Valley in 2007 and that Central is the best throughout ¹⁹⁵

298 Of the roughly 14 500 km of roads in the Lake Victoria basin, only about 1 200km are paved (8%) These carry more than 80 percent of passengers and freight traffic However, serious under-investment and lack of commitment to maintenance have left the road network in a poor state of repair This poor condition contributes to a high rate of road accidents and deaths as well as to extensive economic losses in maintenance and repair of vehicles Road safety is further reduced by the operation of *matatus*, which comprise close to 78 percent of the public transport system ¹⁹⁶ Moi has rejected claims that Nyanza can be regarded as economically marginalised, in part because of the poor state of roads, provides as evidence several roads his government constructed or improved Kisumu-Bondo, Awasi-Chemilil, Kibos-Chemilil, Miwani (sugar belt road), Migori-Isebania, Luanda-K'Otieno-Sori and Homa Bay-Katito-Kisumu While this network had the desired effect of opening up certain areas in the region, most are in a poor state of repair In addition submissions were received from residents who claim not to have benefited at all, or who were, in their view, 'accidental beneficiaries' of projects that did not target their needs.

299 Decrying the poor state of roads in Kuria, one witness stated poignantly

There has not been any tarmacked road in Kuria since the world was created, apart from a small stretch that links Migori to Tanzania through Kuria This was a road constructed in the early 1970s and does not very much serve Kuria, apart from being a highway passing through Kuria It is against such a backdrop that while we embrace nationhood, ethnic unity and patriotism, we similarly envisage with gusto unity in diversity, unity of purpose and equitable community development that is enshrined in devolved systems worldwide ¹⁹⁷

300 The assumptions made in this study are borne out by testimonies by residents linking the difficulties they experience in accessing services such as health and economic stagnation to poor road infrastructure Lack of motorable roads has also hampered access to markets for agricultural produce Some speakers linked lack of investment and the subsequent poor state of infrastructure to politics, lack of accountability and corruption When responding to the question whether

¹⁹⁵ World Bank (n 194 above) p 55

¹⁹⁶ National Environment Management Authority (2007) *Provincial Environment Action Plan Nyanza Province 2007-2011* Nairobi: NEMA p 75

¹⁹⁷ TJRC/ Hansard/Public Hearing/Kuria/ 25 July 2011/ p 6

she was aware that any monies were ever allocated for infrastructure, Phoebe Asiyo responded

During my time in Parliament, you could not trace where monies were sent to by the Treasury. Yes, you passed the Bills, but the ministries did whatever they wanted with those monies. I will give you an incidence or two that took place in my constituency. Money was allocated for rural electrification in Kendu Bay. All the equipment were delivered together with the poles and everything. Because I did not quite agree with everything the establishment said and I was critical of some of the policies of the government, some very big vehicles came and took away all the poles and equipment that would have given the people of Kendu Bay electricity in 1980. It is only this year that Kendu Bay is getting electricity, yet that allocation was made in 1980. You can count how many years it has taken for electrification to get to Kendu Bay.¹⁹⁸

301 On the role of politics in economic inclusion, Asiyo's testimony is instructive

There was a road from Oyugis to Kendu Bay, which was allocated funds for tarmacking. The funds were raised by Tom Mboya when he went to the USA. In 1971, that road was supposed to be tarmacked. The money for that road was used to tarmac a road in Thika and yet, the road would open up South Nyanza to Tanzania. Up to this minute, the road remains un-tarmacked. These are some of the issues we raise when we talk about marginalisation of Nyanza Province. Of course, there are much bigger issues, for example, the irrigation of Kuja/Miriu. It was intended to provide light and irrigation for Nyakach, all the way to Kobala in Rachuonyo. Today, that face of it is out and nobody is talking about irrigation, yet it was key for food security in that very dry area. So, I am just mentioning the few instances in my constituency where the government has withdrawn money and even equipment and taken them to other areas. There are much bigger development programmes that were taken away from Luo Nyanza to other areas on the pretext of *siasa mbaya, maisha mbaya*¹⁹⁹ (wrong politics, bad life)

302 As noted previously sections, the Commission is convinced that economic fortunes of some regions have turned on whether they supported or antagonised the regime of the day. While we cannot confirm the veracity of the assertion that money intended for a road in Nyanza was diverted to Thika in 1971, Asiyo's testimony seems to bear out the perceived link between politics and economic inclusion. It is sad that that the adage, *siasa mbaya, maisha mbaya* (wrong politics, bad life) captures a past reality and experience of Kenya's people. It is hoped that the new constitutional dispensation, with all its stipulations on inclusion and social justice, will banish this way of managing national affairs.

¹⁹⁸ TJRC/ Hansard/ Public Hearing / Kisumu/ 14 July 2011/ p 40

¹⁹⁹ TJRC/ Hansard/ Public Hearing / Kisumu/ 14 July 2011/ p 40

Coast Province

- 303 The idea that the former Coast Province has been marginalized economically by successive governments since independence is a central feature of the historical narrative in the context of Kenyan politics, development and gross human rights violations. Like the former North Eastern Province, the NFD in general and Nyanza, the Coast region could be placed in the category of 'politically dissident' regions that have suffered marginalisation under successive regimes. However, marginalisation experienced in the region, especially when understood from the point of view of dispossession, is due also to the confluence of interests arising from the region's strategic value as a principal gateway to the country and the East and Central African region and its valued seafront land resources.
- 304 The Coast consists of 13 districts and 21 constituencies, with a population of 3.3 million people, according to the 2010 national census. The main ethnic groups are the Mijikenda comprising of nine culturally and linguistically inter-related sub-groups, among them the Rabai, Chonyi, Giriama, Mjibana, Kauma, Kambe, Digo and Duruma. Most of them profess the Christian faith, save for the Digo who are mainly Muslims. The non-Mijikenda groups are the Taita-Taveta, Orma, Pokomo, Munyoyaya, Malokote, Bajuni, Swahili and people of Arab descent. The last three mainly inhabit the coastal towns. In total there are 15 coastal ethnic groups and a growing Caucasian community.
- 305 However, over the years, there has been a significant migration of Kenyan citizens from upcountry regions drawn to the Coast in search of better economic prospects. The region has therefore become a mosaic of various identities. This has had a profound bearing on the socio-economic and political relations within the region. Perceptions of marginalisation of the region yielded a sense of 'otherness' with some ethnic groups being classified as 'insiders' or indigenous communities, while other communities are routinely referred to as *wabara* or upcountry people.
- 306 The latter group includes the Kamba, Kikuyu, Luo, Luhya and other groups. Over the years, the indigenous communities residing in the Coast have consistently complained of exclusion from the hinterland and exploitation of their resources without reward. This partly explains political dynamics. The persistent claims and allegations of exploitation and exclusion are blamed on the so-called non-indigenous communities commonly referred to as '*watoka bara*' or *wabara* (those from the hinterland).

307. The Commission visited various parts of the region and received numerous written and oral submissions from residents. Travelling across the region, we experienced what Coast communities have for years decried what they perceive as marginalisation and under-development of the region. We came to the conclusion that as is the case for other marginalized regions, successive governments have since independence failed to take tangible action to deal with these deep-rooted feelings among the inhabitants of the Coast. One of the critical issues, described by some as 'a ticking time bomb', is the seemingly intractable land question.²⁰⁰ More recently, other factors including the perceived mistreatment of residents at the hands of police in the context of Kenya's efforts in the American-led 'war on terror', poor education levels and lack of infrastructure have all served to fuel feelings that successive governments do not care about the region. We hereby outline findings on marginalisation at the Coast

Particulars of economic marginalisation

308. To observers, the Coast region embodies a series of paradoxes, which appear to summarise the narrative of economic marginalisation of the region. About a decade ago, Ali Mazrui, a leading Kenyan scholar characterized Kenya's Coast Province by a number of dichotomies (or "paradoxes")²⁰¹. He noted that while the Coast has been historically the most "cosmopolitan" of all regions that constitute Kenya today, a region which has attracted immigrants from highly diverse ethnic and religious backgrounds over several centuries, and which has played a central role as a hub of commerce and infrastructure, the region was relegated to a secondary position in terms of political and economic power in colonial and post-colonial times. Although Mazrui positively described the Coast as heterogeneous and being the 'least tribal' of the regions of Kenya, he observed that it is "among the least 'national' in power, influence and orientation"

309. Mazrui states that despite having provided Kiswahili as a *lingua franca*, the Coast was and continues to be relatively under-developed in modern education, infrastructure and other factors. He also notes that although the Coast has not been under-represented in the political system in a formal sense because it has had a fair number of constituencies measured by population figures, there is a persistent perception of being politically marginalized, with people of Coastal

²⁰⁰ Government of Kenya *Report of the Commission of Inquiry into Post Election Violence (CIPEV)* 220

²⁰¹ AA Mazrui *The Kenya Coast: Between Globalization and Marginalization* (2000)



Abeid Abdalla Kavanga, a representative of the Mombasa Republican Council, testifying before the TJRC.

origin holding relatively few executive positions in the central administration, civil service and parastatals.²⁰² It is our view that while the participation or inclusion of residents of one or other part of the country in the public service is not necessarily important for its own sake - and that service delivery is what is crucial - we have shown earlier in section one of this chapter that Kenyan history demonstrates that economic fortunes of regions or parts of regions have historically been tied to proximity to power. Claims of exclusion (whether proved or not) should be taken seriously.

310. The Commission heard that for the coastal region, the overall outlook of marginalisation does not appear to have changed over decades since independence. Residents expressed their disappointment that the change promised by the National Rainbow Coalition (NARC) coalition of 2002 that they overwhelmingly supported did not materialize with the disintegration of the coalition soon after President Kibaki's election.

²⁰² G George 'Changing Political Faces on Kenya's Coast' (2008) *Journal of Eastern African Studies* 1992-2007

Testimony on Economic Marginalization

TJRC/Hansard/Public Hearing/Hola/12 January 2011/p. 23

People of Tana River, Munyoyaya, Moilana, the Pokomo and the Orma have been denied these rights. Our hospital is like rotten house that has been abandoned. It is in a pathetic state, but that is where we are admitted. We do not get proper medication. You get a prescription and you are told to go and buy medicine from other private hospitals. When you are discharged, you get a bill that you cannot afford to pay. That is one right that we have been denied. I have complained. I have gone up to the President, and asked for this to be looked into, but it has not been done.

The third issue is about education. I wonder why our schools do not excel in national examinations. Even if they do not do well, there is no institution of higher learning in our area. These are some of problems we face in Tana River.

Our roads are terrible. The Garissa-Mombasa road is impassable. I do not know whether your officers came here by road or air. If they came by road, I am sure they saw how bad this road is. This has been our concern for many years. Since the time of Mzee Kenyatta, this road has remained in the same state up to today. I do not know whether we are waiting for the trumpet to be blown so that this road can be tarmacked up to Garsen.

The other issue which I have followed with the authorities is the recruitment of youth into the army, police, prisons and AP service. During the recruitment exercise, money changes hands. If you cannot part with KSh60,000, your son cannot be employed. We formed a committee of 40 elders from this district and went to Nairobi to complain about these malpractices, but nothing has happened so far. We have not succeeded.

With regard to agriculture, we do not have market for our produce. For example, our mangoes rot in the *shamba* because we cannot sell them. We have struggled to do mango farming on a large scale, but with little success. We are also exploited by middlemen from Nairobi. They buy them as they wish. Since we have no other market, we sell to them at a throw-away price. We have tried to get this market in Nairobi, but all in vain. We have never succeeded. We have gone through members of Parliament. We have tried to go through the civil servants, but it has not worked out. These are injustices that they have visited upon us in Pokomo land. Businesses are dying. This does not just affect the Orma or the Pokomo or the Munyoyaya, but all the communities that live in this district. It is the same situation. I am speaking the truth that is known among all these communities.

I appeal to this Commission to visit the hospital and see the condition in which it is. It is the same government that is in Kenya, but if you look at our schools, starting from Mororo all the way up to Kipini they are in pathetic condition. You cannot believe that this is where your children live. Will they benefit in any way? Will they get any treatment? For three days, they do not get any water yet, that is a boarding secondary school where children are supposed to be learning. If you look at the desks, they would rather sit on the cement. The situation is very bad. We are all Kenyans and we should be treated equally. We have pleaded for these issues to be addressed, but we have not succeeded. Today, you have come here to listen to us and we are not talking politics. I am talking about the problems that Tana River is facing and what the elders have tried to solve without any success.²⁰³

203 TJRC/ Hansard/ Public Hearing / Hola/ 12 January 2011/ p. 2-3

The land issue

- 311 Land and associated concerns, which is the subject of a more detailed chapter in this report, is one of the region's most intractable problems, and the centre of most marginalisation accounts. Many observers note that the land question is a potential trigger of conflict, owing to its peculiar historical and legal origins and the impact dispossession has had on the economic fortunes of locals²⁰⁴
- 312 The persistent failure by successive governments to address the issue has not helped, but fueled theories of conspiracy of *wabara* or non-coastal leaders and communities. The single most conflictive issue in Coast region is land or rather, the loss or lack of access to it, faced by many communities and individuals. In virtually all accounts, problems of land access for the local population play a very important, if not the dominant role²⁰⁵. The substantive chapter on land deals with this issue in detail. A short summary of the historical origins of the problem will suffice here.
313. The period leading up to the affirmation of protectorate status over East Africa on August 15 1895 is important, since it is during this era that native communities (mainly the Mijikenda) were driven out of their ancestral land by Arab invaders who were seeking to establish permanent settlements as a way of consolidating trade with Asia and the Middle East or looking for slaves.
- 314 In 1886 when the British and German governments established the 10-mile coastal strip or *Mwambao* and ceded control over it to the sultanate of Zanzibar, the assumption was that the sultan's subjects within the strip would retain rights to land vested in the Imperial British East Africa (IBEACo) and later the British imperial government within the strip was restricted to waste and unoccupied land. The indigenous communities within the Mwambao were treated as if they did not exist. From 1896 up to the period 1908, the British authorities, in their quest to establish the full extent of land accorded to 'private' ownership, passed an ordinance for the adjudication of claims within the strip²⁰⁶.
- 315 The land titles ordinance provided at section 17 (1) that all land that would not have been claimed within 6 months would be considered as Crown Land. Certificates of title issued by the recorder of titles were to be conclusive evidence of ownership and could be held up against all persons (including government) that the person to whom the certificate is granted is the owner of the land and all that was on it.

204 See for instance M Mwandawiro *Land, elections and conflicts in Kenya's Coast Province*,

205 M Mwandawiro *Investigation Report on Violence at Kenya's Coast Province for the NGO Council* (2009) p 17

206 Land Titles Ordinance(1908)

- 316 This ordinance was applied to Malindi, Lamu, and Tana River District. By 1975, this ordinance had been applied to the whole of the 10-mile coastal strip. In the process of adjudication, only the claims lodged before 1922 were accepted by the recorder of titles in a process that dragged on until 1975. Many of these were reportedly fraudulent, undocumented and unverified.
- 317 As a result, 95 percent of all land within Mwambao was recorded in the name of Arab immigrants, the remaining 5 percent being declared Crown Land for lack of claims. In what is now Lamu District, claims were lodged only in respect of the island. The entire mainland was declared crown land, later government land.
- 318 During the period leading up to the independence of the Kenyan republic, the colonial government in 1926 took measures that ensured that 'native resources' in this part of the country were delineated 'outside' Mwambao except some (13) pockets of land in what is now Kwale District. The indigenous people were dispossessed. The independence constitution confirmed and satisfied all land rights (regardless of how the land was acquired) before 1 June 1963, thus giving legitimacy to a fraudulent and clearly unjust process of expropriation.
- 319 The Land Titles Act radically altered the concept of land ownership under African customary tenure governing the indigenous coastal communities and created biases in the land adjudication against the indigenous communities.²⁰⁷ The abuse of the Land Titles Act has had a great negative impact on coastal land, leading to the area having the largest single concentration of landless indigenous people.
- 320 Specifically, this is manifested in the form of "squatters" on government land, absentee landlords, tenants-at-will, idle land, mass evictions and lack of access to the sea. The slow land adjudication process and delay in finalization of settlement programmes have denied the locals secure access to land.²⁰⁸
- 321 It is maintained that the process of adjudication was riddled with fraud and lacked transparency. It did not benefit the locals who had lost their ancestral lands to Arabs and the colonial government and subsequently the post-independence government. Speaking in relation to Lamu, Hussein Sudi El-Maawy stated:

From the onset of independence, Lamu residents were unaware of the extent of the government land, they were precluded from obtaining land, land was provided as gifts to individuals who were deemed loyal to that administration, or on the basis of ethnicity, thus advocating nepotism within government ranks. These allocations were done illegally as the individuals concerned failed to follow the proper procedures as

²⁰⁷ Cap. 282 Laws of Kenya

²⁰⁸ National Land Policy, articles 184-186. Ministry of Lands, 2007 p.39

mandated by the Land Acquisition Act. An example is publicizing the distribution of land. The people who were involved in this irregular allocation were the surveyors, the physical planning officers, the Lamu County Council Chairman, Members of Parliament, chiefs, the District Commissioner and the Commissioner of Lands.²⁰⁹

- 322 Successive post-independence governments maintained the status quo, leaving land grievances, particularly the squatter problem unresolved. While local claims remained unaddressed, huge tracts of land were leased out to investors (99-year leases). One commentator suggests that while much of the Arab-Swahili control over coastal land has been eroded in the decades since independence, it was not the local communities that profited from this process.
- 323 Instead, much land went to large-scale agro-industrial ventures (such as sisal estates), the tourist sector or private developers along the ocean shore. Kenyans will remember that until the directive was overturned by a court of law in 2012, only the President of the Republic of Kenya had the power to allocate beach plots and land facing the sea. It is not surprising that most of this land would be allocated and is now controlled by well-connected “up-country” Kenyans or foreigners, many of them “absentee landlords”.
- 324 The report further suggested that a clear indicator that the successive governments continue to marginalize the coast area is that the government has not come up with a solution to the problem of absentee landlords and that of squatters in Mombasa, despite many promises that action would be taken. On assuming power in 2003, the NARC government, through a ministerial order from the Ministry for Lands and Settlement, directed the termination of payments of ground rent to the landlords until the government found a permanent solution to the squatter problem in the ten-mile coastal strip. It is reported that the order would change nothing on the ground.
- 325 The widespread nature of the land problem in Coast was a persistent issue in our hearings. It was revisited by the majority of those who interacted with the Commission. Speaking in Wundanyi, Frida Mghanga Mwadime recounted

Concerning land, this is a critical issue, not only in Taita Taveta County. I think you heard of it as you travelled around Coast Province. In Taita Taveta, land is a very crucial issue because 63 percent of our land is comprised of a national park, Tsavo East and Tsavo West. Thirty three percent of it comprises personal land and ranches. We have sisal estates in Voi and in Taveta and those who own this land are senior [well-connected] people. I will not mention their names because they are known. In Voi, we also have such land-owners. The

²⁰⁹ TJRC/ Hansard/ Public Hearing / Lamu/ 9 January 2012/ p. 4

Taita and Taveta are only left with 6 per cent, on which we have constructed our schools, dispensaries and it is also used for farming ²¹⁰

- 326 The theme of dispossession of ancestral lands by the colonial government and post-colonial governments is quite prominent. Tales of dispossession dominated submissions from residents. In Taita Taveta, the Commission heard about loss of land to national parks, sisal farms and ranches owned by the rich and powerful. It was reported that 63 per cent of land in the region is covered by the Tsavo East and Tsavo West national parks, while 33 per cent is personal land and ranches owned largely by 'outsiders'. This was ancestral land that had been taken over by the colonial government and held under sisal plantations. When the white farmers departed, ownership was transferred to rich and powerful people from 'upcountry' rather than to locals who had been forcibly removed. The testimony by Christopher Nyange raises some of these key issues

The third issue is with regard to land that was taken by people for sisal plantations. This area was given as a gift to the people who had helped the British government. Why should they have given gifts in Taita when the war was not concerning the Taita? The question seemed to be hard for the colonialists to answer. In 1964 when they left, they said that the affected areas should be compensated. Money was given but it has never reached the Taita or Taveta people. Instead, land was transferred from them to the same people. It went to the Kenya government or administration led by Kenyatta, who took the compensation money and land as well. The injustice was started by the colonialists. All this land should have been given back to the owners ²¹¹

- 327 With respect to one 7 000 acre farm in Taita Taveta forcibly taken in 1932 and passed down from a Mr Grogan, to a Mr Patel, then to one Basil Criticos, Kio Kisala, who spoke on behalf of the more than 12 000 residents of Titobo and Timoribo locations, narrated their travails, with this plea

Our expectations are that since the Greek man [Basil Criticos] on that land has no grandfather, we ask who passed on that land to him? Our expectation is that the land should be reverted back to the citizens. We should occupy it as local residents. The farm was taken away in 1932. He should give up the land for us and let it be sub-divided among us. I would also like to say that our elders be compensated for guarding his farm against invasion by monkeys, forced labour and arbitrary arrests. This was against their human rights.

In Taita Taveta, this has left the majority of the population landless and destitute, with only six per cent to go around. Very few residents have very small plots that they can call their own, yet many do not have titles, which has rendered their hold as tenuous as that

210 T.JRC/Hansard/ Public Hearing/Wundanyi/24 January 2012/ pp 6 - 7

211 T.JRC/ Hansard/ Public Hearing/Wundanyi/24 January 2012/p 26

of those who squat on big farms. Historical dispossession abounds in other parts of the region. As a result of this state of affairs, the squatter problem is serious in the region.²¹²

- 328 Expressing views similar to those of Dorothy Munene below, several speakers questioned the authenticity of titles of private developers from outside the region, while imploring the government to de-gazette the park as well as repossess and redistribute privately-held land to locals

We ask that the land that is owned by the private developers be looked into, how did they acquire it? Where did they buy it? If you look at history you will see that when Grogan left, none of the presently rich people bought that land. So how did they acquire it? This land is supposed to be returned to us. Most of us have one acre and six to ten children. Where will these children live? The places are so congested and you would think it is Mathare slum. So we are asking the government to look into such land so that the land is returned to its rightful owners.²¹³

- 329 The Commission also heard accounts of residents who lost their land during security operations or were forced to move for security reasons, never to recover it again. These accounts relate both to the 'Shifita War' and subsequent security operations in the region. Some residents expressed the view that in certain parts of the region such as Lamu, security was used as an excuse to dispossess them of their land. According to multiple accounts, many were not restored to their land, (which was taken over by the government and subsequently grabbed by powerful people) or to recover compensation for the same.

330. In respect of lack of compensation, one speaker notes as follows

[] little consideration has been given to the Lamu community members who were forced out of their farm lands in 12 villages, including those in Shakanı, Shendenı, Vundenı by the security forces during the 'Shifita War' in the 1960s. These locals, who were, in essence, the first IDPs in independent Kenya, were forced to move into slums in Lamu or to migrate to other areas of Kenya and Tanzania and, to date, no form of redress has been made.²¹⁴

- 331 Submissions from Coast residents invariably link their state of economic marginalisation marked by poverty, illiteracy and lack of access to basic services to these varied acts of land-related dispossession. The Commission heard of many accounts of police brutality and other kinds of mistreatment by the provincial administration, extra-judicial killings, arrest and imprisonment of those who agitate for restitution as well as the destruction of property and evictions of those who live off these lands with contested titles.

212 TJRC/ Hansard/ Public Hearing / Wundanyi/ 25 January 2012/ p. 21

213 TJRC/ Hansard/ Women Hearing / Wundanyi/ 24 January 2012/ p. 7

214 TJRC/ Hansard/ Public Hearing / Lamu/ 9 January 2012/ p. 4

332. The control of land by absentee landlords has left many local communities despondent. Indeed, the landlessness of the native communities of the Coast region is mainly responsible for the high levels of poverty. In some areas, local communities find it difficult to continue fishing operations as hotels and other plot owners have blocked access to roads and beaches.²¹⁵ In respect of land and poverty, the views expressed by Hussein Sudi El-Maawy a retired senior lecturer and now a community elder in Lamu are relevant for other parts of the region.

It has been found that the land insecurity and inequitable access to natural resources led to vulnerability and is one of the biggest causes of poverty. It, therefore, comes as no surprise that Lamu County remains one of the poorest in Kenya. Decades of inherited poverty have led to the disenfranchisement of the people, they have been denied access right over their land since colonialism, later, they were forced out of their homes during the 'Shifita War' of the 1960s. Lamu has reached a boiling point after the government failed to address the historical injustices as well as curtail ongoing fraudulent land procurement in the area.²¹⁶

333. Residents are of the view that although the new Constitution and the National Land Policy have finally acknowledged indigenous ownership of land, and the importance of addressing historical injustices in the coastal region, the delayed reforms and political blockage towards development of power to manage their land and natural resources persist.

Education

334. Experts suggest that the problem of marginalisation in the education sector at the coast has historical roots in the colonial and pre-colonial era. It is notable that until shortly before independence in 1963, the provision of education in Kenya was segregated along racial lines, with separate systems for European, Asian and African pupils. From a national perspective, the Coast region is among the most 'under-developed' areas of Kenya in the provision of education.

335. This section highlights some of the factors that contribute to the low quality education at the Coast together with the more institutional and financial aspects of educational policy. The slow uptake of western education upon introduction has had a bearing on standards and coverage. At the Coast, western education took long to take root. Some reasons have been proposed by experts why this is the case.²¹⁷ Western education, which before World War I was introduced through mission schools, made

215 M Mwandawiro, *Usipoziba ufa utajenga ukuta: Land, elections, and conflicts in Kenya's Coast Province* (2009).

216 TJRC/ Hansard/ Public Hearing / Lamu/ 9 January 2012/ p. 3.

217 See for instance Robert Makonde, *Challenges of western education in the Coast Province of Kenya 1840-1963*. Unpublished PhD Thesis. Columbia University (1980).

little headway among Muslims, who feared that their children would be proselytized. Special consideration was given to the Arab communities in the protectorate, but their former slaves and servants, predominantly black Africans, were largely ignored.

- 336 State educational policy calling for government-missionary 'cooperation' in matters concerning African education did little to improve opportunities among Africans in the province. Makonde points out that the evidence from this region is especially strong in showing how Indians and to a lesser extent Arabs were provided with better schools and skills training in preparation for middle-level positions in the colonial administration and society.²¹⁸
- 337 In contrast, only a small percentage of African children were encouraged to pursue 'industrial' training. The attempt to 'reform' education through measures such as those proposed in the Beecher Report served between 1950 and 1963 to mollify discontent and prepare for decolonization. The Beecher Committee was appointed in 1949 and mandated to investigate, evaluate and report upon the structure and functioning of the African educational system.
- 338 Makonde argues that the implementation of the Beecher Committee report allowed the rich districts to benefit far more than the poor ones at the Coast. Within the protectorate, almost nothing was done to provide even primary educational services to Africans. Further, research suggests that the inequalities inherent in the coastal region before colonial rule have not only been sustained but have also been exacerbated both by the racially divided and stratified school system and by the policies for funding through the Local Native Councils. These policies laid a strong foundation for the persistent problem of marginalisation in education.²¹⁹
- 339 Today, the Coast remains one of the lowest-literacy regions in the country. According to government statistics, both Kwale and Kilifi districts had the highest primary school enrolment rate between 2002 and 2004 in the Coast. In the same period, Lamu and Taita Taveta districts' enrolment rates continued to lag behind the other districts, although there was a slight improvement in the latter. The low enrolment rate is attributed mainly to poor facilities and infrastructure, lack of trained teachers, and early marriage of girls, particularly in the rural areas.
- 340 Overall, literacy levels are low in the Coast, but are higher in urban than in rural areas. According to the Kenya Central Bureau of Statistics, Economic Survey of 2005, a significant disparity in literacy is found between men and women, with

²¹⁸ See for instance Robert Makonde *Challenges of western education in the Coast Province of Kenya 1890-1963* Unpublished PhD Thesis, Columbia University (1980).

²¹⁹ Makonde (n 218 as above).

that of women being much lower. Kilifi, Tana River and Kwale districts have the highest disparities between men and women.²²⁰

341. In terms of numbers of schools and learning centers, the Kenya Central Bureau of Statistics' Economic Survey of 2005 revealed that inadequacy and distribution are a problem. In Kisauni constituency, for example, with a population of over 300 000, the constituency had only sixteen primary schools and four government secondary schools. This contributes to the prevalence of illiteracy in the area, and it could be contrasted with Wundanyi constituency (Taita), which has less than 100 000 people, but only 56 primary schools and 15 government secondary schools.²²¹

342. Lack of facilities and trained teachers in adequate numbers and their impact continues to be a persistent complaint. Speaking in relation to Lamu, Mohammed Abdikadir portrays a picture that is replicated across the region:

The other issue is poor performance in national examinations. We have a shortage of teachers in Lamu. We do not have sufficient equipment. You find that we have schools, but no laboratories. The schools do not have sports equipment and libraries. This has made it impossible for them to compete effectively against other counties. Out of 47 counties, we are ranked in the 44th position. This is very sad because we know that our children would like to study like others, so that when it comes to employment, they can also compete with the rest of the country.²²²

343. It appears that the government's policy of free primary education has been undermined by lack of teachers and other facilities. Bakari Ali Mohamed concurs:

Everybody is talking about the shortage of teachers in schools. Parents have to employ some teachers. Children do not perform well because the school committees are not able to employ teachers.²²³

344. Widespread complaints were recorded that although national universities have started their campuses at the Coast, the region does not have a fully-fledged university based in Mombasa, the second largest city in Kenya. In addition, until the elevation of three coastal schools (Kenyatta High, Mwatate, Mama Ngina Bura Girls' School and Ribe Boys' High School) to national school status in May 2011, there was no single national high school at the Coast. The three were among 27 other schools granted this status around the country. The grievance appears justified given that national schools represent the mark of excellence as they are

220 Government of Kenya Central Bureau of Statistics, *Economic Survey (2005)*

221 Kenya State of the Coast Report (2008) United Nations Environment Program (UNEP) and the National Environment Management Authority

222 TJRC/ Hansard/ Public Hearing / Lamu/ 9 January 2012/ p. 37

223 TJRC/ Hansard/ Public Hearing/Lamu/9 January 2012/p. 51

often better resourced; admit top performers and generally top national exams and the number of those who subsequently get university admission

- 345 Lack of education and poor education standards have a direct bearing on economic prospects. Residents lamented unemployment among their ranks. Unable to access work, many young people resort to joining the security forces. Speaking on behalf of the Munyoyaya community from northern Tana River region, Hirsi Sheikh Dulow lamented the poor education standards, unemployment and marginalisation of that community. In our view, this is the fate of most communities in the Tana River region

[] You will be surprised to hear that in Kenya, this community does not have a single officer in the government, not even a District Officer. You cannot find a lieutenant in the military, the Kenya Police or the Administration Police. Their highest rank would be that of sergeant. In terms of education, we do not have officers. The few who are there are clerks. This is because of victimization. There is no development in our area and in terms of education, we have been so much marginalised that we cannot compete effectively with other communities in Kenya and that means that when it comes to employment, we encounter problems. It is only recently that we had a few people who have studied to degree level, but before that the level of education was so low. So, when we talk of being marginalised and receiving no justice in Kenya, we know what we are saying. This community has suffered great injustice since independence. Even long after attaining independence, they have been victimized. They have not received sufficient education and they are left behind on all fronts of development and we think this commission should address that. Those who get D grades are unable to go to secondary schools. Even if they are not admitted by the Joint Admissions Board (JAB), they are unable to pay for the parallel degree courses and because of that, they rush to join the security forces.²²⁴

- 346 The Commission also recorded a persistent complaint that most learning institutions such as primary schools, especially in rural coastal areas, experience a severe shortage of well-trained teaching staff. It was reported some of these primary schools largely depend on untrained teaching staff. For instance a report compiled by Ujamaa, an NGO, revealed that 45 percent of teachers in primary schools around Mtaa and Taru locations of Kinango District are untrained. These teachers are tasked with the duty of teaching examination candidates. While the real impact of this shortage cannot be ascertained, it is noted that lack of adequate trained teachers must have a bearing on the quality of education and literacy levels in affected areas.
- 347 Testimonies cited the location of Utalii College in Nairobi as further evidence of marginalisation of the region. Utalii is the premier government training college in matters of hospitality and tourism. The Coast is largely known as the hub of tourism, with tourists-related sectors as its economic mainstay. While we may not

²²⁴ TJRC/ Hansard/ Thematic Hearing / Lamu/ 9 January 2012/ p. 12

be in a position to verify these claims, Coast residents submitted that other than the location of the college, numerous other factors - including poor transition rates at primary and secondary level - conspired to ensure that they had insignificant representation in this important institution. A branch of Utalii was opened at the Coast in 2010 and although this is an important development, it is not easy to immediately gauge its impact.

Health

- 348 The health care system in Kenya comprises of several providers and levels of health care provision, mostly the government's ministries of Medical Services and Public Health and Sanitation and private health care providers such as non-governmental organizations (NGOs) and community-based organizations (CBOs). The public health system consists of national referral hospitals, provincial general hospitals, district hospitals, health centers and dispensaries. Private health care systems are mostly run by NGOs, faith-based organizations (FBOs) and CBOs. Health facilities including dispensaries, health centres, district hospitals, provincial hospitals, teaching and referral hospitals, private maternity and nursing homes, private clinics and voluntary counseling and testing facilities (VCTs) are run by government, NGOs, CBOs or FBOs.²²⁵
- 349 Despite the centrality of the Coast region to the Kenyan economy, it records the lowest health infrastructural development as seen in the low number of healthcare facilities (402 facilities by the end of 2007). A key factor in explaining this trend has been attributed to exclusionary practices of the governing elites. Other factors include the low levels of adult education and adherence to the local ways of defining and maintaining health, some of which are not beneficial. High costs hinder the use of modern health services in most parts of the coast province. A survey in Kwale District conducted by the Health Management Information Systems (HMIS) indicated that high costs hamper the use of modern health services for 10 to 30 percent of the population.²²⁶ As a result, many people have turned to traditional healers.
- 350 The survey in Kwale showed that 40 percent of the mothers take their child to a traditional healer when they fall sick. Reliance on traditional medicinal practitioners is higher if the mother has no formal education or is a Muslim, and if the condition of the child is chronic. Reports and anecdotal evidence suggest that the Coast region has largely been ignored when it comes to the provision of social

225 Social policy, development and governance in Kenya: A Profile on Healthcare Provision in Kenya. Research Report by Kenya L (DPMF Researcher) Professor Bujra A (Director of Project) Development Policy Management Forum (DPMF).

226 The health facilities provided only include health facilities which have been registered and provided codes by the Ministry of Health.

amenities.²²⁷ The table below shows that the number of government hospitals increased considerably by six facilities and government-manned dispensaries by 24. Urban bias creates inequality in accessing health facilities, with most of them located in the better-developed commercial centres such as Mombasa. At the district level, Kilifi records two hospitals, while Kwale has no hospital, but has five private health clinics. The influx of commercial sex workers too has implications on the disease burden, mainly HIV/AIDS, with Mombasa, Malindi and Lamu districts the most affected. Insecurity in the districts of Kwale and Likoni also influences the distribution of health facilities.

Table 1.1

Year	2003 — 2004	2005 2006	2006 — 2007
	No of Health Facilities	No of Health Facilities	No of Health Facilities
Hospitals			
GOK	9	9	15
NGO/Missions	2	2	4
Private	10	10	7
CDF			0
Dispensaries			
GOK	152	152	176
NGO/Mission	55	55	57
Private	9	9	38
CDF			63
Health Centres			
GOK	32	32	38
NGO/Mission	2	2	2
Private	1	1	2
CDF	-	-	0
Total	272	272	402

In addition, the table below shows the dire situation that some of the coastal people in rural areas face in pursuit of medical care. In Kilifi, the doctor-to-patient ratio was 1 doctor to 100 000 patients. This statistic, as one may readily deduce, is a big contributing factor to the low quality medical care provided to such rural people.

²²⁷ See Abdalla Bujra and Leah Keriga 'Social policy, development and governance in Kenya: A Profile on Healthcare Provision in Kenya' Development Policy Management Forum (DPMF)

Table 1.2

Health Indicator	Mombasa	Malindi	Lamu	Kwale	Kilifi	Taita Taveta	Tana River
Doctor Patient ratio (GOK)	1 3000	1 19502	1 36343	1 82690	1 100000	1 41000	1 95500
No of health facilities	211	83	5	57	73	44	57
No of hospitals	9	3	1		2	3	2
No of nursing homes and h/centers	19	2	-	5	5	7	5
No of dispensaries	183	24	-		21	22	36
Average distance to Health centre	0.5km	1.5km	5km	30km	5km	10km	50km

Source: Research Report by Leah Keriga and Prof Abdalla Bujra

Infrastructure and social amenities

351 Despite the government having undertaken a number of policy measures to develop infrastructure and services for human settlement since the 1970s, a report by the United Nations Environment Program (UNEP) and the National Environment Management Authority (NEMA)²²⁸ suggests that very little progress has been made in their implementation. Among the policy measures developed to address infrastructure and service provision include the 'Growth Centre Policy', 'Rural Trade and Production Centre Strategy', 'District Focus for Rural Development' and 'Slum Upgrading'. Even in areas where infrastructure has been built applying these policies, the expected results have not been realized. The Growth Centre Policy, for instance, has failed to redirect human settlement away from Nairobi and Mombasa cities. A result of the ineffective implementation of these policies has been the continued poor state of infrastructure in many areas, including coastal rural areas (NEMA, 2004)²²⁹

Roads

352 The UN and NEMA-prepared State of the Coast Report²³⁰ provided data showing that most of the roads in Mombasa District converge on the city due to its importance as an industrial and commercial centre. It is relatively well-served by both classified and unclassified roads, although the network is not equally

228 Kenya State of the Coast Report Published in 2008 by the United Nations Environment Program (UNEP) and the National Environment Management Authority (NEMA)

229 Kenya State of the Coast Report Published in 2008 by the United Nations Environment Program (UNEP) and the National Environment Management Authority (NEMA)

230 Government of Kenya 2008 "Kenya State of the Coast Report: Towards the integrated management of Kenya's coastal and marine resources" UNEP and NEMA, Nairobi p 90

distributed, with many of the roads concentrated on the Mombasa/West Mainland axis. This has left the North/South mainland areas with few vehicular roads, which has been a contributing factor in the relative under-development of these parts.

- 353 Kwale District has probably the densest road network on the Coast outside Mombasa. Kwale has the longest motorable road network of 1129.6 km, followed by Mombasa, which has 109.6 km. The bulk of the road network in Kilifi is mainly unclassified and seasonal. The same situation is found in Lamu, Tana River and Taita Taveta districts. Inadequate repair and maintenance, and uncoordinated and unplanned development on road reserves have worsened the situation of roads in the region. The Coast is also served by a railway line from Mombasa to Nairobi, branching at Voi to serve Taita Taveta township. The railway is used to ferry passengers and cargo from the port of Mombasa.
- 354 However, Kwale is divided into two unequal parts by the Lunga Lunga-Kihangu-Silaloni road, with one-third lying to the western side served by unclassified roads. The remaining two-thirds lying on the eastern side are well-served by classified roads as it is densely populated and economically more significant.
- 355 The road network in Kilifi is composed mainly of unclassified roads, nearly all of which are impassable during the wet season. Tana River, Lamu and Taita Taveta districts have few tarmac roads, the majority of which are usable only in the dry season. It has been estimated that nearly 75 percent of all goods imported and exported through the port of Mombasa are conveyed by road, underlining the critical importance of this means of transport.

Water and Sanitation

- 356 Government statistics²³¹ suggest that nearly 50 percent of households at the Coast are connected to a reticulated water supply, whereas the national figure is only just over 40 percent. The number of connected households is highest on Mombasa Island, with nearly 20,000, followed by Mombasa mainland, where nearly 13,000 are connected and fewer household numbers for the other centers making a total of over 45,000 households connected to a reticulated water supply in the Coast.
- 357 The water demand is estimated at 190,000m³/day during the low season and 210,000m³/day during the high tourist season. Despite a number of major sources being fully operational, there is a shortage of water due to the high demands.

²³¹ Ministry of Planning and National Development Kwale and Kilifi District Development Plans for 2002-2008

arising from the growth in population and industry. Consequently, private and communal boreholes are quite common supplementary sources of water. Over 65 percent of the coast population is served by pit latrines. Over 25 percent have no provision for domestic waste water whatsoever. These data contrast somewhat with national averages where 6 percent have a flush toilet and only 16 percent have no provision for sewage disposal whatsoever.

- 358 The main sources of fresh water in rural areas at the Coast are ground water, surface water and roof catchments, according to the UN/NEMA report. Mombasa Island and district has the highest number of households with access to piped water supply, while Lamu has the lowest. Water demand in the coastal region has been growing rapidly over the years. The demand estimated for 1995 was about 200 000 m³ /day and was projected to rise to 280 000m³ /day by 2010 and 380 000 m³/day by 2020 (World Bank, 1996)
- 359 The water supply system has been overtaken by demand, which has increased rapidly in concert with the growth of the tourism industry and irrigation schemes. The main uses of water are domestic (which accounts for 35 percent of the total water demand), livestock, irrigation and industry. To address water shortage, complementary water sources such as communal boreholes, roof catchments, dams and wells are common. There is need, however, for the quantity of groundwater to be assessed, and this information to be used for its management.
- 360 Increasing pollution from domestic sewage and solid waste is the most severe pollution challenge in the Kenya Coast, particularly at hotspots located in and around main urban centers like Mombasa. Over 65 percent of the Coast has no sewage system and is served by septic tanks, soak pits and pit latrines. In Mombasa, wastewater management is not adequate and only 10 percent of the population is connected to the sewage system. Individual houses have pit latrines while most institutions dispose their wastewater in soak pits, which contributes to groundwater pollution. Areas served by sewage systems, however, also contribute to environmental degradation because treatment works are not operational and the sewage is disposed directly into the sea, threatening public health and marine life. The situation is compounded by the fact that Kenya does not yet have any effluent standards for discharge into the sea, and most water projects have been implemented without due consideration of sanitation and other complementary infrastructure. The main causes of the poor urban water systems in coastal regions include poor planning, mismanagement and lack of technical expertise.²³²

²³² World Bank, *Meeting the Challenges of Mega Cities in the Developing World: A Working Paper* (1996)

Housing

- 361 Most communities at the Coast build houses using mangrove poles, coral rubble, palm thatch and clay. Due to high poverty levels and poor development of infrastructure, most rural houses are not connected to modern amenities such as piped water, electricity and a sewer system ²³³ In most urban centres, the demand for housing has outstripped supply, leading to the spread of slum and squatter settlements without clean water supply or sewerage. While rapid urbanization and poverty are the main causes of this scenario, the situation is aggravated by inappropriate and ineffective regulatory frameworks, limited access to affordable finance, high construction costs and inaccessibility to affordable, serviced land. As the demand for low-cost housing increases, especially in the urban centres, new ways of providing housing need to be sought. The insecurity of titles due to unresolved historical land ownership issues has had an impact on the ability of residents to develop permanent structures or use the land they occupy to obtain loans to invest in economic development.

Gender and marginalisation

- 362 Gender equity at the Coast hinges heavily on the religious, cultural and economic dynamics of the different communities that inhabit the region. Deep-rooted religious, traditional and cultural values militate against gender equity with regard to opportunities for equitable sharing of household and societal responsibilities, inheritance and employment ²³⁴.
- 363 For instance, 48.6 percent and 42 percent of men work in the formal and informal sectors respectively. The corresponding figures for women are 34.8 and 55.1 percent, indicating that men have greater access to livelihood opportunities than women. It is however important to note that these aspects indicate marginalisation of women by their communities rather than by the state. While this is not directly attributable to the state, cultural and religious practices compound the effect of marginalisation of women.

Intra-regional disparities

- 364 It is evident that some areas of the Coast are better endowed than others, due to the status of the region (whether a city or not), economic power and/or political influence. As the capital city of Coast, Mombasa tends to have an advantage over other regions economically, mainly in terms of infrastructure. In healthcare,

²³³ Government of Kenya Coast Province Profile (2002) Central Bureau of Statistics. (Unpublished data)

²³⁴ J Hoorweg, D Foeken & RA Obudho, *Kenya Coast Handbook: Culture, resources and development in East African Littoral* (2000)

Mombasa has about 211 health facilities compared to five found in Lamu District. The average distance a person can walk to a health centre in Mombasa is 0.5km compared to 50km walked by a patient in Tana River.

- 365 Most rural areas at the Coast are served by a dilapidated and narrow road network, in contrast with urban centers such as Mombasa, Kilifi and Kwale, which are well served by both classified and non-classified roads. The better roads are generally concentrated around important industrial and commercial centres, which also host the air traffic infrastructure. Mombasa has the main airport in the Coast region, Moi International Airport, serving international and domestic air traffic. Malindi, Lamu and Ukunda have smaller airports, while other towns have airstrips.
- 366 In terms of CDF allocation, Taita Taveta is allocated more resources compared to Mombasa. One argument for this is that Taita Taveta ranks lower on the poverty index and has suffered greater marginalisation than urban Mombasa, therefore the need for more allocation of resources for development purposes. However, despite the fact that it receives more money, the county remains one of the poorest in the country. Taita Taveta is one of the richest districts in the country in terms of land and land-based resources, an integral component of the Tsavo economic system, which accommodates more than half of the country's population of elephants.
- 367 However, most of its population is entirely dependent on rain-fed agriculture, whose production has declined by a factor of two over the last couple of years as a result of land degradation, unprecedented droughts and destruction of crops by wildlife. Notably, most of the district has some intractable land issues, with the huge portion of land owned by non-residents and a large part is the Tsavo national park. Some estimates indicate that only 25 percent of the land is held by locals.
- 368 It can be argued that while CDF has empowered local communities to initiate development programmes, the management of these funds must be improved. Apart from increasing the amount disbursed to previously marginalized regions, cancelling the legacy of marginalisation will require a comprehensive programme that includes land reforms, supporting farmers to improve agricultural production and a state for locals in the extractive industries.

Western Province

- 369 In terms of size, Western Province is the second smallest province in Kenya. It borders Uganda to the west, Rift Valley to the east and Nyanza Province to the south. Under the Constitution of Kenya, 2010, it comprises four counties - Bungoma, Busia, Kakamega and Vihiga. The predominant inhabitants of the Western region are the Luhya, whose large populations live in the rural areas and agriculture is the main economic activity.
- 370 While all indicators and perceptions among the people have Western region as a marginalized region, this characterization has not featured as prominently in formal accounts as is the case for Nyanza, Northern Kenya and the Coast regions. This depiction is perhaps attributable to a combination of factors, including the fact that due to its rich fertile soils that favour agriculture and relative security, Western has been perceived to be economically stable, in spite of the high levels of poverty²³⁵.
- 371 Western has often been ignored in classification of marginalized regions in Kenya, yet its historical evolution and political fortunes are closely tied with that of Nyanza province, which is acknowledged in formal accounts as a marginalized region. Both provinces had been administered as one unit during the colonial period. In addition to the historical ties, leading figures from both regions shared ideological orientation and have jointly been at odds with both the Kenyatta and Moi governments. A thriving agricultural sector, both subsistence and cash crop-based meant that the region had the ability to produce food, and the influence of churches in the education sector appear to have cushioned the region from the effects of economic marginalisation experienced in Nyanza. It is notable however that there has been a diversity in political orientation within the region in the sense that while the region remained marginalized, sections of its leadership were co-opted into government.
- 372 Backed up with a history that lacks political favour with successive governments and the high level of poverty, it is evident that Western Kenya is marginalized. Recent trends reveal that the region has been forgotten in the development agenda. It would therefore be worthwhile to specifically examine key indicators of marginalisation in the region generally and specific parts suffering from gross cases of marginalisation.

²³⁵ See PF Hebinck & M Omosa *Chronic Poverty in Rural Western Kenya: Its Identification and Implications for Agricultural Development* (2003).

Socio-economic indicators of economic marginalisation

Education

- 373 Education and literacy is one of the indicators for measuring human development. According to the Kenya National Adult Literacy Survey report conducted in 2006 by the Kenya National Bureau of Statistics in collaboration with UNESKO,²³⁶ regional disparities confirm the trend that economically-privileged areas have a higher rate of academic achievement compared to poverty-stricken areas. Western Province had a 54 percent desired level of mastery and a 57.9 percent minimum level of mastery - below the estimated 61.5 percent national literacy level.
- 374 There are fewer government schools in Western compared to the Rift Valley and Central region. Most are mission schools run by religious institutions or private schools. The limited input by government in education has adversely affected the overall situation of access to education in the region. Only the middle-class and upper-class can afford private schools, shutting out the poor.
375. The quality of education is determined by the quality of teachers and the distribution of educational facilities. While this assertion cannot be confirmed, the popular perception in the past was that Western was short-changed in terms of the quality of teachers posted in the region. In the early 1970s, there were allegations that teachers at some schools in did not have the required qualifications, leading to low pass marks.²³⁷ Records from 1986 show that the number of trained teachers in secondary schools in Central, Rift Valley, Eastern and Nyanza was higher than that of Western and North Eastern.²³⁸ In the late 1990s, Nairobi and Central had the highest percentage of qualified teachers, compared to North Eastern and Western.
- 376 The rate of pre-primary attendance in Western is encouraging. According to the 2009 census, Western is ranked third in the country. The population attending primary stands at 1,276,295. Western is ranked third with places like Rift Valley, Eastern and Nyanza having a higher number of students attending primary school. However, the Commission has been unable, from the available sources, to establish what this absolute number represents in terms of the percentage of children eligible to attend. The transition from pre-primary to primary education in Western is commendable. When it comes to secondary school and tertiary education, the province ranks 6th, with less than 200,000 and 12,000 respectively attending such schools.

²³⁶ The Kenya National Adult Literacy Survey was conducted in 2006 by the Kenya National Bureau of Statistics in collaboration with UNESKO. The report presents the findings on the status of literacy in Kenya. The specific objectives include identifying issues that relate to adult literacy, obtain comprehensive data on adult literacy and the magnitude of literacy. This report gives the regional disparities in the level of literacy in Kenya with places like Nairobi and Central having above 75% minimum level of mastery.

²³⁷ Kenya National Assembly Official Record (Hansard) March 21- May 12, 1972.

²³⁸ Educational Statistics Unit, Ministry of Education.

- 377 The transition rate has been inconsistent between 2003 and 2008 following the introduction of free primary education by the Kibaki administration. At 2003 it was 43.8 percent, below the national rate of 52 percent. It increased in 2004 and 2004-2005 then dropped in 2006. The highest transition was in 2008 where the rate rose to 45.7 percent but this was still below the national average of 52 percent²³⁹. In terms of the drop-out rate, Western is ranked second. The national dropout rate is 5.4 percent, while that of Western is 8.0 percent²⁴⁰. Causes of drop-outs include poverty, substance abuse and poor performance.
- 378 One of the main complaints from residents in relation to education is the lack of tertiary institutions to absorb those who graduate from secondary schools as Frederick Wandera Oseno from Busia stated:
- Our main problem is that we do not have tertiary institutions and that is why, at the moment, if we want to employ 20 nurses, for example, you can get seven. There are many students with a mean grade of C+ and above, but because of lack of money, they are just at home. When they stay at home, they become idlers. It is high time we got a tertiary college around that can accommodate them. The teachers and lecturers to those institutions should ensure that the students who have got C+ and above get sponsorship and training. Whenever we look for nurses, they are not there because of lack of finances to take them to colleges²⁴¹.

Agriculture and economy: The case of the cotton, rice and fishing industries

- 379 During the 1960s and 1970s, agriculture was generally good in the region. The situation however changed in the 1980s and 1990s with the deterioration of the economy. This period was marked with poor market prices and relapse of basic infrastructure²⁴². Certain parts of Western, especially Busia District, with its poorer soils that could sustain only certain crops (cotton and rice), suffered more than others as state corporations dealing with them were systematically destroyed and bankrupted during the Moi era. The popular perception is that the cash crop industry in Western and Nyanza (especially rice, sugar and cotton) was systematically destroyed by the government in order to impoverish the region associated with opposition to successive governments.
- 380 Cotton farming was introduced in Kenya in the 1900s, by the late 1960s it had been introduced to many parts of the country. Cotton has great potential in Western as the soil is quite fertile for cotton growing. At one stage, Busia in Western produced about 60,000 bales of cotton per year²⁴³. Cotton growing provided employment

239 Public Expenditure Review: policy for Prosperity Ministry of State for Planning, National Development and Vision 2030

240 G. Odipo & O. Abagi, *Efficiency of Primary Education in Kenya: Situational Analysis And Implications For Educational Reform* (1997)

241 TJRC/ Hansard/ Public Hearing / Busia/ 1 July 2011/ p. 25-26

242 R. Ochieng (ed) *Historical studies and social change in western Kenya: essays in memory of Professor Gideon S. Were* (2007)

243 Kenya National Assembly Official Record (Hansard) 20 June 2006

opportunities to many people, however there has been a decline in cotton production not only in Western, but also in the country generally. In 1991 when the Cotton Lint and Seed Board was privatized, the industry suffered major challenges which led to the closure of major ginneries. The ginneries previously owned by the Cotton Board were later sold to private entrepreneurs. In 1992, the government made efforts to revive cotton growing in Western and Nyanza with two ginneries built at Asembo Bay and Malakisi. Despite these efforts, the mismanagement and controversial privatization of the Cotton Board during the Moi regime adversely affected the industry.

- 381 Residents lamented the neglect the cotton industry suffered, partly attributing it to government policies and the location of related factories away from the region of production. Witness Frederick Wandera Oseno, told the public hearings in Busia that

Samia and Busia are well-known for cotton farming and it has helped us in education. Interestingly, cotton farming is done in Busia County and the industry is (sic) in Eldoret. The second industry is being taken to Kisumu. That has deteriorated cotton farming, with low prices and no markets for the cotton. When farmers saw all those violations, some could not continue with cotton farming. I cannot blame the past government. If there was somebody to ensure that there is ready market and good prices of cotton, we would not be having many deaths and poverty in Samia and Busia counties.²⁴⁴

- 382 The government initiated several rice irrigation schemes in the 1960s and 1970s. The largest one is the Mwea irrigation scheme in Kirinyaga, Central Kenya. There is also the Ahero scheme in Kisumu County and the Bunyala irrigation scheme in Busia, which was launched in 1968. Mismanagement and lack of investment by the National Cereals and Produce Board (NCPB) brought the industry to its knees in the late 1980s and 1990s. Scheme operations eventually stalled in 1999 due to depletion of the revolving funds following the 1998 Mwea crisis. Ahero also collapsed, leaving Mwea as the only major functional rice irrigation scheme in Kenya.

- 383 As in Nyanza, fishing is an important economic activity in the Western region, where it is practiced on a commercial and subsistence scale in Budalang'i and Funyula constituencies in Busia District which border Lake Victoria. Despite its importance, the industry has suffered decades of neglect. Fishermen receive little or no state support to buy equipment, cooling facilities lack, marketing is scanty and there are no local factories to process fish. Speaking in Busia, witness Zainabu Muyoti complained.

We have fish, but we do not have cold storage facilities. We are requesting this Commission to make suggestions that we are provided with cold storage facilities. If we had cold storage facilities, we would bargain on the prices. But when third parties come

²⁴⁴ TJRC/ Hansard/ Public Hearing / Busia/ 1 July 2011/ pp. 25-26

into play, they dictate and we are afraid that our fish will go bad and nobody will buy them. So, we normally sell them at a throwaway price.²⁴⁵

- 384 There are complaints that government response to the hyacinth weed menace that has adversely affected fishing activities has been less than adequate. Recently, the minister in charge of Fisheries acknowledged that the government has done very little to revive the fishing industry in Western Kenya. It is reported that today, pond-based fishing in other parts of the country could have overtaken Nyanza and Western in overall yields following government investment in fishing ponds.

Land

- 385 While land title issues in most of Western are settled, conflict remains in parts previously vacated by white settlers and where government initiated settlement schemes, especially in Mt Elgon and Bungoma. The land issue as it relates to conflicts in Mt Elgon and Bungoma is the subject of a separate chapter in this report. While large-scale land-related conflicts such as those witnessed in the Rift Valley and Coast regions are not common in Western, land fragmentation is however a problem due to population pressure. This situation is a result of the small land sizes which averages is 1.1 hectares per household compared to land size averages in the Rift Valley that stands at 2.6 hectares per household.²⁴⁶

Security and economic marginalisation

- 386 Western is home to the agriculturally-rich Mt Elgon District, which has been at the centre of long-standing disputes over land. What initially started as land disputes soon spread to criminal acts. A militia group called the Sabaot Land Defense Forces (SLDF), whose activities are described in detail elsewhere in this Report, had been blamed for committing most of these criminal acts. The motive of the group is reportedly to seek redress for alleged injustice during land distribution in the Chebyuk settlement scheme. Mt Elgon has suffered from high rates of insecurity and people have lived in fear due to the continued violence.
- 367 As a result of the insecurity in Mt Elgon region, people lack basic medical services, clothing, and sufficient food.²⁴⁷ Other socio-economic effects of the violence in Mt Elgon include poor agricultural production as well as threats to food security. Mass displacement and creation of new groups of destitute IDPs has resulted, with competition over basic goods and services such as water, food and shelter.

245 TJRC/ Hansard/ Public Hearing / Busia/ 5 July 2011/ p. 44

246 The emergence of land markets in Africa: assessing the impacts on poverty, equity, and efficiency. Stein Terje Holden, Keijiro Otsuka. Frank Place. Washington DC. Resource for the Future (2009)

247 http://www.msf.org/source/countries/africa/kenya/2008/MSF_MtElgon_May2008.pdf Mount Elgon: Does Anybody Care (2008)

According to humanitarian organizations such as the Kenya Red Cross Society, lack of adequate water has caused health problems. Coupled with inadequate sanitation supplies, the situation gets worse. Due to the violence and insecurity, the provision of medical care by the government has starkly declined. Schools have also been affected by the rise in insecurity. Many children have been forced to stay out of school, while others have transferred to other schools in safer areas.

388. Due to the escalating violence, the Kenya Army was deployed in 2008 to calm the situation in response to the atrocities allegedly committed by the SLDF. However, the army, which was supposed to protect people in this region, was accused of committing various human rights abuses on the people of Mt Elgon, leading to fear by the local people of both the militia and the army.
389. Other than insecurity in Mt Elgon, other parts of the Western have over the years experienced insecurity linked either to post-election violence or ordinary criminal activities. In the 1980s and 1990s, economic activity was disrupted in many parts of Western, especially in Kakamega, due to the activities of a militia group/gang called 'Msumbiji'. Before 2007, Western experienced cycles of political violence and land clashes in 1992 and 1997. According to the Commission of Inquiry into the Post-Election Violence (CIPEV) of 2007 chaired by Justice Philip Waki, the violence experienced in Western is not well-understood or fully-acknowledged. This violence posed great security challenges in Western, with great loss of life. According to the CIPEV report, areas that were most affected were Busia, Vihiga, Kakamega, Lugari, Mumias and Mt Elgon districts. Violence took the form of killings, mostly by security forces, looting and destruction of property. Overall, the violence as in previous cycles has had a serious socio-economic impact because of the depressed local economy.

Health, water, sanitation and housing

390. According to the National Health Survey, Western has low numbers of health facilities.²⁴⁸ Many hospitals are mission hospitals, clearly indicating the absence of or a limited role of government in the sector. A Medical Services ministry survey reveals that there are eight district hospitals, 13 sub-district hospitals, one rural training health center, three rural demonstration training health centers, 56 health centers, 158 dispensaries and one provincial general hospital in Western. Child and under-5 mortality is very high, with 121 children under-5 dying per 1 000 births and closely follows Nyanza, where 149 out of 1 000 children die.²⁴⁹

²⁴⁸ Social Policy, Development and Governance in Kenya
²⁴⁹ Kenya Demographic and Health Survey (2008-09)

In 2003, Western ranked third in child mortality ²⁵⁰ A witness noted the lack of adequate health facilities in one part of Kakamega, which reflects a region-wide trend.

We really do not have very many health centres. The few that exist do not 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 at 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 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 ²⁵¹

- 391 The 2009 census records that Western, Nyanza and North Eastern provinces have the lowest supply of piped water. Only 7 percent of the households in Western can access piped water, despite of the presence of numerous permanent rivers and other water sources that can be tapped and processed. The access rate is below the national average, which stands at 10 percent. In terms of water quality, the number of people who access water is much lower. At the county level, there are several disparities. Lugari District for example, suffers from diminished access to safe drinking water and sanitation at only 16.4 percent, which is way below the national rank which stands at 53 percent ²⁵²
- 392 Over the years, the availability of safe water for drinking has been below the Kenyan average percentage. Sanitation both in homes and in urban centers remains poor in Western. The 2009 census notes that 'poor sanitary conditions impacts on prevailing health standards and development'. The percentage of the main mode of human waste disposal in Western is alarming - only 0.9 percent of the households have access to a main sewer, 0.7 percent to a septic tank and 0.1 percent to a cesspool. Western however ranks highest in the percentage of households with a pit latrine, with 95.5 of the households having pit latrines. While this is a good thing, serious health problems are posed by pit latrines in areas like Busia that experience periodic flooding during the long rainy season.
- 393 According to the Demographic and Health Survey, the percentage of home ownership in Western is above the national one, with 89.6 percent of the people

²⁵⁰ Kenya Demographic and Health Survey (n 265above)

²⁵¹ TJRC/ Hansard/ Women's Hearing / Kakamega/ 28 June 2011/ p. 22

²⁵² Little Fact Book - Social Economic & Political Profiles of Kenya's Districts (2002)

owning houses and 7.8 percent paying rent.²⁵³ However, as in the case of Nyanza, these are mostly non-permanent houses made of mud walls and floors with grass thatches or iron sheet roofing.

Roads

394 According to NEMA, infrastructure in Western is fairly well developed and evenly distributed.²⁵⁴ From our travels as a commission, this statement contradicts the reality on the ground. It also does not align with perceptions of the residents who feel that the poor state of roads is a clear indicator of the marginalisation that the region has suffered. Overall, the road network can be said to be bad in this region. In fact, it is the most cited indicator to demonstrate that the Western region is marginalized.

395 There are some tarmac roads, all-weather roads and a railway line (the main Kenya Uganda Railway) that has been out of commission for more than a decade. The rainy season has however spoiled the state of roads, which are in a bad state of disrepair. In addition, huge trucks used for transportation to neighbouring countries are a major cause of deterioration of the condition of roads. The Parliamentary Committee on Transport and Housing blames the Roads ministry for the poor state of roads in Western and Nyanza, despite the government allocating funds for rehabilitation in the whole country.

396 On the road infrastructure, Mary Emadau from Teso region made remarks which apply to the whole of Busia and neighbouring counties.

Teso has never had a tarmacked road except the Trans-Africa road. We have been told from time to time that the road that joins us with Busia and Mt Elgon is supposed to be tarmacked but even today, I used it and it is a murrum road.²⁵⁵

397 The lack of all-weather roads is a countywide problem. Witness Zainabu Muyoti weighed in during the public hearings in Busia.

We are requesting that as a country we want a road to come from Amurai passing through every constituency going through Amukura, Nambale, Butula, Funyula to go to Port Victoria. If women and men do business, we will interact with all these communities. Busia people do business in Amagoro. Let us work together and do business together to bring peace among us.²⁵⁶

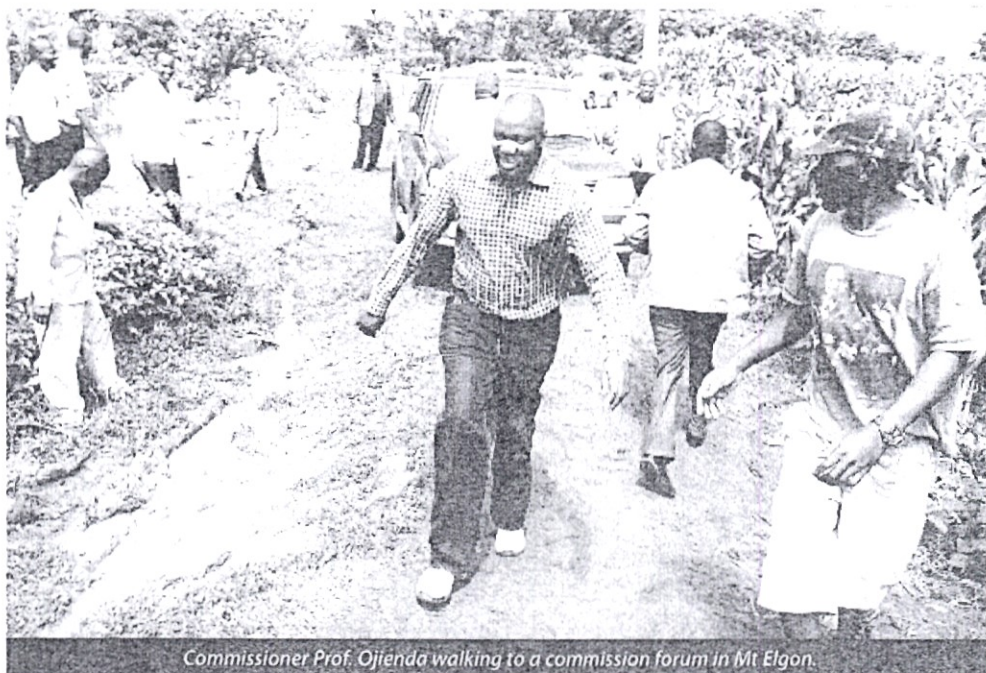
398 The same situation exists in other counties which have minimal coverage of tarmac roads. In Kakamega, a case was made by one of the witnesses, a Ms Machoto and

²⁵³ Kenya Demographic and Health Survey 2003.

²⁵⁴ NEMA Provincial Environmental Action Plan (2007-2011) Western Province.

²⁵⁵ TJRC/Hansard/Women's Hearing / Busia/ 5 July 2011/ p. 7.

²⁵⁶ TJRC/Hansard/Women's Hearing / Busia/ 5 July 2011/ p. 44.



Commissioner Prof. Ojienda walking to a commission forum in Mt Elgon.

others on the impact of lack of infrastructure on health and development:

On issue of infrastructure, our roads are very bad. The Sigalagala to 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 facility like Shibuye health 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, the transport cost is normally between Sh5 000 and Sh7 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.²⁵⁷

Employment

399. Nairobi, Coast, Western and North Eastern provinces have more people who are unemployed than employed.²⁵⁸ The unemployment rate of persons aged between 15 and 64 years dropped from 27.5 percent in 1998/99 to 9.6 percent in 2005/06.²⁵⁹ The limited number of factories employs only a few people. In Kenya, youth unemployment is a major development issue. Unemployment of the youth in Western is also high. The major challenges posed by unemployment are participation in social ills and high dependency rates.

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

258 Pulling Apart Facts and Figures on Inequality (2004)

259 <http://mirror.undp.org/kenya/NESCUneemploymentinKenya.pdf>

Busia County Case Study

- 400 Busier comprises five constituencies of Budalang'i, Amagoro, Nambale, Butula and Funyula. Like in the entire Western region, the main economic activity of Busia is agriculture. Fishing is the second most important economic activity. It is the poorest county in Western ²⁶⁰. According to the Kenya poverty maps, about two-thirds of the county's residents are unable to meet their basic minimum requirements ²⁶¹. Busia is one of the counties faced with many challenges, high poverty levels²⁶², the complex effects of HIV/AIDS, a high TB burden and a high HIV/AIDS prevalence rate. The rate of mortality in Busia is relatively high with the key causes being malaria, HIV/AIDS, anaemia, pneumonia and gastro-enteritis ²⁶³. The major development challenges and constraints facing the county include increased food insecurity, declining levels of agricultural production and poor conditions of roads.
- 401 Busia has various sources of water including Lake Victoria and two main rivers, Nzoia and Sor. In relation to piped water, access is different in rural and urban areas. The urban areas in Busia tend to have a higher percentage of access to piped water (14.7%), compared to rural households (3.6%). These differences are also visible in access to main sewer and septic tank with urban areas having 4.4 percent access compared to 0.2 percent access in rural areas.²⁶⁴
- 402 Infrastructural facilities in Busia are generally under-developed. Most of the roads are impassable during the rainy season ²⁶⁵. Regular flooding in areas like Budalang'i worsens this situation. Lack of industries inhibits infrastructural development and the low supply of energy is a major impediment to industrialization. Most of the energy needs of households are met through use of firewood, posing negative environmental consequences as it leads to depletion of forest cover. Industrialization is a major factor in the provision of infrastructure since areas with industries attract construction of roads, settlement and investment opportunities. For agricultural development to thrive in Busia, it is necessary that industries are built to facilitate development in terms of raw materials, agro-processing, value addition sales and marketing of produce.

260 Little Fact Book (2002) Social Economic & Political Profiles of Kenya's Districts. Institute of Economic Affairs

261 CBS (2003). Geographical Dimensions of Well-Being in Kenya: Who and Where are the poor? From Districts to Locations. Volume

1. Figures in parentheses in the table are the poverty gaps expressed as a percentage of those living below the poverty line.

262 The poverty index stands at 68 percent.

263 <http://www.husobusia.org/>

264 <http://opendata.go.ke/Countries/Busia-Fact-Sheet/sn15-d89k>

265 Food Security District Profile. District Profiles for 23 Districts(2007) FAO Kenya

- 403 Agriculture is the main economic activity in Busia, contributing nearly 36 percent of household income and employing over 81 percent of the workforce. The major cash crops are rice, sugarcane, cotton and coffee. Sugarcane and coffee production are carried out in the high-potential areas of Butula and Nambale. The unemployment rate in Busia stands at 13.65 percent.
- 404 Fishing is the second most important economic activity in Busia County. The Busia people's livelihoods largely depend on agriculture and fishing, which provides employment. The major problem fishermen in Busia face is cross-border conflict between fishermen in Kenya and Ugandan security forces. Robbery on the lake has also become a major issue because armed pirates/robbers from Uganda often steal fishing boats and fish.²⁶⁶ Other challenges of fishing in Busia include lack of storage facilities, poor marketing infrastructure and lack of a fish processing plant.
- 405 Busia still has a high prevalence of absolute poverty. According to the Kenya poverty maps, about two-thirds of the district's residents are unable to meet their basic minimum requirements and the majority of the populace lack proper employment. The informal sector accounts for a large number of employment opportunities. At the divisional level, the poverty incidence ranges from 63 percent to 74 percent, with Budalang'i, Funyula and Butula divisions registering the highest proportions. The major causes of deprivation are low and poor utilization of agricultural land, collapse of the cotton industry, lack of organized marketing channels and widespread unemployment.
406. Despite agriculture being the main economic activity, food shortage is a major concern. Cases of malnutrition are also common and are attributed to the low purchasing power due to widespread poverty and over-reliance on starchy foods. Generally, food insecurity is common in Funyula and Budalang'i divisions that experience flooding annually.
- 407 Adequate and affordable health services lack in Busia, with few public health facilities. Statistics show that in 2003 there were 29 health facilities in the district, two government hospitals, 17 dispensaries, six health centers and 10 private or mission hospitals. Busia, Funyula and Budalang'i had hospitals with resident doctors.²⁶⁷ The number of private or mission hospitals supersedes that of government hospitals, evidence of limited government support to develop health

266 Special Report: Kenya's Lake Region Short Rains Rapid Food Security Assessment (2006) USAID

267 Kenya Country Programme Annual Report (2003)

in Busia. Morbidity rates in Busia differ for men and women, with women having a higher morbidity rate (50 %) than men (46 %).²⁶⁸ Infant mortality stands at 75/1000, while life expectancy is at 210/1000, with a crude death rate of 23/1000.

408. Busia has low enrollment in schools, attributed to high poverty levels. A large number of children are school drop-outs as evidenced by the levels of education attainment in the region as well as transition from one level to the next. Statistics in 2009 show that the transition from pre-primary education to primary education is very encouraging in Busia, with 16.4 percent of the school-going population attaining pre-primary education and 72 percent primary education. It is the transition from primary to secondary education that is worrying.
409. Out of the 72.3 percent of those that attain primary education, only 9.8 percent attain secondary education; while only 1.4 attain tertiary education. Some of the direct consequences of dropping out are the use of child labor and early marriages. Apart from the discouraging levels of education attainment, the level of school performance in national exams is also very low. This is attributed to factors such as poverty, inadequate infrastructure (classrooms, learning materials) and a limited number of schools that increases distances for school-going children. In addition, the student-teacher ratio is very low. This is a major development challenge.
410. Floods in some parts of Kenya including Kano plains in Nyanza and Budalang'i in Busia, Western have become a major development challenge. The Nzoia River in Budalang'i is annually prone to flooding and many people are displaced during these periods. More than 28,000 families were affected by floods in Budalang'i in 2007 with 6,000 to 8,000 displaced and 2,000 marooned.
411. Negative economic and social impacts of floods include reduced or hampered economic growth and development, damage to buildings, roads and other infrastructure, loss of lives from drowning, outbreak of diseases, contamination of water and loss of food due to destruction of crops. Flood control in this area is dependent on dykes. The 1997 *El-nino* rains destroyed some of the dykes in this area. Over the years, the maintenance and rehabilitation of the dykes has been poor, posing serious challenges for future flood control. The persistence over many decades of a problem that can be solved has consigned many residents of Budalang'i to a life of destitution.

²⁶⁸ <http://opendata.go.ke/Countries/Busia-Fact-Sheet/snf5-d89k>

North Rift

- 412 The North Rift region comprises districts of the Rift Valley to the north of Nakuru district and is generally accepted to comprise the districts of Turkana, West Pokot, Trans Nzoia, Uasin Gishu, Marakwet, Baringo, and Samburu. This area suffers from developmental and educational neglect, and violence from cattle rustling, both within Kenya and across the border with Uganda, Ethiopia, and Sudan.
- 413 Marginalized under the colonial government and isolated politically and developmentally after independence, the North Rift shares characteristics of pastoralist poverty with other arid and semi-arid land (ASAL) districts such as Marsabit, Moyale, Mandera, and Wajir.²⁶⁹ Unlike the named districts from the former North Eastern and Upper Eastern provinces, the marginalisation of Turkana, and by extension the North Rift, is due in large part to its distance from seat of the central government in Nairobi, rather than perceived 'political incorrectness' or 'political dissidence'.
- 414 Turkana District, part of ASALs, is arguably the most challenging region of Northern Kenya and the people of Turkana are some of the most marginalized people living in the country. According to the 2009 census, the Turkana number close to one million, approximately 2.5 percent of the Kenyan population. Turkana comprises of 6 districts: Turkana North, Turkana Central, Turkana West, West Pokot and Pokot North and has an area of 77,000 square kilometers. It shares international borders with the three countries of Ethiopia, Uganda and Southern Sudan.
- 415 A combination of climate and conflict makes the Turkana region of Kenya a very difficult place to live in, and results in high levels of malnutrition, poverty and unrest. Nearly 75 percent of the population relies on food aid to survive. The region's remote location and poor infrastructure make the area inaccessible to most government and development efforts to improve the local economy and help people achieve a better way of life for themselves. Increasing drought has obliged pastoralists to travel further in their search for pasture and water. This often brings them into conflict with rival pastoralist communities such as the Pokot.²⁷⁰
- 416 Turkana is home to Kakuma, one of the largest refugee camps in Kenya. The communities hosting the camp, like their counterparts in Fafi and Lagdera districts which are home to the other major camps, are characterized by widespread

269 Taya Weiss, *Guns in the Borderlands: North Rift* (2006), [Institute for Security Studies: Pretoria]. Available at: www.iss.co.za/pubs/monographs

270 Northern Kenya caucus- [http://nkcaucus.blogspot.com/search/label/United States African Development Foundation \(USADF\)](http://nkcaucus.blogspot.com/search/label/United+States+African+Development+Foundation+(USADF))

poverty, with absolute poverty at 74 percent, a high level of dependency on relief food and scarcity of water supply both for livestock and human consumption

- 417 According to a UN report, since the establishment of the refugee camp in 1992 adjacent to Kakuma town in Turkana North and Dadaab/Fafi, there has been an increase in rural-urban migration in search of food, employment and other services in the camps. This has resulted in increased urban destitution, family separation, child labour, and increased petty crimes, leading to a significant breakdown of the social fabric. The presence of the camp resulted in an increase in population density in the area surrounding the camp.
418. For example the population of Kakuma town grew from 5 000 in 1991 to approximately 40 000 by the year 2000. The population of Dadaab refugee camp now stands at almost 200 000.²⁷¹ The increased feeling of marginalisation among the Turkana and Dadaab people compounds the problem. The community views the international agencies with wariness, and believes that the refugees are leading a better life than they are, characterized by their adequate access to social services. Hostilities, latent and violent conflicts often characterize the relationship between the two communities.²⁷²

Insecurity and marginalization

- 419 Insecurity is rife in the North Rift region. Cross-border conflicts between Kenya, Uganda, Ethiopia and Southern Sudan have continued without or with limited government action. Neighbouring foreign armies attacking communities in the North Rift and even shelling bombs by rockets have continued without any government intervention. Inter-district boundaries not marked by councils lead to conflicts among communities. These inter-district conflicts are encouraged by the absence of government protection or by insufficient, demoralized security personnel at the outpost.²⁷³

Turkana borders Uganda, Sudan, Ethiopia and Pokot on the southern part and no border is peaceful. Turkana is even protecting these borders for the country, but massacres have been happening all over. Much has been discussed in different meetings. The government has also sometimes come down, but little has been done. Sometimes we speak to the government to put offices to guard the border, but you find that little is done. Recently we had some attacks at Todonyang, Lokori and Kainuk in the months of June and July, whereby even policemen were killed. These were husbands and fathers. So, we feel that the government of Kenya is lacking somewhere.²⁷⁴

271 Refugee Host Communities - Joint Agencies Project. Available at - <http://mirror.undp.org>

272 Refugee Host Communities - Joint Agencies Project. Available at - <http://mirror.undp.org>

273 Ministry of Justice, National Cohesion and Constitutional Affairs, April 2010 *Report of the Committee of National Elders Conference on Cohesion and Integration* Nairobi: Government Printers 210

274 TJRC/ Hansard/ Public Hearing / Lodwar/ 10 October 2011/ p. 11

420 Small arms and light weapons' proliferation has made traditional raiding (cattle rustling) a commercial venture, more deadly and severe. Small arms including automatic and semi-automatic weapons have become widely available and are increasingly used in the pastoralist districts. These weapons have come from a variety of sources, including conflict-prone neighbouring countries such as Sudan, Somalia, Ethiopia and Northern Uganda. With each community constrained to arm itself due to the inability or unwillingness of the government to assure residents of security, local "arms races" are created.²⁷⁵ There is inadequate policing of pastoralists areas as both the national and district police and security forces are either unable or are unwilling to confront cattle rustlers who have more often than not struck with impunity. The state's obligation and duty to provide security to her citizens is conspicuously under siege in Northern Kenya. This has greatly contributed to the spiraling gun culture, self-defence and retaliation missions. The arming of local vigilante groups, popularly known as 'Home Guards' by the state, in response to security problems, has exacerbated the cattle rustling conflict rather than ease the situation. There are credible reports suggesting that legal state arms issued to these groups have been used in criminal activities, including cattle rustling raids.²⁷⁶

Political exclusion and marginalisation

421 The North Rift region has experienced political marginalisation since the colonial period. Regarded as part of the Northern Frontier region (together with North Eastern Province), the closed-area policy imposed by the colonial regime isolated the region from the rest of the country and made it impenetrable by 'outsiders'. Later, successive regimes imposed the kipande, a pass system or a traveling permit that made it difficult for the community to interact with the rest of the country. The colonial administration suppressed any form of development, terming residents as 'fierce', 'savage', 'warlike' and had to be separated through a variety of restrictions.²⁷⁷ In contemporary times, the people of North Rift have complained that they are inadequately represented in national political institutions and the public service since independence. It is a glaring contradiction that in representation in Parliament, a vast county like Turkana with an area covering 77,000 square kilometers with a population of one million, only has three constituencies. Furthermore, for a long time it has been administered as one district until recently, when President Kibaki created new districts. Equally, new constituencies were proposed for the region by the Interim Independent Boundaries Review Commission (IIBRC) and later ratified by its successor, the Independent Elections and Boundaries Commission (IEBC), which conducted the March 2013 General Election, in which they participated.

275 R. Pkalya, M. Adan and I. Masinde (2003) *Conflict in Northern Kenya: A Focus on the Internally Displaced Conflict Victims in Northern Kenya*. Nairobi: ITDG-EA 64.

276 Pkalya, Adan and Masinde (n 275 above).

277 Ministry of Justice: *National Cohesion and Constitutional Affairs* (n 297 above) p 209.

- 422 The people within this region feel inadequately represented not only in government and national elective bodies, but also allege marginalisation in public employment in relation to other ethnic communities due to the perception that they are not educated. People from outside the region also form an overwhelming majority in local public service positions. An estimated 99 percent of departmental heads in Turkana County are not ethnic Turkana. This is the trend even in UN agencies and NGOs that operate in Turkana. Therefore, there is a perception that all avenues through which the locals could channel their grievances are blocked. The new county dispensation however presents better prospects for the community.
- 423 Because of the harsh climatic conditions in the region, many public servants including teachers regard a posting in Turkana as a disciplinary measure. Practices abound within the civil service whereby disciplinary cases and those who fall out of favour with their superiors are sent to the ASAL regions like Turkana as a form of punishment. The perception among locals is that those posted there have no passion in tackling concerns that afflict the community. Poor leadership is also a hurdle to participation by the community. They blame the government's wrong methods of decision-making in processes such as disarmament and the misuse of the provincial administration in dictating to the community on what to do. Many government projects in the region have turned out to be white elephants due to failure to consult and involve the community in the design and planning of such activities.

Inter-ethnic conflicts, cattle rustling and droughts

- 424 Various factors compound the effects of economic marginalisation. Physical boundaries cutting across traditional migratory routes and wars in neighbouring countries continually bring increased problems in accessing traditional grazing resources by the people in the North Rift. Weapons entering Kenya from neighbouring war-torn countries have made raids between communities increasingly dangerous and sophisticated. In addition to traditional cattle raiding, conflicts in the region have at times assumed economic and political proportions. There have been allegations in the past that economically-powerful people fund livestock thefts and politicians are encouraging conflicts to flush out would-be supporters of political opponents from their political turfs.²⁷⁸ These factors have compounded and complicated conflict management processes, especially when remoteness and the nomadic nature of the pastoralists are taken into account. Any positive impact of the work of development agencies is negated by persistent conflict.²⁷⁹

²⁷⁸ Pkalya, Adan and Masinde (n 275 above)

²⁷⁹ Pkalya, Adan and Masinde (n 275 above)

I would like to make a presentation about raids and killings and other occurrences within Turkana South District. It is the same issues concerning Turkana East District, which was part of Turkana South until it was hived off. In the previous years, especially in the 1970s and 1980s, there were cattle rustling between the Turkana and the Pokot. This was not taken very seriously, because they thought it was just raids, the Pokot stealing from the Turkana, and the Turkana stealing from the Pokot. They killed each other. But in the 1990s, the cattle rustling changed into something completely different. It became attacks. It was transformed into burning of villages, killing people in villages, attacking government camps, and there was a lot of more killing than when the traditional cattle raids used to be there. This went on from 1992 and led to the people from areas of Katilu, Kainuk, Kaptiur and Lokori to move towards the north. They all moved towards the north. These raids made them to be poor. But because of the mercy of the Almighty God, he got us manna from heaven, and put gold in some of the northern areas. The people of south and east moved into the north. They started surviving on gold. The rest of us who were left in those centres would not sleep. We did not have morning, or evening. It was fighting all through. This went on for many years until, eventually, we had a bit of peace. This peace was short-lived. They, eventually, came back.²⁸⁰

- 425 The North Rift region has suffered perennial drought over the years with devastating effects for human and animal life. Images of starving children and dead livestock have become almost synonymous with the experience in North Rift and Northern Kenya in general. Yet despite the regularity and predictability of drought, adequate arrangements to enhance communities' resilience to cope with severe droughts and other disasters have not been undertaken in northern Kenya. During droughts, the pastoralist's livelihoods become particularly precarious. There are worrying incidences of conflict over scarce water and pastures during dry spells, which can last for as long as eight months. Economic insecurity and deprivation during drought has increased the risk of violence and social breakdown.²⁸¹
- 426 There have been persistent food shortages among the pastoralist communities. Food insecurity in the region arose due to the collapse of irrigation schemes and the construction of a hydroelectric dam/power plant that has interfered with the Turkwel River.²⁸² The effects of drought produce displacement. Women and children bear the brunt of these forms of violence and many of them go without food for days. They depend on wild fruits (Elamach and Edapai), which are scarce and seasonal. Cases of malnutrition are rampant in these conflict-prone districts, as the communities' traditional diet consisting of meat, milk and blood becomes increasingly unavailable. Deaths from starvation have become a common feature of life in this part of the country.²⁸³

280 TJRC/ Hansard/ Public Hearing / Lodwar/ 10 October 2011/ p. 25

281 Pkalya Adan and Masinde (n 275 above)

282 Ministry of Justice, National Cohesion and Constitutional Affairs, April 2010 *Report of the Committee of National Elders Conference on Cohesion and Integration*. Nairobi: Government Printers 210

283 As above

- 427 In terms of public employment, the North Rift region lags behind because of the high levels of illiteracy due to the low number of schools in the region, especially secondary schools. Insecurity has been a major challenge to school attendance, as children fear going to school. There have been reports of children being attacked in schools by bandits and rustlers. Some schools have closed due to insecurity and the effects of drought. According to a website operated by Turkana professionals, many Turkana graduates are jobless. Yet, almost all employees in government offices in Turkana and NGOs are non-Turkana. Even in the newly-created districts, no District Education Officer (DEO), District Officer (DO), or District Commissioner (DC) from the community was posted to the district.²⁸⁴
- 428 The North Rift is almost without any physical infrastructure. The Kitale-Lokichoggio road is the only meaningful road in the region which is tarmacked. It has however eroded badly over the years. There are no access roads to rural land and cross-border roads have been neglected.²⁸⁵

Land and investment

- 429 The land tenure system in Turkana is in need of serious reform. While collective holding of land is useful in protecting land resources for a pastoralist community, the near absence of individual titles poses serious problems for would-be investors. Most of the land in the region is held as trust land by the county council. Animals are not insured and when stolen in raids, the owners are not compensated. According to the KIPPRA Land Reform and Poverty Report²⁸⁶ the region has shown low levels of land ownership rights which is indicated by the proportion of individuals with title deeds to a parcel of land. The fact that the people are not issued with title deeds limits them economically as they cannot access loans from financial institutions or any commercial use.
- 430 Conflict acts as a disincentive to investment by the communities and development agencies, both in the long-term and short-term. At the local level, a lot of effort and funds go to contain conflicts and to mitigate against conflict-related effects, rather than being channeled to development work. Similarly, market centres such as Chesegon, Marti and Nachola are virtually deserted due to conflict and the resultant insecurity. Many roads are no longer useful economically. The Turkana, Pokot, Marakwet and the Samburu communities have lost between 50 percent and 80 percent of their livestock to either drought or cattle rustling. It is extremely difficult for pastoralists to get started over again after such heavy stock losses.²⁸⁷

²⁸⁴ Ministry of Justice, National Cohesion and Constitutional Affairs (n 307 above) p 210

²⁸⁵ As above 209

²⁸⁶ Joseph Kieyah and Robert K Nyaga *Land Reform and Poverty in Kenya*. Nairobi: Kenya Institute for Public Policy Research and Analysis (KIPPRA) p 8

²⁸⁷ Pkalya Adan and Masinde (n 295 above) p 15

431 Turkana in itself is richly endowed with natural resources, but which remain largely untapped. Turkana District has rich building sand and quarry materials. Small-scale mining is found in the southern part of the district at Nakwamoru and central parts at Makutano near Kakuma. While there are some reported gold deposits, mining is not of a commercial nature, though an alluvial type of gold is being exploited.²⁸⁸

Pastoralism and other cultural practices

432 Most of the people living in the North Rift region are pastoralists. Pastoralists are some of the most marginalized people in Kenya, often having virtually no say over the changes that are impacting on their lives. Pastoralists derive their livelihoods mainly from natural resources - pasture, water, natural vegetation and livestock. However, reduced access to these resources, particularly land and water, has increasingly put pastoralists under intense pressure. As a result, they are increasingly finding themselves fighting for their survival.²⁸⁹

433 In most of the areas in the North Rift, conflicts have increased economic hardship as the people's only livelihoods option (pastoralism) has been ravaged. Cattle have been stolen in raids, increasing the vulnerability of resource-poor pastoralists to hunger, malnutrition and abject poverty. Livestock, food, crops, money and property are looted in raids and schools, health facilities and settlements are destroyed.

434 Cultural practices such as cattle rustling and banditry have led to the loss of many human lives and the displacement of various population groups. The raiding is accompanied by indiscriminate killing of innocent people, the majority of them women, children and the elderly. One morning alone in Marakwet District, more than 50 people were killed in cold blood in one cattle rustling incident. The practice has undergone fundamental transformation from a cultural practice of replenishing cattle, to a more militarised, predatory and destructive practice. The practice has experienced significant commercialization.

Education

435 Learning is affected when teachers are forced to withdraw from conflict-stricken areas and the communities re-locate their settlements for fear of being invaded. Education for children and the youth is affected and interrupted in the short and long run. In the conflict between the Marakwet and the Pokot, about 25 schools have been abandoned, while at least 27 schools have been closed in Samburu.

²⁸⁸ Security Research and Information Centre *Terrorized Citizens* p 16
²⁸⁹ Pkalya Adan and Masinde (n 295 above)



District. Moreover, although primary schools are widely available, secondary schools are few and tertiary colleges are non-existent, except for some few satellite programmes at certificate and diploma level confined in Lodwar town run by Mt Kenya University. Turkana District has about 175 pre-primary schools, 136 primary schools, eight secondary schools, two youth polytechnics and one medical training college.²⁹⁰

436. Efforts have been made to improve access to education by pastoralist communities. The first one is the creation of mobile schools, whereby around 50 mobile schools are now in operation in six arid districts including Turkana and Samburu in the North Rift. Teachers in these schools are attached to a nomadic family or group of families. After three years in the mobile school, the children are supposed to enrol in conventional boarding schools. The advantage of this type of schooling is that children do not have to leave home and can continue their household work. The disadvantage is that mobile schools are difficult to staff, manage and monitor. Households can scatter at any time, causing students

²⁹⁰ J Kamenju, M Singo and F Wairagu. (2003). *Terronzed Citizens: Profiling Small arms and Insecurity in the North Rift Kenya*. Nairobi: Security Research and Information Centre (SRIC) p.17

to move in and out of the system with negative consequences.²⁹¹ There are also sedentary schools for mobile populations. Alternative Basic Education for Turkana (ABET) has set up learning centres at semi-permanent villages near important roads. In Samburu District, shepherd schools (Ichekuti) have evening classes in conventional schools for village children who spend the day herding.²⁹²

- 437 In his 2011/2012 budget speech the Finance minister recognized that education is a lifelong investment that should be extended to Kenyan children so as to secure the future of the nation. So Sh8.25 billion was allocated for free primary education, Sh18.5 billion for free day secondary education and Sh1.67 billion for the free school feeding programmes in the ASALs areas like those in the North Rift. Sh387.7 million was allocated for early childhood development.²⁹³ For educational development and infrastructure, Sh750 million was allocated to upgrade national schools, Sh680 million for the purchase of computers for schools to enhance access to quality learning materials, Sh780 million for the improvement of infrastructure in schools and Sh380 million for the construction of low-cost boarding schools in ASAL areas.

Health Services, social amenities, water and sanitation

- 438 The number of health facilities has increased in all the districts, but most of them remain under-utilized probably because of cultural reasons, cost-sharing and insecurity. In many cases government hospitals do not have drugs to dispense. Malnutrition among children below five years is rampant, especially among the poor.²⁹⁴ There is limitation in the number of health facilities in Turkana, with only one district hospital serving the entire county of six vast districts.

We find that some facilities like maternity wards are not found back in our villages and even here in town. You just find that it is only the district hospital that has such facilities. Most of the hospitals or dispensaries are owned by a church diocese and other institutions like Care International and the Africa Inland Church (AIC). The government has not put up dispensaries and hospitals for the people. In many cases, our women want to go for delivery services, and when there are complications, they take time to reach the district hospital, as a result many die on the way.²⁹⁵

291 David Siele, Jeremy Swift and Saverio Kralli (2011) *Reaching Pastoralists with Formal Education: A distance-Learning Strategy of Kenya*. Paper presented at the International Conference on the Future of Pastoralism, 21-23 March 2011. Organized by the Future Agricultures Consortium and the Institute of Development Studies, University of Sussex and Feinstein International Center of Tufts University. 5

292 Siele, Swift and Kralli (n 291 above).

293 2011-12 Budget Statement for the Fiscal Year 2011/2012 (1st July-30th June) by Hon. Uhuru Mugai Kenyatta.

294 R. Pkalya, M. Adan and I. Masinde (2003) *Conflict in Northern Kenya: A Focus on the Internally Displaced Conflict Victims in Northern Kenya*. Nairobi: ITDG-EA. P.20

295 TJRC/ Hansard/ Public Hearing / Lodwar/ 10 October 2011/ p. 14

439 Conflict also leads to destruction of social amenities. Postal services, social amenities are only dotted along the dilapidated highway road linked to South Sudan. Water is a scarce resource, particularly during the dry season. People often travel more than 10 kilometres in search of water for domestic use and for livestock. Thus, conflict over water sources and pasture between Turkana and their neighbours is common.²⁹⁶ Most of the people in the North Rift also have no toilets or latrines. They help themselves in the bush. They have poor housing. Houses are made from brushes, wood, branches, leaves, grass and with no doors and windows for protection. Electricity penetration remains negligible. This is despite the fact that Turkwel gorge electric power originates from Turkana, but services other districts.

State Responses to Marginalisation

440 In analyzing the context within which economic marginalisation has occurred in Kenya, one of the main features noted is the centralised nature of the state and its fusion with the private sector. This fusion generated client-patron networks as different actors vied to gain access to resources at the centre. In the face of agitation linked to economic marginalisation, the state traditionally responded in one of two ways. The first impulse on the part of the incumbent government was invariably to work against any attempt to weaken the power of the centralised state and to defend the incumbent leader's hold on power and the economic trappings that came with it. Some of the political events that have defined Kenya - assassinations (Pio Gama Pinto, Tom Mboya, JM Kariuki and Robert Ouko), major political fallouts (Kenyatta-Odinga, Moi-Odinga; Kibaki-Odinga), and recourse to authoritarianism marked by detention without trial and torture - can be attributed to the fear of those at the centre that they would lose power or their perch at the economic table that holds the proverbial 'national cake'.

441 Where grievances were acknowledged, the state responded by ceding to minor demands for inclusiveness and the wider distribution of national resources, but largely channeling this through co-opted individuals from particular ethnic/regional constituencies. Such a response did not touch the existing political structure or dislodge patronage networks and the inequitable resource flows from the centre to 'favoured regions'. In the early years of independence and

²⁹⁶ J Kamenju, M Singo and F Wairagu (2003) *Terrorized Citizens: Profiling Small arms and insecurity in the North Rift Kenya* Nairobi: Security Research and Information Centre (SRIC) 17

early in President Moi's rule, changes in the law (the constitution) were not directed at empowering the regions, but rather were geared towards creating a stronger, more centralised state marked by personalisation of power. These changes produced a state that ended up being less just, more authoritarian and exclusionary.

- 442 The second way in which the state responded was politically through co-option, especially of key leaders from marginalised communities. However, since the clamour for economic goods was invariably linked to, and in fact preceded demands for greater democratic space, co-option of certain groups was often accompanied by continued marginalisation of the respective community and clamping down on popular dissent that was expressed politically from respective communities. Apart from failure to confront embedded structural economic injustice, co-option almost always brought no benefits to communities from which beneficiary leaders hailed. Benefits accrued only to those co-opted and in very exceptional situations other elites around the co-opted individual or indirectly to their respective groups of origin. This is an approach that was perfected by both the Moi and Kenyatta regimes. Asingo's comments relating to the latter apply with equal force to the former.

In order to entrench his leadership, Kenyatta perfected the art of neo-patrimonialism. This involved incorporating into the political system and the bureaucratic institutions the patrimonial logic of ascribing the right to rule to a person rather than to an office. Kenyatta's neo-patrimonialism was characterized by what Bratton and Walle refer to as systematic clientelism, where public sector jobs, material rewards and economic opportunities were offered as favours to clients who in turn mobilized political support and loyalty to the patron.²⁹⁷

- 443 While co-option can be regarded as a response to marginalisation to the extent that it brought particular individuals within existing client-patron networks, co-option had a marginalizing effect in respect of non-cooperative elites and the broader community, and was perhaps designed to pacify a few while consigning the majority to the fringes of the economic system. In any case, providing any economic incentive for political support for the broader group appeared unnecessary because their support was presumed once their leaders had been accommodated somewhat within the economic patronage network.
- 444 Throughout the years, the tokenism involved in co-option of leaders from different ethnic communities who then became 'point men' for political mobilization not

²⁹⁷ Asingo (n 30 above)

only lent an appearance of inclusiveness to an otherwise exclusionary economic and political system, but also ensured that the national leader had just enough support beyond his ethnic base to hold onto power and to command a level of popular legitimacy

- 445 Once this support was secured, the rest of the population was dispensable. Asingo blames the patron-client system for Kenya's slide into dictatorial rule and corruption. In this regard, he notes of the Kenyatta regime - a statement that applies as well to the post-1982 Moi regime - that "the corporatist aspirations of the state elites and their reliance on patron-client political ties was largely responsible for the transformation of the Kenyatta regime to an authoritarian state" Bratton and Wale, cited with approval by Asingo have observed in this regard that

[r]elationships of loyalty and dependence pervade a formal political and administrative system and officials occupy bureaucratic positions less to perform public services, their ostensible purpose, than to acquire personal wealth and status. Although state functionaries receive an official salary, they also enjoy access to various forms of illicit rents, pre-bends, and petty corruption, which constitute a sometimes important entitlement of office.²⁹⁸

- 446 A lot more than dictatorship and corruption can be blamed on the patron-client political relations in post-independence Kenya

Responses to Marginalisation in the pre-2010 era

- 447 The struggle for economic empowerment and inclusion in Kenya is inseparable from the struggles for the expansion of political and democratic space. Minimal reforms of the political system undertaken in the 1990s form the basis of the more fundamental changes introduced by the 2010 Constitution. The democratic reforms have relevance at two levels at least

- 448 First, the repeal of Section 2A of the previous constitution that allowed the introduction of multi-party politics opened up the hitherto closed political space for the oppressed and marginalised sections of society to speak up and express their concerns. Before 1990, any form of agitation was ruthlessly suppressed, with those involved thrown into jail, often without trial. Civil society groups equipped with the tools of mobilization, an essential element in securing social goods for economically marginalised groups, began to take root

²⁹⁸ Asingo (n 30 above)

- 449 Secondly, by expanding political participation, divergent views and leaders acquired increased space for expression and accommodation at the national level. Although the political and economic structure had not changed in any fundamental way, their participation started to chip away at the system, culminating in the Inter-Parties Parliamentary Group Reforms (IPPGR) in 1997 that opened further the democratic space while repealing numerous oppressive laws including emergency laws under which the former NFD had been governed since the late 1960s as well as laws that authorized detention without trial. However, while political space opened up, the economic structure largely remained intact and with the independence party KANU retaining power in both multi-party elections in the 1990s (1992 and 1997), the old patronage networks remained undisturbed.
- 450 Moi as president had managed to retain power in both elections through the expansion of the patronage network by co-opting from opposition ranks, thus weakening the opposition. As the economic situation worsened in the 1990s, public land - including forests and land set aside for utilities - became the main currency used to purchase political support. It is reported that the worst forms of grabbing of public land, including forests, happened during this period.
- 451 The nature of the economic structure and the manner in which it furthered economic marginalisation of those not at the centre in post-independence Kenya was examined in Part II of this chapter. As noted, Kenya has had two long-term development policy frameworks and subsequently, several five-year policies. The two long-term policy frameworks were 1) Sessional Paper No. 10 of 1965 entitled 'African Socialism and its Application to Planning in Kenya' and, Sessional Paper No. 1 of 1986 entitled 'Economic Management for Renewed Growth'.
- 452 Sessional Paper No. 10, the blueprint for economic development at independence, had several objectives: to ensure equal opportunities for all citizens; to provide democracy, to ensure that resources were used for the benefit of society and its members, to encourage various forms of ownership of property, and, to promote freedom of conscience and human dignity. As earlier discussed, although newly-independent Kenya and subsequently the Moi regime had developed a useful economic framework that would have created an equitable, inclusive and fair economic system, these frameworks were never really properly put to use. What ruled the day was political survival and the use of the state machinery to enrich those at the centre of power or those connected to power and to some degree their respective communities.

453 A state that had responded forcefully to the marginalisation of Africans by introducing affirmative action measures through the Africanisation programme soon adopted the exclusionary practices of the departing colonial administration that was once loathed. Only this time the divide was not racial but rather ethnic and regional. In the Moi era, there were fringe and token measures that did not touch the core architecture of the exclusionary state, notwithstanding the good record that the Moi regime had in the education sector (In discussing the case of Nyanza, it is acknowledged that there were attempts to reorient policy - especially in education - to benefit areas that had been marginalised under Kenyatta) However, the manner in which corrective measures were implemented was such that it had the effect of not only erasing the legacy of lagging behind, but also tilted the balance completely in favour of certain regions, thus creating new 'victims' of marginalisation

454. Although co-option seemed to be the favoured approach to inclusion, there is evidence of policy measures that benefited or that at least had the effect of benefiting the wider population in regions that were considered marginalised One of the programmes that received attention in our hearings was the district focused-development instituted by Moi In his communication to the Commission, Moi cited this programme as one of his major projects that was meant to enhance equitable development Moi asserts that his policy of 'District Focus' brought development to the previously marginalised areas and should be applauded as the basis of devolution as conceived in the current Constitution, stating

In an effort to create equitable system of development countrywide, I also formed the district focus for rural development, which is a concrete pre-cursor of devolution, which we have formally adopted in our Constitution ²⁹⁹

455 Indeed, testimonies were heard from Kenyans who said they had benefited in some way from the 'District Focus' programme, which they claimed was a success Daniel Chacha Muherei, from a region itself regarded as marginalised and one of the poorest districts in Nyanza, testified on behalf of Kuria MP Wilfred Machage'

In a teacher training intake, huge disparities occurred with other Nyanza communities grabbing most of the chances, including those designated for the Kuria students For example, in 1973, Kuria was given five chances to train P3 teachers, but instead only two were taken and the rest of the positions were filled by other communities Such a practice continued for a long time until former President Moi sympathised with the Kuria people and gave us our own Kuria District, which became the focus for the teacher recruitment ³⁰⁰

299 Written Submission by former President Daniel arap Moi to the TJRC (2012) p 24

300 TJRC/ Hansard/ Public Hearing / Kuria/ 25 July 2011/ p. 5

456 The north of Kenya is one region that has received special attention in terms of targeted projects, all of which unfortunately failed either because they were ill-conceived, were not funded, money was lost through corruption, or they did not receive local buy-in. Rejecting the claim that his government had economically marginalised that part of the country, Moi appears to cite the creation of a special ministry for that region as evidence of inclusion, adding that his government took various measures to promote equitable development, including that of North Eastern and North Kenya

[] But despite these natural impediments, my government made a big effort to reach our people there, and today, despite all the challenges, the people of the dry areas feel as Kenyans, as the rest of the citizens. I created the Ministry of Reclamation of Arid and Semi-arid Lands and appointed Hon Justus Ndotto as its first Minister. This was one of my attempts to speed up development in the arid areas.³⁰¹

457 What is not stated is that little was achieved through this ministry, for reasons that the Commission was not able to ascertain. A similar ministry was created by the Kibaki administration, but complaints relating to lack of a specific kitty allocated to it to carry out development projects were voiced. MPs from Northern Kenya complained that they had thought that this would not be the case, but to their chagrin, the ministry made no difference because it 'had been reduced to coordinating other government agencies'

458 These examples led the conclusion that while the need to address marginalisation in certain regions was clear and programmes had been created for this purpose, there was lack of implementation. The Commission concurred with views expressed by some that such programmes were only initiated "for political reasons" to give the impression that something was being done could be justified

Responses to economic marginalisation in the period 2003-2011

459 Kenyans began 2003 with great euphoria. They had, in the historic elections of 2002, brought to an end the 40-year dictatorial and exclusionary rule of KANU, the independence party. When supporting the Kibaki-led 'Rainbow Coalition' of key leaders from different parts of Kenya, they were rejecting ills associated with the previous regimes, including marginalisation, widespread inequity and exclusion. Writing just before the 2002 elections, Odhiambo Mbari, (an eminent scholar and head of the Devolution Committee during the National Constitutional Conference held at Bomas of Kenya, Nairobi) described the elation that met the appointment of a generally balanced cabinet on January 3, 2003

³⁰¹ Written Submission by Former President Daniel arap Moi to the TJRC (2012) p 23

President Kibaki announced his new cabinet at a function at State House, witnessed by the media. It was a leaner cabinet than the one that had been presided over by Moi. It comprised 24 Ministers and 24 Assistant Ministers. He named three women to full ministerial positions and four Assistant Ministers—the highest number of women ever appointed into the cabinet since independence. Despite a few murmurs, the cabinet was hailed as truly representative of the country.³⁰²

460 Mbari then captured the beginning of disappointment with the Kibaki government, one that would partly precipitate fallout within the coalition in 2004, serving as a precursor to the hotly-contested National Referendum on the Constitution in 2005 while setting the stage for the tragic events of 2007-2008

[] when it came to the second batch of appointments of permanent secretaries, widespread outrage was expressed. The appointments included people who are well past their official retirement ages and thus lack in energy, drive and creativity. Besides, the appointments reflected an attempt to recycle key officials from the Moi regime who had been responsible for the excesses of the regime in the first place. Due to this fact, the majority of Kenyans were already wondering whether the new government was serious about implementing the change for which they had voted.³⁰³

461 Although at its core, the Kibaki administration can be said to have largely maintained most of the practices of the previous regimes - concentrating appointments to key public positions in one region and similarly focusing development money, especially for infrastructure - it must be given credit for increased inclusion at the centre. It can be argued that this has perhaps been the case because inclusion was in part mandated by political agreements (NARC in 2002 and the National Accord in 2008). Increased scrutiny of governmental processes by citizens, itself attributable to increased political consciousness among Kenyans, has had an important role in forcing inclusion, at least in appointments.

462 One of the key responses to marginalisation that had a visible structural impact in thinking at the centre as well as visible economic effect in the regions was the introduction of the Constituency Development Fund (CDF). Perhaps because of the involvement of MPs (who are national political actors) and the larger sums of money involved, CDF has had great visibility. It is often forgotten that CDF operates alongside other devolved funds, most of which pre-date the CDF. As of 2011, there were about 13 different devolved funds.

463 It is arguable that in the period 2000 to 2011, Kenya tried to shift its approach to development from the top-down to a more people-centered, bottom-up approach.

302 C. Odhiambo-Mbari, 'The rise and fall of the autocratic state in Kenya', in W. Oyugi (eds) *The politics of transition in Kenya: From KANU to NARC* (2003) 51-92.

303 As above.

to development. This is perhaps best seen in the increase in both the devolved funding initiatives and increased funds allocation to particular devolved funds. In the 2007/2008 budgetary allocation, more than Sh58 billion went to devolved structures. Despite some challenges, milestones have been marked under the decentralised funds regime: schools, health centers and recreation facilities have been built, water and sanitation facilities have become more accessible, employment opportunities have been created through enterprise and the roads network has been improved.

- 464 The CDF has become one of the more successful devolved funds since its inception. According to a report on devolved funds, CDF has been viewed as a key strategic driver of socio-economic development and regeneration within Kenya. It is a development initiative targeted at the constituencies by devolving resources to the regions to meet socio-economic objectives which have previously been managed from the centre established in 2003 through the CDF Act as published in the *Kenya Gazette* Supplement No. 107 (Act No. 11) of 9 January 2004 (later replaced by the CDF Amendment Act of 2007), the main objective of CDF is to fight poverty and shift planning and identification of projects to local communities. At least 2.5 percent of Government revenue is allocated to the Fund. It is reported that almost KES 60 billion has been channeled through CDF since its inception. CDF is reported to contribute over 10 percent of all development in Kenya.

Responses to economic marginalisation in the new constitutional era

465. The main and most structured response to economic marginalisation in post-independence Kenya is the Constitution of Kenya, 2010. Other than its specific provisions that relate to particular groups considered as marginalised, such as women, ethnic minorities, indigenous people and the disabled, there are provisions that are overarching in nature. They have relevance for all groups that have previously suffered economic marginalisation. These provisions relate to: 1) national values, 2) the Bill of Rights, 3) the devolution framework, 4) affirmative action and, 5) land reforms.

National values and the interpretive process

- 466 Unlike the previous constitution, the entire constitutional framework is today underpinned by certain fundamental principles provided for under Article 10(2) and provides that the national values and principles of governance include:
- 1) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people,

- ↳ Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- ↳ Good governance, integrity, transparency and accountability, and
- ↳ Sustainable development

467 While all the principles are important, those captured under Article 10(2) (b) have direct relevance for marginalised groups. There are specific provisions elsewhere in the 2010 Constitution that regulate specific issues, granting rights, imposing duties, prescribing actions, donating powers and so on. However, the importance of constitutional values and principles is that they tie everything together. Principles and values are really the soul of the Constitution, the guiding light providing a kind of roadmap and justification of the entire laws. While principles and values stand as a pursuit of their own, their main function is to guide the interpretation of specific provisions of the Constitution and of legislation (Acts of Parliament, county legislation and local government by-laws).

468. Article 10(1) provides that the values bind all state organs, state officers, public officers and any person who applies or interprets the Constitution' as well as any of these when they enact, apply or interpret any law. Similarly, these constitutional values enumerated in Article 10 must underpin the making and implementation of public policy decisions by the named individuals and entities. Legislation, policy, regulations, administrative directions or other measures that do not accord with these values and principles are in their face, unconstitutional and thus null and void. Accordingly, measures taken by various state organs in respect of previously marginalised groups can, and should be tested against these values and principles for constitutional validity.

The Bill of Rights and socio-economic rights

469 One of the main claims made by those clamoring for a new constitution was that it must come equipped with a comprehensive Bill of Rights that would provide a bulwark against a powerful and unaccountable Executive that routinely cracked down on dissent by all means available to it. People wanted a constitution that would guarantee them justice whenever any of their rights were violated by the state or private entities. Today, it is accurate to state that one of the main gains for Kenyans in general in the new Constitution is a robust Bill of Rights, which boldly addresses the claims already enumerated, but goes much further in a number of respects. From the perspective of social exclusion and marginalisation, the Bill of Rights forms the basis, both of claims specific to marginalised groups, and

a robust adjudication framework that could be activated when these rights are breached.

The Bill of Rights as a mandatory framework for social policies

470. The Bill of Rights is a mandatory framework for social policies. Under the new Constitution, the Bill of Rights is a central pillar for inclusion. The Constitution locates social, economic and cultural policies within the Bill of Rights. This means that the government - at national and county level - must ensure that all policies they adopt are Bill of Rights compliant. In this regard, Article 19(1) provides that "the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies." It continues to state at sub-section 2 that "the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings."
471. It is also crucial to note that the Bill of Rights binds all organs of state. Article 2(1) enacts that "this Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government". In the exercise of their functions - the executive, legislative and judicial arms of government at both levels - must be guided by the Constitution. This provision renders any act performed by these actors unconstitutional if it done outside the bounds of the Constitution. In dealing with previously marginalised groups (women, the poor, minorities and indigenous people) relevant constitutional provisions discussed here must be adhered to.
472. In terms of implementation, the responsibility of all state organs is also engaged. Article 2(1) provides that "it is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights." It is also important to note that one of the principles to guide state action is equality and non-discrimination. Article 27(4) prohibits direct or indirect discrimination of any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. This provision, as well as other provisions in Article 27 on equal opportunities, is a potent tool that previously marginalised groups can use to attack discriminatory legislation, policies and other measures in a variety of sectors including public employment, distribution of resources and social goods.
473. The Constitution itself empowers the government by providing it with a constitutional mandate to remedy marginalisation. Article 27(6) provides that

the state is required to take measures, including instituting affirmative action measures, to ensure that the right to non-discrimination is enjoyed by those previously marginalised. As will be clear later in this Report, this provision would sanction measures such as reservation of political seats for previously marginalised groups and special budgetary allocations that benefit these groups alone to the exclusion of other groups or the broader public

Socio-economic rights as a framework for social Intervention

474 One of the greatest innovations in the Bill of Rights is the inclusion of a catalogue of socio-economic rights (SERs) By providing for these rights, the Constitution of Kenya, 2010 stands among few in the world This inclusion is revolutionary for at least one reason which is relevant for marginalised groups Like the South African constitution, the Kenyan Constitution differs from the traditional liberal model (with its minimalist state with limited powers) to a transformative model, which requires state intervention to advance equality, human dignity and social justice To be specific, Article 43 of the Constitution provides in part as follows

Every person has the right— (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care, (b) to accessible and adequate housing, and to reasonable standards of sanitation, (c) to be free from hunger, and to have adequate food of acceptable quality, (d) to clean and safe water in adequate quantities, (e) to social security, and (f) to education

475 For its part, Article 20(2) recognizes the difference in the nature of rights (especially civil and political and social economic rights) by providing that “every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom” Other than the nature of the right, the Constitution also recognizes that SERs impose certain burdens — especially budgetary — on the state and that realization of this category of rights should be progressive However, the state cannot just sit by because these rights impose special obligations In terms of Article 21(2) of the Constitution, the State is required to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of these rights

476. The state must demonstrate that the stated goals can be achieved The test of compliance will include criteria relating to whether the state has taken any measures and whether the measures taken can reasonably be considered to advance the realization of the right in question Since the marginalisation of groups often has the result of depriving them of social goods, vast opportunities are presented by SERs in the Constitution (Article 43) for previously marginalised groups, including

possibilities for litigation to hold government to account. To ensure that these groups can benefit from this facility, several measures are recommended for relevant actors at the end of this chapter.

Access to Justice Rights

- 477 Informed by Kenya's past history where 'Executive-friendly' courts found reasons to refuse to hear or order remedies in cases of human rights violations, the Constitution provides for the right of access to justice as a free-standing right. This is a right that is of particular importance for previously marginalised groups who often not only operate on the fringes of the mainstream socio-economic system, but also struggle to access justice in a variety of ways.
- 478 As a new right in the Constitution, the High Court will have to consent to it. In this exercise, there are likely to be theatres of contest. For our purposes, it is suggested that the following elements – already flagged in certain provisions of the Constitution – should be considered as integral to the discussion: distance (relating to geographical reach of forums of adjudication by litigants), cost (which is often-times prohibitive, especially for the poor), process (in terms of rules and procedures that hinder or facilitate adjudication of claims) and, time (the need for expeditious justice).
- 479 The 2010 Constitution has put to rest the heated philosophical debate that continues to rage elsewhere: whether claims related to SERs are knowable in law, and that they can be adjudicated upon by a court as legal claims. It is important to remember that rights in the Bill of Rights, including SERs, are justiciable claims. This means that they impose certain obligations on the state (vertically) and on private actors (horizontally), and that when these are breached, they can be adjudicated by a court of law. Those with tangible claims of a socio-economic character, including those around dispossession of land, can bring them to a court of law.
- 480 When the provision on access to justice is read with those that deal with *locus standi*, (that is, the ability of an individual, group or entity to bring claims before a court of law) it becomes evident that previously marginalised groups have at their disposal a very robust mechanism within which they can articulate their interests. Article 258 and Article 22 of the Constitution provide for the most expansive possibilities on who can bring a claim to court. Article 258, which relates to the enforcement of the Constitution as a whole and is thus the basis of *locus* for any claim relating to the enforcement of the Constitution, provides in sub-section 1 that every person has the right to institute court proceedings, claiming that this Constitution has

been contravened, or is threatened with contravention. Sub-section 2 then adds that in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:

- (i) a person acting on behalf of another person who cannot act in their own name,
- ┆ a person acting as a member of, or in the interest of, a group or class of persons;
- ┆ a person acting in the public interest; or
- ┆ an association acting in the interest of one or more of its members

481 Article 22, which is located in Chapter IV of the Constitution (Bill of Rights) reproduces the terms of Article 258, but adds a provision for the Chief Justice to make rules relating to human rights claims and criteria for bringing the same. The test of compliance will include criteria relating to whether the state has taken any measures and whether the measures taken can reasonably be considered to advance the realization of the right in question. Vast opportunities are presented by SERs in the Constitution for previously marginalised groups, including possibilities for litigation to hold government to account. To ensure that previously marginalised groups can benefit from this facility, this Report has recommended several measures for relevant actors.

Devolution framework

482 Although at independence Kenya bucked the trend in the majority of African countries by adopting a devolved system of government, it was dismantled by 1966, paving way for a centralised state. Centralised systems of government that were preferred by newly-independent states began to be associated with state failure in Africa and the developing world.

483 The abuse associated with a centralised system, including exclusion and marginalisation of certain regions by successive post-independence governments led to the clamour for a devolved system that was more equitable, fair and accountable. In Kenya like in many other countries, devolution of powers was touted as a means of enhancing participatory governance, accountability, good governance and equitable development. Thus during the making of the current Constitution, devolution of powers became a major feature.

484 The 2010 Constitution creates 47 Counties in Kenya as centres of devolution. The main objectives of devolved government are to promote democratic and accountable exercise of power, foster national unity by recognizing diversity,

give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them. It also recognises the right of communities to manage their own affairs and to further their development; protect and promote the interests and rights of minorities and marginalised communities and to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya. Devolved government also aims at ensuring the equitable sharing of national and local resources throughout Kenya, facilitating the decentralization of state organs, their functions and services, from the capital of Kenya and also to enhance checks and balances and the separation of powers.

- 485 The 2010 Constitution, through the introduction of devolution, supports development of infrastructure in the country and ensures that all marginalised areas are developed and up to pace with other areas. Devolution will result in general increase in supply, distribution and access to goods and services through decentralization. Each county will independently plan for its residents' basic amenities such as water, energy and infrastructure, tourism, agriculture, building and construction at county level. There will also be increased access to financial services such as banking, capital markets (stock exchanges), insurance and fund management.
- 486 Devolution has many benefits. For our purposes, we focus only on the economic aspects of devolution. Devolution financially empowers the regions. Revenue raised nationally is to be shared equitably among the national and county governments. County governments may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally. Criteria for equitable sharing are set out in Article 203, but the amount allocated to county governments must not be less than 15 percent of the national revenues of the preceding year. Marginalised areas will receive an additional 0.5 percent of all the revenue collected by the national government to bring the quality of basic services including water, roads, health facilities and electricity in those areas to the same level as that generally enjoyed by the rest of the nation.
- 487 The Commission on Revenue Allocation (CRA) was established under the Constitution to make recommendations for equitable sharing of national government revenue between the national and county governments, and among the county governments. At the national level there is a Consolidated Fund and for all counties there is a Revenue Fund. Into these funds are placed all revenues from which payments must be approved by the respective legislative assembly. Only the national government may impose income taxes, value added taxes, excise taxes as well as customs and

other duties on the import and export of goods. A county may impose property rates, entertainment taxes, and any other taxes authorized or imposed by an Act of Parliament. Both the national and county governments may impose charges for services.

488. The socio-economic status of those previously marginalised at the periphery will be enhanced. With outflows of finances to the regions, devolution can lead to more rapid and more balanced economic and social development. Writing in 2007 about the proposed regional and district governments, Prof Yash Pal Ghai noted that the centralised system - with the concentration of all government institutions and decision making at the centre - leads to the concentration of economic activities in the capital city area. The result is uneven development and growing disparities of economic opportunities and attendant impoverishment of regions and communities. This explains rural-urban migration into already crowded Nairobi. With county governments with the constitutional mandate and responsibility for the welfare and development of their constituents, new centers of growth can emerge.
489. Devolution introduced by the Constitution would provide a solution and alternative to the under-development problem in the regions. According to the Task Force on Devolution, the building blocks of developmental devolved government include the growing and sustaining of county cooperation and competitiveness, county public service delivery, building and maintaining quality places for investment and living and, managing counties for prosperity. One commentator notes that devolution could provide for an enhanced framework for economic management of Kenya at national and devolved levels. The two-tier government introduces a new threshold for investment through counties with the potential to enhance service delivery to citizens and to promote economic growth, especially since counties will have financial security and independence.

Affirmative action and the equalization fund

490. Article 27 (6) obliges the government to devise legislative and affirmative action programmes and policies to redress the disadvantage suffered due to past discrimination. Affirmative action is defined at Article 260 as "any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom." It is a deliberate policy or programme that seeks to remedy past discrimination by increasing the chances of the affected to participate in what they were previously denied. The object of affirmative action otherwise known as positive discrimination is to enhance the participation of marginalised

groups in decision-making and implementation and make a difference in the political climate and culture

- 491 Affirmative action policies are recognized as useful mechanisms through which states can redress past and existing injustices and inequalities. Accurate statistics often reveal the outcome of discrimination against, neglect of and unconcern for the marginalised populations within a state. Affirmative action performs three key functions. First, it remedies past discrimination through programmes to benefit individuals or society as a whole. Article 56 of the Constitution provides for both. Second, affirmative action enhances diversity so that a state will be able to grow with better values, peace and stability. Third, affirmative action increases political power of the marginalised, enabling them to influence decision-making. Affirmative action is thus used to ensure fairness and equal representation in all spheres of life in a state.
- 492 Article 56 obliges the government to put in place affirmative action programmes for minorities and marginalised groups to allow them to participate in governance and other spheres of life.
- 493 Such programmes further provide special opportunities for marginalized groups in educational and economic fields, access to employment, development of their cultural and linguistic heritage and ensure access to water, health services and infrastructure. Article 27 (8) seeks gender balance in elective and appointive bodies by obliging the state to ensure that no more than two-thirds of the members of such bodies shall be of the same gender. To this end, it provides that the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. In line with the need to have affirmative action on this issue, Article 203 (1) (h) on public finance enacts that one of the criteria for determining budgetary allocations is the need for affirmative action in respect of disadvantaged areas and groups.
- 494 The Equalisation Fund for marginalised areas is established under Article 204 as an affirmative action towards economic and social rights. The fund consists of money amounting to one half of one percent of all revenue collected by the national government each year. This fund is to be used by the national government only for the purpose of providing basic services such as health, water, roads and electricity to marginalised areas. The fund may also be directed to the provision of either direct or indirect conditional grants to counties in which marginalised communities exist.
495. The government, and in particular Parliament that has power to legislate on this issue should devise criteria - based on the less than adequate definitions of

'marginalised community' in Article 260 of the Constitution - for the purpose of identifying groups and areas that are marginalised. It is hoped this TJRC Report on economic marginalisation will inform the process of identifying marginalised areas and devising ways of deploying the Equalization Fund as addressed with recommendations in Part IV of this chapter.

- 496 Parliament may only pass Bills that appropriate funds from the Equalisation Fund on the recommendation of the Commission on Revenue Allocation that must obtain approval by the Controller of Budget for all withdrawals from the fund. With the understanding that affirmative action introduces reverse discrimination (although constitutionally-sanctioned) and that it serves a crucial but limited purpose of improving the situation of previously marginalised regions, the fund is set to lapse in 20 years from the effective date, unless Parliament extends it for a fixed period of years as per Article 204 (6) and (7).

Public service and employment

- 497 We have previously described how ethnicity has played an important role in Kenyan politics and the fact that the composition of the public service has mirrored the ethnicity of those in power. Partly as a reaction to a report by the National Cohesion and Integration Commission (NCIC) that painted a damning picture of the outlook of the public service, the then Head of the Civil Service Francis Muthaura directed permanent secretaries to ensure that members of one community should not take up more than 25 percent of the jobs in the civil service and in government. Heads of state corporations, departments and institutions were requested to comply with the directive immediately, although the Commission is unable to establish whether this directive has been complied with.
- 498 Article 27 of the Constitution breaks with the past and will hopefully introduce a new practice in public employment. In general terms, it provides for non-discrimination in all spheres of life, including in employment and calls for affirmative action. Article 232 (h) (i) puts representation of Kenya's diverse communities and affording equal opportunities for appointment, training and advancement for members of all ethnic groups in the public service as part of its core values and principles. Article 227 (2) (b) puts, "the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination" as one of the considerations to be factored in the procurement and disposal of public goods and services.

Land reform and economic inclusion

- 499 Kenya had not had a clearly defined a National Land Policy since independence until one was adopted in 2009 This, together with the existence of many land laws, some of which were incompatible, resulted in a complex land management and administration system
- 500 From the advent of colonialism, Kenya has grappled with the land question, which subsequent regimes have been unable or unwilling to resolve Challenges relating to land include fragmentation, breakdown in land administration, disparities in land ownership, landlessness and poverty This has resulted in environmental, social, economic and political problems, including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict
- 501 Item Number 4 of Kenya's National Dialogue and Reconciliation Process clearly articulated the need for comprehensive land reforms on three fronts anchoring the Land Principles in the constitutional reform process, finalization, adoption and implementation of the National Land Policy, and redressing historical injustices in order to foster national harmony through the National Land Commission and the Truth, Justice and Reconciliation process
- 502 Discussions in Part III show that land is Kenya's most intractable national issue Access to and ownership of arable land underlines the deep-seated political, socio-economic and regional inequities in Kenya According to the Kenya Land Alliance, more than half the arable land is owned by 20 percent of the population while 13 percent of Kenyans are landless Land is tied with ethnic identity There are lingering claims by communities related to alienated ancestral lands The Pokot say they were not compensated for the alienation of what is now Trans Nzoia District Similarly, the Maasai assert that they were swindled out of their land through the Maasai Agreements of 1904 and 1911
- 503 The Ndungu Commission Report revealed that landlessness among squatters is linked to the failure of the post-independence governments to implement a comprehensive resettlement programmed and because they lack ethnic entitlement, squatters are vulnerable to frequent displacements and dispossession
- 504 The unresolved grievance of colonial land alienation underlies the risks of social and political conflict Many analysts have argued that land is the main reason why Rift Valley was the epicenter of the 2007-2008 post-election violence Unresolved historical claims to 'ethnic territory' render existing property rights weak or uncertain

505. The Commission notes that the recognition of communal title to land in the Constitution as well as the creation of the National Land Commission, whose mandate includes settling historical land injustices, provides a basis for addressing some if not the majority of these claims
506. One of the major problems that has bedeviled Kenya since independence is the illegal allocation of land. People entrusted with the protection of public property infringed on the rights of the masses by grabbing huge tracts of land as allowed by the old legislative and constitutional framework. For instance, the Government Lands Act that empowered the President to grant titles in 'unalienated government land' was for years at the centre of massive alienation of land. The Commissioner of Lands, on behalf of the government, would issue a simple letter of "reservation" on government land to individuals. Provisions under the Agriculture Act that enabled the Agriculture minister to alienate idle land and give it to others, led to mass grabbing of Agricultural Development Corporation (ADC) farms
507. Various studies have disclosed that Kenya had a complex land regime, yet the administrative framework that oversaw it was poorly coordinated and gave excessive power to administrators, without establishing mechanisms to ensure that they not only performed their duties, but that they did not abuse their powers, thereby breeding corruption in the relevant agencies. Land redistribution schemes initiated in the post-independence period have been rightly criticized for unfairness. Amendments to the Constitution that vested power of alienation of public land in the President created more problems in part because access to land was determined by political influence
508. Most holders of the huge parcels of land are concentrated within the 17 to 20 percent of the country that is arable, such that more than a half of the arable land is in the hands of only 10 percent of the 40 million Kenyans. That leaves up to 29 percent of the population absolutely landless while another 60 percent on average own less than one hectare of land. According to the National Development Plans from 2001 to 2008, pastoral activities occupy 70 percent of Kenya's land mass area, and support 25 percent of the human population and 50 percent of all livestock. Less than 20 percent of the land in Kenya is high potential and accommodates about 70 percent of the population. The result is landlessness and squatting in both rural and urban areas, leading to congestion and fragmentation of land into uneconomic units and subsequently ethnic conflicts, particularly in the pastoral areas

Changes introduced in land by the new Constitution

- 509 It is in the light of these historical injustices that far reaching reforms relating to land were formulated in the new Constitution Chapter 5 of the new Constitution establishes a framework to ensure that the process of allocation, adjudication, consolidation and registration of land is done equitably, transparently and sustainably
- 510 The National Land Policy approved by the Cabinet at the end of 2009, introduces far-reaching reforms that will go hand in hand with the provisions in the Constitution, paving way for the resolution of perennial land problems and to redress historical injustices inherited from the colonial administration Major highlights of the new policy include barring non-citizens from absolute ownership of land and subjecting them to a leasehold system as well as a set of principles developed to govern land ownership and safeguard women's land rights The policy gives the government powers to reclaim grabbed public land, to tax idle land, and reduce all leaseholds to 99 years Furthermore, Article 68 requires Parliament to enact a law that will "enable the review of all grants or dispositions of public land to establish their propriety or legality"

Principles governing land ownership

- 511 The Constitution enacts a set of principles on issues relating to ownership of land under Article 60, which stipulates that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with principles which include equitable access to land, security of land rights, sustainable and productive management of land resources, transparent and cost effective administration of land, sound conservation and protection of ecologically sensitive areas and elimination of gender discrimination in law, customs and practices related to land and property in land The Constitution also establishes principles and mechanisms for resolving the claims of dispossession that have so often been used by political actors to mobilize their constituents along ethnic lines Its principles and mechanisms on the resolution of historical land injustices and on state acquisition of unlawfully-acquired private property so that it can be used to benefit the public, should be analyzed from this perspective

Taxation of idle land and reduction of 999-year leaseholds

- 512 There are so many people in Kenya who own huge tracts of land, which remains idle and is held largely for speculative purposes The Constitution introduces tax on idle land or else its reclamation It also solves the problem of absentee land

ownership which has been a serious problem especially at the Coast. Article 65 of the new Constitution provides that a person who is not a Kenyan citizen may hold land on the basis of leasehold tenure only. It reduces the maximum period to hold leasehold retroactively from 999 to 99 years, which means that all land currently on 999-year lease automatically reverts to 99 years. Article 65(2) specifically stipulates that, if a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a 99-year lease, the provision shall be regarded as conferring on the person a 99-year leasehold interest, and no more. An independent National Land Commission has been created to maintain oversight and manage all public land among other related duties.

Land Acreage

- 513 Article 68(c) (1) of the Constitution requires Parliament to enact legislation to prescribe minimum and maximum land holding acreages in respect of private land to protect the public against land grabbing.
- 514 Other than just ensuring fair distribution of land resources from those owning more than 10,000 hectares to those owning less than one hectare, this clause also guards against congestion and parceling of land into uneconomic units. A combination of these clauses in the Constitution and ongoing computerization at the Central Land Registry in Ardhı House, will contain land grabbers. A general overview of Article 68 reveals that it provides for the regulation of the minimum and maximum land-holding acreages, thus promoting sustainable use of land resources and conservation. This provision will prevent a few individuals from hoarding arable land to the exclusion of the majority.

Protection of community land

- 515 Article 61(1) classifies land and provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. It therefore makes provision for communally-owned land unlike before, thus it protects the interest of the various communities, especially the marginalised ones. Article 63(1) goes further to provide that community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Any unregistered community land is required to be held in trust by county governments on behalf of the communities for which it is held and such land shall not be disposed of or used except in the terms of a legislation which specifies the nature and extent of the rights of members of

each community individually and collectively. The government is required to enact legislation to give effect to these provisions.

- 516 To this extent, community land in Kenya shall consist of land lawfully registered in the name of group representatives under the provisions of any law, land lawfully transferred to a specific community by any process of law, any other land declared to be community land by an Act of Parliament, land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines, ancestral lands and lands traditionally occupied by hunter-gatherer communities; or land that is lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2). For its part, Article 66 seeks to ensure that investments in property such as land benefit local communities. This provision would, for example, address the grievances of the residents of the Coast region, who claim that they have been excluded from sharing the revenues generated from tourism and other coastal resources.

Policy responses

- 517 The Kenya Budget 2011/2012 makes efforts towards remedying marginalisation. For the poor, it provides for funds to support education (free primary and secondary education) and health. It also expands spending on safety nets to cushion the vulnerable from the challenges of high food and fuel prices. For the youth, the Budget continues to provide resources by supporting existing public works programmes that the government started two years ago, commonly known as the Economic Stimulus Programme (ESP) and *Kazi Kwa Vijana* (KKV) (Work for the Youth). The Budget will also scale up programmes aimed at increasing labour absorption, skills training and enhancing the employability of the youth.
- 518 For farmers, the Budget has set aside funds for agribusiness to begin the journey of leveraging lending to the agricultural sector and rural development, targeting 1.5 million smallholder farmers and over 10 000 agribusinesses throughout the country. For the rural and marginalised, there is increased funding for CDF to complete critical projects that benefit the poor and earmarked sources for basic services in the marginalised areas in the spirit of the Constitution as relates to progressive equitable development.
- 519 One policy response that the government has established is through annual budgetary allocations to increase steadily the amount going to the devolved funds. In his 2011/2012 Budget Speech, the then Finance minister Uhuru Kenyatta stated that funds will be provided for the poor to support education (free primary

and secondary education) and health as well as to expanding spending on safety nets to cushion the vulnerable from the challenges of high food and fuel prices

- 520. The Youth Enterprise Development Fund and the Women Enterprise Fund was further enhanced by the government's contributions of Sh385 million and Sh440 million. Consequently, the minister challenged the management of these funds to show results for Kenyans. Sh667 million was awarded for physically challenged persons.
- 521. The (appropriate) budgetary allocations to the various marginalised groups and various devolved funds is an assuring way of the Government acknowledging and responding to marginalisation. Despite the response through budgetary allocations, there has been criticism that the allocated funds to the different groups of persons or devolved funds are not enough when held against the actual number of people who need the resources.

Vision 2030

- 522. Vision 2030 is Kenya's current development blueprint covering the period 2008 to 2030. It aims to transform Kenya into a newly-industrialising "middle-income country providing a high quality life to all its citizens by the year 2030". It is anchored on three 'pillars' - economic, social and political.
- 523. The economic pillar aims to improve the income and livelihoods of all Kenyans through an economic development programme, covering all regions of Kenya, and aiming to achieve an average gross domestic product (GDP) growth rate of 10 percent per annum beginning 2012 through focus on tourism, agriculture, wholesale and retail trade, manufacturing, business process outsourcing and financial services. To realise these aims, there is a commitment to develop a governance system that is able to support the governance demands of a middle-income, rapidly-industrializing country. To achieve this goal calls for deep structural reforms to strengthen the rule of law and transparency, accountability and integrity in the public and private sectors.
- 524. Perhaps the most relevant pillar for economic marginalisation from the perspective of rhetorical commitment, the social pillar seeks to build a just and cohesive society with social equity focusing on eight key areas of education and training, health, water and sanitation, environment, housing and urbanization, and gender, youth and vulnerable groups.
- 525. There is commitment to develop social safety nets that re-orient service delivery and public funding towards vulnerable, disadvantaged and marginalised groups in

order to build a just and cohesive society that enjoys equitable social development in a clean and secure environment. On education, Vision 2030 provides that Kenya recognises that the education and training of all Kenyans is fundamental to the success of its aims. It further acknowledges regional disparities and inequality especially in the marginalised ASALs. It provides that "although the primary school enrolment rates increased from 70.4 percent in 2002 to 83.7 percent in 2005, there exist great gender and regional disparities, with the ASAL areas being the worst affected." To address this issue, Vision 2030 will anchor the promotion of equity in access to education through a variety of measures.

- 526 Vision 2030's political pillar aims to realize a democratic political system founded on issue-based politics that respect the rule of law, and protect the rights and freedoms of every individual in Kenyan society through focus on six strategic areas - the rule of law, electoral and political processes, democracy and public participation, transparency and accountability, public administration and service delivery, security, peace-building and conflict management.
- 527 Vision 2030 also recognizes vulnerable people to include widows and widowers, orphans and children at risk, persons with disabilities, under-age mothers, the poorest of the poor, internally and externally displaced persons and the elderly. Some of the strategies identified to reduce marginalisation among this group include expanding pro-poor financial services, for example, through micro-finance institutions and village financial associations, full implementation (including appropriate budgetary allocations) of the Disability Fund, building more financial institutions in rural areas for access, increasing savings by rural poor and improving access to food and healthcare services for marginalised groups and ensuring adequate representation of marginalised groups in decision making.

Conclusion

- 528 It is going to take years for Kenya to reverse the legacy of economic marginalization of regions identified as marginalized in this Chapter: North Eastern, Upper Eastern, Nyanza, Western and North Rift. However, it is encouraging that positive steps are being taken towards that direction. This Chapter has provided detailed discussion of the historical context for understanding economic marginalization in Kenya, which context must be taken by the relevant authorities charged with dealing with the multiple legacies of economic marginalization. The Commission's findings and recommendations in this regard are contained in the findings and recommendations volume of this Report.



CHAPTER



Land and Conflict

Introduction

1. The Republic of Kenya is approximately 581,751 square kilometres (44.6 million hectares) of which 97.8 percent is land and 2.2 percent is comprised of water surfaces. Only 20 percent of the land surface could be classified as medium to high potential land, while the remaining 80 percent is either arid or semi-arid. Forests and woodlands occupy about 7 percent of the country's land mass. Some of the forests and woodlands form part of national parks and reserves.¹ The analysis shows that there is only about 43.62 million hectares of land in Kenya that is suitable for human settlement for the more than 42 million Kenyans. In the absence of any possibility of elasticity of available land to accommodate an increasing human population, the situation points to the reality of land scarcity, a challenge that is compounded by the critical nexus between land and both subsistence and economic development in the country.
2. In Kenya, the availability of land to both the private and the public sectors remain vital to the country's development and to the subsistence of its increasing human populations. The reason is that Kenya is a country that is endowed neither with sufficient mineral resources, nor with a strong manufacturing base. This provides an understanding of the significance of land for both subsistence and commercial agriculture and as the basis of many of the related economic activities, especially manufacturing of raw agricultural products. For the majority of the Kenyans, land is

¹ National Development Plan 2002-2008. Government of Kenya, Nairobi, 2002.

the basic, and in most cases, the only economic resource from which they eke out a livelihood.² The ability to access, own, use and control land has an implication, not only on one's ability to feed and provide for his/her family but it also determines his/her socio-economic and political standing in society.

- 3 Moreover, it is around land that socio-cultural and spiritual relations among community members are defined and organized. It is viewed as having an ancestral-cultural bond, spiritual and philosophical dimensions, thus linking the physical and metaphysical worlds. To this extent, land provides some form of ethno-cultural identity and social security – the medium which defines and binds together social and spiritual relations within and across generations.
- 4 For the foregoing reasons, individuals and communities have developed a sentimental attachment to land and any significant loss of land not only threatens the basic means of subsistence for many, but also a fundamental aspect of the foundation of their socio-cultural system.³ It is no wonder then that land retains a focal point in Kenya's history, culture and politics and access to land as well as ownership, use and control remains an emotive and politicized issue in contemporary Kenya,⁴ with many being prepared to risk their lives to acquire or defend it from real or perceived threats. It is not surprising, therefore, that land has since the colonial times to the present day, been the subject of myriad state-managed policy and legal relations. Neither is it surprising that it has been the subject of several commissions of inquiry.⁵
- 5 The situation summarized in the foregoing paragraphs explains why ownership and use of land in Kenya or the absence thereof is very closely linked to poverty on one hand and improved livelihoods on the other, and hence the quest for every Kenyan to own land and the actual and likely determination by every landless person in Kenya and every person facing land ownership and use injustices in the country to explore every possibility, including those of a violent nature, to acquire or recover and own land.
- 6 In order to fully understand the causes of land-related conflicts in Kenya, one needs to trace the problems of land acquisition, ownership and use to the pre-colonial period to properly appreciate where the problems currently causing land-related

2 RR Simiyu. Militarisation of resource conflict: The case of land-based conflict in the Mount Elgon region of Western Kenya (2008) Institute for Security Studies 4 available at <http://www.iss.co.za/uploads/M152FULL.PDF> (accessed on 3 May 2012)

3 ML Kilson. Land and the Kikuyu: A study of the relationship between land and kikuyu political movements (1995) 40 (2) *The Journal of Negro History* 104

4 Robert Simiyu. Militarization of resource conflict: The case of land-based conflict in the Mount Elgon region of Western Kenya (2008) Institute for Security Studies 4 available at <http://www.iss.co.za/uploads/M152FULL.PDF> (accessed on 3 May 2012)

5 Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land (2004) Government Printer xvii

conflicts and violence originated and to design mechanisms that are cognizant of both root causes of the problem as well as historical factors that continue to foster the problems and related violence and strife so that the underlying fuelling factors may also be addressed

- 7 Therefore, the following section presents a historical background to the existing land tenure and related acquisition, ownership and use problems, some of which continue to bedevil Kenyans to date. This section explains, among other things, how settlement patterns of the various ethnic communities in the region now called Kenya attracted 'tribal' identities to land in various parts of the country and how colonial policies and practices generated some of the current land-related problems [with acquisition, ownership and use] including landlessness of a large segment of Kenya's population, such that any effort to address the problems, as presently manifested, ought also to factor what occurred with acquisition, ownership and use at that point in time
- 8 The presentation in the following section provides the basis for understanding why colonial land policies and practices regarding land acquisition, ownership and use partially, but significantly prompted the struggle for independence. Most importantly, it explains why, at independence, many Kenyans who had suffered land-related injustices awaited anxiously for redress by the first independent government in the form of land restitution, restoration and/or compensation which is, significantly, the reason many who were disappointed have, over the years, resorted to self-help measures to realize what they believe to be injustices whose redress are long overdue, but have been flagrantly overlooked or ignored

Historical Background

- 9 This section explains the origins of land tenure (acquisition, ownership, use) and related problems in the coastal region of Kenya and in Kenya's mainland. The explanation generally, demonstrates why and how colonial land policies and practices generated some of the land-related problems, including land scarcity and landlessness that have resulted in violent conflicts among Kenyans so that suitable measures may be designed in light of identified injustices from their very beginning
10. It is recognized that although land-related problems in the colonial period, especially at the Coast, predated occupation of Kenya by the British colonialists

and that although the manner of acquisition, ownership and alienation of land by Arabs at the Coast was slightly different from that of the British in relation to mainland Kenya, this fact has not been properly appreciated. Yet certain tenets of the "policies" and practices of Arabs, coupled with subsequent collaboration with the British and failures of the independent Kenya government, may have been the cause of widespread landlessness, land scarcity and absence of titles to occupied lands by many individuals, families and communities at the Coast.

11. Therefore, an analysis of Arab land acquisition, ownership, alienation and related activities at the Coast is important in presenting some of the unique features of the land problems there. It goes without saying that colonialism includes colonization by Arabs, especially at the Coast and, subsequently, colonization by the British.

Land ownership before the advent of colonialism

12. Before the commencement of colonisation by the British, each of the various indigenous ethnic communities in the region now known as Kenya communally occupied distinct territories in various parts of what constitutes the land within the country's internationally-recognised borders. The history of Kenya indicates inward migration of whole groups (ethnic communities) of people and settlement by the groups (communities/tribes) in areas distinctly identified by their presence, wherein land was allocated by tribal elders to families for cultivation or grazing, depending on need and in accordance with traditional customs and practices.
13. Communities' need for more land was identified collectively and the need was often satisfied by expansion onto nearby unoccupied areas. Because population in the region was generally low, community expansion to satisfy need for land occurred, in many cases, peacefully. However, where one community occupied land deemed necessary for expansion by another, land was, often, acquired through conquest, characterized by inter-tribal wars which, in many cases, resulted in the acquisition of land by one community from another. But history reveals that communities displaced from their homelands, as it were, through conquest, had no difficulty finding alternative land by moving away from invaders to unoccupied areas because the population was low and there were vast unoccupied lands in the region.
14. Even in the absence of conquest, communities, having exhausted land in one area, moved freely to other areas to allow already utilized lands (for grazing or cultivation), to regenerate. For pastoralists, movement was often extended over

long distances. In many cases, community members returned to areas where vegetation had regenerated and therefore, there was movement back and forth in areas that were, in the main, distinctly identified with specific tribes. One of the key factors that emerges from the manner of acquisition, distribution and utilization, is that the need for land of all individuals and families within each of the communities/tribes was fully satisfied.

- 15 There is no known case of any individual member of a community or family within a community in need of land that community elders could not or did not satisfy. There is also no known case of land-related disputes that arose between individuals or families within a community that community elders failed to address conclusively. History shows that generally, there was peaceful co-existence within communities and that external threats to communal land ownership and use were tackled collectively. The situation was disrupted and distorted, first, by Arabs at the Coast and subsequently, the British, followed by individuals and groups of individuals in the succeeding independent Kenya government in ways that have had far-reaching consequences on the livelihood of the people of Kenya and the development of their nation.

Origins of land-related problems at the Coast

- 16 From the explanation presented in the foregoing paragraphs, especially that different ethnic communities/tribes in the region that is now the country called Kenya occupied distinct areas of land across the region, it can be understood that not all of the presently 42 tribes (ethnic communities) in Kenya occupied the coastal area or, as it is more otherwise known, the 'Coastal Strip'. The fact provides basis for understanding that land problems at the Coast whose origins are traceable affected only some of the communities/tribes in Kenya which is why, if a peculiar or special factor is revealed that may have precipitated the current land problems at the Coast, those factors ought to receive specific consideration.
- 17 Against the backdrop of communal ownership and utilization of land at the Coast, characterized by general peaceful communal coexistence, Arab traders from Arabia and Persia invaded the coastal region in the early 1800s and their subsequent activities generated land-related problems first, by their practice of the slave trade and secondly, by their forceful acquisition of land occupied by local communities and land available for their movement and expansion, as they were accustomed to do. Arab traders, who occupied the region, were, under the leadership of the Sultan of Zanzibar, heavily involved in the slave trade.

- 18 The significance of this activity in relation to land is that it is a factor that made many indigenous communities, especially the Mijikenda, to flee areas that they were occupying around the beaches for fear of being captured and sold as slaves. Effectively, indigenous communities vacated their homes and grazing and agricultural lands which were soon thereafter occupied by the Arabs, especially along the beaches, which, today, constitute the most prime land in present-day Kenya. Questions arise: Are the Arabs still in control of the area and occupation of the lands? If not, who assumed ownership of the lands? How were the lands transferred successively to the current owners? Were the Mijikenda (comprising the Dorobo, Boran, Digo, Chonyi and Duruma, among others) and the Taita and Pokomo who also occupy the Coastal Strip rendered landless by occupation of the land by Arabs and their subsequent successors? Were the Mijikenda rendered landless by activities of Arabs and their successors? Has the fact that indigenous communities at the Coast were dispossessed and displaced by colonialists and subsequent governments been subject of land-related investigations in independent Kenya? If such investigations have been conducted, have there been recommendations for restoration, restitution or compensation in their favour? Have any of such recommendations been implemented, especially considering those who ended up as owners of the lands along the beaches that were previously theirs? Is the fact that some individuals and businesses from outside of the Mijikenda (as presently manifested) acquired land previously belonging to them likely to raise disquiet among the Mijikenda, especially if they have ended up as landless people or are facing land scarcity? Should subsequent acquisition of land (from the British onward) previously belonging to the Mijikenda be traced (to determine subsequent injustices from those of Arabs) for purposes of compensation or restitution?
- 19 In order to adequately address the foregoing questions, it is necessary to understand that changes in coastal land ownership and utilization, first, from Arabs to the British, and later, from the British to present owners. At the time of the arrival of the British, Arabs, under the leadership of the Sultan of Zanzibar, had already established control along the Coast, whose land they acquired and occupied, indigenous communities having been disposed of through the slave trade and direct forceful evictions. In 1888, the British Imperial East African Company (IBEACo) that had come, on behalf of the British government, to administer the present-day Kenya - which was then referred to as the East Africa Protectorate -⁶ signed a concession agreement with the Sultan of Zanzibar in which all rights to land in his territory except "private lands" (which were land held under certificates of ownership issued by the Sultanate⁷), were ceded to IBEACo.⁸

6 Leys, C., *Underdevelopment in Kenya: The Political Economy of Neo-colonialism*, Berkeley University of California Press (1994) at 28

7 Report of the Commission of Inquiry into the Land System of Kenya on Principles of a National Land Policy Framework. Constitutional Position of Land and New Institutional Framework for land Administration (2002) 21

8 Report of the Commission of Inquiry into the Land System of Kenya on Principles of a National Land Policy Framework. Constitutional Position of Land and New Institutional Framework for land Administration (2002) 21

- 20 This agreement affected indigenous community ownership and occupation of land in the ten-mile coastal strip that runs from Vanga, at the border with Tanzania to Kipini on the mouth of River Tana, together with the Lamu archipelago. To gain control and administration over the areas, the British government, through IBEA signed an administration agreement with the Sultan in 1895 which, in effect gave it control over all the land that the Sultan had ceded to the British under the 1888 concession agreement that it had previously concluded with the Sultan of Zanzibar⁹ The only parcels of land that were exempted from British alienation were the 'private lands'¹⁰ which were not land held by the indigenous communities that previously owned them, but land held by Arabs under certificate of ownership issued by the Sultanate, having violently acquired it through the slave trade or forceful eviction
- 21 The 1888 and 1895 agreements terminated the land rights of indigenous Africans at the Coast, especially the Mijikenda, Taita and Pokomo and formed the basis of acquisition, ownership and control of their land by the British colonial administration which, in 1895, declared a protectorate status over Kenya to mark its official assumption of jurisdiction over Kenya for a variety of reasons, including interest in establishing trade routes to Uganda through construction of the Kenya-Uganda railway, which required huge financing and the Kenya colony had to be economically productive to generate finances to build the railway and to fund the colonial British administration
- 22 To make the Kenya colony economically productive to be able to finance its administration and establish the Kenya Uganda Railway, the British colonial administration deemed it necessary to secure incoming settlers' right to productive land, but the declaration of a protectorate status over Kenya in 1895 had not given the colonial administrators authority to deal with land, meaning that without further measures, the administration and its invited settlers could only acquire land from natives through conquest, agreements and treaty or sale, all of which proved inefficient means of acquiring land
- 23 The hurdle was overcome, first, by extension of the application of the Indian Lands Acquisition Act of 1894 to East Africa Protectorate (including Kenya) in 1899 This piece of foreign land legislation converted all land in Kenya that had not been appropriated by individuals or by the colonial administration into 'Crown Land', meaning land belonging to Her Majesty, the Queen of England, which she could grant to individuals in leaseholds for a term of years or in fee simple¹¹

9 Report of the Commission of Inquiry into the Land System of Kenya on Principles of a National Land Policy Framework Constitutional Position of Land and New Institutional Framework for Land Administration (2002) 21

10 Report of the Commission of Inquiry into the Land System of Kenya on Principles of a National Land Policy Framework Constitutional Position of Land, and New Institutional Framework for Land Administration (2002) 21

11 For further reading see Okoth Ogendo H W African Land Tenure Reform in Agricultural Development in Kenya 152 (Heyer J ed 1976)

- 24 However, there was no clarity on what constituted 'Crown Land' for purposes of acquisition and use by the growing number of settlers and it was limited in quantity for the desired ends. In response and to expand the scope of what constituted 'Crown Land', an East Africa Order in Council was passed in 1901 in respect of land to define it, thereby to become public land, including all land under the control of the Queen through agreement, treaty or convention and all other lands that she was to acquire.¹²
- 25 By the 1901 Ordinance, land that the British had acquired from the Sultan through the two agreements of 1888 and 1895 became 'Crown Land'. However, part of the land ceded to the British by the Sultan had been occupied not only by indigenous communities, mostly the Mijikenda, but also by Arab traders who had settled at the Coast under the Sultanate and both groups had claims to it. Therefore, in order to "put to rest any claims by indigenous inhabitants of the Coastal Strip to land ownership"¹³ and 'determine accurately how much land was actually "owned privately" so that the limits of 'Crown Land' at the coast could be defined,"¹⁴ and to ascertain land that was available for disposal to prospective settlers,¹⁵ the British colonial administration that was taking shape in Kenya, having assumed the position previously held by IBEA Co. in relation to land at the Coast, enacted a Land Titles Ordinance in 1908, with limited application to the Coastal Strip.¹⁶
- 26 Accordingly, the Land Titles Ordinance of 1908 required "all persons being or claiming to be proprietors of, or having or claiming to have any interest whatever in immovable property within the ten-mile Coastal Strip to lodge their claims, whether of title, mortgage or other interest, within six months with a Land Registration Court which was presided over by a Recorder of Titles.¹⁷ Where the Recorder was satisfied that a particular claim was valid, he would issue a certificate to that effect.¹⁸ Such certificate was
- Conclusive evidence against all persons (including the crown) of the several matters therein contained and a certificate of ownership shall be conclusive proof that the person to whom such certificate is granted, is the owner of the land.¹⁹

12 Section 1 of the East Africa Order in Council passed in 1901.

13 Report of the Commission of Inquiry into the Land System of Kenya on Principles of a National Land Policy Framework: Constitutional Position of Land and New Institutional Framework for Land Administration (2002) 21.

14 Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer 2*.

15 Republic of Kenya: Report of the Select Committee on the Issue of Land Ownership Along The Ten-mile Coastal Strip of Kenya (Government Printer Nairobi, 1979) at 2.

16 No. 11 of 1908.

17 The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer 2*.

18 The Report of the Select Committee on the Issue of Land Ownership along the Ten Mile Coastal Strip of Kenya (1978) *Government Printer 2*.

19 Reproduced in The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya, (1978) *Government Printer 2*.

- 27 The Ordinance also declared that "all land concerning which no claim or claims for a certificate of ownership shall have been made shall be deemed to be 'Crown Land' and was henceforth to be governed by the Crown Land Ordinance, 1902"²⁰ The Crown Lands Ordinance of 1902 applied to the whole of Kenya
- 28 From the wording of the Land Titles Ordinance of 1908, it appears that the indigenous communities at the coast, notably, the Mijikenda, Taita and Pokomo, were, in the law, given a chance to present their claims to land that, much of which had, in the first place, been taken away from them by Arabs. However, the indigenous Africans within the ten-mile Coastal Strip did not make claims over land in the region during the six months provided by the Land Titles Ordinance for reasons revealed by the Select Committee that investigated the issue of land ownership along the ten-mile Coastal Strip as follows
- First of all, the indigenous people of the strip had no knowledge of the existence of the Ordinance. Even if they did, they never understood its provisions. Secondly, the Ordinance had no relevance to indigenous conceptions of land tenure. That they should be asked to lay claims upon the soil was a startling preposition. Third, the Ordinance was clearly biased against these people. For the colonial government and courts believed that no African, whether as an individual or a community had any title to land. Hence for purposes of the 1908 and other colonial land ordinances, land occupied by Africans was always treated as ownerless. Fourth, the actual investigations of claims were done mainly by Mudris - usually Mazrui Arabs absorbed into the colonial administration - who were generally unsympathetic to the indigenous people. Fifth, the time limit within which claims could be made was extremely short. And indeed after 1922 claims would no longer be received at all. Besides, when in 1926 three "native reserves" were established in Kwale and Kilifi, any further doubts concerning the possibility of ever receiving claims from indigenous coastal peoples were laid to rest. For with the exception of 13 pockets of land in Kwale, land comprised within these reserves was deliberately delineated outside the ten-mile strip.²¹
- 29 Moreover, apart from the Recorder himself, the only other statutory officers were surveyors and administrative officers. The duties of these two officers included boundary surveys and preparation of maps to be attached to certificates of ownership. The latter only had the duty to receive claims but had no power to adjudicate them. The process of adjudication was thus left to only one man, the Recorder.²² Although in practice, two intermediate committees were appointed to assist the Recorder, the process was one that would be difficult, if not impossible

²⁰ Land Titles Ordinance No. 11 of 1908

²¹ The Report of the Select Committee on the Issue of Land Ownership along the Ten Mile Coastal Strip of Kenya (1978) *Government Printer 3*

²² The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer 3*

for indigenous Africans to know about or to follow. It remained essentially judicial, involving issuance of summons, administration of oaths and invitation of parties to argue their claims either in person or through lawyers.

- 30 Matters were made worse by the fact that no proper investigations were conducted on claims presented. Most claims were presented on the basis of old Arabic documents or allegations of possession or inheritance that were mainly false. Where, as was often the case, no objections were raised or if an objector failed to appear altogether, no further proof was ever asked for. In the very few cases where claims by indigenous Africans were allowed, the size of their land was deliberately reduced by the Arab assistants of the Recorder.²³ In such circumstances, Mazrui Arabs made claims to large tracts of bush lands whose boundaries they could not even point out, resulting in their appropriation of 18,000 hectares of land in Central Kilifi over which they declared a Mazrui trust. The same flawed process also allowed over 95 percent of land in Malindi to be taken by Arabs. Since very few claims were received in Lamu, much of the land there was declared 'Crown Land'.²⁴ In Kwale where there were fewer claims, much of the land was subsequently sold or granted in leaseholds to Indians, Europeans and other concessionaires interested in large-scale agriculture.²⁵
- 31 For the reasons elaborated, indigenous Africans at the Coast lost a chance to lay claim to their land and their right to do so under the British administration was foreclosed even though many families and communities remained resident on some of the land which they would, for failure to lay claim, continue to occupy for years without any recognition or registration of title thereto.
- 32 Arabs, on the other hand, were quick to lay claim over land along the Coastal Strip which was not originally theirs. A select committee established by the government in 1978 to investigate issues of land ownership along the ten-mile Coastal Strip established that the Registrar of Titles did not take time to verify the claims placed before him.²⁶ The effect of this was that the Mazrui Arabs took most of the land in the coastal strip, leaving the indigenous communities, including the Mijikenda, the Pokomo and the Taita, landless and as squatters on their farms.²⁷

23 The Report of the Select Committee on the Issue of Land Ownership along the Ten Mile Coastal Strip of Kenya (1978) *Government Printer 3*

24 The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya, (1978) *Government Printer 3*

25 The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer 3*

26 The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya, (1978) *Government Printer 3*

27 The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer 3*

- 33 For the foregoing reasons, The Land Titles Ordinance has been attributed to the state of widespread landlessness in the coastal region,²⁸ and yet at independence, it was adopted as the Land Transfer Act. As explained subsequently, new legislations passed in 1938 extinguished any other rights that "natives" in Kenya as a whole might have had *outside* their respective reserves.
- 34 Moreover, 1908 Ordinance introduced a British conception of land, that is; that whatever is attached to the land becomes part of that land, such that as indigenous ethnic communities at the Coast lost their land, they also lost whatever rights they may have had under Muslim or customary law to farm produce. In addition, many missed compensation for permanent improvements that they had made to land in the form of permanent structures. Therefore, the majority of the indigenous people who still remained on the land - because the new unjustified owners never resided on the land anyway - so simply in the belief that it was still theirs, recognised ownership and control having shifted to either the Arabs or the British and their collaborators.²⁹
- 35 Unlike mainland Kenya which was under the control of the colonial government throughout the colonial period (from 1895 to 1963, first, as a protectorate and subsequently, as a colony), the ten-mile Coastal Strip remained under the control of the Sultan of Zanzibar until 1963, when the Sultan renounced sovereignty over the strip following the signing of an agreement between the British, Kenya and Zanzibar governments which effectively integrated the Coastal Strip into independent Kenya.³⁰
- 36 The foregoing explanation appears to be the genesis of the widespread squatter problem at the Coast, characterized by large numbers of families and communities occupying land for which they have no title and therefore, do not own and consequently, many indigenous people at the Coast are exposed to forceful and unexpected evictions by those who hold titles to the land they occupy, their assigns or successors in title. Resolution of the problem of landlessness at the coast was made more difficult, if not impossible by the provisions of section 75 of the independence constitution which provided that

28 The Report of the Select Committee on the Issue of Land Ownership along the Ten Mile Coastal Strip of Kenya (1978) *Government Printer 3*

29 The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer 3*

30 The Report of the Select Committee on the Issue of Land Ownership along the Ten Mile Coastal Strip of Kenya (1978) *Government Printer 4*

all existing land rights irrespective of the manner in which they were acquired be confirmed and guaranteed³¹

- 37 The independence constitutional provisions which were buttressed by those of sections 27 and 28 and the Registered Land act (Cap 300, now repealed) ruled out the possibility that historical claims would ever be the basis for land distribution after independence, in the country as a whole
- 38 Some of the pertinent questions that deserve answers integrated in national solutions to conflicts over land are (a) whether the agreement signed at independence between Kenya's government, the outgoing British administration and the Sultan of Zanzibar took cognisance of the loss of land by indigenous Africans to Arabs and the British and made provisions for them, (b) whether any scheme of land registration, compensation or restitution was implemented for the benefit of indigenous people who lost their land to Arabs and subsequently to the British, and (c) what measures have subsequent governments made to redress the situation?
- 39 Another factor that should be borne in mind in the a search for solutions to the land problem at the Coast is the subsequent establishment, in 1926, after much of the land there had been declared 'Crown Land', of three "native reserves," mostly outside of the ten-mile Coastal Strip, in Kwale and Kilifi"³² As subsequent sections of this chapter disclose, from the year 1926, the British colonial administration confined indigenous Africans to "native reserves", meaning that those who continued occupying their land after it was acquired by Arabs or the British were compelled to move out of the land into the designated reserves. Many questions arise concerning the confinement of Africans to reserves, including land allocation practices and policies in the reserves, but for purposes of determining causes of current land-related conflicts, two pertinent issues arise
- 40 Firstly, whether Africans occupying a particular reserve were considered to be collectively owning it. Secondly, whether, at the time a system of land registration was introduced in post-independent Kenya, land was distributed to all occupants of a particular reserve and registered in their names or land constituting any reserve remained in the collective unregistered ownership and use of a community as communal land, which was subsequently alienated to a few members of the reserve or sold to persons from outside the community, leaving original occupants as squatters or landless

31 The provision was wrongly informed by a feeling that land redistribution should not be made at the expense of economic (mainly agricultural) stability id. at 4

32 The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer* 3

Origins of land-related problems in mainland Kenya

- 41 For mainland Kenya, change in land tenure and related policies and practices first occurred with the coming of the IBEA Co that was mandated by the British government in 1888 to administer the present-day Kenya, which was then referred to as the East Africa Protectorate and in the process, to facilitate construction of a railway to link Kenya and Uganda³³ The company also had the task of raising revenue to finance British administration of the protectorate and to accomplish the task, it encouraged and facilitated many settlers of British and, to a smaller extent, Dutch origin, to take up residence in Kenya for the purpose of undertaking agricultural activities in the hope that their agricultural productivity would generate much-needed revenue to fund construction of the railway as well as finance administration of the colony³⁴
- 42 IBEA Co was unable to administer the territory, prompting the British government to declare the region now Kenya a protectorate in 1895 and on 1 July 1895 the British government posted the first Governor, Sir Arthur Hardinge, to establish a formal British administration in Kenya³⁵ However, declaration of a protectorate status over Kenya had not conferred authority on colonial administrators to deal with land, meaning that without further measures, the administration and its invited settlers could only acquire land from natives through conquest, agreements and treaty or sale, all of which proved inefficient means of acquiring land As already noted, the hurdle was overcome, first, by extension of the Indian Lands Acquisition Act of 1894 to the East Africa Protectorate, including the region now Kenya, in 1899 Through this piece of foreign legislation, the British administration developed rules to guide its acquisition of land in Kenya
- 43 Among other effects, the Land Acquisition Act of 1894 vested all unoccupied land, including all lands situated within one mile on either side of the Kenya-Uganda Railway that was deemed necessary for the construction of the railway on the Commissioner for the Protectorate and lands over which indigenous communities shifted back and forth for cultivation and grazing³⁶ The Act also allowed for the acquisition of land for the construction of government premises and roads³⁷ In addition, it empowered the Commissioner for the Protectorate to allocate land to settlers on leases not exceeding 21 years.³⁸

33 Leys C Underdevelopment in Kenya *The Political Economy of Neo-colonialism* Berkeley University of California Press (1994) at 28

34 C Leys Underdevelopment in Kenya the political economy of neo-colonialism (1994) Berkeley University of California Press 28

35 Kahl C H *Population Growth Environmental Degradation and State-Sponsored Violence The Case of Kenya 1991-93* International Security (1998) Vol 23 (2) at 106 and Leo C The Failure of the "Progressive Farmer" in Kenya's Million Acre Settlement Scheme *Journal of Modern African Studies* (1978) Vol 16 (4) at 620

36 Land Acquisition Act of 1894

37 Land Acquisition Act of 1894

38 Land Acquisition Act of 1894

44. The Land Acquisition Act of 1894 had the effect of converting all land in Kenya that had not been appropriated by individuals or by the colonial administration into 'Crown Land', meaning land belonging to Her Majesty, the Queen of England, which she could grant to individuals in leaseholds for a term of years or in fee simple³⁹ but there was no clarity on what constituted 'Crown Land' for purposes of acquisition and use by the growing number of settlers and it was limited in quantity for the desired ends

45. Further, On 29 December 1897, the British administrators passed the East African Land Regulations which extended the period lease granted settlers to 99 years. The regulations also sought to safeguard some areas under African occupation described as those lands "that were cultivated or regularly used by any native or native tribes"⁴⁰. Alienation on such areas could only be permitted once the Commissioner for the Protectorate was satisfied that the land "was no longer in use by the native or native tribes and that the issuance of the certificate of title would not be prejudicial to the native interests"⁴¹

46. It appears from the wording of the East African Land Regulations of 1897 that initially, British administrators sought to protect land use and occupational rights of indigenous Africans in mainland Kenya. However, the years that followed saw an influx of settlers into Kenya, prompting the government to avail more land for their occupation and utilization. The colonial government realized that the 1897 Regulations were restrictive since they disallowed the alienation of land under occupation of natives or native tribes. Accordingly, it enacted the East Africa Order in Council in 1901 to provide the Commissioner with full authority to alienate 'Crown' lands. The Order in Council was also intended to define 'Crown Land' for purposes of acquisition and use by the growing number of settlers because until then, there was no clarity of what constituted it. Because 'Crown Land' was limited in quantity for the desired ends, the Order in Council also sought to expand the scope of what constituted 'Crown Land'

47. The Order defined 'Crown Land' to include all land under the control of the Queen through agreement, treaty or convention and all other lands that she was to acquire⁴². By the provisions of the order, all such land became public land which was, by the law, under the control of the Queen⁴³. However, the order fell short of conferring direct authority on the British administration to acquire land. Therefore,

39. For further reading see Okoth Ogendo, H.W. African Land Tenure Reform in AGRICULTURAL DEVELOPMENT IN KENYA 152 (Meyer J. ed. 1976)

40. East African Land Regulations

41. East African Land Regulations

42. Section 1 of the East Africa Order in Council passed in 1901

43. Section 1 of the East Africa Order in Council passed in 1901

in 1902, another ordinance - the Crown Lands Ordinance - was passed, which vested power in the British High Commissioner to Kenya Protectorate both to acquire land, including land in native settlements and villages and to sell land acquired in freeholds to any settler in lots not exceeding 1 000 hectares⁴⁴

- 48 In the process of passing, importing and implementing legislation, including the Indian Land Acquisition Act of 1894 and the Crown Lands Ordinance, the British introduced a new concept of land ownership and use, with the 'Crown' or, in modern parlance, the state, asserting itself as a political entity owning land in Kenya and having the right to grant portions of it to individual users. In some cases, the state granted rights over land occupied by natives to settlers, where such land was perceived to be owned by it, the state, on the basis of newly-introduced legislation
- 49 It is important to note, for example, that section 31 of the Crown Lands Ordinance allowed the Commissioner to "grant leases of areas of land containing native villages or settlements without specifically excluding such villages or settlements" The only land it excluded from leases to be so granted related to the "land in the actual occupation of natives at the date of the lease" It has been argued that the failure of the colonial government to define "actual occupation" left land that was in actual occupation and use by indigenous communities which was, by provision of the Ordinance, excluded from alienation, undefined⁴⁵ The failure exposed such land to further alienation and indeed, in subsequent years, a meaning of actual occupation was adopted and thereby, the British alienated more land from Africans in the region now Kenya⁴⁶
50. With a lot of land at its disposal, the British administration encouraged many Europeans to settle in Kenya and in order to facilitate their agricultural production to meet the objectives already stated, they allocated settler tracts of land of up to 1 000 hectares as permitted by the Crown Lands Ordinance of 1902 For purposes of understanding why certain areas in Kenya are, to date, prone to land-related conflicts, it is instructive to note that when European settlers arrived in Kenya, they preferred to live in certain areas that came to be known as the 'White Highlands' The areas include present-day Rift Valley, Western, Nyanza and Central regions which were considered as favourable for settlement because of their "temperate climate, fertile soil, and relatively disease-free environment"⁴⁷

⁴⁴ Section 4 of the Crown Lands Ordinance of 1902

⁴⁵ ML Kilson 'Land and the Kikuyu: A study of the relationship between land and kikuyu political movements' (1995) 40 (2) *The Journal of Negro History* 112

⁴⁶ ML Kilson 'Land and the Kikuyu: A study of the relationship between land and kikuyu political movements' (1995) 40 (2) *The Journal of Negro History* 113

⁴⁷ CH Kahl 'Population Growth, Environmental Degradation, and State-Sponsored Violence: the Case of Kenya' 1991 93 (1998) 23 (2) *International Security* 106

- 51 For further expansion, construction of the railway line and the extent of "unused land" were the main determinant of which areas became the 'White Highlands'⁴⁸ The railway was essential to the settlers since it not only determined the boundaries of the 'White Highlands',⁴⁹ it also determined the usefulness of land since "only land within reach of it was regarded as being of any commercial use."⁵⁰ Despite the fact that local communities were in actual occupation of the 'White Highlands', settlers viewed the areas as unoccupied and thus available for their occupation because they equated uncultivated land as unoccupied, possibly because they did not understand the shifting nature of occupation of land by both agrarian and pastoral communities in the region. No wonder, Sir Harry Johnston, a British administrator, described 'White Highlands' at the time as "utterly uninhabited for miles and miles or at most its inhabitants are wandering hunters who have no settled home, or whose fixed habitation is the lands outside the healthy area"⁵¹
- 52 To increase and expand settler occupation and utilization of the so-called 'White Highlands', British administrators applied the full import of provisions of their laws, including the Land Acquisition Act of 1894 and the Crown Lands Ordinance of 1902, which authorized them to acquire land through conquest, sale and agreement but there are indications that the provisions of their laws were not strictly followed because in some cases, various tactics appear to have been applied in acquiring land, including tricking illiterate community leaders into signing land alienation agreements whose terms and implications they could not and did not fully understand
- 53 Consequently, dispossessing whole communities of their land set the stage for some of the violent conflicts of land ownership and user rights that have been witnessed in recent years in Kenya
- 54 There are examples of some of the methods the British applied to acquire land from indigenous Africans. They reveal the injustices perpetrated in the process, which, in subsequent years, precipitated violent conflicts between affected communities and individuals and families from outside of the affected communities who have been deemed as unjustifiably claiming land from communities that have already suffered what, in their view, is illegal land alienation. The very act of alienation of land was an injustice. In the process, several other injustices and atrocities were committed against indigenous Africans by the British, which is why as the country

48 WTW Morgan, 'The White Highlands' of Kenya Vol. 129, No. (June 1963) *The Geographical Journal*, pg 144

49 The boundaries were for many years described only by reference to two points on the railway: at first from Kiu to Fort Ternan [now Lake Victoria] and later from Sultan Hamud to Kibigori. The alignment of the railway therefore helped to determine the areas first settled by Europeans

50 WTW Morgan, 'The "White Highlands" of Kenya Vol. 129, No. (June 1963) *The Geographical Journal*, pg 144

51 WTW Morgan, 'The "White Highlands" of Kenya Vol. 129, No. (June 1963) *The Geographical Journal*, pg 140

approached independence, large groups of people anxious for justice, such that if their land-related grievances were not addressed, they were likely to resort to self-help justice. It is important to consider British policies and laws which guided their contestable practices in relation to Africans' land.

- 55 The laws were, at independence, adopted with very minor changes and by so doing, the independent government of Kenya appears to have integrated, not only an alien land tenure on a people who had greatly suffered its injustices, but also embraced the spirit of the laws which was singly in favour of alienation of land from Africans for the benefit of the British administration and its invited European settlers. Could the spirit of the laws and, in cases where legal provisions were adopted verbatim, the letter thereof also, been the cause of failure to address land injustices at independence and the subsequent emergence of official practices in relation to land that were akin to those of the colonialists? Some insight might allow a deeper understanding of the root causes of land grabbing phenomenon in post-independent Kenya and the related violent conflicts.

Acquisition of land via agreements

- *1904 Anglo-Maasai Agreement*
- 56 The Maasai community remains one of the communities that has in post-independence Kenya been engaged in perennial wars, especially with members of the Kikuyu community over land ownership and use, especially in Enoosupukia, parts of Naivasha, and in Molo. To a small extent, the Maasai have also been periodically engaged in violent conflicts with members of the Kuria community, their neighbours to the south, especially over utilization of pasture land and watering points. What could have placed the Maasai community in a situation of actual or perceived land scarcity to the extent of armed conflict in case of perceived encroachment by members of other communities? Causes of the conflicts should be understood in a historical perspective to factor the root causes of injustices that were perpetrated by the British and subsequently, at independence, in order to find lasting solutions to the problems.
- 57 The Maasai community is Nilotic, because of its movement into Kenya from the north, having followed the River Nile into the region that is now Kenya. Upon entry into the region, the Maasai originally occupied the area now bordered by Suswa, Ol-Joro Orok and Ol-Kalou.
- 58 Being pastoralists, they moved freely with their cattle in the areas, especially in search of pasture and their movement was planned in a way that allowed

vegetation in overgrazed areas to regenerate before moving back with their cattle. Because their population was relatively low, it was not difficult for them to move back and forth with their cattle. However, they lost their land and all use rights to the British through a purportedly signed agreement in 1904.

- 59 In 1904, Maasai elders, known locally as *laibons*, through Lenana, their leader, entered into the first "agreement" with the British administrators in which they purportedly agreed to surrender their prime grazing lands in Suswa, Ol-Joro Orok and Ol-Kalou areas and move to Laikipia.⁵² It is estimated that under this agreement approximately 11 200 members of the Maasai community and over two million head of their livestock, lost their land to only 48 Europeans.⁵³
- 60 Those who signed the agreement on the part of the British administrators considered the agreement binding, even though the Maasai elders who signed it purportedly on the part of the whole community were, apparently, uneducated and may not have fully appreciated the full import of an agreement based on foreign and customarily incompatible notions of land use and related tenure. Nevertheless, once the agreement was considered to have been signed by the Maasai, they were driven to Laikipia, to pave way for settler occupation. The Maasai did not take long in their newfound land in Laikipia before they were, again, driven away, purportedly by another signed "agreement".

■ **1911 Anglo-Masaai Agreement**

- 61 When the land in Laikipia became attractive to settlers, Maasai elders purportedly signed a second agreement with the British in 1911 in which the Maasai gave away the land in Laikipia and, purportedly, agreed to move many miles away to the more arid terrain of the southern Rift Valley in the current Narok and Kajiado districts. This long journey, coupled with harsh weather condition, saw the community suffer heavy losses of human life and livestock only to settle in an area with scarce pasture and water resources, not to mention the prevalence of livestock diseases which was worsened by the presence of wildlife in the area.
- 62 Realizing that the land to the south might not sustain their livelihood, and convinced of their inability to militarily resist their removal from Laikipia,

52 See generally Felix Mukwiza Ndahinda 'Indigenusness in Africa: A Contested Legal Framework for Empowerment of "Marginalized" Communities' (2011).

53 JM Klopp 'Ethnic Clashes' and Winning Elections: The Case of Kenya's Electoral Despotism (2001) 35 (2) *Canadian Journal of African Studies* 437. O Lumumba 'The National Land Policy in Kenya: Addressing Historical Injustices' (2004) 2 *Kenya Land Alliance Issues Paper* 10. H Lotle 'Rough Time in Paradise: Blames, claims and memory making around some protected areas in Kenya' (2007) 5(3) *Conservation and Society* 310.

the Maasai challenged the 1904 and 1911 land agreements in a civil court in 1913,⁵⁴ demanding that they return to the northern highlands as well as receive compensation for the loss of their livestock.⁵⁵ Among the arguments presented were that the community leaders who purportedly signed the two agreements were illiterate and therefore unable to enter into any valid agreement.⁵⁶ They further stated that community leaders who purportedly signed the agreements had not consulted with members of the community and therefore could not be assumed to have acted on behalf of the whole community. However, despite the active assistance of sympathetic British activists and lawyers, the Maasai lost the case, as it was dismissed on technicalities and received no compensation.⁵⁷

- 63 In rejecting their claim, the court stated that the Maasai ethnic community as living within the limits of the East Africa Protectorate are not subjects of the Crown, nor was East Africa British territory. East Africa, the court maintained, being a Protectorate in which the Crown has jurisdiction is, in relation to the Crown, a foreign country under its protection and therefore, its native inhabitants were not subjects owing allegiance to the Crown, but protected foreigners who, in return for that protection, owed obedience.⁵⁸ The agreements were interpreted as, "not constituting legal contracts between the protectorate government and the Maasai signatories, but rather, as treaties between the Crown and the representatives of the Maasai, a foreign tribe living under its protection."⁵⁹
- 64 By covering the heinous acts of the representatives of the British government under the protective umbrella of "acts of state", the court found itself unable to grant relief to the Maasai plaintiffs for the serious damages suffered through deaths of their members and loss of livestock, among others. The court erroneously found that "acts of state" could not be subject of an examination by a municipal court, regardless of whether they were "just or unjust, politic or impolitic, beneficial or

54 In *Ole Njogo & Others v. The Attorney General & Others* Civil Case No. 91 of 1912 which was filed in the High court of East Africa Protectorate at Mombasa (reported in (1913) 5 EALR 70- 80) the Maasai resorted to court as the platform where they could channel their opposition to illegal alienation of their land by the colonialists. The Maasai challenged both the British representatives of the Crown and Maasai signatories to the 1911 agreement. Specifically they challenged the validity of the agreement on the ground that the signatories did not have the authority to represent the Maasai tribe. Invoking the terms of the 1904 agreement they requested the court to issue an injunction restraining the British administration officials involved from preventing their return together with their livestock to Laikipia District or from forcing those still in the District to move out.

55 See facts of the case in *Ole Njogo & Others v. The Attorney General & Others* Civil Case No. 91 of 1912 id.

56 Who owns the Land: Blood and Soil issues in the Kenya Rift Valley (2008) available at www.ogek.org/indepth/ind-who-owns-the-land.htm last accessed on (15 May 2011).

57 The case is reproduced in part in Felix Murwiza Ndahinda, *Indigenesness in Africa: A Contested Legal Framework for Empowerment of "Marginalized" Communities* (2011) At 273- 274.

58 See the extract of the ruling in Felix Mukwiza Ndahinda, *Indigenesness in Africa: A Contested Legal Framework for Empowerment of "Marginalized" Communities* (2011) at 274.

59 Felix Mukwiza Ndahinda, *Indigenesness in Africa: A Contested Legal Framework for Empowerment of "Marginalized" Communities* (2011) at 274. An ambiguity/contradiction in the ruling in the case relate to the fact, as stated by the court, that although East Africa was a foreign country outside of the dominions of the British crown, the Crown or its representatives had unlimited power in the protectorate.

injurious to those whose interests are affected”⁶⁰ The Court of Appeal upheld the dismissal of the case by the lower court on the same grounds.

- 65 Two years after the court’s decision and perhaps, in recognition of the dire consequences that the two agreements had on the Maasai community and the embarrassment that it might have caused the British administration, it passed the Crown Lands Ordinance of 1915 which prohibited land transactions between white settlers and Africans without the prior consent of the Governor of Kenya⁶¹ The Ordinance also brought all land under the control of the ‘Crown’, including lands previously reserved and actually occupied by indigenous ethnic communities and all lands reserved for the use of any particular ‘tribe’⁶²

Acquisition of land through establishment of reserves

- 66 In investigating the causes of land-related conflict in Kenya, the establishment of the so-called “native reserves” is relevant for a variety of reasons First, the establishment of the reserves was another tool applied by the British colonial administration to further alienate local communities’ prime land, thereby exposing communities, over time, to land scarcity and landlessness Secondly, the establishment of reserves for exclusive of use specific communities created a sense - in the minds of community members - of exclusive domains from which various tribes did and to date, seek to “exclude members of other ethnic communities from occupation, to the point of violent conflicts, as clearly manifested, for example, soon after national elections in late 2007 and early 2008 Further, the establishment of reserves and confinement of African communities therein made it easier for the British colonial administration to undertake further draconian measures against local communities and their members, including the introduction of forced labour upon populations captivated in the reserves, which further exposed individual community members to loss of land and use rights during long periods of forced service in European farms, as elaborated next
67. The British administration’s efforts to alienate land in mainland Kenya accelerated after World War I, when former British soldiers were encouraged to settle and engage in agricultural production activities and for that purpose, they were allowed to acquire land, ostensibly from the Crown, at concessionary rates⁶³ Settlement of ex-soldiers was facilitated by the Ex-Soldier Settlement Scheme and backed by the Crown Lands (Discharged Soldiers Settlement) Ordinance of 1921, Kenya having

60 Felix Mukwiza Ndahinda ‘Indigenesness in Africa: A Contested Legal Framework for Empowerment of Marginalized’ Communities (2011) At 274

61 Crown Lands Ordinance of 1915

62 Crown Lands Ordinance of 1915

63 CH Kahl ‘Population Growth, Environmental Degradation, and State-Sponsored Violence: The Case of Kenya, 1991-93’ (1998) 23 (2) *International Security* 106

been declared a British colony in 1920. However, only a limited amount of 'Crown Land' was suitable for settler cultivation and this provided impetus for the colonial government to alienate more land from indigenous Africans, in areas that were deemed to be of high agricultural potential by establishing and confining African communities to what was referred to as "native reserves"

- 68 As was the custom and policy of the British, a law called the Kenya (Native Areas) Ordinance, was passed in 1926 to provide basis for the establishment of reserves and to confer official recognition of their existence.⁶⁴ By then, the colonial government, had, in 1915, amended the Crown Lands Ordinance which brought all designated reserve lands occupied by Africans under the control of the Crown, thus paving way for their various forms of control of not only allocation and use of the land, but also movement within and between the lands, including forced migration onto settler farms. The 1926 Native Areas Ordinance and subsequently, the Lands Trust Ordinance passed in 1930, had indications of intention to confer Africans ownership and use rights over land in the reserves and to protect the rights by stating, for example, that in the reserves, land was set aside for use and benefit of African communities for ever and by prohibiting alienation of such land except for public purposes, in which case, land of equal value was to be substituted.⁶⁵ However, the colonial system of reserves proved to be another tool for alienation of local communities' prime land.
- 69 As the British colonial administration forced Africans into reserves purposely designated in marginal and unproductive areas which were also very limited in size, considering the numbers of individual community members and the likely increase in their population, they took over African communities' land left behind, which then formed part of 'Crown Land' to be made available to an increasing number of settlers. In most cases, reserves were designated for occupation by particular ethnic groups. The colonial government defined the boundaries of each reserve and later established the *kipande* system, an identification system, aimed at controlling the movement of local communities and their individual members from one reserve area to another. Over time, the system created, in the mind of confined communities and their members, the sense that the reserves were their exclusive domains.
- 70 It is on this basis that such communities sought to resist what they perceived as intrusion of their spaces, by the immigrant communities,⁶⁶ a notion that persisted

64 ML Kilson. *Land and the Kikuyu: A study of the relationship between land and kikuyu political movements* (1995) 40 (2) *The Journal of Negro History* 115

65 EW Smith. *Land in Kenya* (1936) 35 (140) *Journal of the Royal African Society* 246

66 Republic of Kenya. *Report of the Commission of Inquiry into Land Law System of Kenya on Principles of a National Land Policy Framework: Constitutional Position on Land and New Institutional Framework for Land Administration*. Nairobi: Government of Kenya 2002

to the present time, now manifested by contentious rejection of individuals and families seeking to undertake business or settle in areas considered as belonging to other tribes and forceful eviction of families and individual members of communities considered not to belong to a particular ethnic community, in various parts of Kenya. The Commission of Inquiry into the Land Law System in Kenya established in the year 2002 found that it is on the basis of the notion that reserves were their exclusive domains that communities (tribes) sought and still seek to resist what they perceive as intrusion of their space by immigrant communities and/or their members.⁶⁷

Acquisition of land through coercive measures

- 71 Related to the establishment of reserves were other measures whose end result was exposure of individuals and families to landlessness and poverty - the introduction of forced African labour, forced military service and forced taxation upon communities already held captive in defined reserves. The financial and political measures introduced included the introduction of the Hut and Poll taxes under the Native Hut and Poll Tax Ordinance requiring payment of taxes by Africans, the Masters and Servants Ordinance mandating Africans to provide forced agricultural labour to Europeans, the 1918 Resident Native (Squatters) Ordinance and the *kipande* (pass book) system, to mention a few. Moreover, as African populations increased, the reserves, in time, became overcrowded and could not accommodate all community members and yet movement from one reserve to another was restricted.
- 72 In order to create a large, cheap African labour force to serve as agricultural labourers in settler farms, the British colonial administration imposed taxes on individual Africans and tax had to be paid in the British currency, which could only be earned by employment in the service of the British and the only employment available for most Africans already quarantined in the reserves was labour on European farms.⁶⁸ In many cases, Africans were also forcibly captured from the reserves and compelled to provide labour on European farms, while other captives served in the British military.⁶⁹

67 Republic of Kenya. Report of the Commission of Inquiry into Land Law System of Kenya on Principles of a National Land Policy Framework. Constitutional Position on Land and New Institutional Framework for Land Administration. Nairobi: Government of Kenya, 2002.

68 These financial and political measures included the introduction of the Hut and Poll taxes under the Native Hut and Poll Tax Ordinance, the Masters and Servants Ordinance, the 1918 Resident Native (Squatters) Ordinance and the *Kipande* (pass book) system to mention a few.

69 These financial and political measures included the introduction of the Hut and Poll taxes under the Native Hut and Poll Tax Ordinance, the Masters and Servants Ordinance, the 1918 Resident Native (Squatters) Ordinance and the *Kipande* (pass book) system to mention a few.

- 73 Since most of the pastoralist communities in the 'White Highlands' did not have cultivation of land as an established practice, the colonial administration resorted to forced recruitment of labour from the other areas, Central, Nyanza and Western provinces, which saw mass migration of the Kikuyu, Abagusii, Luhya, and Luo as 'squatter' labourers on settler farms.⁷⁰ As individuals entered into forced labour, they and in many cases, other members of their families, lost their lots in the increasingly crowded reserves. Immigrant communities were also victims of land alienation, having lost their land to the European settlers in other parts of the 'White Highlands'.⁷¹
- 74 As the population of Africans increased in the reserve confinement, families suffered land scarcity and landlessness, many ending up as squatter labourers on European farms to eke out a living. It also resulted in subsistence production pressures on land which had negative implications for the livelihoods of Africans, especially because native reserves consisted of large numbers of people concentrated in small land areas to allow intensive and extensive extraction of land resources in the settler farms. The capacity of Africans to purchase land elsewhere was curtailed by a blanket prohibition of African cultivation of cash crops and rearing of graded cattle as a way of shielding European settlers from economic competition.

Acquisition of land through forced evictions

- 75 Evidence obtained through testimonies of affected community members indicated that a number of African communities lost their land to British settlers through forced evictions. It emerges from the evidence that the British applied a number of tactics to first gain acceptance by Africans and then use their acquaintances to better understand community members enough to develop strategies for their eventual eviction from prime lands.

Forceful eviction of the Talai, Pokot and Turkana

- 76 Three of the communities that suffered loss of land through such schemes are the Talai, a sub-tribe of the Kalenjin community, and the Turkana. In both cases, white settlers who came as either investors or missionaries established their homes in close proximity to African families and first developed friendly interactions with the Africans, characterized by giving of free gifts to the Africans in circumstances shrouded in false religious piety.

70 CH Kahl, *Population Growth, Environmental Degradation, and State Sponsored Violence: the Case of Kenya 1991-93* (1998) 23 (2) *International Security* 106. Human Rights /Africa Watch, *Divide and Rule: State Sponsored Ethnic Violence in Kenya* (November 1993) *Human Rights Watch* 23.

71 CH Kahl, *Population Growth, Environmental Degradation, and State-Sponsored Violence: the Case of Kenya 1991-93* (1998) 23 (2) *International Security* 106 quoting Africa Watch, *Kenya: Taking Liberties*, p. 2.

77 Once they gained acceptance and trust of local communities, the settlers advanced their schemes to requests for farm produce from Africans and eventually, followed by demands for livestock and livestock products and, where families resisted, confiscation of the products. In some cases, African communities living in close proximity to Europeans making such advances fled their homes and farm lands when the settler demands became unbearable, whereupon, the settlers took over their prime lands. In other cases, African resistance of white settler demands caused the settlers to forcefully evict them from their homes and once they vacated their land, the settlers took them over without compensation or consideration of their plight at all. The situation is best described by the testimony of John Auta Asili below:

The colonialists came as investors and missionaries. They build their houses on top of the hill. During that time, the community was attracted to known white persons. First of all, they did not understand each other because their languages were different. The colonialists used to speak in English while the local people used to speak in Kikuyu and Kamba languages. They tried being friendly by using religious phrases. They built their houses near that community. During that time, the farms were so big that some of them were not used. First, they tried being friendly by giving sugar to Matongoro and Misooni communities in Garech, Jericho, Mti Mmoja and other areas. They even taught them how to make sugar. They attracted the community very much. They started to ask them about their ways of living. They started sending them to the communities to ask for milk. They would use sentences such as "Sir, I need milk." The community used to think that these people were only being friendly to the community. Later on, terrible things started to happen. The colonialists started asking for cows so that they could slaughter for their visitors. Things started to become terrible because there were people who used to betray others in the community. The English people started using such persons to solicit for cows. So, there emerged a struggle between the local communities and the English people. That was when the community decided to move further away, and their friendship with the English people stopped at that time. The colonialists started grabbing the land of the communities and even took their animals by force. They started saying that all that property was theirs.⁷²

78 For the indigenous communities that attempted to resist the oppressive interactions of white settlers and fought back, such as the Pokot and the Talai, the manner of forced eviction attracted dire consequences. The colonial government responded with great force and evicted them from their land, with the Pokot being driven to Uganda while the Talai clan members were forced to move far away from the Rift Valley to Gwassu in South Nyanza. The testimony of David Nasura Tuwei, on behalf of the members of the Talai clan, explains the tribulations that the community underwent and the effects of forcible eviction that they suffered as follows:

72 TJRC/Hansard/Public Hearing/Murang'a/ 10 November 2011/p. 21 para 1-4

Our forefathers resisted the colonialists and were either exiled or imprisoned. The most interesting or sad thing is that never in the history of Africa regarding the European intrusion has a whole community consisting of children, women, old men and even animals been exiled. They were not given a chance to defend themselves in the court of law. Normally, leaders would be exiled or jailed just like Mzee Jomo Kenyatta and Nelson Mandela of South Africa. But in this case, it was hundreds of innocent people. This was the worst violation of human rights by the colonial government. They [the colonial administrators] chased them [members of the Talai clan] to Gwassı in South Nyanza which is a dry place with little rain and is infested with tsetse flies, snakes and other animals. In October, 1934, the Talai trekked for 13 days from Sondu, near the Kipsigis boundary to Gwassı. Within that period, 14 women who were pregnant miscarried while cows, sheep and goats died. Several Talai women and children died as a result of the Gwassı bug. That confirms that the colonial government wanted those people to die. The British Colonial Government uprooted the Talai from the prestigious positions of leadership to destitute marginalized minority groups that have been relegated from the leadership and reduced to useless beggars. Their position before the colonialists was equivalent to the British Royal Family and Uganda's Kabaka Kingdom.⁷³

- 79 The eviction of the Talai clan was apparently effected under the Laibon Removal Ordinance of 1934, which contained harsh provisions for forceful eviction of African communities, directing those removed, as the Talai
- to the settlement area and compulsory settlement in the "rocky area with high hills" on the shores of Lake Victoria and Mung'ori Bay.⁷⁴
- 80 On the basis of its provisions, the Talai appear to have suffered the worst form of human of human rights deprivation in Kenya.⁷⁵
- 81 To ensure that resistant communities such as the Talai did not return and as a way of guaranteeing security of persons and property to the European settlers and that land alienation from Africans to white settlers proceeded without hindrance, the colonial government established a number of police forces and security

73 TJRC/Hansard/Public Hearing/Kericho/19 September 2011/p. 54 & 55

74 The Laibon Removal Ordinance (1934) (Kenya) section 7

75 Under the Ordinance, the Provincial Commissioners of Rift Valley and Nyanza were granted sweeping powers to take the fingerprints of all the members of the Talai clan for the purposes of compiling a register. The PC had the powers to demand answers to questions of ancestry from any person suspected to be a Talai and he alone, could declare one a Laibon and cause him to be removed to Gwassı or other concentration camps.

"Any person who is aggrieved by any entry relating to him or his family made or proposed to be made in a register may appeal to the PC against such entry" reads section 8 (5) of the ordinance. The law further gave the PC powers to establish concentration camps to collect and detain the Laibons and their families therein and also organise compulsory movement of the Laibons and their livestock.

Section 10(c) of the Ordinance was meant to deter any escape as the PC was given powers to "To arrange for the guarding of the Laibons and their families in camps or temporary holding places to prevent their escape."

The Law was very harsh on any member of the clan who withheld any information concerning their parentage and ancestral background and provided for the arrest of such individuals without a warrant who upon conviction could be jailed for six months or fined a maximum of Sh. 300.

formations which included the White Settler Regiment, Police Reserve, the General Service Unit, and the Home Guard unit. The forces were notoriously associated with severe physical assault of community members prior to eviction from their land.⁷⁶ The Home Guard unit grew into a formidable counter-African insurgency force under the control and command of chiefs, the provincial administration and local settlers.⁷⁷

■ ***Forceful evictions of the Elgon Maasai/Sabaot***

82. The Sabaot, as they are widely known in Kenya today, offer the clearest example of a people in Kenya who have, in the recent past, organised what might appropriately be referred to as a 'tribal army' to fight for land-related injustices, especially forceful eviction and acquisition of their land. Although most Kenyans may be familiar with the internal wars waged by the Sabaot Land Defence Force (SLDF) in recent years, especially in 2008 to 2010 to evict those they perceive to have either directly illegally acquired their ancestral land or assisted members of other ethnic communities to acquire their land unjustifiably, few people, if at all, are aware that since the period of colonialism, the Sabaot have suffered systematic forced evictions and illegal alienation of their land, first, by the British and later, by officials in subsequent post-independence governments. The Sabaot's plight is hereby elaborated in the hope that it will elicit immediate government action to address both past and recent land-related injustices that members of the community have been subjected to. It comes out clearly that had the previous post-independence governments addressed the land-related injustices that the Sabaot have suffered, the country would not have experienced repercussions of the self-help measures of SLDF.
83. As early as 1913, the Sabaot, then known as Elgon Maasai, suffered forced evictions by the British settlers who ordered them to move out of Trans Nzoia to pave way for white settlements.⁷⁸ In 1914, the following year, forceful eviction of the Sabaot community was intensified by settlers in an operation dubbed, "*Elgon Kwenda Operation*" which involved, among other things, confiscation of their livestock while the livestock belonging to Africans who collaborated with the British were spared, in order to force the community to move further away from Trans Nzoia, which was their homeland.⁷⁹
84. Forceful actions targeting the whole community were complemented by actions targeting key members of the community who were deemed to be occupying

⁷⁶ Gertzel Cherry *The Politics of Independent Kenya* 1963-8 (Nairobi 1970) pp 13-5

⁷⁷ See Gertzel Cherry *The Politics of Independent Kenya* 1963-8 (Nairobi 1970), pp 13-5

⁷⁸ The eviction is recognized in Gazette Notice No. 418 of 11th June 1932 which details the finding by the Carter Commission

⁷⁹ The Indigenous- Elgony-Maasai (Kony) Sabaots Memorandum Presented to the TJRC at Kitale, Trans Nzoia County, 20th October 2011, at page 16 (TJRC/KTU/001(Exhibits))

prime land. For example, in 1920, Sabaot Chief Kasis arap Kipkwemboi was forced to give his homestead to a Mr Arthur M. Champion, the First District Commissioner for Trans Nzoia District, to establish an administration centre, and his homestead later became the DC's office.⁸⁰

- 85 Between 1921 and 1922, more members of the Sabaot community were moved out of Trans Nzoia after the land they were occupying was declared part of 'Crown Land'. The rest of the people were forcibly recruited as farm labourers for Europeans. In 1924, all of the members of the community who had, for one reason or another, remained in the region were declared squatters in Trans Nzoia. When, in 1929, an opportunity became available, they were the first African community in the region now Kenya to present their claims to the Carter Commission on land that had been set up by the British.⁸¹ However, although the commission, headed by Sir William Morris, recommended that the community be given 80,000 hectares of land in compensation for lost land and two million pounds in compensation for lost livestock and homes, the recommendation was never honoured. Instead, the community was further dispossessed when in 1931, the then District Commissioner, John Lionel Bretherton Llywelyn, moved 200 members of the tribe with their 5,600 heads of cattle to Sebei country (District) in Uganda while between 12 and 15 remaining families were sent off to the Maasai reserve in Narok and West Suk (Pokot District).⁸²
- 86 The situation of the Sabaot including their livelihood was worsened by the fact that when, in 1938, a Native Land Trust Ordinance was passed for the purpose of settling African communities that had been dispersed and detribalized through forceful evictions, no reserve was established for the Sabaot/Elgon Maasai.⁸³ Moreover, in 1940, male members of the Sabaot were deliberately recruited as carrier corps while their wives were recruited into forced labour force for white settlers.⁸⁴
- 87 During negotiations for independence, the British government and representatives of Kenyatta's government that was to take over governance agreed to resettle African communities that had been displaced by white settler activities in the country. To give pre-eminence to resolution of their grievances over land, the Sabaot, then known as Elgon Maasai, were represented in Lancaster House conferences where

80 The Indigenous - Elgony-Maasai (Kony) Sabaot's Memorandum Presented to the TJRC at Kitale. Trans Nzoia County. 20th October 2011. at page 17 (TJRC/KTL/001(Exhibits))

81 The Indigenous - Elgony Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale. Trans Nzoia County. 20th October 2011. at 17 - 19 (TJRC/KTL/001(Exhibits))

82 The Indigenous - Elgony-Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale. Trans Nzoia County. 20th October 2011. at 19 (TJRC/KTL/001(Exhibits))

83 The Indigenous - Elgony-Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale, Trans Nzoia County. 20th October 2011, at 19 (TJRC/KTL/001(Exhibits))

84 The Indigenous - Elgony Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale. Trans Nzoia County, 20th October 2011. at 19 (TJRC/KTL/001(Exhibits))

it was agreed in 1961 and 1962 that land that had been forcefully taken away from African communities, including the Sabaot, would be restored to them. Kenyatta who was to become the first president affirmed the agreement on 5 February 1962 upon his return from London by stating that

Katika katiba mpya, serikali yenu imeahidi kila sehemu ya inchi, kama ni ya Maasai, itakaa kama ilivyo, ikitawaliwa na Maasai wenyewe kama ni ya wa Nandi, wa Nandi watatawala inchi yao, hiyo ni kusema, ardhi yao Hakuna mtu kutoka nje kwenda kunyakua mali yao Mashamba yao ni shauri yao kujua watafanya nini nayo⁸⁵

- 88 Kenyatta's sentiments and pledge echoed the intention and measures that the British government had established to resettle African communities that were evicted from their homelands during the colonial administration which had, by the time of the negotiations, also established a Ministry of Lands and Resettlement for the purpose of resettling African communities that had lost their land to white settlers through forced evictions. However, Kenyatta never honoured the promise. Instead of resettling the Sabaot community in Trans Nzoia, parts of Trans Nzoia District, including Uasin Gishu District (now, Lugari), were carved out and made settlement schemes for members of the Luhya communities from North Kavirondo⁸⁶
- 89 Members of the Sabaot community claim that, in an unexplained change of mind, the Kenyatta administration not only changed the name of the Ministry of Lands and Resettlement to the Ministry of Lands and Settlement, for which the Sabaot still demand an explanation, but also "facilitated the re-grabbing of the Sabaot homeland by Luhya political allies of both Kenyatta and Moi, including Masinde Muliro"⁸⁷ It was shocking for members of the Sabaot community that in 1963, when Masinde Muliro became Member of Parliament for Kitale East, he moved to Trans Nzoia in the Rift Valley Province to campaign for or advance the interests of the Bukusu community who, by then, occupied parts of former 'White Highlands' farms that had been forcibly taken away from the Sabaot community.⁸⁸
- 90 By the time Moi took over power, some members of the Sabaot community had settled at Kiboroa as a result of forced evictions during the colonial period⁸⁹ A head count conducted in 1987 by the provincial administration in efforts to re-settle

⁸⁵ The Indigenous- Elgony- Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale, Trans Nzoia County, 20th October 2011, at 20 (TJRC/KTL/001(Exhibits))

⁸⁶ The Indigenous- Elgony- Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale, Trans Nzoia County, 20th October 2011, at 19 (TJRC/KTL/001(Exhibits))

⁸⁷ The Indigenous- Elgony- Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale, Trans Nzoia County, 20th October 2011, at 19 (TJRC/KTL/001(Exhibits))

⁸⁸ The Indigenous- Elgony- Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale, Trans Nzoia County, 20th October 2011, at 20 (TJRC/KTL/001(Exhibits))

⁸⁹ The Indigenous- Elgony- Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale, Trans Nzoia County, 20th October 2011, at 20 (TJRC/KTL/001(Exhibits))

members of the community found that 1 062 families had settled in Kiboroa. However, instead of affirming their re-settlement in the area, the provincial administration evicted them after the count and in the process, they were scattered, some living in forests, others in trading centres, while some ended up as farm labourers.⁹⁰ Thus Moi's administration failed to recognise and address the community's land problem

- 91 Apparently, members of the Sabaot community had very high hopes for the addressing their land grievances through a new national constitution. During the National Referendum held in 2010, they voted in favour of a new Constitution that would establish a National Land Commission to address the historical land injustices that they have suffered over the years.⁹¹ However, to their dismay, instead of resolving their land grievances, the government, in February 2011, brought internally displaced persons (IDPs) to settle on part of their land in Chepchoina.⁹²
- 92 The foregoing analogy of the Sabaot's land problem indicates that when members of the community finally decided to take matters in their hands to resolve their problem through self-help measures, they had valid reasons for doing so. Therefore, it is very unfortunate that the Mwai Kibaki administration responded to the problem with brutal force that was never complemented by any meaningful efforts to address the root causes of emergence and activities of the SLDF

Land alienation and displacement by multinational corporations

- 93 Apart from the colonial administration and its white settler demand for land, multinational corporations, many of which had European origin, also contributed to displacement and landlessness of African communities, especially in Kericho and other parts of the Rift Valley. In various parts of Rift Valley, especially in Kericho, such companies acquired large tracts of land that was initially meant for the resettlement of African communities in the area for cultivation of tea.⁹³
- 94 Companies that were allocated most of the productive land in the Rift Valley in 1923 on lease for 999 years were, notably James Finlay Company Limited (formerly the African Highlands Produce Company Ltd) and Unilever Kenya Ltd (formerly Brooke Bond). These companies, among others, acquired land at the expense of the local landless Africans in the affected areas

90 The Indigenous- Elgony-Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale Trans Nzoia County 20th October 2011 at 20 (TJRC/KTL/001(Exhibits))

91 The Indigenous- Elgony-Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale Trans Nzoia County 20th October 2011 at 20 (TJRC/KTL/001(Exhibits))

92 The Indigenous- Elgony-Maasai (Kony) Sabaot Memorandum Presented to the TJRC at Kitale Trans Nzoia County 20th October 2011 at 20 (TJRC/KTL/001(Exhibits))

93 TJRC/Hansard/Public Hearing/Kericho/19 September 2011/ p. 49 & 50

- 95 Land leases granted to the companies by the colonial government was also for very long periods of time, being 999 years from 1923, yet the leases covered very large tracts of land that should have benefited the landless at the time of allocation and provided room for local community expansion necessitated by population growth⁹⁴ It is recommended that on the basis of permissive provisions of the current Constitution, the 999 lease period should be reviewed with a view to reducing it to no more than 45 years

Land alienation during the Mau Mau movement

- 96 Repressive tendencies of the British, especially forced eviction of Africans from their homelands, coupled with alienation of evictees' land, which was made worse by, among other things, the suffering of Africans in squalid conditions in the overpopulated reserves and restrictions on African commodity production, precipitated an African freedom movement in the nature of a land and freedom army, known as Mau Mau⁹⁵ The Mau Mau, which comprised members of a number of African ethnic communities that had, among other things, been dispossessed of their land, under the leadership of members of the Kikuyu community, launched several violent assaults against officers serving the colonial administration in Kenya and their African collaborators, in a bid to recover their land and regain freedom from oppression⁹⁶ Attacks organized largely in forest areas and staged by the Mau Mau prompted the colonial government to declare a 'State of Emergency' in Kenya in 1952 and that provided the colonial administration another chance to unjustifiably alienate Africans' land
- 97 During the emergency period, persons suspected to be members of the Mau Mau movement were either killed, detained or repatriated from their settlement schemes, including Olenguruone Settlement Scheme in Nakuru, Rift Valley, from which some of the members of the Mau Mau were repatriated to Central Province
- 98 Under the guise of the declared State of Emergency, the British colonial administration took draconian measures against Africans, including repatriation from their settlements, arrest and detention of members or sympathizers of

94 TJRC/Hansard/Public Hearing/Kericho/19 September 2011/ p. 49 & 50

95 Kanyinga k Land Redistribution in Kenya' in HP B Mkhize Et al (eds) *Agricultural land redistribution: Towards greater consensus* (2010) 93 JW Wakhungu C Huggins & E Nyukuri Land tenure and violent conflict in Kenya (2008) *African Centre for Technology Studies* 2 C Leo The Failure of the 'Progressive Farmer' in Kenya's Million Acre Settlement Scheme (1978) 16 (4) *The Journal of Modern African Studies* 620 Human Rights/Africa Watch Divide and Rule State Sponsored Ethnic Violence in Kenya (November 1993) *Human Rights Watch* 23, RR Simiyu Militianisation of resource conflict The case of land-based conflict in the Mount Elgon region of Western Kenya (2008) Institute for Security Studies 4 available at <http://www.iss.co.za/uploads/M152FULL.PDF> (accessed on 3 May 2012)

96 CH Kahl Population Growth Environmental Degradation and State-Sponsored Violence the Case of Kenya, 1991-93 (1998) 23 (2) *International Security* 107 C Leys Underdevelopment in Kenya the political economy of neo-colonialism (1994) *Berkeley University of California Press* 49



Mr. Charles Njaraba testifying on the plight of Mau Mau families during the TJRC's Rumuruti hearings.

the Mau Mau. Land was alienated from those associated with the Mau Mau and allocated to those who were loyal to the administration as a punishment for what it considered as acts of terror against the settler community.⁹⁷ Thus the Mau Mau movement attracted further African land alienation by the colonial administration and attendant landlessness and destitution because when Mau Mau fighters and their collaborators returned from war, they found that their land and other property had been confiscated by British administration loyalists including 'home guards' and the provincial administration. It is noted that the declaration of emergency also, as a colonial measure, permitted the colonial administration to suspend hearing and determination of land-related suits in African courts through the enactment of the 1957 African Courts (Suspension of Land Suits) Ordinance, which made it impossible for affected Africans to present their claims in court for redress and thus foreclosed their right to justice in respect of land ownership and utilization in the colonial period.⁹⁸

97 JW Harbeson, 'Land reforms and politics in Kenya, 1954-70' (1971) 9 (2) *The Journal of Modern African Studies* 236; C Leys, 'Underdevelopment in Kenya: the political economy of neo-colonialism' (1994) Berkeley: University of California Press 48.

98 JW Harbeson, 'Land reforms and politics in Kenya, 1954-70' (1971) 9 (2) *The Journal of Modern African Studies* 236; C Leys, 'Underdevelopment in Kenya: the political economy of neo-colonialism' (1994) Berkeley: University of California Press 48.

99. The significance of loss of land through alienation during the Mau Mau movement lies not only in its precipitation of land scarcity, landlessness and destitution, but also in the fact that it precipitated inter and intra-ethnic tensions and subsequent violent conflicts among ethnic communities, including the Kikuyu and between the Kikuyu and Maasai and the Kalenjin before and after independence⁹⁹ Some of the then precipitated land-related violent conflicts have been witnessed between the Kikuyu and the Maasai in Olenguruone and also between the Kikuyu and the Kalenjin in the Rift Valley, even as late as the year 2008 That said, it is worth noting that in post-independent Kenya, certain factors emerged soon after independence that have fostered and worsened inter-ethnic land-related conflicts in the areas cited, among others, in the country For a better understanding, the factors are elaborated in following sections of this chapter

Land alienation and the Swynnerton Plan

100. The Mau Mau uprising, being the only concerted and determined violent effort by Africans from across the ethnic divide - with sustained impacts on white settlers since invasion by Arabs at the Coast of Kenya to gain independence from colonialism - compelled the British colonial administration to reconsider their policies and practices in relation to Africans' land, apparently to make land concessions to Africans In that regard, a policy in the form of the Swynnerton Plan was developed in 1954 which stated that the traditional system of tenure in African reserves promoted fragmentation of the land holdings into smaller and uneconomical land units for production and sought to provide solutions to improve and make African land tenure systems contribute to the economic development of the colony¹⁰⁰ For the first time, the colonial administration, through the Swynnerton Plan, allowed Africans to not only buy land and acquire titles to land in the White Highlands but also, facilitated the acquisition of credit, and removed the restriction on the cultivation of export crops by Africans¹⁰¹ However, the Swynnerton Plan generated serious negative consequences, which are, to some extent, still being felt in Kenya to date, as the following paragraphs reveal
101. Measures that were provided for and implemented under the Swynnerton Plan failed to properly factor African's widespread customary land tenure and introduced a title registration aspect of a colonial land tenure that was both alien and incompatible with Africans' land holding, use, distribution and

99. JW Wakhungu, C Huggins & E Nyukuri, Land tenure and violent conflict in Kenya (2008) *African Centre for Technology Studies* 2

100. The Swynnerton Plan was named after R J M Swynnerton, the then Assistant Director of Agriculture who designed it

101. CH Kahl, Population Growth, Environmental Degradation and State-Sponsored Violence: the Case of Kenya, 1991-93 (1998) 23 (2) *International Security* 107. K Kanyinga, Land Redistribution in Kenya, in HP B Mkhize Et al (eds) *Agricultural land redistribution Towards greater consensus* (2010) 92

transmission customs and practices. It also failed to recognize and redress of previous cases of Africans' land alienation by both the British and Arabs and resulted in more landlessness and scarcity in many areas and communities across the country.

102. The Swynnerton Plan provided for, among other things, a process of land adjudication, consolidation and registration of adjudicated parcels of land in the names of those identified as owners.¹⁰² However, under the plan, land was registered in the names of present male-heads of households who were conferred use rights without recognition of use rights of female heads of households whose husbands were still operating in the Mau Mau, largely outside of designated settlement areas. It did not also recognize the use rights of those whose husbands had died - some of them at the hands of the British and female relatives who had use rights over the land.¹⁰³

Effects of colonial land laws, policies and practices

103. In a number of paragraphs in the foregoing section, a various impacts of colonial land policies, laws and practices on Africans and their land ownership and use rights have been explained in the expectation that it provides the basis for factoring the injustices in current measures for redress. The discussion reveals, among other things, that colonial policies, laws and practices had both immediate and long-term effects on African communities, including permanent displacement. They further created arbitrary ethnic specific boundaries, thus generating a notion of exclusivity of land rights by certain communities in certain areas. They disrupted the socio-cultural and economic life of many communities, including those at the Coast, thus exposing families and succeeding generations to landlessness. These policies, laws and practices promoted inequality in land and related rights, poverty and destitution in addition to barring Africans from owning land in the White Highlands.
104. When, in subsequent years, the ban was lifted; the interests of communities and families that were evicted from prime lands in the highlands ought to have been considered first. They also created a system of land tenure based on hitherto, alien principles of English property law, with limited application to high-potential areas, while largely neglecting the regime of customary property law in the marginal areas to which they were confined with negative consequences on Africans' land use practices, productivity and progress. They diminished African

¹⁰² Swynnerton, R.J.M., *A Plan to Intensify the Development of African Agriculture in Kenya*, (Nairobi, 1954), Government Printer.

¹⁰³ Wakhungu, J. W., Huggins, C. & Nyukuri, E., *Land Tenure and Violent Conflict in Kenya*, African Centre for Technology Studies (2008) at 2.

customary land tenure, making the establishment of an appropriate, comparable and compatible tenure necessary during and after independence. They caused many local communities including the Maasai and Nandi lose an estimated five million hectares of land to white settlers¹⁰⁴. Further, they generated equality and discrimination in access to land and related infrastructure and social amenities that were mainly concentrated in the areas occupied exclusively by the colonial administrators and the white settlers and thus was the genesis of the current imbalance in the country in the various respects. The selective registration system generated tension within and between families and several land-related injustices that required immediate redress after independence.

105. The elaboration also shows why land-related conflicts were likely to arise among various communities in the country and between communities and the government, if prompt and appropriate redress measures took long to genuinely implement. It reveals, for example, that reserves for confinement of Africans were created by the British arbitrarily in various parts of the country and their boundaries defined, regardless of previous occupations by communities (tribes) in the pre-colonial period, thus compelling communities of different origins to live together as neighbours regardless of whether they had nothing in common such as shared ancestry, identity, language, economic livelihood or culture¹⁰⁵. The situation did and has, over the years, resulted in ethnic suspicion, mistrust, tension and structured violent conflicts¹⁰⁶.
106. Further, elaboration on the preceding paragraphs show that although the letter and spirit of colonial land laws and related facilitating laws and regulations such as the Masters and Servants Ordinance were intended to extract both Africans' land and labour for the benefit of the British and their collaborators, many of the laws (including their letter and spirit) were adopted at independence without overhauling their basic tenets that were, not at all, in the interest of Africans. Therefore, the laws could have hindered an acceptable transition in terms of land ownership and use rights from the British to Africans at independence and in years to come thereafter.

104. See for example Maloba Wanyabari, *Mau Mau and Kenya: An Analysis of a Peasant Revolt* (London: 1993) p 27. Lonsdale, *Conquest State* in Berman Bruce and Lonsdale John, *Unhappy Valley: Book One: State and Class* (London: 1992) p 38.

105. Anderson, David M. 'Yours in Struggle for Majimbo': Nationalism and the Party Politics of Decolonization in Kenya, 1955-64' *Journal of Contemporary History*, Vol. 40, no. 3 (2005) confirms that ethnicity was an important variable in the definition of administrative boundaries since it was based on the colonial policy of divide and rule.

106. Kenya Regional Boundaries Commission, *Report of the Regional Boundaries Commission* (London: 1962).

Land and the Transition to Independence

- 107 This section of this chapter explains, among other things, that there has always been a strong linkage between land and politics in Kenya. It also explains that land occupied settler politics throughout the colonial period and was the fundamental issue in the independence movement,¹⁰⁷ which helps to understand why land remains a politically sensitive issue in the country. It is revealed that the role of political parties in addressing land questions at independence was significant in so far as party founders, members and their leaders embraced the land question as key. The section further demonstrates that land was the focus of negotiations for independence between the British colonial administration and the local elites and the negotiations raised the hope of Kenyans at the time that upon attaining independence, all land-related claims would be resolved with finality, which is why failure by the first independent government to fully address existing land issues was likely to perpetrate inter-ethnic conflict for years to come. Further, it reveals the historical roots of some of the current political and related land struggles.
- 108 All of the foregoing colonial policies, laws and practices, as well as the negative impacts that they engendered, collectively generated a land question embodying various land issues arising during colonialism, which became a key motivation for the formation of various local political groups pressing for Kenya's independence. Political parties which emerged from various parts of the country in the late 1950s with land rights for Africans and freedom from colonisation as a common agenda included the Kikuyu Central Association, the Young Kavirondo Tax Payers Association and the Mwambao United Front.
- 109 Although land was a common agenda for all the groups, there was constant tension and conflict between their members representing Africans in the Legislative Assembly (Legco), especially in the late 1950s and early 1960s on modalities and arrangements for independence, which would have skewed negotiations between them and their British counterparts. In order to overcome the hurdle, on 14 May 1960, the Kenya Africa National Union (KANU) was founded as some sort of umbrella political organization, but with leadership dominated by representatives from larger and more influential ethnic groups including the Kikuyu, Luo, Embu, Meru and Kamba. Divergence of views between KANU and other parties subsequently formed was to delay negotiations with the British on land but eventually, agreements were reached which Kenyans could lay their hopes on for resolution of land rights claims.

107 The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer* 1

110. KANU favoured rapid decolonisation, social reforms, a prominent state role in the economy and open competition for land, based on the willing-buyer, willing-seller options and availability of and access to resources, unfettered by ethnic boundaries, in which case, their communities would perform relatively well.¹⁰⁸ The position was not well received by political representatives of other local communities who seemed to prefer a more cautious and tolerant (to settlers) approach to the land question.
111. Consequently, on 25 June 1960, the leaders of four regional alliances - the Kalenjin Political Alliance of Daniel Moi and Taaita Towett, the Coastal African People's Union of Ronald Ngala, the Maasai United Front led by John Keen and John Koncheloh, the Kenya Africa People's Party of Masinde Muliro and Somali leaders - agreed a merger to create a competing national coalition, the Kenya African Democratic Union (KADU). Its key assets were its position on land, and the desire of the (more socially conservative) coastal and pastoral communities to avoid continued dominance by the Kikuyu and Luo themes in post-independence politics. KADU had the backing of the European settlers as it promised to protect their farms and support liberal economic policies.¹⁰⁹ The divergence of views, especially on land, between the then political coalition parties threatened to derail discussions between them and negotiations on land, as part of the independence package, but the situation was saved by a surprising position adopted by a British party leader during one of the conferences that were held in London to discuss the issues, known as the Lancaster House conferences.

The First Lancaster House Conference

112. At the First Lancaster House Conference held in London between January and March 1960, conflict between KANU and KADU arising from their divergent views on land marred negotiations. However, with the continued African pressure for independence, the toll it wrought on British settlers and continued conflict over land, strengthened by changing British attitude over Kenya colony prompted Mr Harold Macmillan, a British Conservative Party leader, and the newly-appointed British Colonial Secretary Ian Macleod to agree that British rule could no longer hold in Kenya simply because of the white settlers' interests, which were mainly in land within the White Highlands.¹¹⁰ Both British representatives also expressed the view that since multi-racialism policy attempts could not offer a long-term solution to conflicts between white settlers and Africans, the legitimacy of African nationalism must be accepted.¹¹¹

¹⁰⁸ Charles Hornsby, *KENYA, A History Since Independence*, 2012, p.61

¹⁰⁹ *Ibid* p.61.

¹¹⁰ The First Lancaster House Conference is described in Oginga Odinga, *Not Yet Uhuru*, pp.178-82, see also Kyle: *Politics*, pp.102-8.

¹¹¹ Kyle, Keith, *The Politics of Independence of Kenya* (Basingstoke, 1999), pp.99-102.

113. On the basis of strong sentiments expressed by the colonial administration's representatives to Kenya, the colonial administration declared Britain's intent to recognize a "wind of change" blowing across the continent of Africa that colonial powers could no longer hold back and the need for it to withdraw from all its remaining colonies. Although they feared that their African colonies, including Kenya, were not ready for independence, the British judged the dangers of delay - violence, radicalization and a turn to communism - to be a higher risk. As part of the package of the expected political change, the colonial secretary appointed a new British representative, Sir Patrick Renison, to replace Governor Evelyn Baring in Kenya.¹¹²
114. After the deliberations at the First Lancaster House Conference, many European settlers felt abandoned by the British government, with no guarantee of what would happen to their land if Kenya attained independence. Unless they were willing to resort to violence, the colony would move towards a majority rule, dominated by Africans. To avert looming danger to settler interests, an arrangement was made, under the British influence, to include four African leaders, Ronald Ngala, James Muimi, Gikonyo Kiano and Taaita Towett, under the African Elected Member Organization (AEMO), in the colonial government, to represent the interests of Africans. However, hard-line members of KANU, led by Oginga Odinga, in contrast, rejected the arrangement - until Kenyatta was released from detention.¹¹³
115. Finally, Jomo Kenyatta was released from detention and he joined the KANU leadership as chairman, after James Gichuru stepped down in his favour. Despite the new dynamics that came with Kenyatta's release, the KANU leadership remained sharply divided on the land question. One group led by Odinga Odinga, Bildad Kaggia and Paul Ngei opposed recognition of pre-independence land deals, believing it would entrench European interests. They even went ahead and campaigned against the sale of any European land to Africans.¹¹⁴
116. The other group led by Jomo Kenyatta, James Gichuru and Mbiyu Koinange were in support of the settler proposals for a large-scale, foreign-funded, buyout policy arrangements with the colonial administration.¹¹⁵ According to Jomo Kenyatta, the British had to fund a large-scale settlement programme that would settle the landless, using long-term loans with easy repayment conditions.¹¹⁶ The KANU faction of Odinga remained unhappy and only reluctantly accepted that land was to

112 Kyle, Keith, 'The Politics of the Independence of Kenya' (Basingstoke, 1999), pp.99-102.

113 Goldsworthy: Mboya, pp.137-8

114 See Harbeson, John 'Nation- Building in Kenya: The Role of Land Reform' (Evanston, 1973), p.122..

115 Harbeson, John, 'Nation- Building in Kenya: The Role of Land Reform' (Evanston, 1973), p.122.

116 Kenyatta, Jomo, 'Suffering Without Bitterness: The Founding of the Kenya Nation' (Nairobi, 1968), pp.163-4

be purchased from the European settlers to settle the squatters and the landless.¹¹⁷ The reason was that Africans could not buy back land that was originally theirs and that during their election campaigns, the leaders had promised their supporters that when the country attains independence, they would get their land back at no charge.

117. The perception of Odinga and his allies in KANU did not go down well with Kenyatta and Mboya. Kenyatta categorically maintained that there were no free things and that land was not free, but must be purchased. His position shocked many of the KANU supporters who felt that he and his allies betrayed them because the political leaders had made election pledges to the effect that Africans would recover their stolen land after independence.¹¹⁸

The Second Lancaster House Conference

118. The Second Lancaster House Conference took place between 24 February and 6 April 1962 in London and was attended by representatives of KANU, KADU, communities in North Eastern and Eastern provinces and delegates of the Mwambao United Front (MUF) from the Coast of Kenya. At the conference, political differences within KANU and between KANU and KADU especially over the unresolved land question, which was not concluded during the First Lancaster House Conference, featured again. Notwithstanding the political differences, an agreement was reached to grant Kenya autonomy, based on KADU's regionalist/federal model of governance. The British government favoured KADU's views, mostly because of its concerns about land and the future of the white settlers and their economy under KANU. Also, KADU represented ethnic groups that had remained loyal to the British during the State of Emergency, and whose leaders had agreed to take office when KANU refused. In addition, KADU represented many of Kenya's pastoralists. Moreover, the Maasai and Kalenjin leaders, including Justus ole Tipis, William Murgor and John Marie Seroney, had threatened civil war or violent conflict if their demands were not met.¹¹⁹
119. At the Second Lancaster House Conference, an agreement was also reached on the outline of Kenya's independence land programme. KANU and the settlers later agreed that there was a desperate need for rapid expansion of the land purchase and settlement programme, while Rift Valley KADU leaders, including Moi and Tipis, defended the historical right to land of the Rift Valley people and the centrality of communal land rights, which would give the Maasai and Kalenjin most of the White Highlands. Contrary to the position of Rift Valley KADU leaders, KANU,

117 Oruka, H. Odera. *Odinga Odinga: His Philosophy and Beliefs* (Nairobi: 1992), p. 75

118 Kyle Keith. *The Politics of Independence of Kenya* (Basingstoke: 1999), pp. 99-102

119 Report of the Kenya Constitutional Conference (London, 1962)

especially its Kikuyu leaders and supporters (both loyalists and ex-detainees), was vehemently opposed to proposals that recognized communal land rights. The fear of the big ethnic community elite was that any sub-division based on pre-colonial occupation or spheres of influence was unlikely to give them the lion's share of the land that they desired.

- 120 Therefore, senior Central Province personalities led by Gichuru, Koinange, Kiano, among others, well before independence, began to scheme for the willing-buyer, willing-seller option of land re-distribution. To them, it was clear that the populist campaign of Oginga Odinga and his allies about free distribution of land after independence to KANU supporters was not a viable option.¹²⁰
- 121 There was a third position to the land question which only made resolution of outstanding issues more difficult. KADU members, led by Muliro, Moi, Towett and Ngala, with dominant support from the Kalenjin, Luhya, Mijikenda and Maasai communities, preferred a multi-racial approach that guaranteed security of land rights for the settlers who wished to stay on after independence as well as the systematic transfer of land to the Africans.
- 122 Because of their position regarding the land question, the colonial administration and white settlers rallied their support behind KADU and also orchestrated the split of the AEMO.¹²¹ Whereas KANU's dominant position at the Second Lancaster House Conference was that the sanctity of individual titles for settlers only should be respected, KADU demanded that it should apply to both ethnic communities as well as to individuals.¹²² The confluence of land and negative ethnicity, apart from personal interests among the elites, created ethnic tensions and conflicts that were to dominate the next four or more decades.¹²³
- 123 The Report of the Second Lancaster Constitutional Conference indicates that in accordance with agreements made between representatives of the British and Africans, former Crown lands became the responsibility of the regions, while the un-demarcated ex-reserves were handed over to the new county councils to allay fears about their future. However, not all of the representatives of African communities who attended the conference were satisfied with the outcome of deliberations and the dissatisfaction, with a feeling of betrayal underlying most of the political and land-related struggles in Kenya for years to come.

120 Leys, *Underdevelopment*, pp 56-7

121 Rothchild, Donald, *Racial Bargaining in Independent Kenya: A Study of Minorities and Decolonization* (London: Oxford University Press, 1973). AEMO was a loose political organization of African leaders elected to the Legislative Council between 1957 and 1960 before the formation of KANU and KADU.

122 Harbeson, John, *Nation-Building in Kenya: The Role of Land Reform* (Evanston, 1973), p 115.

123 See Goldsworthy, David, *Tom Mboya: The Man Kenya Wanted to Forget* (London 1982), pp 173-8.

- 124 The report indicated that the Maasai who attended the conference in a unique status because of previous land treaties made on their behalf with the British colonial administration were left with little apart from the promise of the ethnic purity of their districts. Their delegation refused to sign on the Land Deal at the Second Lancaster Conference, claiming a second British betrayal, although their refusal to sign had no practical effect on the land deal.¹²⁴ Resolutions of the Second Lancaster Conference may have been a good compromise for the British, but for the Maasai, failure to discuss the land question and the future of the Maasai in light of the two agreements made between their leaders and the British, before independence would have left them with serious liabilities in the event of future expropriation.¹²⁵ The Maasai were and continue to this date to be dissatisfied with the agreements reached at the conference over land.
- 125 Representatives of other communities, including the Mijikenda at the Coast and pastoral communities in North Eastern and parts of the Eastern provinces were equally dissatisfied with the outcome of deliberations on land at the conference. Representatives of the communities were and still are dissatisfied, not only with the land agreement made at the Second Lancaster House Conference, but also with policies adopted at the conference and by the post-independence governments. As a result, soon after independence, pastoral communities from the region that became known as the North Eastern Frontier (NEF) demanded to be joined with the 'Greater Somalia' country than to remain in Kenya.
- 126 For communities at the Coast, dissatisfaction with agreements over land arrived at the conference, made worse by exclusionary policies and practices of post-independent governments, could have been the genesis of land and related political struggles at the coast, which have given rise to the emergence of the Mombasa Republican Army (MRC). At the Second Lancaster House Conference, delegates of the Mwambao United Front (MUF) from the Coast Province attempted to introduce the 'Land Question of the Ten- Mile Coastal Strip' through a memorandum that demanded their autonomy from mainland Kenya after independence, but their move was rejected by the conveners of the Conference, on the advice of the Secretary of State, who argued that the Coastal Strip land question fell outside the scope of the conference. In addition and unfortunately, the conference, instead of addressing the real and pressing land question at the Coast, took note of "Her Majesty's Government's intention to continue to discharge as hitherto, its responsibilities with regard to land matters at the Coast under the existing Agreement with the Sultan of Zanzibar"¹²⁶

124 Report of the Kenya constitutional Conference (London, 1962) Annex C pp 29-30. Hughes, Lotte. Malice in Maasailand: The Historical Roots of Current Political Struggles, *African Affairs* Vol 104 No 415(2005) pp 209-11

125 Leo, Christopher. *Land and Class in Kenya* (Toronto, 1984) pp 91-4

126 Robertson James, W. *The Kenya Coastal Strip*. Report of the Commissioner Presented to Parliament by the Secretary of State for Colonies by Command of Her Majesty (Cmnd 1585 London, December 1961) p 13

- 127 The situation at the Coast was particularly complex because of the size and influence of the Muslim Arab and Swahili communities, many of whom saw little future in an African dominated Kenya, and who campaigned for coastal autonomy. Ronald Ngala, the coastal Mijikenda communities' representative, pushed for a middle ground position, but was not supported by representatives of the Muslim Arab, Swahili, Shirazi and Bajuni communities who had also attended the conference. Eventually Ngala reluctantly supported the integration of the 10-mile Coastal Strip into mainland Kenya for the sake of harmony and transition to independence.¹²⁷

The Third Lancaster House Conference

- 128 During the third and final Lancaster House deliberations of September to October 1963, KANU successfully managed to weaken the 'Majimbo Constitution' that was drafted during the Second Lancaster House Conference, which proposed an independent government based on regionalism. KANU, with the unexpected support from the British, reneged on the constitutional agreement which had incorporated regionalism (a Majimbo system of government) before even it was implemented to address land issue, among other things. Therefore, although on 20 October 1963 Kenyatta issued a categorical assurance that under the independence Constitution, "all 'tribal' land would be entrenched in tribal authority and that no one could take away land belonging to another tribe,"¹²⁸ that appears to have been just an attempt to appease Ronald Ngala and other minority community leaders who were planning secession or alliance with Kenyan Somalis on account of failed promises on land restoration and establishment of regional governments across the country. Indeed, it was a vain hope that was likely to engender anger and frustration in communities that had hinged their hope in recovering land lost to Arabs and European settlers after independence.
129. By the time land issues were negotiated at the Lancaster House Conferences, African elites appear to have known that a redistribution of land in the White Highlands was inevitable and therefore, they positioned themselves for competition for the land, based on colonial tenure. Contrary to their expectations and schemes, communities that had unjustifiably and painfully lost the land, such as the Maasai, the Kalenjin and other pastoralist communities, based their claims on pre-colonial usage of land. The situation was made more tenuous by the Kikuyu and other sedentary African communities who also claimed land in the White Highlands, also basing their claim upon colonial tenure.

127 Salim A. I. *The Movement for Mwambao or Coast Autonomy in Kenya 1956-63* in Ogot, Bethwell (ed) *Hadith 2* (Nairobi 1970)

128 Letter from Kenyatta Kenya Independence Conference 1963 Cmnd 2156 (London 1963) Annex C see also Kenyatta *Jomo Harambee!* (Nairobi 1964) p 14. The assurance soon turned out to be false as the powers of the regional or federal government over trust land was eroded and transferred to the central government through a stage managed constitutional amendments and defections to KANU by KADII proponents of federalism. In fact regionalism was crippled before it was implemented.

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- 130 The varying positions, worsened by the failure of regionalism and the land buyout scheme discriminately implemented at independence, became the genesis of inter-ethnic tensions and perennial conflicts between the communities over the former White Highlands.¹²⁹ The potential for conflict was made worse by the fact that due to increase in population and pressure on land, many 'squatters' from Central Province, who were not lucky to get land allocations from the White Highlands in their ancestral homeland, either bought land through land-buying companies or were allocated land by the government in areas perceived to belong to other communities, north-west of their province, as far as Uasin Gishu and Trans Nzoia
- 131 From the foregoing and other relevant literature, Kenya's independence was a negotiated process between the British colonial administration and a group of African elites in their position as representatives of their people, in which there was a strong expectation on the part of the British that the colonial system (including its system of land ownership and use already established) would continue, in order to allow settlers to adapt to changed political circumstances.¹³⁰
- 132 Most importantly, the British considered that protection of property rights already acquired by settlers was vital to the conclusion of independence negotiations held between 1960 and 1962.¹³¹ On the basis of that understanding, part of the land deals made at Lancaster House Conferences which were based largely on proposals from white settlers was that regionalism would be the supportive governance structure and that it would be accompanied by a dramatic extension of settlement such that most settler ranches and plantations would remain intact in the White Highlands, while a million acres of mixed farms (half of what settlers already owned) would be taken by the independent government and used to settle Africans.¹³²
- 133 The one million acres of land to be acquired from white settlers for settlement of Africans displaced during colonialism was to be funded by the British government and international loans, and executed through private land purchases. However, both KADU and the white settlers had favoured a more limited settlement approach. The fear of KADU was that the Central Land Board that was proposed to manage the transfer of white-owned lands to Africans would favour the majority ethnic communities such as the Kikuyu, and therefore it sought to ensure that the regions would play a role in the board, but this was not to be.¹³³

129 Wasserman Gary, *Politics of Decolonization: Kenya Europeans and the Land Issue 1960-65*(Cambridge, 1976) p 120

130 Wasserman G. *The Independence Bargain: Kenya Europeans and the Land Use 1960-1962* 11 *J. Comm. Pol. Stud.*

131 *Report of the Kenya Constitutional Conference (1962)*

132 See Wasserman Gary *Politics of Decolonization: Kenya Europeans and the Land Issue 1960-65*(Cambridge 1976) p 120

133 Wasserman *Politics of Decolonization*, p 120

Resettlement programmes

- 134 By the early 1960s, the problem of landlessness had been worsened by population increase in the designated native reserves, thus heightening desperation for lasting solutions. As the country approached independence in 1963, many communities that had lost land to the colonial administration and its settlers were eagerly awaiting restoration of their land, at no charge. While some of the landless community members 'squatted' in certain areas in the hope that their occupation would be regularized by the government, others took a confrontational and violent approach to the land question on grounds that they were just recovering their land which had been 'stolen' or annexed by force by the colonialists, with the help of their African collaborators.
- 135 As explained in the preceding section, there had also emerged a group of African elites and business people who were eager to acquire land, especially in the White Highlands, for commercial purposes. Thus African interests generated a near scramble for land in the former White Highlands and other strategic areas. However, as demonstrated by the divergent views of Africans' political representatives during the Lancaster House conferences where the existing land questions were negotiated as part of the independence package, some of the proposed measures would not be favourable to many of the communities that had lost their land to colonialists. Moreover, the colonial government changed its attitude towards Jomo Kenyatta whom it initially perceived as a radical or trouble maker and maintained cordial working relationships with him, thus compromising his perceived capacity to genuinely address land issues after independence.¹³⁴
- 136 The situation resulted in agitation by Africans who were dissatisfied with the buyout policy arrangement between the incoming independence administration and the outgoing colonial administration, especially in view of the fact that the African communities were pressing for a return of their land that was forcibly and unjustifiably taken away from them. There were also those who fought for independence with the expectation that they would recover their alienated land or, at least, compensation for the loss of their main source of survival and livelihood, whose claims threatened to turn the White Highlands into battle grounds between Africans who remained landless on the one hand and African elites who were poised to acquire land therefrom, based on British land tenure and remnant white settlers on the other.
- 137 To avert political pressure and the looming dangers from agitated Africans, the incoming independent government, with approval and financial backing of the British colonial government in its last years of administration in the early 1960s,

¹³⁴ H O Oruka, 'Oginga Odinga: His Philosophy and Beliefs' (Nairobi: 1992), p 75

made settlement proposals including offers for British funding of settlement schemes for Africans, but as is shown next, subsequent implementation of the schemes failed to fully address the existing land question, at the time

- 138 Instead, officials of the newly-formed independent government in Kenya turned the foreign-funded settlement schemes into cartels for their own acquisition of, and benefit from large tracts of land in the Rift Valley, among other parts of the White Highlands and in the process, defrauded communities that were affected by land alienation by the British even more and set the stage for some of the battles over land witnessed in recent years

■ *The Mackenzie scheme*

- 139 At independence, Jomo Kenyatta became Prime Minister of Kenya and soon, at his insistence, the Constitution was amended to create the position of an Executive President, as both Head of State and Head of Government Kenyatta appointed James Gichuru as Minister for Finance, Bruce McKenzie Minister for Agriculture and Jackson Angaine Minister for Lands and Settlement The three ministers played key roles in the design of settlement programmes and in the acquisition of loans granted by the British government to buy out white settlers for purposes of resettling African communities that lost their land, in both low and high-density settlement schemes Settlement arrangements had been agreed during the Lancaster House conferences

- 140 In 1964 Mackenzie, as Minister for Agriculture, made some initial proposals for resettlement His proposals were more concerned with the highest quality of land, and were based on a large farm model Such a model would never meet the political demand for land among the majority of Africans who had held higher expectations about independence and the opportunity to own land or recover what was alienated from them by the white settlers with the support of the colonial administration.¹³⁵

- 141 However, McKenzie's recommendations had key ingredients for a final resettlement plan He spearheaded the design of two types of resettlement schemes The first a 'yeoman' scheme, in which large farms would be created for experienced farmers and were to be interspersed with European farms For that category of farms, recipients would contribute five hundred (500) sterling pounds The second was a peasant scheme designed to create smaller farms for which recipients would contribute one hundred (100) sterling pounds The peasant scheme category was planned for establishment in the borderlands between native reserves and the highlands

¹³⁵ Ibid pp 59-61

- 142 To capacitate Africans to make payment for farms in the two categories, the British government, with contribution from the World Bank, advanced a loan of 7.5 million sterling pounds to the incoming government of Kenya
143. The funding was intended to facilitate the buyout and resettlement programme in different parts of the country, especially in regions previously occupied by the white settlers.¹³⁶ However, the scheme also offered credit facilities to non-affected Africans who wished to purchase farmlands in the White Highlands. The 'Yeoman Programme', as it was called, which was later renamed the Assisted Farmers Scheme (AFS), envisaged buying 240,000 acres in the White Highlands to be sub-divided into 100 acres parcels and distributed to a select group of Africans who would farm alongside white settlers.¹³⁷ However, access to loan facilities and subsequent allocation of land in the Mackenzie schemes to certain groups of individuals, especially ex-loyalists of the colonial administration, did not please members of communities that had genuinely lost land to the colonialists
- 144 In particular, the arrival of the first wealthy Africans who happened to be ex-loyalists of the outgoing colonial administration from their native reserves to acquire the newly-demarcated large farms on the basis of loans facilitated by the independent government attracted resentment from communities that felt entitled to the land on the basis of having lost it to white settlers and in some instances, resulted in violent conflicts between the new African elite settlers and those who remained landless.¹³⁸ Moreover, resettlement schemes based on the Mackenzie proposals were focused on the former White Highlands without serious consideration of the dire need to resettle the Mijikenda who also lost their land at the Coast and were, by then, largely, landless
145. In addition to imbalanced allocation of land to ex-loyalists who were deemed to be undeserving of land allocations by landless African communities and communities facing land scarcity, other political developments introduced by the Kenyatta administration further diminished the chances of landless and land-scarce local communities to recover their lost land or receive compensation therefore
- 146 Land, or more specifically, recovery and restoration thereof to African communities in their regional enclaves, was the main factor underlying negotiations for Majimbo or regional government between African community representatives and the British colonial administration in the Lancaster House conferences and in subsequent meetings, including the meeting of October 1963 at which a draft of the independence

136 Leo Land and Class p 111

137 Leo Land and Class p 111

138 Conclusions of a Meeting of the Cabinet 21 November 1963 in CAB 128/38 p 5

constitution including a regional governance structure, was agreed. However, Kenyatta's administration soon introduced radical changes to the independence constitution which eroded the regional basis for recovery, retention and utilization of communal lands to the chagrin of many communities and their leaders.

147. In 1964, the Kenyatta administration introduced two major amendments to the Independence Federal Constitution. The first and second amendments abolished significant sections of the Federal (Majimbo) Constitution. These amendments ensured that all land vested in the regions was transferred back to central control by the President and his associates, including the Commissioner of Lands and the Minister in charge of Lands and Settlement.¹³⁹
148. Central government also conferred upon itself the power to unilaterally take over trust lands which were, formerly, African reserves for specific ethnic groups, which counties were to hold in trust for the groups, collectively, without compensation. The administration's surprising move weakened regional governments further, leaving them without power over land or money, yet many people in the regions were still suffering land scarcity and landlessness. Discontent of representatives of affected communities from various regions was openly expressed, for example, in the fiery speeches by KADU leaders who preferred a Majimbo system such as Murgor and Seroney from Rift Valley and Ngala from the Coast, who, consequently, demanded autonomy from central government.¹⁴⁰
149. The leaders' clamour for autonomy in ways reminiscent of the MRC's current demands for secession from Kenya, met with stern warning of dire consequences from Kenyatta and his lieutenants.¹⁴¹ As the current political situation shows, discontent which the Kenyatta administration compelled affected community leaders to conceal would feature in later years through calls for a Majimbo system of government that culminated in a constitutional referendum accepting that system. It would appear that suppression of the discontent also precipitated the emergence of the present MRC's belligerent activities at the Coast, whose end is currently, not in sight. An interview with MRC representatives discloses that frustration, destitution and under-development resulting from landlessness at the hands of colonial and post-independent Kenya governments, coupled with intentioned failure by the governments to address the dire land needs of the people at the Coast lie at the root of the MRC's activities.¹⁴²

139. Amendments and Additions to be made to the Constitution. Kenya Independence Conference 1963, Cmnd 2156 (London 1963) pp 12-22.

140. Odinga. *Not Yet Uhuru*, pp 242-247.

141. Odinga. *Not Yet Uhuru*, pp 242-247.

142. See, Paul Goldsmith. *Report Based on Research Commissioned by Pacl Kenya: The Mombasa Republican Council, Conflict Assessment: Threats and Opportunities for Engagement*, October 2011 (copy with the TJRC).

- 150 Further, amendments to the independence constitution of 1963 exposed Africans who acquired land rights to one of the vagaries of the British land tenure - the institutionalization of the policy and power of compulsory acquisition of land by the state. On the basis of the constitutional amendments, the state acquired the power to extinguish any title or other interests in land held by any individual or corporate personality and subsequently, acquire it for public or any other purpose. This power of compulsory acquisition was derived from the feudal notion that as sovereign, the state holds the radical title to all land within its territory. Acquisition of land was, therefore, regarded merely as a form of re-possession by the state of that which is its own, without recognition of the sanctity of each community's ownership of land for the benefit of community members that prevailed before alien notions of land tenure were, unacceptably, wrought upon them.
- 151 From that particular period in time, state power of compulsory acquisition of land was entrenched in the independence constitution of Kenya. Thus section 75 of the constitution vested such power in the state and made it exercisable on the state's behalf by the responsible minister, acting through the Commissioner of Lands. Further, the Land Acquisition Act (Cap 295 now repealed) was enacted to give effect to section 75 of the Constitution.¹⁴³ For trust lands which were meant for local communities, the constitution, in Chapter IX, simplified the process of compulsory acquisition, specifying that such process involved merely "setting apart" of the land, by the Head of State or the county council holding it in trust for a local community.¹⁴⁴
- 152 Initially, the principle of compulsory land acquisition seemed noble, the state could use it to acquire land in the interest of the public. However, in time, the public trust doctrine was relegated to the periphery by state officials who, with wanton impunity, resorted to illegal/irregular allocations, a widespread phenomenon which became popularly known as 'land grabbing' in Kenya.¹⁴⁵
- 153 It is noted that besides authorisation of compulsory acquisition of land, there were negotiated provisions in the independence constitution whose effect watered down claims of historical land injustices. For example, Article 75 of the constitution provided that all the existing land rights, irrespective of the manner in which they were acquired, would be confirmed and guaranteed.¹⁴⁶ The provision

¹⁴³ See section 75 of the Constitution of Kenya (1998 Edition). The first and second constitutional amendments not only centralized authority of Government in the Office of an Executive President but also returned the control of land to the centre, thus at the disposal of the Head of State, Minister for Lands and Settlement and the Commissioner of Lands. Indeed, the Kenyatta Government succeeded to get the legal authority to acquire and allocate land at will.

¹⁴⁴ See The Land Acquisition Act (Cap 295) of the Laws of Kenya and Chapter IX of the Repealed Constitution of Kenya.

¹⁴⁵ See the Ndung'u Report on Illegal/ Irregular Allocation of Land.

¹⁴⁶ See Section 75 of the Former Constitution of Kenya which recognized and upheld the sanctity of the Land Title deed regardless of the manner in which it was acquired.

was based on the notion that land redistribution should not be undertaken at the expense of economic stability, which was dependent largely on agricultural productivity. While the provisions favoured land merchants and speculative owners, it diminished chances of redress for those who lost land through the various land reform processes including alienation by the colonial administration and adjudication and registration as already explained. Further, it opened avenues for the phenomenon of land grabbing and related corrupt transactions involving land, including irregular allocations of public land. It also attracted a counter argument that historical claims were not valid in the post-colonial period and hence the ensuing conflict of interest between the proponents and opponents of finality in irregular acquisition, registration and award of land titles.

- 154 Provision for confirmation and recognition of land titles regardless of how they were acquired may be considered as the most critical resolution in the constitutional settlement arrived at Lancaster House. It foreclosed chances that historical claims would ever be the basis of land distribution after independence in the whole country, including the 10-mile Coastal Strip.
- 155 Yet there were and still are many individuals and communities experiencing land scarcity, landlessness and related poverty and destitution as a result of alienation of their ancestral land in the colonial days, not to mention that many people and families also, as explained, lost land unjustifiably during the process of land adjudication and registration.
- 156 The situation at the Coast was compounded by the fact that by an agreement signed in 1963 between the British, the newly-independent Kenya and Zanzibar governments, the Sultan of renounced sovereignty over the Coastal Strip, known also as Mwambao, which, thenceforth, became fully integrated into independent Kenya, the rights of coastal communities that lost their land to Arabs and the British having been completely ignored or overlooked.¹⁴⁷ That was a recipe for conflicts in subsequent years. The only hope for a lasting solution to the problems of communities affected by historical land injustices lay in a new constitutional settlement to undo the legal entanglement enacted to their disadvantage during the negotiations for Kenya's independence.
- 157 In addition, the land adjudication, consolidation and registration process introduced in the former African reserves continued in post-independent Kenya, regardless of strong opposition to it, especially in areas that were occupied by the Maasai and the

¹⁴⁷ Kenya Independence Conference 1963. Cmd 2156 (London: HMSO, 1963). Land Acquisition Act (Cap 295); Registration of Land Act (Cap 300); Land Titles Act (Cap 282).

Kalenjin on that basis that to the communities, land had never been an individual asset. Moreover, in the areas occupied by the communities, the process was marred by corruption, which in the first phase of the process, raised tensions that forced a complete re-demarcation and re-registration. However, Kenyatta's administration continued implementing the process on the basis of the Swynnerton Plan already discussed, in the belief that individual title and the consolidation of fragmented holdings were essential for long-term agricultural improvement, in addition to reducing the cost of land litigation and the fear of land expropriation.

■ *The One Million Acre Scheme*

158 The One Million Acre Scheme, hereinafter referred to as 'the scheme', was negotiated as part of the independence package between representatives of Kenyan Africans and representatives of the British colonial administration. After lengthy negotiations which were sustained by intense pressure on the British government from Africans as well as white settler farmers and British politicians to speed up land transfer plans prior to independence, details of the scheme were agreed. However, although with regard to the land question in Kenya, the scheme was intended to resettle Africans who had lost their land, while at the same time to ensuring that white settlers were compensated for their farms and developments thereon, its objective was largely political, namely: to secure an orderly transition to independence without destroying the large farm sector and foreign aid opportunities, and to avoid a land grab or a new emergency. As the following discussion shows, none of the objectives was fully met, to the disappointment of many landless and land-scarce Africans.

159 The scheme was established on the basis of agreement between the British administration and Kenya's elites who were preparing to take over power and was to be implemented between 1962 and 1967, with financing mostly by the British government. In accordance with the agreements, the British government subsequently advanced to Kenyatta's government a loan of 21 million sterling pounds for the purchase of one million acres of land out of the 7.5 million acres that was held by European settlers in the White Highlands, for the settlement of landless and land-scarce Africans.¹⁴⁸ Each would-be African beneficiary of land was to be advanced a loan proportionate to the amount necessary to purchase land from the fund and the loan was to be repaid over a period of 30 years. Part of the reason the loan was advanced was to promote a rapid transfer of ownership of farms belonging to settlers who wanted to leave the country after independence.¹⁴⁹

¹⁴⁸ It is noted that West Germany, the Land and Agriculture Bank (LAB), the Agricultural Finance Corporation (AFC) and the United Kingdom contributed to the development loan, but the World Bank declined to make contribution because it was not comfortable with the resettlement arrangement.

¹⁴⁹ Wasserman, *Decolonization*, pp. 158-9.

The arrangement was also to safeguard European settler possessions in the event of power transfer, thus necessitating an elaborate scheme of constitutional and statutory guarantees of property rights,¹⁵⁰ mostly in favour of the settlers

160. Contrary to the expectation of affected Africans, the outgoing colonial administration made it clear that African settlers could not get free land but were expected to either purchase it directly with their money or borrow the loan that was to be repaid back to the British government. Therefore, the approximately 35,000 families that were eventually settled on the One Million Acre Scheme had contractual obligations to repay their loans
161. The scheme was designed to comprise small to medium-size holdings covering a total of 1.5 million acres to be sold to individuals who would be facilitated by the loan from the British government to buy out the departing white settlers. Land transfers were based on a willing-seller, willing-buyer principle, but the people earmarked for resettlement on the former White Highlands were supposed to be landless and unemployed, even though long-term workers on farms identified for purchase had priority, provided they were "acceptable to the regions", that is, of the "right ethnic group"¹⁵¹. Once the landless and unemployed and former farm workers received land allocations, the provincial administration selected additional beneficiaries by lot
162. Clearly, the One Million Acre Scheme was well-planned and had many of the ingredients that would have ensured satisfactory settlement of many of the individuals, families and communities affected by British alienation of Africans' land and resultant landlessness and land scarcity. The scheme's components included the availability of an apparently accessible loan facility, very long-term repayment period, settlement in one's former ethnic domain and priority to the most needy
163. However, as revealed next, its method of implementation which was skewed largely by personal and ethnic interests of the government's implementation officials defeated its African resettlement purpose.
164. The government established an Agricultural Settlement Fund Trust whose trustees were mainly James Gichuru, Jackson Angaine and Bruce Mackenzie who, in liaison with the British, controlled the fund into which all settlement loan was paid. A Central Land Board with regional representation was established to take responsibility for land purchase, but it was chaired by a Briton, thus ensuring only nominal autonomy. Further, actual settlement of the landless was placed with the Ministry of Lands

150 Paul Syagga, *Public Land, historical land injustices and the new Constitution* Working Paper No 9 (Society for International Development) p 10

151 Carey Jones N.S. *The Anatomy of Uhuru* (New York: Praeger, 1966) p 157

and Settlement, but in practice, the ministry took over most of the functions of the Central Land Board.¹⁵² In addition, President Kenyatta appointed Bruce McKenzie as the Minister for Agriculture and a representative of white settlers to become Parliamentary Secretary for Lands and Settlement, to reassure the United Kingdom and its European settlers, in general, that their interests were being taken care of by their own people. A question that arises is whether any of the African leaders was incorporated into any of the established institutions to safeguard the interests of all the landless families and communities, including those at the Coast.

165. The resettlement plan was informed by several factors. First, there was a perceived need on the part of colonial administration to entrench the settler community firmly in Kenya and maintain their land rights, without having to return back to the Africans. Secondly, the colonial administration sought to achieve the aim of socializing the new African elites into the colonial political, economic and social patterns through the establishment of a multi-racial alliance of European settlers and African landowners to facilitate both independence and a majority rule under KANU. Thirdly, the land acquisition process was geared towards preventing the mobilization of a radical nationalist base that would be opposed to the continuation of colonial land policies in the country after independence. Would the underlying factors facilitate satisfactory land transfers in the interest of landless and land scarce Africans?
166. The One Million Acre Scheme and others established for similar purposes did not resolve the land problems facing Africans in Kenya.¹⁵³ Instead, their implementation increased the potential for violent conflicts over land in the country, mainly because in the process of their implementation, mainly the rich and those who were politically connected in the public and private sectors benefited. Loans could only be given to those who qualified to repay or had the financial means to pay on cash basis. Moreover, funds from the British government that were advanced as loans for purchase of land from the White Highlands also appear to have been misused by officials in the administration who were entrusted with their dispensation.¹⁵⁴ The fact that land transfers were based on a willing-seller, willing-buyer principle, and that loans could only be advanced to those who qualified to repay and had cash to make a down payment, also meant that the poor who could not raise the required deposit and security to guarantee their loans were left out in the resettlement process.

152 The fact that the Ministry of Lands and Settlement was headed by Jackson Angaine, President Kenyatta's long term ally and friend, cast doubt on his capacity to guarantee impartial land transactions in the interest of all affected tribes.

153 See Christopher, Leo, 'The Failure of the "Progressive Farmer" in Kenya's Million-Acre Settlement Scheme' (1978) 16 (4) *The Journal of Modern African Studies* 622.

154 See W. G. Lamarque confidential correspondence with the London Office, 7th January, 1969, p.2.

- 167 Moreover, resettlement programmes were marred by malpractices like irregular land allocations, land grabbing, permitted engagement in settlement programmes of corrupt land-buying cartels, political patronage in the process of land allocation and negative ethnicity and nepotism in land allocation processes in several parts of the country. For example, in the new settlements, several hundred white farmers' houses and 100-acre plots around them, marked as "Z plots" were kept intact and reserved by Angaine, the then Minister for Lands and Settlement, reportedly with instructions from the President in May 1964 to sell them only to "senior community figures"¹⁵⁵
- 168 In addition, there was no competitive pricing for sale of prime land and other property such as houses in the White Highlands and many were, on the basis of British settlement funds, sold to ministers, members of Parliament, ambassadors, permanent secretaries and provincial commissioners, all with little farming experience. Apparently, the irregularities were ignored by officials in charge of administering the fund¹⁵⁶. As a result, rich businessmen and businesswomen, rich and powerful politicians who were loyal to the colonial administration, managed to acquire thousands of acres at the expense of the poor and landless¹⁵⁷. Instead of redressing land-related injustices perpetrated by colonialists on Africans, the resettlement process created a privileged class of African elites, leaving those who had suffered land alienation either on tiny unproductive pieces of land, or landless.
- 169 A good example of illegal and irregular acquisition of the Million Acre Scheme can be found in the case of Sitatunga, Maridadi and Liyavo Settlement Schemes in Trans Nzoia, which in this case can be used to paint a global picture of what happened and continues to happen in the Settlement Schemes. To quote from the late Mzee Jomo Kenyatta Letter of Offer,
- "I, Mzee Jomo Kenyatta, EGH, MP, the President of the Republic of Kenya offers Sitatunga Farmers Co-operative Society Ltd, a co-operative society registered under Certificate of Reg No 2037 under the Co-operative Societies Act, Cap 490, the piece of land containing the measurements 1,683 acres (665 hectares) and known as land Ref No 5519 and 5520 which piece of land is situated in Trans Nzoia District. This offer is subject to and grant will be made under the provisions of the Government land act (Cap 280) Laws of Kenya"
- 170 From the above quote, it's clear that the land was given to the registered members of the Sitatunga Farmers Co-operative Society who were 100 as per the letter of the Ministry of Cooperative Development and Marketing dated 1st September, 2011,

¹⁵⁵ See for example WG Lamarque's Communication to the London Office, 7th January 1969 pp 1-2

¹⁵⁶ Letter from B. Greatbatch to WG Lamarque, Ministry of Overseas Development, Kenya Land Settlement Account: CAG Refused to Certify Accounts 1964-65', 3 February 1965, p 2, in DO 156-15, Kenya Land Settlement Account: 1964-5

¹⁵⁷ Wasserman Decolonization pp 171-5

“The Society was registered on 30th March 1972 as a farm purchase co-operative society and its registration number is C2037, the same is captured in the letter of offer that was given by President Kenyatta in 1972. The society managed to acquire the farm through Government assistance as per letter of offer dated 16th November, 1972 from Office of the President. The 100 member remained active up to 1980 when they cleared the loan advanced to them by the Settlement Fund Trustees having cleared the loans on purchase of land”

- 171 Adjudication was set to begin in the early 1980s and the farmers genuinely anticipated that they would benefit from the adjudication. However, it is at this stage that senior government and military officers who were not members of the society and had not been part of the group that repaid the loan were allocated huge tracts of land in the scheme contrary to the initial objectives of setting up the schemes which was to settle the poor and landless.
- 172 The members of the society who were landless, destitute and poor had little recourse but to settle for the five acres that was allocated to them. The 100 acres plots known as ‘Z plots’ were reserved for senior government officials and military officers. At the TJRC hearings in Nairobi, Mrs. Kegode and Rtd. Lieutenant General Sumbeiywo who were mentioned as having been irregularly allocated land in the scheme stated that they were not aware that the land belonged to the members of Sitatunga Farmers Co-operative Society. Mrs. Kegode stated as follows:
- “As a Kenyan, if I were to advise our beloved Government, I would tell them to never double-allocate land because we are all Kenyans. There are people who are landless, and who are now the society people. Those are my brothers and sisters. Some of them are my children. It will not be nice for us to have a dislike for one another or blame one another over something we did not create.”¹⁵⁸
- 173 Rtd. Lieutenant General Sumbeiywo stated:
- “I feel I have provided what the Commission required but I do not know how the people who may have been wronged will be reconciled with me because for 31 years they have been looking at me as the person who took their rightful thing without telling them. I do not know how it will go. I would have wished that we talk to each other so that I can know what to do.”¹⁵⁹
- 174 Though non members benefited from the land as stated above, one aspect that comes out clearly is the role that was played by the Manager of Sitatunga Farmers Co-operative Society namely James Gichogo, who was invited for a hearing at the Commission but declined to appear. He would have assisted in

158 TJRC/Hansard/Public Hearing/Nairobi/4 April 2012

159 TJRC/Hansard/Public Hearing/Nairobi/4 April 2012

shedding light on how the land was distributed to the disadvantage of the real members. He was in charge of the process leading to the distribution of the land to non members.

175. The Director of Land Adjudication and Settlement, the Directorate that is charged with the management of SFT's, Mrs Esther Ogega presented before the Commission on the same issue of Sitatunga, but her explanations were found not convincing. The land belongs to the members of the Sitatunga Farmers Co-operative Society and the Commission recommends that members of the Sitatunga Co-operative Society be compensated and or the land is reverted back to them.
176. In the case of Liyavo Settlement Scheme, the members registered themselves as Liyavo Farmers Co-operative Society Limited on 1st April 1972 under the Cooperative Societies Act, Cap 490, Section 7. The farm has an average of 2802 acres (1123 hectares) and the same is comprised in Land Reference Number 5751 situated in Trans Nzoia County, Kwana Division, Kapsitis Location in the Rift Valley. The said parcel of land was given to 150 families who were squatters and landless by the late President Mzee Jomo Kenyatta on 1 November 1972 under the provisions of the Government Lands Act.
177. On 10 October 1974, the Liyavo members were settled on Two and a Half acres for their homestead and subsistence farming and thereafter the members were to work very hard on the remaining piece of land of 2427 acres as co-operators to raise funds in order to offset the outstanding loan advanced to them by the Settlement Fund Trustee for purposes of purchasing the farm. In 1978, the members of the society went and visited Mzee Jomo Kenyatta at State House Nakuru and informed him about the clearance of the loan. The then President promised to send surveyors to go adjudicate the land so that members could get their rightful shares. The land had 786 heads of cattle, 630 pigs and stakes of maize crop that were left behind by the departing white settlers that assisted in clearing the loan.
178. Indeed in 1983, during President Moi's tenure, the land was demarcated and only Two and a Half acres were added to the existing Two and a half acres that the members were holding previously and the rest of the acreage was unlawfully subdivided amongst top civil servants in government during Moi's time and contrary to the terms and conditions of settlement in the Shirika Settlement Programme dated 10th November 1974, which was the constitution of the society.

- 179 The case of Maridadi farm, which is in Kwanza Division of Trans Nzoia County, is equal and similar to that of Sitatunga and Liyavo
- 180 Also, resettlement in the One Million Acre Scheme took an ethnic dimension in favour of members of some specific ethnic communities against others. This created suspicion, mistrust, tensions and conflicts among other ethnic communities, who felt discriminated against by the Central Land Board and its subsidiaries. There were instances where some 'squatters' could be evicted from areas they already occupied and denied land allocation simply because of their ethnicity, regardless of their landless status. For example, squatters and former farm workers from the Central Province were evicted from the Lugari Settlement Scheme in Western to make way for members of the Luhya community. Similar evictions took place in the Aberdares where those who did not belong to the Kikuyu community were evicted by the government to pave way for the resettlement of the Kikuyu people
- 181 It also emerges that although all Africans who were rendered landless or left with too little pieces of land were entitled to resettlement anywhere in the White Highlands under the arrangement with the British, meaning that any parts of the highlands was available for their resettlement, officials in Kenyatta's administration reserved large former settler farms in Central and North Rift Valley around Nakuru, Kitale and Eldoret for the willing-buyer, willing-seller arrangement, deeming it to be the only practical approach. The Kalenjin and the Maasai who were evicted from the reserved areas during the period of colonisation opposed the move, considering it to be unfair and an unjust attempt to cause them to buy land which had been alienated from them by the British from members of the Kikuyu community to whom the large farmlands were allocated during the flawed resettlement process.¹⁶⁰
- 182 During the KADU days, Moi supported regionalism and a decentralised system of land tenure that recognised both individual and ethnic land rights based on historical claims. However, after the merger of KANU and KADU in 1964, Moi changed his open resistance to centralisation of land administration under a Central Land Board. As an influential political leader, his appointment obligated him to support the government's land re-settlement plans in the Rift Valley, especially of the Kikuyu, even though he was an influential Kalenjin leader
- 183 Because of his position in Kenyatta's government, Moi abandoned any open attempt to restrict or resent immigrants from Central Kenya and other parts of the country

¹⁶⁰ Tabitha Kanogo, *Squatters and the Roots of Mau Mau, 1905-1963* (London: James Currey, 1987), at 150-152

into the former White Highlands in Rift Valley, perhaps for fear of creating suspicion, mistrust and tension with his boss, Jomo Kenyatta. Tensions arose over Moi,¹⁶¹ who, as the most senior Kalenjin in Kenyatta's government, was seen as allowing immigrants from Central Province to acquire white-occupied land in Nyandarua, Laikipia, Nakuru and other parts of the Rift Valley, outside their "traditional" areas in Central Kenya. It is reported that, while he could not challenge the process publicly though, Moi worked behind the scenes to help Kalenjin farmers compete with the Kikuyu to buy settler farms.¹⁶² One of Moi's close allies, Taita Towett, who was similarly influential, also pressurized European land owners to sell their land within the Kalenjin spheres of influence.¹⁶³ However, the little efforts made by Moi and his close political allies from the Kalenjin community did not fully address the land-related needs of members of the Kalenjin community

- 184 In subsequent years, for example, during Daniel arap Moi's regime, the situation increased tension between the Kikuyu and the Kalenjin and other communities that similarly felt entitled to resettlement in the former White Highlands. For instance, in 1985, Kipsigis leaders ordered members of the Kikuyu and other communities, including the Luo who were working in tea farms in Kericho to leave Rift Valley.¹⁶⁴ Tension and ethnic strife over flawed land settlement schemes also revived political debates for the re-establishment of a regional (*majimbo*) government in Kenya, in which case, regionalism would be understood to mean that each ethnic community occupies its tribal domain along establishments that existed before colonisation.¹⁶⁵
- 185 Therefore, it is no wonder that the *majimbo* debate dominated political discussions in post-independent Kenya and that the debates were, in many cases, accompanied by ethnic violence over land-related claims in areas such as Molo and Burnt Forest, where communities felt that members of other communities were settled and thereby, imposed in their areas while they remained landless or suffered land scarcity. As early as the late 1960s and early 1970s, militia groups comprising members of certain communities who felt defrauded of their land by the Kenyatta administration were already taking shape, especially in the Rift Valley. One of such groups was the Land and Freedom Army comprising non-Kikuyu members who felt betrayed after independence by the Kenyatta administration in terms of getting resettled on free lands acquired from the white settlers.¹⁶⁶

161 Vidner, Jennifer A. *The Rise of a Party State in Kenya: From Harambee! to Nyayo!* (Berkeley, 1992), 8-81, quoting the unpublished thesis of Apollo Njonjo.

162 See, for example, letter from T. J. Bellers to Counsell, Kenya Internal, 28 April 1971, in FCO 31/854 Political Developments in Kenya, 1971.

163 Letter from Clay to Joy, "National Assembly," 13 October 1971, in Foreign Commonwealth Office 31/853 Affairs of the National Assembly in Kenya, 1971.

164 Tabitha Kanogo, *Squatters and the Roots of Mau Mau, 1905-1963* (London: James Currey, 1987), at 150-152.

165 Tabitha Kanogo, *Squatters and the Roots of Mau Mau, 1905-1963* (London: James Currey, 1987), at 150-152.

166 Leo, *Land and Class*, p. 132.

- 186 The general result was that the majority of the people who were actually settled through the One Million Acre Scheme were not necessarily the landless people who had demanded and fought for the establishment of those schemes¹⁶⁷ The beneficiaries were a few individuals, mostly Kikuyu, who had freely accumulated money through farming, small business ventures, wage employment or sale of their existing holdings during and after the period of colonisation For example, some people in Central Province simply disposed of their land or assigned it to relatives in order to qualify for the cheaper and comparatively larger settlement plots in the Rift Valley Terms of the repayment loans provided by the British government were also flexible, representing about 90 percent of the purchase price in low-density schemes and 100 percent in high-density schemes Ironically, those settled in the schemes included President Kenyatta with about 216.5 acres and his long-serving Minister for Lands and Settlement Jackson Angaine, with 252 acres; while the majority of deserving allottees were allocated between 5 and 20 acres of land only¹⁶⁸
- 187 The foregoing elaboration illustrates the fact that the multi-million resettlement schemes were not only mismanaged but were also ethnicised and politicised, despite its noble goals of resettling the landless across the country¹⁶⁹ The competition and conflict over access, utilization and ownership increasingly took an ethnic dimension akin to tribal political alignments in the period just before and after independence As a result, settlement processes intended to create harmony among local communities as they increased their status of livelihood instead created suspicion, mistrust, tensions and conflicts between the Kikuyu and other ethnic communities, especially the Kalenjin in the Rift Valley, who felt discriminated against by the Central Land Board and its subsidiaries¹⁷⁰ A report of a 'Stamp Mission' assigned to evaluate the outcome of the One Million Acre scheme in October 1965 found it to be a complete failure, due to numerous instances of corruption, misallocation and mismanagement of funds by the top government officials involved in the resettlement process The report concluded that Britain would reduce financial commitment to the settlement programmes in Kenya
- 188 The conclusion one would make from the foregoing discussion is that Kenyatta's administration squandered the opportunity to fully and adequately address the land question Had it not, the current violent conflicts over land with political undertones would have been prevented

¹⁶⁷ See Ndingu Report findings pp 125-128 and details in Annexes 52 and 53 in Vol 1 of the Annexes to the Ndingu Report, 2004

¹⁶⁸ President Jomo Kenyatta and Minister for Lands Jackson H. Angaine were allocated large parcels of land in the settlement schemes at the expense of the poor landless and needy and needy individuals in society

¹⁶⁹ Carey Jones Anatomy of Uhuru (New York Praeger 1966)

¹⁷⁰ Carey Jones Anatomy p 157 explains how the One Million Acre Scheme took an ethnic approach to the high density schemes allocating European land within their sphere of influence each of the major ethnic groups Few if any schemes were multi-ethnic

Land issues and Related Conflicts in Post Independence Kenya

- 189 The overall objective of this section is to interrogate land problems in post-independent Kenya, in order to determine underlying causes of violent conflicts that have arisen in relation to land for purposes of recommending appropriate redress, in accordance with of the TJRC mandate. The mandate of the Commission was to investigate causes of land-related conflicts from the post-independence period to the present. The period before independence has been considered in detail, with clear indications of the adoption of British colonial laws, policies and practices in relation to land at independence.
- 190 Since independence, there have been three political regimes in Kenya - the Kenyatta, Moi and Kibaki regimes. This section presents findings of the various methods of irregular and corrupt land acquisition and allocation methods that have occurred over the years, perpetrated mostly by government officials, and how the land-related activities have, over the years, fuelled land-related ethnic tension and strife whose roots are, in many cases, traceable to land-related injustices committed during the colonial period.
191. The discussion is divided into three parts, each addressing land-related challenges during a particular regime and consequences thereof and indicates whether or not consequences were sufficiently address or still endure, as land issues awaiting redress. The first part considers Jomo Kenyatta's regime, beginning with a summary of land policies and laws that were applicable soon after independence which should have guided official dealings with land and, in the process, demonstrates the extent of official failure to adhere to the laws and policies, thereby occasioning injustices to people, many of whom already suffered land alienation and related consequences during the colonial administration and attendant victims' resistance, rebellion and violent retaliation.

Land irregularities at independence as causes of violent conflicts

- 192 This section presents findings on land-related irregularities and attendant violent conflicts and related issues during the Kenyatta regime, beginning with mainland Kenya and then the Coast, many of which have endured, to this day. As the previous discussion shows, irregularities involving land acquisition, ownership and use take many forms, including discriminatory land allocation practices, based on ethnicity and unjustifiable allocation of land by government officials to themselves or to

their affiliates. The foregoing section elaborates irregular land allocation practices that occurred during Kenyatta's administration through land allocation schemes. However, irregularities and malpractices that characterised land allocation in the settlement schemes were not the only form in which official corruption in relation to land was manifested. Therefore, in order to design meaningful measures to fully address the root causes of land-related violent conflicts that have been witnessed in the recent years, other forms of land-related injustices that occurred during Kenyatta's administration are presented in this section.

193. The presentation in this section explains that official corruption in the acquisition, allocation, ownership and disposal of land in Kenyatta's era continued unabated regardless of the existence of applicable laws and policies that were intended to govern dealings in land. This raises the question whether there might have been some inherent loopholes in the laws and policies or in their implementation that should also form the focus of analysis as the country seeks to design appropriate measures to address land-related conflicts with finality.
194. A number of terminologies are used in this section of the chapter on land which require definition in order to clarify the meaning, for the purposes of this report. The first is "irregular allocation of land", which refers to official actions and procedures in relation to land, leading to land acquisition, ownership, occupation and/or use which do not conform to applicable laws and regulations.
195. The second terminology that deserves definition is "land grabbing", which is used here to mean official and private actions, steps and procedures in relation to land acquisition, ownership, occupation, use or any other dealing in land, both private and public, that is not only illegal, but is also conducted with wanton impunity, recklessness and is blatant and widespread. An elaboration follows.
196. As the country approached independence in 1963, many communities that had lost land to the colonial administration and its settlers were eagerly awaiting restoration of their land, at no charge. As previously explained, there also emerged a group of African elites and business people who were eager to acquire land, especially in the White Highlands, for commercial purposes. African interests generated a scramble for land in the former White Highlands and other strategic areas. While some of the landless community members squatted in certain areas in the hope that their occupation would be regularized by the government, others took a confrontational and violent approach to the land question on grounds that they were just recovering their land which had been 'stolen' or annexed by force by the colonialists, with the help of their local loyalists. However, individuals and

communities that had genuine expectations of land restoration at the instance of the government suffered great disappointment when the first government's response came in the form of an announcement by President Kenyatta's administration that there was no free land, despite having used land as a tool to mobilize Africans to support KANU and its struggle for independence and self-governance of the country

197. The frustration of communities disappointed by the administration's sharp response was expressed by Mr David Nasura Tuwei, an 85-year old member of an affected community in the following terms:

After 1963, the Talai had hoped that our government would give us priority in the White Highlands resettlement project as we had lost our land to the Kipsigis community¹⁷¹ When the whites left the country, the leaders of the time who came into power took over the farms that we have specified and they did not regard us. We were left on the rocky, waterless and the barren lands¹⁷²

198. Besides continued landlessness, land scarcity, destitution and poverty, failure to give priority, in land allocation or, more accurately, re-allocation in favour of those who genuinely lost their land to the colonialists soon after independence, generated another problem - the scramble for land by African elites and businesses for purposes other than settlement. However, what heightened the situation to propositions of violence was the engagement of public officials in Kenyatta's administration in irregular and illegal land acquisition and use, at the expense of landless and land-scarce communities

Nature of land-related illegalities and irregularities after independence

199. During Kenyatta's administration at independence and for several years thereafter, illegal dealings in land which left many individuals, families and communities landless and land-scarce took many forms. They included outright land grabbing, preferential treatment of certain communities, especially the Kikuyu, in land allocations and settlement, establishment of settlement schemes selectively for the benefit of members of certain communities, while other deserving individuals and families from other communities remained unattended, and illegal alienation of land from what was designated as public land for public purposes

200. The early years of Kenya's administration ushered in Kenya, the beginning of mass land grabbing and irregular allocations of public land and other resources, which, in time, became a widespread and almost endless phenomenon throughout the

171 TJRC/Hansard/Public Hearing/Kencho/19 September 2011/p. 56 para 1

172 TJRC/Hansard/Public Hearing/Nakuru/23 September 2011/p. 5 para 3

country Throughout the years of his administration, both land grabbing and irregular land allocations were perpetrated by and for the benefit of the President himself, members of his immediate family, his relatives and friends and officials in his administration, including political leaders from other tribes, with wanton impunity.

- 201 Existing literature indicates that between 1964 and 1966, one-sixth of European settlers' lands that were intended for settlement of landless and land-scarce Africans were cheaply sold to the then President Kenyatta and his wife Ngina, his children, Daniel Moi who succeeded him as president, other political leaders at the time including Mbiyu Koinange, Ronald Ngala, Oginga Odinga, through the Luo Thrift and Trading Company, Gikonyo Kiano, J M Kariuki, Masinde Muliro and Paul Ngei¹⁷³
- 202 Kenyatta himself appears to have benefited immensely from irregular allocations of land that should have benefited those who lost land to Arab and British colonizers By 1965, Kenyatta is reported to have been using his position as president to buy numerous settler farms in the White Highlands and also excising and allocating to himself and family government forest in Kiambu¹⁷⁴ President Kenyatta's direct engagement in irregular land allocations compromised his position to prevent or remedy similar cases of land grabbing by his close associates¹⁷⁵
- 203 In addition, there were peculiar cases of land grabbing and related malpractices during Kenyatta's administration which serve to illustrate how deeply the problem of land grabbing had cut into Kenya and the wanton manner in which key government officials, including the president grabbed what should have been public or communal land and "dished" it to relatives¹⁷⁶
- 204 Further, there were cases involving President Kenyatta's personal approval of the purchase of large farms by his family, exempting the transactions from review by the respective land control boards In the process, his family acquired vast farms in Nakuru, Njoro and Rongai areas in the Rift Valley¹⁷⁷
- 205 Moreover, the president and his family owned several beach plots and hotels on the Coast where, as previously stated, many African communities lost their land, first, to Arabs and later to Europeans, rendering many landless, to this day It was revealed that by 1972, the President and his family had more than eleven properties

173 Kenya National Archives on African Political Elites at Independence

174 Hornsby Charles Kenya A History Since Independence (I B Tauris and Co Ltd 2012) pp 107- 108

175 Hornsby Charles Kenya A History Since Independence (I B Tauris and Co Ltd 2012) pp 107- 108

176 See Hornsby Charles Kenya A History since Independence p 314

177 See Hornsby Charles Kenya A History Since Independence p 314 see also Sunday Times 10 August 1975 p 12

at the coast including hotels, in addition to those he owned through proxies, yet Mombasa Municipal Council waived all land rates due on his property in the same year¹⁷⁸

- 206 As already noted, other key personalities also benefited from irregular land deals during Kenyatta's administration, especially his close associates who also irregularly acquired prime land at the coast, mostly beach plots, including Eliud Mathiu, the Coast Provincial Commissioner then, Isaiah Mathenge, former Provincial Commissioner, Rift Valley, Matu Wamae, John Michuki and Beth Mugo¹⁷⁹ Other long-serving provincial commissioners during the administration who similarly acquired land irregularly at the expense of landless and land-scarce Africans were John G. Mburu, Charles Koinange, Isaiah Cheluget, Paul Boit and Simon Nyachae.¹⁸⁰ Not surprisingly, all of the land allocation beneficiaries who at the time they irregularly acquired the land served as PCs were sons of either former colonial home guards or chiefs¹⁸¹
207. Commission has compiled a list of individuals for whom there is evidence of illegal or irregular acquisition of land during the Kenyatta administration. This list, along with a similar list of names from the Moi and Kibaki administrations, will be handed over to the National Land Commission for further investigation and action. Two constitutional amendments conferred upon the president the power to make grants of unalienated government land to himself and others, together with corresponding parcels of land, all of which were acquired through abuse of constitutional powers vested in the presidency¹⁸². In the process that might be suitably referred to as the scramble to irregularly acquire land in the former White Highlands, key personalities from various ethnic backgrounds also acquired large tracts of land in areas that formed part of former reserves for other different ethnic communities
- 208 For example, in Uasin Gishu, key personalities from the Kalenjin community dominated the east and west of the region, those from the Kikuyu community occupied the south, while those from the Luhya community occupied the north-west. In addition, members of the same communities acquired parts of the White Highlands as follows: the Kikuyu - Nyandarua, Laikipia and most of southern

178 Ibid pp 315-16

179 Ibid pp 314-16 see also the Sunday Times 17 August 1975

180 Nellis John The Ethnic Composition of Leading Kenyan Government Positions Research Report No. 24 (Uppsala 1974) Table III reinterpreted

181 Nellis John The Ethnic Composition of Leading Kenyan Government Positions Research Report No. 24 (Uppsala 1974) Table III reinterpreted

182 Table 2 below illustrates some of the prominent people who were allocated land during the Kenyatta administration. The Ndung'u Report of 2004 on the Illegal/ Irregular allocations of Public Land also describes some of Kenyatta's activities. Unfortunately very few scholars have had the courage to interrogate and document the abuse of office and land grabbing witnessed during his regime for fear of repression and attracting unspecified consequences from the family or beneficiaries of the ill gotten public lands and property yet silence on such malpractices is in itself part of the historical land injustices

Nakuru, the Luhya - western Trans Nzoia and Lugari and the Kalenjin - eastern Trans Nzoia and northern Nakuru.¹⁸³ The intermingling of communities in areas that were not their original "homelands" resulted in competition and conflicts throughout Kenyatta's administration because what was perceived as foreign settlements in the ex-reserves of other communities remained deeply unpopular, despite official policy that was permissive of African settlement anywhere in the country.¹⁸⁴

- 209 Besides the direct engagement by key individuals in irregular land deals, various kinds of land-buying businesses, many with questionable legal status, were established for purposes of irregularly acquiring land meant for the landless, for profit. Examples of such land buying companies were the Gikuyu, Embu and Meru Association (GEMA), NDEFO and Nyakinyua, to mention a few, which operated mainly in the Rift Valley and in Central Province, but with outreach offices in other parts of the country. Some of the companies managed to acquire land and re-distribute it to their members who were mostly kinsmen of their founders, while others went underground or closed business, having received large sums of money from their members or shareholders, thus worsening the situation of landlessness and land scarcity in the country.
- 210 Although land remained a key source of political patronage and the government's primary tool in controlling dissenting voices or opposition, there were challenges against the manner in which land was corruptly acquired by key government officials and their close associates that should have warned the government of the day of the short and long-term dangers of official malpractices in relation to land. For example, in October 1973, Martin Shikuku, the then Butere MP, warned that if the Kikuyu did not share the fruits of Uhuru with others, they would eventually be "eaten by the other 41 tribes like a satisfied hyena was eaten up by hungry hyenas."¹⁸⁵
- 211 The politician's warning was indicative of the ethnic perception of land grabbers and hatred and animosity that was building up over the years because of skewed allocation of land and other public resources in favour of individuals mainly from the Kikuyu community by the Kenyatta administration. The likelihood of land-related conflict was enhanced by findings that during Kenyatta's administration, members of the Kikuyu community held 50 percent of the top jobs in the country.¹⁸⁶

¹⁸³ Carey- Jones Anatomy p 157

¹⁸⁴ Carey- Jones Anatomy p 157

¹⁸⁵ Legum Colin Africa Contemporary Record 1973-74 (New York 1974), B 172

¹⁸⁶ See Table 5.5 Senior Kikuyu parastatals heads in the 1970s in Hornsby Charles, Kenya A History since Independence, p 256-258

- 212 Further, the link between irregular land allocations during Kenyatta's era and political discontent of a nature that could cause violence was demonstrated by sharp reactions to the malpractice by members of Parliament who were opposed to them. Official records of the National Assembly indicate that during one of the parliamentary sessions in 1974, the then Moyale MP Osman Araru criticized Jackson Angaine who had been Lands and Settlement minister for 15 years for openly facilitating the settlement of members of the Kikuyu ethnic group in the Rift Valley. The enraged MP is reported to have asked Angaine whether he was only interested in land that members of his community were grabbing from the Kalenjin people in the Rift Valley, stating that land was already "finished" there.¹⁸⁷ The Moyale MP's open criticism of Angaine was a strong indicator of displeasure, not just by affected communities, but also by other communities in Kenya that were not partaking in the malpractices related to land. Further, in 1974, a Kalenjin MP demanded Angaine's sacking and referred to him as "a leader to hell and darkness."¹⁸⁸ Both sentiments pointed to the ethnic resentment of the Kikuyu due to the phenomenon of land grabbing perpetrated by their leaders which could and, in subsequent years, did result in violent conflicts among the communities living in Rift Valley.
- 213 It is noted from the sharp remarks directed at Angaine by fellow MPs, that his Ministry of Lands and Settlement also played a facilitating role in irregular land allocations in the country. There are indications that in addition to mounting discontent over irregular land allocations during Kenyatta's administration, the malpractices also threatened to mar the relationship between the administration and its external partners, especially the British government. The British government was worried about the negative publicity in the press and parliamentary criticism of their aid administration which seemed to have facilitated the irregular land transactions involving key government officials.¹⁸⁹ In spite of its concern about the likelihood of strained relationship with Kenya, the British government failed to intervene to stop the corrupt practices. Instead, it continued funding the failing land resettlement process.¹⁹⁰

Land Problems at the Coast in Post-independent Kenya: Kenyatta's Administration

- 214 As already explained, the coastal region, unlike mainland Kenya, was first colonised by Arabs who, during their colonisation, enslaved members of the Mijikenda community and also took over a lot of their land. Subsequently, the Sultan of Zanzibar who was governing the coastal area, having brought African communities

¹⁸⁷ Osman Araru, Member of Parliament for Moyale, in NAOR, 23 November 1973, col 535

¹⁸⁸ Moses arap Keino in NAOR, April 1974. Moses Keino also quoted in East African Standard, 26 April 1974, p. 1

¹⁸⁹ See W.G. Lamarque's confidential correspondence with the London Office, pp. 2-3

¹⁹⁰ See F.H. Partridge's letter to Hansford dated 27th August 1968

living there under his control, handed over power to the British, as protectors of the coastal region. In the process, much of the land previously owned and occupied by African communities was also handed over to the British colonialists. At some point in time, the British established a claims process through which private persons who had lost land could seek restoration and other redress for land, but African communities did not benefit from the process because, among other things, they were not aware of its existence.

215. As a result, most of the individuals, families and communities at the Coast ended up living as 'squatters' on land that had either been acquired by Arabs or the British such that by the time Kenya attained independence, many at the Coast had no titles to their land. The situation seems to have been confused by the takeover of power by the British from Arabs in a procedure that local communities did not well understand, especially the progression from the Coastal Strip as a sultanate to a protectorate under the British. Equally unclear was the status of the Coastal Strip, including land at the time of independence when the Sultan renounced his sultanate over the region to allow it to be merged with the mainland as Kenya.
216. The foregoing factors present unique features around land at the Coast which make it deserve special consideration. With regard to land issues and the need for their redress, the coastal region is also unique because very many different kinds of land problems have arisen there requiring redress. Land problems there are widespread and transcend many decades, including pre and post-independence administrations. Land problems remain largely unaddressed in the coastal region which has the largest number of landless people and has been severely marginalized in terms of land adjudication, consolidation and registration. Because of the myriad land problems, the majority of people at the Coast remain very poor; it is the region where land acquisition by individuals and other bodies from outside of the indigenous ethnic communities (considered as up country people) has been the largest. It is also the region where land-related injustices appear to have been the gravest and the longest lasting. For these reasons, land issues at the Coast require urgent redress by first enumerating the kinds of land problems that have continued to affect the region and its people.
217. As explained, there exists myriad land problems relating to alienation, acquisition, occupation, ownership, use and disposal at the Coast including forced eviction of coastal families and communities by private individuals and entities as well as public entities in the process of irregular acquisition of land. There has also been forced eviction of families and communities from community ranches, without compensation, to pave way for large-scale government projects. Furthermore

there has been a notable absence of consultation with potentially affected local communities in the acquisition of land for government projects

218 This in addition to forced evictions by private individuals from upcountry in the process of grabbing their land and the establishment of settlement schemes which end up benefiting individuals and families from certain upcountry ethnic communities. The indigenous coastal people's predicament has been compounded by the personal and irregular alienation of land at the Coast by government officials, including some of the former presidents, for their own private use. Their litany of woes continues with the failure to identify and recognize certain indigenous communities at the Coast for purposes of settlement and re-settlement and the illegal alienation of parcels designated as trust land for the benefit of specific coastal communities by government officials and their close associates. Then there has been the establishment of protected wildlife areas on land occupied by local communities without recognition of their existence and compensation, declaration of illegal settlements in coastal communities homelands to pave way for annexation of land for the benefit of people from outside of the region, as well as illegal acquisition of land at the Coast by private individuals from the mainland. Failure to complete the processes of land adjudication, consolidation and registration exercises at the Coast and allocation of large communal lands, including ranches and trust lands to foreign individuals and business entities add to the grievances. These problems underlie the emergence of the MRC in the region and threaten to give rise to more violence there unless urgent measures are purposefully and systematically taken to address them.

■ ***Failure to re-settle and register coastal people as owners of land***

219 The large number of the Mijikenda and other coastal communities who should have been settled as part of the independence package negotiated at the Lancaster House conferences in London were never settled. It has been explained that the negotiations included an undertaking by the British government to provide a loan for payment of white settlers to acquire part of the land they occupied for settlement of Africans, but settlement programmes in that scheme excluded the whole coastal region. Later, other settlement programmes were introduced, including one also supported by the World Bank but that too, was concentrated on mainland Kenya. As a result, large numbers of families and communities occupied lands for which they had no title deeds or any other form of proof or ownership and thus became susceptible to land grabbers. Much of land at the Coast, including land in Malindi was, at independence, categorized as government land, yet local communities were living on the land. In Lamu, for example, all the land in what currently constitutes Lamu County was categorized as government land, while

the local indigenous population was considered as 'squatters' on the land, yet it was their own.¹⁹¹ The same situation prevails in the Tana Delta which has, in the recent past, featured in the media prominently when violence broke out between communities living there over land.¹⁹²

220. The squatter problem was made worse by that fact that in many cases, the process of land adjudication, consolidation and registration was not conducted at the Coast, thus leaving families without evidence of ownership of the land they occupy. Since people did not have title documents to the land they occupied, it appeared and still does appear to land grabbers that the land they occupy does not belong to them.¹⁹³ The situation was and continues to be exploited by individuals and corporations, especially from upcountry, who consider such land as belonging to no one and therefore available for their acquisition, regardless of the presence of families living on the land. It has made it easy for private individuals, government officials and local as well as foreign investors to transact irregular deals leading to acquisition of land, whereupon, the genuine inhabitants are forcibly evicted without compensation.
221. Lack of title deeds has also exposed coastal communities to violent evictions by government functionaries, especially security forces in the pretext of carrying out security operations. For example, in Kiunga, at some point, people from Somalia crossed the border into Kenya and killed one police officer. The Kenya government was quick to blame local people for the officers' death and on that basis, assigned GSU officers to the area. The GSU, in addition to torturing the local Bajuni communities, demolished their villages, including Rasini and Mtanga Wanda islands, causing them to flee. Upon return, community members found that their land had been taken over and registered in the names of upcountry people who to date, claim to be owners of the land.¹⁹⁴
222. In Kipini where the Swahili, the Giriama and the Pokomo have been living since the pre-independence period, the situation reflects selective adjudication and registration exercises. Witnesses testified that although they lived together awaiting title deeds for their land, in time, they discovered that people from other upcountry community, especially the Akamba and the Kikuyu as well as soldiers who had descended in the area for unexplained reasons, had sub-divided the land and obtained title deeds while they, indigenous communities, had none and were unable to access government land registration services.¹⁹⁵

191 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/p. 3.

192 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 12.

193 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 21.

194 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 42.

195 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 46.

- 223 The problem was worsened by the growing commercial value of coastal land for tourism-related development. The government made grants of coastal land suitable for tourism, often in areas already occupied by the Mijikenda, resulting in mass evictions and subsequent conflicts. Lamu reached a boiling point after the government failed to address the historical injustices as well as curtail ongoing fraudulent land procurement in the area.¹⁹⁶ Related to it is failure to resettle those who were internally displaced at the Coast during the post-election violence (PEV) of 2007-2008. Lack of compensation for displaced individuals and families there. Affected people at the Coast have complained that while Kenyans displaced by the 2007-2008 PEV have been recognized as internally displaced persons (IDPs) and many, especially in mainland Kenya have been re-settled, the government of Kenya has given very little, if any, consideration to large numbers of people at the Coast who have been displaced over the years, including those who have been, from time to time, displaced as a result of *Shifita* incursions in Lamu.¹⁹⁷
224. It has been stated that in Lamu, since the 1960s, there have been *Shifita*-related wars between the communities in the area and either local communities or government security forces every time the *Shifita* from Somalia cross the border into Kenya to either steal cattle or to perpetrate other kinds of raids.¹⁹⁸ However, every time Kenyan security forces are sent to the area to respond to *Shifita* attacks, they turn against community members and torture them, destroy their crops, demolish their homes and forcibly evict them. As a result, community members have been forced out of twelve villages in the area including Shakani, Shendeni and Vundeni. All of the community members who were evicted from their homes during such operations became internally displaced but the government has failed to recognise them as such and re-settle them, rendering many landless and poor. Many have resorted to living in slums, while some moved to Tanzania in search of homelands when their own government failed to come to their aid. Neither has the government provided affected coastal communities any form of redress of atrocities committed against them by the GSU and other security agencies that have tortured and rendered many homeless in the course of conducting security operations.¹⁹⁹
- 225 The Boni and the Bajuni communities have suffered similar evictions since the early 1960s. Soon after independence, there were people at the Coast who declined to join Kenya in preference for Somalia and crossed the border into Somalia. However, they soon began to cross back into bordering areas in Kenya

¹⁹⁶ TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 3

¹⁹⁷ TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 4

¹⁹⁸ TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 4

¹⁹⁹ TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 4

to steal livestock from local communities. However, the GSU that the government sent to the areas from time to time to rebel the attackers, turned against affected community members

- 226 They accused them of collaborating with the *Shifita* raiders, shot and killed many of them, forcing many families to flee, having lost their livestock, crops that were destroyed by the GSU and homelands, yet to date, the government has failed to compensate or re-settle them²⁰⁰ Because of the government's persistent failure to recognise and address the plight of coastal communities that have suffered forceful evictions at the hand of the government's own security functionaries, many affected people hold the view that they were better off during the colonial period. In the words of one affected person who, at the time of his testimony, was still nursing scars from torture by the GSU who also shot him and fellow community members as well as forcibly evicted them on account of anti-*Shifita* operations

We, as the Bajuni, feel that we were better off when we were under the colonial government than during the post-colonial period. During the colonial period, we did not have any problems because at that time we even had our own villages. After independence, our villages were destroyed. They were at Kiunga, Kishakani, Funambai, Vibonden, which is our home, Ashwei and Materoni. These are the villages which were destroyed after independence. We were left with two villages and we had the Bajuni. We did a lot of farming and exported a lot of farm produce during the colonial period. We were better off during the colonial period than the post-colonial period. I can tell you that when we got independence, we were very happy and we celebrated.²⁰¹

- 227 The foregoing statement discloses the potential danger of violent conflicts by Kenyans whose government has not only committed atrocities against, but has also failed over the years to recognize their plight and redress them

■ ***Fraudulent Allocation of Government Land at the Coast***

- 228 Coastal communities have also suffered illegal alienation of government land in terms of manner of acquisition and allocation. Many coastal families and communities settled on what was designated as government land upon losing their own land, in the hope that the government would settle them on the land. However, from the time Kenya attained independence, officials in the administration engaged in illegal excision of the land without following the mandatory substantive and procedural provisions of the Government Lands Act

200 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 17

201 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 44

- 229 In many places, including Lamu and Taita Taveta, government officials annexed and allocated land as gifts to individuals deemed loyal to the administration and also on the basis of ethnicity, thus advocating nepotism within government ranks. Officials involved in illegal allocation of government land were surveyors, physical planning officers, local authority officials including the Lamu County Council Chairman, MPs, chiefs, the District Commissioner and the Commissioner of Lands. While government officials benefited from illegal acquisition and allocation of government land to themselves and their close associates, coastal communities that were in dire need of re-settlement were excluded. Unfortunately, local residents, for example, in Lamu, were not aware of the extent of government land in their areas²⁰²
230. In Taita Taveta District, many coastal families and communities settled, at independence, on what they believed to be government land, hoping that the government would officially re-settle them on it. However, in 1972, the Greek Criticos family, in partnership with the then President Kenyatta himself, acquired the land to establish sisal plantations, leaving many families living on the land as 'squatters'. A letter from Basil Criticos, a senior member of the family, dated 25 November 2011 indicates that the Criticos family, alone, owned 30 000 acres of land next to a bigger parcel of land owned by the Kenyatta family²⁰³. This meant no one could construct a permanent building or enclose land to signify exclusive occupation and/or use, generating another source of long-running conflicts over access to, ownership and use of land involving not only the Taita and other coastal communities, but those from upcountry who had settled on large farms as farm workers.
- 231 Apparently over time, especially between 1996 and 2003, the Criticos family offered a substantial proportion of the 30,000 acres of land to the government for purchase at low rate of only KSh600 per acre to settle landless squatters. However, after acquiring the land, the government, in its usual style of irregularity, began to settle people from upcountry, especially the Kamba and not the coastal communities that the land was meant for²⁰⁴. The Criticos family further offered to sell land at concessionary rates to landless communities from the Coast and from upcountry, including those from Nyanza who had settled on the land as farm workers but the family's efforts were thwarted by the government which, through the provincial administration, forcibly evicted the Criticos family from the whole parcel of land and began to irregularly settle people on it²⁰⁵. By 2008,

202 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012' p. 4

203 Letter from Hon. Basil Criticos dated 25th November 2011 at pages 1- 3 (Copy with the TJRC)

204 Letter from Hon. Basil Criticos dated 25th November 2011 at pages 1 & 2 (Copy with the TJRC)

205 Letter from Hon. Basil Criticos dated 25th November 2011 at pages 2 & 3 (Copy with the TJRC)

the Criticos family's efforts to give up a large portion of the land for re-settlement of the landless appears to have been completely disrupted, to a halt, as a result of illegal dealings with the land on orders of the then President, supplemented by support of the local MP and the Ministry of Lands and Settlement.²⁰⁶ However, the Commission could not independently verify these allegations from independent sources

- 232 In addition, the following parcels of land belonging to the government were illegally acquired, mostly by key government officials and subsequently sold to private individuals or private and public entities: Plot No. L R 16121 measuring 2.5 hectares in Shimoni, Kwale, was illegally acquired by Ali Korane, former District Commissioner in the KANU government and later Permanent Secretary in the NARC government. Korane subsequently sold the land, through Rahole Enterprises, to the Kenya Ports Authority (KPA) for KSh8 million.²⁰⁷ Harry Mutuma Kathurima illegally acquired plot No. L R 9093 in Malindi, measuring 7.0 hectares and subsequently sold the land for KSh12 million.²⁰⁸ In the same manner, the late Sharriff Nassir, then an MP, illegally acquired land title number Mombasa/Block 1/1682, measuring 2.78 hectares in Mtongwe creek, Mainland South and subsequently sold it for Sh10 million. The same politician also illegally acquired land title number Mombasa/Block v/1614 in Kibarani, Mainland North and sold it for KSh6 million.²⁰⁹
- 233 While individuals with connections to the government were personally acquiring land illegally, others established companies through which land was siphoned from the public domain. A case in point involves Winworld Limited, which illegally acquired land title number Mombasa/Block 111/528 in Kilifi/Takaungu (Mainland North), measuring 173 hectares. It subsequently sold the land for KSh150 million.²¹⁰ Erastus Muthamia Kiara also illegally acquired land title number Mombasa/Block v/1683 in Mombasa, Mainland North, which he subsequently sold for KSh1.2 million.²¹¹ While people, mainly government officials and their associates, acquired land for speculative purposes and subsequently sold it, making huge profits, indigenous individuals and families at the Coast who had been living on the land were evicted and in most cases, left landless and destitute while the affluent, some of whom were politicians, expected to protect their interests, enriched themselves.

²⁰⁶ See page 3 of Letter from Hon. Basil Criticos dated 25th November 2011 (Copy with the TJRC)

²⁰⁷ Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 95

²⁰⁸ Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 95

²⁰⁹ Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 95

²¹⁰ Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 95

²¹¹ Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 95

■ *Irregularities involving protected wildlife area lands*

234 Apart from the numerous cases of illegal allocation of government land at the Coast, there have been cases involving establishment of protected wildlife area on lands occupied by local communities as their homelands since the pre-independence period. Affected areas include those over which Kiunga Marine National Reserve and Dundori National Reserve were established. It was stated that prior to the establishment of Kiunga Marine National Reserve in 1979, local communities had lived on Kiwayu Island for decades, as their homeland. However, when the Kenya Wildlife Service (KWS) was establishing a marine reserve on the land, it did not consider that it was the people's homeland and evicted community members without providing them with alternative land. Upon eviction, community members sheltered at the Dundori National Reserve, but they were evicted from there also.²¹²

235 Chances of affected communities recovering their land in the areas aforementioned was diminished when KWS irregularly permitted foreign investors to acquire title deeds to lands from which communities were evicted from the island and to establish large tourist hotels while continually harassing community members, making it impossible for them to even cultivate land and earn a living from it.²¹³ Moreover, community members have been denied resource rights to the gazetted reserve despite their having lived in the reserve for long, for example, community members lived in the temporary shelter in Dundori National Reserve. Community members consider that by so doing, the Kenya government has applied double standards by allowing foreigners and people from upcountry, based on their ethnicity, to gain financial benefits from land previously theirs, while failing to recognize indigenous people's land rights. To affected communities, this is a gross violation of the provisions of the new Constitution.²¹⁴

■ *Outright land grabbing*

236 Coast people emphasize that the biggest problem there is land and that the problem has persisted since Kenya attained independence.²¹⁵ Coast people maintain that in 1963, at the time Kenya attained independence and the Coastal Strip became part of it, some land was released by the Sultan of Zanzibar and the agreement then between the Sultan and Jomo Kenyatta, then Prime Minister, was that the land would be given back to the rightful owners immediately after independence. However, this did not happen for reasons that were never explained to the coastal people.²¹⁶

212 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 4

213 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 4

214 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 4

215 TJRC/Hansard/Public Hearing/Kwale/ 23 January 2012/ p. 11

216 TJRC/Hansard/Public Hearing/Kwale/ 23 January 2012/ p. 11

- 237 As time went on, demand for land at the Coast rose with growth of the tourism industry which attracted both local and foreign investors to the coast ²¹⁷ However, instead of re-settling local communities and issuing them with title deeds for their land to allow them to trade freely with investors, the government left them to continue living on their land as 'squatters' and exposed them to loss of land through land grabbing by both local and foreign investors. In many cases, investors from upcountry took advantage of settlement exercises meant for coastal communities to acquire land for themselves, for their own settlement, for speculation, for business establishment and for subsequent sale to other local and foreign investors ²¹⁸ In many cases, people from outside of the coastal region also outrightly took land belonging to coastal families and communities without compensation
- 238 The process of land grabbing at the Coast increased in the early 1970s and was perpetrated by the then president himself, who is stated to have issued a decree barring the sale and other transactions involving all beach plots without his permission ²¹⁹ It was argued that his objective was to control the lands and direct their transactions in his favour, through irregular land transactions that were overseen by the then Coast Provincial Commissioner Eliud Mahihu. On behalf of the president, it was Eliud Mahihu who decided who could and who could not acquire beach plots, of the people scrambling for the same from upcountry ²²⁰
- 239 In time, the then president, through Mahihu, allocated a lot of land at the beach and in other parts of the coast in Likoni, Waitiki Farm, Casalak in Diani, Msambweni and Lunga Lunga, among others, to himself, members of his family, his relatives and friends. Other people in his government including politicians, provincial commissioners and foreign investors also grabbed land at the expense of coastal families and communities ²²¹ Affected people recalled, for example, that Msambweni land was given to Kinyanjui, the Casalak land was given to then minister Darius Mbela and the one in Waitiki was given to Kenyatta's relatives ²²²

217 The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer* 5

218 The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer* 5

219 There was a Presidential Edict issued by Jomo Kenyatta over the sale of beach plots. No one was allowed to buy any of them without his personal permission or his right hand man, Eliud Mahihu, the long serving powerful Provincial Commissioner for Coast Province. He presided over the allocation of beach plots to himself, Kenyatta family and prominent people in government and private sector. See also Daily Nation Business Daily 12 and 13 November 2009 online edition

220 See See also Daily Nation Business Daily 12 and 13 November 2009 online edition

221 TJRC/Hansard/Public Hearing/Kwale/ 23 January 2012/ p. 11. The same sentiments were reiterated by other witnesses who testified before the TJRC at the coast

222 TJRC/Hansard/Public Hearing/Kwale/ 23 January 2012/ p. 11

- 240 There are also cases where coastal families were forcibly evicted, just to pave way for occupation by people from upcountry. For example, after independence, the following villages that were occupied by the Bajuni as their homelands were destroyed - Kiunga, Kishakani, Funambai, Vibondeni, Ashwei and Materoni. The Bajuni were, in the process, displaced without any form of compensation or assistance and have, over the years, been rendered poor and destitute. As a result, members of the community strongly feel that they were better off when they were under the colonial government than during the post-colonial period because during the colonial period, they had their own villages, were farming and exporting crops and had no problems of the nature that they have experienced as a result of landlessness²²³
- 241 Due to land grabbing and resultant landlessness and destitution at the Coast, the numbers of coastal communities has reduced, while that of invaders from upcountry has steadily risen. For example, the indigenous Bajuni have either been displaced or outnumbered by immigrants and thus they have become a minority in their own homeland. As a consequence of their numerical strengths, immigrants from upcountry also began to exercise political influence, with their civic and parliamentary candidates contesting in the elections. This in itself created fear and suspicion between the local host community and the immigrants. As a result of this scenario, the region continued to experience ethnic tensions and conflicts during the electioneering period.
- 242 The kind of blatant land grabbing described by affected community members left many of them poor and without education because they have no means to afford it. Admittedly, land grabbing has angered Coast people, the majority being jobless, uneducated and poor youth. The volatile situation created that threatens to result in violent conflicts was described as follows:

They took our land and this brought about a lot of bitterness. The young people found themselves without jobs. Moi's government continued dishing out land as reward to councilors and MPs. You would find a councilor from Duruma selling land in Digo land and that brought a lot of enmity among the people. That is why the coastal community feels that all people from upcountry are bad because all their land has been given free of charge to people from upcountry. A councillor is given a beach plot and he then sells it and buys a nice car yet the people do not have anything. The majority of the youth are annoyed because they are supposed to be employed somewhere and contribute economically, but they were denied that right. That is why the young men are easily bribed because they are unemployed and their rights have been given to other people.²²⁴

223 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/ p. 42 and 44

224 TJRC/Hansard/Public Hearing/Kwale/ 23 January 2012/ p. 11

- 243 Evidently, the problem of land grabbing continued after Kenyatta's administration, leaving the coastal people in perpetual poverty. In addition to individuals and groups of individuals who obtained land irregularly at the Coast through key officials in both the Kenyatta and Moi administrations, there were cases involving private individuals and corporate bodies acting on their own, in collusion with local authority officials. In Tana River where most of the land is communal land, many rich people have managed to acquire land and title deeds therefore, while indigenous communities living there and their families have no titles²²⁵
- 244 The situation was worse on Manda Island where the then PC Mahihu took the opportunity between 1974 and 1976, using his junior officers, DCs and chiefs to forcefully acquire land on Manda Island from local people. In the process six people were killed who, together with their families, lost their right to the property they possessed on the island and all the developments they were undertaking thereon²²⁶
- 245 The abuse of state office to aid private individuals to gain land from coastal communities without consultation, compensation or mitigation extended to ecologically-sensitive areas including fish landing areas in Kiwayu, Mkokoni, Manda Island, Manda Toto, Tenewi among other areas that have been grabbed by renowned politicians and their cronies. The practice threatens the local peoples' livelihood as well as ecological sustainability in affected areas²²⁷
- 246 In addition, there are areas that are still regarded as government land at the Coast, without clear delineation, including large areas in Tana River. Some of the land in the area is considered as community land but the boundaries are not clear to local communities. Lack of clear delineation or designation of such areas has allowed rich and influential people to acquire land and related title deeds while members of the local indigenous communities do not have title deeds²²⁸. Therefore, community members demand that land adjudication should be conducted in every area, especially in Tana River where very few people have title deeds. They also demand that the government ensures that everyone at the Coast, including the Tana River area, has access to land in accordance with the new constitution to prevent upcountry people from coming to the areas any time to claim land. They also demand that families who lost their members due to forceful evictions from their land in affected areas be compensated²²⁹

225 TJRC/Hansard/Public Hearing/Kwale/ 23 January 2012/ p. 4

226 TJRC/Hansard/Public Hearing/Kwale/ 23 January 2012/ p. 4

227 TJRC/Hansard/Public Hearing/Kwale/ 23 January 2012/ p. 4

228 TJRC/Hansard/Public Hearing/Kwale/ 23 January 2012/ p. 4

229 TJRC/Hansard/Public Hearing/Kwale/ 23 January 2012/ p. 4

247. Although a large number of people from outside the coastal area were quick to illegally acquire land at the expense of coastal communities, many of the illegal landowners there have held land for speculative purposes and as such they have not put land into actual use as they wait for the value to appreciate. This has not only reduced land available for resettlement of landless people, but has also contributed to cases of unutilized or under-utilized land in the region. In some cases, landowners do not live on the farms, accounting for the many cases of absentee landowners in the region. In the meantime, indigenous communities rendered landless by land grabbers 'squat' on the farms where they constantly face evictions. Some have also, in the quest for justice, been engaged in endless court battles as those claiming to be landowners seek to evict them from their land²³⁰

■ ***Irregular acquisition of Tiwi and Diani trust lands***

At independence, the Trust Lands Ordinance passed by the colonial government to establish trust land for the benefit of African communities was adopted, with little changes, as the Trust Lands Act. Both the Act and the constitution (both the independence and the subsequently adopted constitution) provided not just for establishment of trust lands, but also for their administration by respective county councils, utilization by respective communities collectively and, in, any unlikely event, alienation for public purposes, but strictly in accordance with the law.

248. Disposal of trust lands to individuals and the issuance of individual titles to trust lands are authorized by section 116 of the Constitution. The relevant section provides that

A county council may, in such manner, and subject to such condition as may be prescribed by or under an Act of Parliament, request that any law to which this section applies shall apply to an area of trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council, it shall cease to be trust land.

249. This authorization does not indicate exactly which law the section applies to, or the considerations a county council should make before proceeding to deal with trust land in a manner that eventually causes it to cease to be trust land. Therefore, we look to the other statutes governing trust lands for clarification on the procedures for disposing of trust lands to private individuals. The statute with relevant provisions in this regards is the Land Adjudication Act. Section 3 of the Act states that.

²³⁰ The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya (1978) *Government Printer* 5

The Minister may, by order apply this Act to any area of Trust land if-

- (a) the county council in whom the land is vested requests, and
- (b) the Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered,²³¹

250 The law proceeds to specify steps in the adjudication process. First, the Land Adjudication Act is applied to the area in question. In light of section 116 of the Constitution, the above provision constitutes the first requirement in the process of alienating trusts lands to private individuals resident therein. It requires a county council in whom the land has been vested to request the minister for the time being responsible for matters concerning land to apply the Land Adjudication Act to the area intended to be alienated. If, upon receiving such a request, the minister considers that it is expedient for the rights and interests of persons living on the land to be ascertained and registered, he issues a legal notice of the application of Cap 284 to the area of trust land in question in the Kenya Gazette. The remainder of the process leading to the issuance of private individuals with titles to portions of trust land (which thereupon, ceases to be trust land) is governed by the Land Adjudication Act (unless a recording of existing rights had not been completed and certified, in which case, the Land Consolidation Act is applied to accomplish it, before the process of adjudication proceeds)²³²

251 The Land Consolidation Act provides for the following procedures to be gone through before any portion of trust land is registered in the name of an individual person or other body

- establishment of an adjudication for purposes of ascertainment and recording of interests, or to establish several adjudication sections within the adjudication area,²³³
- publication of notice in respect of each adjudication section defining the area of adjudication section be defined as clearly as possible and issuing a declaration to residents that interests in land within the adjudication section will be ascertained and recorded in accordance with Cap 284,
- fixing of a period within which a person claiming an interest in land within the adjudication section must make his claim to the recording officer, either in writing or in person or by agent (any person making a claim may be required to point out to the demarcation officer or to demarcate, or to assist in the

231 Land Consolidation Act, Cap 284 section 3(1)(a) & (b)

232 Land Adjudication Act, Cap 284 Sections 3(1) (c) & section 16

233 Adjudication Act, Cap 284 Section 5(1)

- demarcation of the boundaries of the land in which he claims to have an interest.
- 252 Such person may also clear any boundaries demarcated by a demarcation officer, conducting a survey and demarcation of parcels of land for persons therein and preparation of a demarcation map showing every parcel of land identified by a distinguishing number²³⁴
253. If in the process of conducting the foregoing activities, an act is done, an omission made, or a decision given by a survey officer, demarcation officer or a recording officer that is objectionable to any resident of the adjudication section, if there are two or more conflicting claims or if there is an objection to the adjudication register, the aggrieved party is authorized to bring the matter before an adjudication officer, an adjudication committee or arbitration board established under the Act²³⁵ These bodies must be comprised of residents of the adjudication area, and not by persons with pecuniary or personal interest in the land in question, or in the adjudication process²³⁶
- 254 Subsequently, forms for every parcel of land is prepared for every parcel of land shown on the demarcation map (in duplicate) (which may be land belonging to an individual, or to a group)²³⁷ These forms, together, comprise an adjudication record²³⁸ Each form is required to contain the number of a parcel as shown on the demarcation map and its approximate area, the name and description of the owner, year and number of gazette notice setting apart land and purpose for setting apart. In cases of land set apart, it must indicate the fact that land is in the ownership of a county council and remains trust land, in cases of land entirely free from private rights or all rights have been relinquished in favour of a county council. There should also be an indication that any person or group is entitled to any interest in land not amounting to ownership (including any lease, right of occupation, charge or other encumbrance including those recognized under customary law). It should indicate joint or ownership in common, where two or more persons are recorded as owners of land.²³⁹ The law allows correction of errors in the adjudication record. Finally, the original adjudication register must be available for inspection by any interested person.

234 Land Adjudication Act, Cap 284 section 16

235 Cap 284, section 6, 7, 8, 21, 22

236 Cap 284 section 8

237 Cap 284, section 19

238 Cap 284 section 23

239 Cap 284, section 23. Where a group is recorded as the owner of land or as entitled to an interest not amounting to ownership of land, the adjudication officer is authorized and required to cause the group to be advised to apply for group representatives to be incorporated under the Land (Group Representatives) Act. Cap 287 cause the recording officer to record that the group has so been advised and notify the Registrar of Group Representatives that the group has been so advised. See section 23(5)

- 255 Clearly, there were ample and elaborate provisions of law to guide dealings with trust land countrywide in order to ensure that beneficiaries of the lands do not suffer injustices related to their acquisition, ownership and utilization. However, in blatant breach of the law, the Kenyatta and Moi administrations as well as county councils entrusted with the lands for the benefit of communities irregularly excised and allocated parcels therefrom and had the parcels registered in their names and that of their cronies, friends and family members. A case in point is the Tiwi trust land.
- 256 The Tiwi trust land was established for the benefit of coastal communities before independence. In 1936 after the 1st World War, the British government rewarded those who fought on their side with land at Tiwi. Each of the beneficiaries was allocated two acres. The remaining land in the area was established as Tiwi and Diani trust lands. Although both trust lands were not demarcated, members of local communities used them in common for a variety of purposes including grazing.
257. However, in 1972 members of the local communities were evicted when a private individual unlawfully alienated 250 acres of the land to himself²⁴⁰.
- 258 Other trust lands that suffered a similar fate were those in Shimba Hills and Kwale, where settlement schemes were established to settle some 3,000 people from upcountry. The local Digo and the county council were hostile to permanent land rights of the people, who included many of the Kamba community. Therefore, at independence, Kwale County Council took over the scheme as trust land and leased it to the settlers for 33 years. Although the move left the upcountry people with no title deeds and therefore no security for loans, their presence in the area created instances of conflicts between upcountry settlers and indigenous peoples.
- ***Fraudulent acquisition of Mazrui trust land in Takaungu, Kilifi***
- 259 Evidently, fraudulent acquisition of trust lands exceeded those established under the Trust Lands Act and the old constitution. Illegal acquisition of trust lands extended to those established by private trusts and *wakfs* (Islamic trusts), like the Mazrui *wakf* land at Takaungu. The trust was established under the Wakf Commissioners Act, Cap 109 of the Laws of Kenya over land measuring 2 741 acres, registered under the Land Titles Act as Number 409²⁴¹. The *wakf* was

240 Testimony of Mr Salim Ali Toza, Oral submissions made to the Truth, justice and reconciliation commission held on Monday 23rd January 2012, at the Kwale County Council Hall at 37.

241 Report of the Ndung'u Commission of Inquiry into Illegal/Irregular Allocation of Public Land (2002) at 144.

established for the benefit of certain known beneficiaries. However, in 1989, Parliament enacted the Mazrui Trust Repeal Act, which purported to convert the land into either government or trust land under the Trust Lands Act. Instead of preserving the land for the intended beneficiaries under the Act, the area was subsequently declared an adjudication area,²⁴² an illegal because the *wakf* was private land.

260. It is recommended that the declaration that the area is an adjudication area be revoked as a matter of urgency and the land reverted to the intended Mazrui beneficiaries. Any title that has resulted from adjudication of the area should similarly be revoked and the land restored to the trust. If, for any reason, the land or part of it is necessary for settlement of the landless at the Coast, the government, through the National Land Commission, should negotiate with the beneficiaries of the trust for land purchase or free donation from the beneficiaries.

■ ***Failure of illegal settlement schemes at the Coast***

261. Since Kenya's independence, settlement schemes at the Coast have been fraught with irregularities and outright discrimination of landless coastal communities. Settlement schemes at the Coast are occupied mainly by upcountry communities. As a result, many members of coastal communities who lost their land during colonialism remain landless, poor and, in many cases, destitute, their means of livelihood having been forcefully taken away, as described below.

■ ***Illegal settlement scheme in Magarini***

262. In the Magarini Settlement Scheme, for example, malpractices abound. Settlement officers sidelined the intended landless coastal community beneficiaries and instead of allocating to them land for settlement, facilitated their eviction from the scheme and replaced them with persons from upcountry.²⁴³ Discussions over land allocations in the scheme held in Parliament revealed that "senior government officials listed their constituents and friends and recommended them to be given plots by the settlement officers."²⁴⁴ However, despite the revelation, no official action has ever been taken to correct the situation.

²⁴² Report of the Ndung'u Commission of Inquiry into Illegal/Irregular Allocation of Public Land (2002) at 145.

²⁴³ K. Kanyinga, 'Politics and struggles for access to land: "Grants from above" and "squatters" in coastal Kenya' (1996) *The European Journal of Development Research* 57.

²⁴⁴ K. Kanyinga, 'Politics and struggles for access to land: "Grants from above" and "squatters" in coastal Kenya' (1996) *The European Journal of Development Research* 57.

■ ***Illegal Settlement Schemes in Lamu***

263 The unprocedural manner of establishing settlement schemes at the Coast, especially during Kenyatta's era, was reflected in many other areas than Magarini.²⁴⁵ In Lamu, Kenyatta's administration, in the 1970s embarked on implementing what appeared, on the surface, to be a policy of re-distribution of settlement schemes in the area now falling under Lamu County were established in a dubious manner as numerous former coastal land owners were not informed or compensated for their land that was appropriated for resettlement ²⁴⁶

264 In the end, the proportion of the indigenous coastal community members settled was much lower- between 15 and 20 per cent only, than that of members of communities from up country ²⁴⁷ To make matters worse, some of the members of coastal communities who received letters of allotment had their land subsequently illegally misappropriated from them despite their having paid all the fees demanded for allotment to the Ministry of Lands ²⁴⁸

■ ***Failed Baraka settlement schemes***

265 During the 1960s and 1970s, several Baraka Settlement Schemes were established at the Coast to provide land for about 5,000 members of coastal communities that had been rendered squatters when their land was taken away, first, by Arabs and subsequently, by the British. However, only a small number of the landless was settled in Kilifi In Lamu District where a larger settlement programme was implemented, supported by aid from Germany, 10 000 members of the Kikuyu community were settled between 1969 and 1979, including ex-Mau Mau soldiers. The irregular move raised the population of the Kikuyu to 20 percent in the district ²⁴⁹

■ ***Failure to consult with affected communities***

266 Regarding construction of a new port in Lamu, coastal communities blame the government for having known that the port would be built there as early as 1965, but failed to consult with affected communities, having settled people from upcountry on part of the land on which the port would be built to make them beneficiaries of compensation, having settled some coastal communities on land meant for the port without re-settling them before port construction work began. The coastal communities further claim that the government designated

245 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/4
246 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/4
247 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/4
248 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/4
249 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/4

a lot of community ranches as land on which the port would be built without compensating communities and finding them alternative land and failing to consult with potentially affected coastal communities over construction of the port²⁵⁰

267. It is stated that Lamu Port, currently under construction, is being established on a number of community ranches measuring a total of 85,000 hectares. They included Galana Ranch, the biggest, Majengo Ranch measuring 12,000 hectares, Umoja Ranch measuring 5,000 hectares, a ranch now registered as Abothei Limited measuring 7,000 hectares, Mongone Ranch measuring 10,000 hectares and a proposed ranch measuring 8,000 acres which is currently Magogoni Settlement Scheme²⁵¹
268. The problem is that although local coastal communities were living on the land later established as ranches, people from up country were brought in 1972 and settled in the areas in which the ranches were established for their benefit²⁵². In the process of their settlement, coastal families that were living on the land were displaced. As a result, it is the people brought in from up country who have benefited economically from the land over the years. Thus historical injustice was planned²⁵³
269. Further, communities living in areas around the port that is currently being constructed at Lamu assert that one of the ranches in the area, namely Enkamani Ranch belonged to their forefathers and was occupied by them. However, the head of Kenya Navy illegally acquired it and subsequently advertised its sale on the internet for the sum 2 million Euros on 2nd November 2009. Therefore, the person who illegally acquired the land stands to profit immensely from its sale at the expense of local community members without any compensation²⁵⁴
270. It is maintained that there has not been any historical injustice worse than what we Lamu people experienced because they were evicted at independence and people from up country brought in and settled on their land. Further, on 25th December 1963, the then President Kenyatta ordered people in areas from Witu to Mashakani to give up their firearms only for them to be subjected to *Shifita* activities followed by torture by GSU and now, Lamu Port is being constructed on their land without consultation or compensation. People have lost their

250 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/p 16 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/4

251 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/p 16 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/4

252 TJRC/Hansard/Public Hearing/Lamu/9 January 2012/p 4

253 TJRC/Hansard/Public Hearing/Lamu/ 9 January 2012/p 3, 30 & 32

254 TJRC/Hansard/Public Hearing/Lamu/9 January 2012/p 30



Abubakar Kuchi taking oath before testifying on Lamu land issues in Kilifi

livelihood as a result if the government decision to construct a new port there but, they ask, where is the compensation? Why were they not consulted? What other means of livelihood will they get, having lost their homelands, pasture lands and fishing areas?²⁵⁵

271. It is claimed that the government itself has misused its power to procure land in Magogoni and other areas under the pretext of public use while poorly compensating those concerned. The government is accused of having misinformed communities in the area that the land was to be used for a Navy Base in 1965. Only recently did they find out that a port is to be constructed in the area. Moreover, the majority of Kenyans from outside of the coastal region were settled in Hindi Magogoni area now meant for the port and they were issued with title deeds. They now stand to benefit from compensation while affected coastal communities in the same area that have lived on the land for over 300 years do not.²⁵⁶

²⁵⁵ TJRC/Hansard/Public Hearing/Lamu/9 January, 2012/p.7.

²⁵⁶ TJRC/Hansard/Public Hearing/Lamu/9 January, 2012/4.

272. Further, a rush by upcountry people to develop the area around the new port to enhance its activities and open up transport to Ethiopia, is likely to cut deeper into indigenous communities' lands but the government has not made provisions for compensation or re-settlement of communities and families likely to be affected²⁵⁷ When upcountry people come, they manage to quickly obtain title deeds, while indigenous people living there have been trying to obtain the same for years. So upcountry people "laugh at us and say we are just sleeping around"²⁵⁸

273. Considering the prevailing volatile situation generated by the development of the Lamu Port and related activities, indigenous coastal communities did not conceal their urge on the government to take action quickly to avert looming conflict. In their own expression, the government needs to

take a step before there is loss of life because we hear that people from other places are fighting each other but we have not fought. We know that a monkey is cowardly but when cornered, it can finish you. So we are like monkeys, we are cowardly but one day-- We are pleading with this Commission to take a step and ensure that the marginalized and minorities – the Boni, Bajuni and Somali - get their rights. Since the Constitution was changed, there is individual land and community land and government land. We were hoping that this would be so but the Constitution is being disregarded. Even regarding the port land, we cannot get compensation because we do not have documents. Do you think that is right? Will that not bring war? The war after independence was not because of elections results, people were just bitter from before and it is the same thing we are seeing here. This will later bring problems and will mess up the peace in the area. If you keep on trampling upon people, one day they will look for a knife and injure you in the stomach.²⁵⁹

Obviously, the root causes of land-related violent clashes are preventable, if only the government could take practical steps to meaningfully address them.

■ ***Incomplete land adjudication, consolidation and registration***

274. Although the Land Adjudication Act, the Registration of Titles Act and other enabling laws were passed to facilitate land adjudication in the whole country, certain areas, especially at the Coast, were left out, thus perpetuating landlessness and vulnerability of coastal lands to the phenomenon of land grabbing.

275. To date, land adjudication and registration have not been initiated or concluded in large areas including Mombasa, Malindi, Taita, Taveta, Kwale and Malindi. In many

257 TJRC/Hansard/Public Hearing/Lamu/9 January, 2012/p 4

258 TJRC/Hansard/Public Hearing/Lamu/9 January, 2012/p 16

259 TJRC/Hansard/Public Hearing/Lamu/9 January, 2012/p 16

places, local people live on land claimed to belong to the government without clear designation of the status of the land. In other places, people live on either communal land or ancestral land that could be recognized as communal or trust land but without any title deed or ascertainment of their rights in the first place. The resulting problems have been explained by an affected person as follows:

I would like the government to take steps to make sure that everybody has the right of accessing land. Adjudication should be done in every area, especially in Tana River where very few people have title deeds. Any rich person seems to be able to get title deeds. Most of the land is community land. When you go down, we border the Tharaka people. The land belongs to the government and anybody can come in and claim it at any time, these people have no way of claiming this land. So, I would like the government to ensure that everybody gets their own area according to the new Constitution. Most of the people from this community who were evicted died, but their children are still there. I would like these people to be compensated.²⁶⁰

276 Failure to adjudicate and register land at the Coast is not just the main reason for the widespread squatter in the region, it has also, for very many years, exposed coastal communities' land to land grabbers, especially from mainland Kenya and foreigners. The problem has been made worse by the growing commercial value of land for tourist development and the government's decision to make grants of coastal land suitable for tourism, often in areas already occupied by the Mijikenda, resulting in mass evictions and subsequent conflicts.

277 No doubt, the constant unpredictable eviction of indigenous communities in the region has made it impossible for them to engage in any meaningful development activities, rendering many poor and destitute. The anger and frustration that the situation has engendered, which is a key recipe for violence is elaborated in the following testimony from a Lamu resident:

Why is it that we are not Kenyans? We are human beings! We could get angry later. We are old now but the youth will not accept the injustice to go on forever. When the war starts, you will start wondering why the conflict has broken out but that is because somebody has gone to Nairobi and managed to get ownership documents.²⁶¹

278 For reasons which have never been explained, the process of land adjudication at the Coast and in surrounding areas has been slow and often done in favour of the immigrants who ended up having land title deeds at the expense of local communities. The selective application of land laws in Lamu, Kwale and Tana River districts, among other places, has been the source of ethnic suspicion, tension and conflicts between the locals and the immigrants.

260 T.JRC/Hansard/Public Hearing/Lamu/9 January 2012/p. 13

261 Testimony of Mr. Ali Gubo Baldo. Oral Submissions Made To the Truth, Justice and Reconciliation Commission Held on Monday 9th January, 2012 at Mkunguni, Lamu Fort, Lamu at 16.

Illegal Land Acquisition in Mainland Kenya during the Post-Independence Period

279. By the time Kenya attained independence in 1963, the British colonial administration had established a new system of land tenure, based on a number of laws which were adopted by independent Kenya at independence. In the newly-introduced land tenure, ownership of land would be (and still is) signified and evidenced by ownership of title to land. Therefore, ownership of title to land provided (and still provides) a strong basis for access to and use of land such that if any person owned land but did not have title to it, such ownership would not be recognized in law and in practice, unless the area in question was one pending land adjudication, consolidation and registration or was considered trust land. The process of issuing titles to land was also governed by law.
280. However, customary tenure continued to operate among African communities, alongside official tenure. In customary tenure, members of a tribe/community or family acquired rights to use land and to pass it on (transmitted it) to their descendants without any formal procedure of conveyance. In the tenure systems operating at independence, three main categories of land emerged - government (including local authority land), trust land/community land and private land. The three categories of land were governed by specific pieces of legislation in terms of acquisition, ownership and disposal.²⁶² This section begins by presenting key features/provisions of the laws governing land transactions, namely: acquisition, ownership and disposal to provide basis for understanding the extent of non-compliance with the laws, which rendered related transactions irregular and illegal, with attendant consequences on peaceful co-existence of the people of Kenya.

Government land

281. At independence, the land laws adopted introduced various regimes for issuing titles to land, depending on the type of land. Therefore, included in this section is an examination of the procedures for issuing titles to each of the categories of land separately, beginning with government land. What was considered as government land becomes necessary to analyse in this section for a number of reasons. First,

²⁶² At independence, the Kenya government inherited the following ordinances with very slight amendments: the Crown Lands Ordinance (renamed Government Lands Act, Cap 280 laws of Kenya), the Trust Lands Ordinance (renamed the Trust Land Act, Cap. 288), the Registration of titles ordinance (renamed the Registration of Titles Act, Cap 281), the Survey Ordinance (renamed the Survey Act, Cap 299), the Land Titles Ordinance (renamed the Land Titles Act), The Land Consolidation Ordinance (renamed the Land Consolidation Act, cap 283); and the Registration of Documents Ordinance (renamed the Registration of Documents Act, cap 285). In addition, the following statutes were enacted to govern transactions in land: The Registered Land Act, Cap 300, 1963 [which was intended to replace the Registration (Special Areas) Ordinance; The Land Planning Act of 1968 (repealed); The Sectional Properties Act of 1987; and the Physical Planning Act of 1986.

there were large numbers of landless people who occupied land designated as government land, in the hope that since the land belonged to government, they would not be evicted from the land or, eventually, they would be settled thereon

- 283 Secondly, any unauthorised activity involving government land was likely to expose dependent communities and families to landlessness, poverty and destitution and therefore, such activities were and still are likely to attract resistance, including violence Third, in later years of independence, public lands included public amenities such as schools, hospitals, beach access routes and children's playgrounds for the benefit of the public and therefore any illegal dealing with such land would and did, in many cases, attract violent reactions from the public

Law governing government land

- 284 For purposes of the Government Lands Act,²⁶³ government lands are land (for the time being) vested in the government by virtue of section 204 and 205 of the Constitution, as contained in schedule 2 of the Kenya Independence Order-in-Council of 1963, and sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act of 1964 ²⁶⁴
- 285 The Kenya Independence Order-in-Council of 1963 (which came into effect on 11 June 1963) provides that land vested in the government of Kenya are all estates, interests or rights over land situated in Nairobi area that were vested in the Queen or Governor, lands registered in the name of the disbanded Trust Lands Board and lands situated in regions (provinces) designated by the Governor as government land ²⁶⁵ To these, the (former) Constitution of Kenya (Amendment) Act adds all estates, interests and rights in, or over land situated in a former region that immediately before the 22 October 1964 were vested in the former regions (provinces), all estates and rights in, or over land that immediately before 12 December 1964 were vested in the Queen of England or the Governor-General on behalf of the government of Kenya and lands formerly registered in the name of the Trust Land Board under the Land Registration (Special Areas) Ordinance
- 286 It also adds all movable and immovable property and all lands that were, before 12 December 1964 held by the Governor-General, the government of Kenya, or by any person in trust for them, and all immovable property acquired for the

²⁶³ This is implied in the preamble to Cap 280 which states that the Government Lands Act is an Act of parliament to make further and better provisions for regulating the leasing and other disposal of government lands and for other purposes. The original intent/objective of the Act (ordinance) to enable the Commissioner of Lands to set aside land for alienation to European settlers for commercial and agricultural developments seem to have been retained

²⁶⁴ The Government Lands Act Chapter 280 Laws of Kenya 1984 (Rev Ed 1972) section 2

²⁶⁵ The Kenya (Independence) Order-in-Council Section 3(1)- (3) [1963]

use of regions and former regions²⁶⁶ In effect, these refer to lands that are not trust lands and have neither been alienated to private bodies (lands not privately owned), nor currently owned by public authorities, including 'Forest Areas'

287 The foregoing provisions do not provide a clear and full picture of what forms government lands Other sources indicate other categories of government land including remnants of land in the City of Nairobi and Mombasa that were acquired for town planning purposes but were never used therefore,²⁶⁷ forest reserves, other government reserves; lands within townships and other urban centers, alienated government lands (for example, lands in the City of Nairobi that have been leased for 999 years with reversionary interest in the state), unalienated government lands, and national parks²⁶⁸

288 It is noted with concern that government lands for purposes of the Government Lands Act may not necessarily include all land owned by the government Land owned by the government includes land owned by the government for government use, for example, because it is a chief's office, or provincial commissioner's office or residence, or land owned by the government by virtue of its reservation by the government for specific purposes, such as the protection of flora and fauna therein The substantive law (statute) governing government lands is the Government Lands Act, Cap 280, which, as already noted, was derived from the colonial Crown Lands Ordinance of 1915, with only minimal amendments The Government Lands Act is both a substantive and procedural statute with respect to government lands and provides for both administration and conveyance of government lands In addition, the Registration of Titles Act, Cap 281, and the Registered Land Act, Cap 300, may apply in certain cases

289 The Act, now repealed, provides that all conveyances, leases, and licenses of, or for the occupation of government lands are to be done, subject to the provisions of the Act²⁶⁹ Statutes governing other lands owned by the government, such as the Forests Act and the Wildlife (Management and Conservation) Act also establish requirements and procedures for disposal and issuance of title to those other government lands

290 The issuance of titles to government lands is a step subsequent to the alienation and disposal of the lands The latter steps are also governed by the law, which

²⁶⁶ The Constitution of Kenya (Amendment) Act No. 28 of 1964 sections 21, 22, 25 & 26

²⁶⁷ See the list of the functions of the Commissioner of Lands with respect to government lands shows that government lands include remnants of land in the City of Nairobi and Mombasa that were acquired for town planning purposes but were not used therefore section 3 Cap 280

²⁶⁸ The Principal Registrar of Government Lands has a list of government lands

²⁶⁹ The Government Lands Act Cap 280 1982 (Revised Edition 1962) Section 4

specifies that with respect to government lands, all of the procedures subsequent to alienation must be conducted in accordance with the provisions of the Act itself²⁷⁰ Therefore, in the process of examining the actual procedures for issuing titles to government lands, procedures for alienation (disposal) of government lands will be considered first

- 291 The key point is that the validity of titles issued with respect to government lands depend on the validity of procedures followed in disposing of the lands Where procedures prescribed by the Act are not followed, any titles subsequently issued are irregular.
- 292 For purposes of disposal of government lands under Cap 280 (which leads to the issuance of title to government lands), government lands may be divided into two categories - town plots and agricultural land²⁷¹ For both categories of lands, Cap 280 provided for alienation and disposal primarily by grants of land to various recipients for a variety of purposes, by leases of town plots and agricultural lands for specified periods of time, and by sale of agricultural land, thereby conferring freehold (absolute) titles thereto to a beneficiary²⁷²
- 293 The only criterion to be met prior to disposal of government lands was that the lands were available, meaning that they were not, at the time of proposed sale lease or grant, needed or required for government purposes, or that land was required for purposes of a municipality (in cases of applications by municipalities for land grants) In the absence of proper criterion for disposal, there are dangers with the exercise of the Commissioner of Lands of the President's discretion with respect to disposal of government lands

Procedures for disposal of government lands by way of grants

- 294 The Governments Land Act authorised the president to make grants of any estate, interest, or right over unalienated government land The Act does not prescribe the circumstances under which grants may be made By these powers, grants of land may be made for religious, charitable or sports purposes, for town planning exchanges on recommendation of the town planning authority of Nairobi, and for the use of local authorities for municipal or district purposes (for office accommodation, town halls, public parks, fire stations, etc)

²⁷⁰ Section 4 Cap 280

²⁷¹ See Sections 4 7 9 & 19 of Cap 280

²⁷² See sections 4 7 9 & 19 of Cap 280 Mortgages and temporary occupational licenses may also be granted on government lands but these may not require the issuance of titles thereof There are also cases where government land may be disposed of by court order See section 106

- 295 Any grants of land are to be made in accordance with the provisions of Cap 280 and subject to any other written law. Cap 280 does not prescribe requirements for the exercise of the power to grant land, and lacks provisions, which say, for example, that land grants are to be made upon application by an interested party, and only if the president, or the Commissioner is satisfied that the purposes for which the land is required are valid. In practice, applications for land grants may be made, for example by the City Council of Nairobi to the Commissioner of Lands and it is usual for applicants to state the purposes for which land grants are needed.
- 296 However, there are no requirements for verification of purpose statements and Cap 280 did. There was also no clear government policy on government land grants. The foretasted omissions notwithstanding, where the Commissioner decided to grant land located within an urban area (a town), the Act authorised the President or the Commissioner to specify conditions for grant. However, conditions have so far not been effected for grants of land in urban areas. In addition to any conditions that may be created by the President, or Commissioner, the Act contains implied covenants against sub-division, assignment, and sub-letting, unless prior written consent of the Commissioner is obtained.
- 297 In practice, where a grant of land is made, the steps are as follows: Valuation of land for purposes of determining rent,²⁷³ Issuance of a letter of allotment, and conveyance and registration thereof. The Act required that all transactions with respect to government lands be registered in the Government Lands Registration Offices in Nairobi and Mombasa (or in the registration districts within which the land is located, in case of land located outside of Nairobi and Mombasa).²⁷⁴ Prior to registration, the Act required that conveyance documents be properly executed by both parties - the Commissioner on behalf of the government, and the grantee, but the Act does not specify what kind of document is to be executed.²⁷⁵ It is presumed that a grant or a letter of allotment in one form or another would be prepared by the Commissioner, stating that land has been granted to a person or body, and then delivered to that person or body for execution. In practice, leases and transfers have been prepared, depending on the statute under which the government land in question was subsequently registered.
- 298 Upon execution, the original conveyance document and two copies thereof are delivered by the Commissioner to the Principal Registrar of Government Lands for registration.²⁷⁶ The statute provides that registration shall be effected by the

273 GLA Cap 280 section 18

274 See Part X Cap 280

275 Section 7 of Cap 280 authorizes the Commissioner to execute conveyance documents on behalf of the government

276 Sections 94 and 95

Registrar by binding (filing) a copy of the conveyance document delivered to him in the Register of Government Lands and entering an abstract or note of the document in a part of the volume of the register that relates to the land affected by the document²⁷⁷ He is also required to indicate the number of the volume and folio of the document on the filed photostat copy and to make and sign an endorsement on the original of the document registered and the filed copy Finally, the original document, which is the document of title, is delivered to the grantee²⁷⁸Cap 280 did not describe or name the document of title to be issued to a grantee at the end of the registration process but the standard application for registration form appearing in the subsidiary legislation under the Act (Form I) suggests that it would be a certificate of title

- 299 Further, the Registration of Titles Act, Cap 281, which applied to certain government lands, stated that title to land comprised in a grant was evidenced by the issuance of a certificate of title thereof²⁷⁹ In practice, certificates of title have been issued conferring leasehold as well as freehold titles to government lands, including lands within townships, pursuant to applications for land grants In many cases, land grants were further sold, sub-leased, or sub-divided with prior consent of the Commissioner of Lands It is emphasized that any title issued for government land grants without following, or in breach of the procedures stipulated under Cap 280 was an irregularly issued title

Disposal of government lands by leases

- 300 In addition to issuing grants of land for various purposes, Cap 280, the substantive and procedural law then governing government lands, authorised disposal of government lands (unalienated plots within township and agricultural lands) through leases The only requirement was that the lands were available, that is, the lands were not, at the time of proposed lease, required for government purposes The procedure for disposal of the lands through leases culminated in the issuance of titles to the lands bearing a leasehold interest for a term of years, or a freehold interest The procedures for issuing leasehold titles to government lands within townships and those within agricultural areas entailed procedures for alienation and disposal, and had to be in conformity with Cap 280²⁸⁰ The procedures were

- c. Availability of unalienated government lands The first procedural requirement was availability of government land within a township, (that is, availability of a town plot belonging to the government, for example, because it remained

²⁷⁷ Sections 95, 97 & 118

²⁷⁸ Sections 95, 97, 118 & 119

²⁷⁹ See sections 21, 22 & 23 of the Registration of Titles Act, Cap 281

²⁸⁰ Section 4

unsold in previous auctions), or within an agricultural area that was not required for public purposes.²⁸¹

- L The Commissioner's exercise of the power to cause the lands to be sold The next requirement was that in exercise of powers conferred on him with respect to such lands, the Commissioner caused such lands to be disposed of in the manner prescribed by the Act ²⁸²
- L Establishment of an "up-set" price Once surveys and divisions of urban plots and agricultural lands were completed, the Act required the Commissioner to establish an "up-set" price at which leases were to be sold He could also establish building conditions and special covenants to be inserted in leases, but this is not mandatory.
- L Establishment of lease periods: In addition, he was required to establish the periods into which the lease terms were to be divided (for not more than 100 years in case of town plots and 999 years for farm plots)²⁸³ and establish the annual rent to be paid in respect of each period
- L Advertisement of availability of government lands and proposed sale by public auction The next step was for the Commissioner to advertise the availability of town and agricultural plots for sale by public auction in the *Kenya Gazette*, indicating the up-set price and other terms of sale In addition, the notice of sale was required to indicate the number of plots available, the area of each plot and their location, the amount of survey fees required, the cost of deeds for each plot, and the time and place where the plan of each farm could be inspected ²⁸⁴ The statute authorised the Commissioner to carry out all of these tasks alone, without any requirement for consultation with other concerned parties or an advisory body
- L Informing bidders of the terms and conditions of sale Further the statute required that before the commencement of sales at public auctions, bidders be informed of the terms and conditions of sale ²⁸⁵ Every sale of leases carried implied covenants and restrictions against sub-division of plots, assignment, sub-letting, or use not specified in the lease, except with the written consent of the Commissioner.²⁸⁶ Bidders were required to be made aware of these conditions.

281 Sections 9 & 19 of Cap 280
 282 Section 9 Cap 280
 283 Sections 10 & 27 (2) Cap 280
 284 Section 13 20 & 21
 285 Cap 280 sections 14 15 22 & 23
 286 Section 18 & 39

- Sale by public auction The Commissioner was required to dispose of government lands through sale by public auction Before a public auction was held (or before some other mode of sale was adopted, if the President so directed as authorised under section 12 of the Act), lands available within urban areas were to be divided into plots suitable for the construction of buildings for business or residential purposes ²⁸⁷ An auction would ensure the government gets the best price; transparency in the process, and would ensure equity between members of the public
- Sale to the highest bidder The Commissioner was also required to ensure that sales of government lands were made to the highest bidder ²⁸⁸ The Commissioner was also charged with ensuring that the highest bidder paid the deposit and the balance of the purchase money, rent, stamp duty and fees for preparation and registration of lease within seven days of the date of the auction ²⁸⁹ The Commissioner was also the recipient of payments and the statute did not specify an account or fund into which purchase moneys were to be deposited immediately after auctions If payments were not made in time, within a month of the date of auction, the purchaser lost the right to lease and the deposit was forfeited ²⁹⁰ This latter provision was unconscionable It failed to take into consideration various genuine factors that may hinder a purchaser from completing payments within one month of the date of auction At least, deposit of the purchase price should be refunded if a purchaser loses the lease
- Preparation of conveyance documents Subsequent to the foregoing procedures, the Commissioner prepared a lease of town plot or agricultural land, which he executed on behalf of the government, then presents to the leasee for execution
- Registration of title The registration requirements under Part X formed the last stage of the procedures for issuance of titles in respect of leases of government lands Once a lease was prepared and executed by both Commissioner and lessee, the Commissioner was required to deliver the lease to the Principal Registrar, with a copy thereof ²⁹¹ The lease had to clearly describe the property affected thereby and its boundaries and situation It had also to indicate a reference to the volume and folio of the register in which the property has been previously registered, or a reference

287 Section 9

288 Sections 14, 15, 22 & 23

289 Section 10 & 16

290 See sections 16, 17 & 26

291 Section 95

to the lease from the government relating to the land affected by the transaction.²⁹² Registration was effected by filing a photostat copy of the document accepted for registration, and by entering an abstract or note of the document in a part of the volume of the register of government lands relating to the leased land. The filed photocopy had to bear the number of the volume and folio in which the sale was registered and the date of registration. Immediately thereafter, the Registrar signed an endorsement on the registered document and on the photocopy and delivered the original to the lessee.²⁹³ In practice, a certificate of lease is issued to signify ownership of a leasehold interest in government lands.²⁹⁴

Disposal through sale of freehold interest in land

- 301 Cap 280 allowed disposal of freehold interest in government lands - town plots and agricultural lands in two basic ways - by failing to stipulate that only leases of government plots in urban areas could be sold, and by expressly authorising the sale of freehold interests in the government's agricultural lands. Section 12 which provided for sale of government urban plots merely said that "leases of town plots shall, unless the President otherwise orders in any particular case or cases, be sold by auction"
- 302 Similarly, with regard to agricultural lands, the statute provided that "leases of farms shall, unless the President otherwise orders in any particular case or cases, be sold by auction"²⁹⁵ There was nothing in the Act to stop sales of town plots and agricultural lands otherwise than by sale of leases thereof. There was nothing that says, for example, that only leases for a term of years shall be issued on government town plots and agricultural lands.
- 303 It is thought that in practice, freehold titles may have been conferred upon disposal of urban plots and agricultural lands in addition to leaseholds. Regarding agricultural lands, the statute made express provisions for the issuance of freehold titles upon sale.²⁹⁶ Section 20 (1) provided that "when agricultural land is available for leasing, it may be sold by auction after giving notice of sale on the gazette" Section 20(2) (d) went further to provide that in the notices of auction,

²⁹² Section 97

²⁹³ Section 118 & 119

²⁹⁴ In addition to leases issued through this procedure, Cap 280 authorizes leases of government lands to be granted for "special purposes" by the Commissioner with the president's approval (Part V) but it does not define what special purposes are or any special procedure for applying for such leases.

²⁹⁵ Section 20

²⁹⁶ See section 20(2)(d)

Upon adjudication and registration, trust land ceases to be trust land. Currently, trust lands are basically the remainder of lands that were, in the colonial days, designated as native reserves. These lands include former special reserves, temporary special reserves, special leasehold areas, special settlement areas, communal reserves, and lands situated outside the Nairobi Area as it was at independence in 1964, if the freehold title thereof is registered in the name of, or vested in a county council by escheat.³⁰³

- 312 An examination of the First Schedule to the Trust Land Lands Act, as in force on 31 May 1963 (The Trust Lands Ordinance of 1963), which established the boundaries of trust lands (then native reserves) reveal that the boundaries were established along tribal lines such that the lands comprised the Kikuyu land unit, The Maasai land unit, the Kamba land unit, Nandi land unit, Kavirondo land unit, Kipsigis land unit, North Pokomo land unit, the Coast land unit, and the Meru land unit. One of the challenges currently facing administration and disposal of trust lands is that the first schedule to the Trust Lands Ordinance defining their boundaries was repealed. This makes it difficult to ascertain the boundaries of trust lands.³⁰⁴ The relevant provisions in the Trust Lands Act describe them as certain areas in Kwale District, Makueni area in Machakos District, Arthi-Tiva area in Makueni District, Lambwe Valley, Sarora Settlement Area in Nandi District, Kaimosi Settlement Area in Kakamega, Meru Concessional Area, and others.
- 313 The legal regime governing trust lands falls into two categories, one dealing with the management of trust lands and the other with disposal/alienation of trust lands at which the land ceases to be trust land and becomes either government land or land privately owned. The substantive and procedural law governing trust lands are primarily the Constitution, the Trust Lands Act, the Land Consolidation Act and the Land Adjudication Act. The laws define trust lands and provide for their administration, management, alienation (disposal) and registration. In addition, the Registered Land Act and the Group Representatives Act apply in certain cases of registration of trust lands. Upon adjudication and registration, trust lands cease to be trust lands. Besides the statutes, trust lands are, in all respects, subject to "the general law that may, from time to time be in force," unless express provisions are made in the statutes to the contrary.³⁰⁵ This implies that trust lands are subject to Common Law.

303 Section 114 of the Constitution defines trust lands to include lands that were known before June 1, 1963 as Special Reserves, Temporary Special Reserves, Special Leasehold Areas and Special Settlement Areas, and certain areas that were defined under the Crown Lands Ordinance. At present, Trust Lands include Lambwe Valley and a few other areas that have not been alienated to private individuals.

304 The boundaries of trust lands do not seem to have been surveyed on the ground in the first place.

305 Trust Lands Act, Section 59.

Administration and management of trust lands

- 314 Section 115 of the Constitution lays out a framework for the management of trust lands. It stipulates that trust lands shall vest in the county councils within whose area of jurisdiction the land is situated. This section of the Constitution set out a legal framework for the public trust in respect of land - here trust lands. In this respect, the Constitution states that county councils in whom trust lands are vested shall hold the land for the benefit of persons ordinarily resident thereon, and to give effect to such of their 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. Only customary rights repugnant to written laws are to be disregarded. Having firmly placed the authority to manage and regulate trust lands in county councils, the constitutional provisions are confused by provisions of the Trust Land Act which give overlapping authority to the Commissioner of Lands to administer trust lands "as an agent for the council," in addition to the numerous other functions and powers of the Commissioner³⁰⁶
- 315 In administering trust lands as agent for county councils, the Commissioner is authorised to perform certain functions relating to issuance of titles to trust lands. He is authorised to exercise on behalf of the council (either in person or through an agent) powers of the council to set aside land for public and private purposes, and to execute on behalf of the council grants, leases and other documents relating to trust lands³⁰⁷. There is no mandatory requirement that powers of the Commissioner be exercised in accordance with any standards, guidelines or rules to ensure that the powers are exercised in a way that would allow county councils to manage the lands so as to give effect to the interests of people ordinarily resident therein.
- 316 Having placed the management, control and administration of trust lands in the arms of the central government (county councils and the Commissioner), the Constitution goes further to provide for alienation/disposal of trust lands. The provisions with regard to alienation are buttressed by similar provisions in the Trust Lands Act. In addition, the Land Adjudication Act and the Land Consolidation Act specify procedures for alienation and disposal of trust lands to both public and private bodies. Procedures for issuing titles to trust lands entail procedures for their alienation and disposal and are governed by the laws.
- 317 In the process of examining these procedures, any existing loopholes in the laws will be highlighted and suggestions will be made for necessary changes/measures.

³⁰⁶ Trust Lands Act Section 53

³⁰⁷ Trust Lands Act section 53 (a) & (b)

Currently, the legal regime governing trust lands authorises disposal of the lands to the government for public purposes, to private individuals, as well as to private bodies. In the process, freehold as well as leasehold titles can be issued

Alienation of trust lands to individuals

318. Disposal of trust lands to individuals and the issuance of individual titles to trust lands are authorized by section 116 of the Constitution. The relevant section provides that

A county council may, in such manner, and subject to such condition as may be prescribed by or under an Act of Parliament, request that any law to which this section applies shall apply to an area of trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council, it shall cease to be trust land

319 This authorization does not indicate exactly which law the section applies to, or the considerations a county council should make before proceeding to deal with trust land in a manner that eventually causes it to cease to be trust land. Therefore, we look to the other statutes governing trust lands for clarification on the procedures for disposing of trust lands to private individuals. The statute with relevant provisions in this regards is the Land Adjudication Act. Section 3 of the Act states that

The Minister may, by order apply this Act to any area of Trust land if-

- (i) the county council in whom the land is vested requests, and
- (ii) the Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered,³⁰⁸

Steps in the adjudication process

- L Application of the Land Adjudication Act to an area: In light of section 116 of the Constitution, the above provision constitutes the first requirement in the process of alienating trusts lands to private individuals resident therein. It requires a county council in whom the land has been vested to request the minister for the time being responsible for matters concerning land to apply the Land Adjudication Act to the area intended to be alienated. If, upon receiving such a request, the minister considers that it is expedient for the rights and interests of persons living on the land to be ascertained

³⁰⁸ Land Consolidation Act, Cap 284, section 3(1)(a) & (b)

and registered, he issues a legal notice of the application of Cap 284 to the area of Trust land in question in the *Kenya Gazette*. The remainder of the process leading to the issuance of private individuals with titles to portions of trust land (which thereupon, ceases to be trust land) is governed by the Land Adjudication Act (unless a recording of existing rights had not been completed and certified, in which case, the Land Consolidation Act is applied to accomplish it, before the process of adjudication proceeds)³⁰⁹

- I Appointment of adjudication officers: The Land Adjudication Act (LAA) provides that before the process of adjudication of trust land commences, the minister appoints a public officer to be the adjudication officer for the adjudication area to which he has authorized the LAA to apply. The statutes do not provide any criteria, such as qualifications, experience or personal integrity to guide the minister in his appointment of an officer to such a crucial task. It goes further to authorize an appointed adjudication officer to appoint (subordinate) demarcation, survey and recording officers to demarcate, survey and record interests of residents within the adjudication area. Additional adjudication officers may be appointed by the minister if the situation so requires.
- L Establishment of an adjudication section: The next step is for the adjudication officer to establish the whole adjudication area as an adjudication section for purposes of ascertainment and recording of interests, or to establish several adjudication sections within the adjudication area.³¹⁰
- L Publication of notice: Once an adjudication section is established, the Act requires that another notice be published by the adjudication officer in respect of each adjudication section and that in the notice, the area of adjudication section be defined as clearly as possible, and issue a declaration to residents that interests in land within the adjudication section will be ascertained and recorded in accordance with Cap 284.
- L Fixing of a period for making claims to land: After publication of notice, the Act requires adjudication officers to fix a period within which a person claiming an interest in land within the adjudication section must make his claim to the recording officer either in writing or in person or by agent (there is no statutory guidance as to what period of time may be appropriate for residents to make their claim of interest), and he may require any person making a claim to point out to the demarcation officer or to demarcate,

³⁰⁹ Land Adjudication Act, Cap 284, Sections 3(1) (c) & section 16

³¹⁰ Adjudication Act, Cap 284 Section 5(1)

or to assist in the demarcation of the boundaries of the land in which he claims to have an interest. Such person may also clear any boundaries demarcated by a demarcation officer.

- L. Conducting a survey and demarcation. Upon completion of the foregoing, survey officers are required to carry out a survey of the adjudication area or areas and to demarcate parcels of land for persons therein. The Act does not indicate whether parcels of land are to be demarcated for each adult resident member of the adjudication area, for each family, or for a head of a family and this raises serious ownership (including trust and gender) issues in relation to registration of interests in trust land. It does provide for demarcation of interests of a group of residents.³¹¹
- I. Preparation of a demarcation map. Upon demarcation, survey officers are required to prepare a demarcation map of the adjudication section, showing every parcel of land identified by a distinguishing number.³¹² In carrying out demarcation of parcels of land, adjudication officers are empowered actually to enter upon any land and to summon any person to give information regarding boundaries of a parcel or to point out boundaries. They may lay out fresh boundaries. If in the process of conducting the foregoing activities, an act is done, an omission made, or a decision given by a survey officer, demarcation officer or a recording officer that is objectionable to any resident of the adjudication section, if there are two or more conflicting claims or if there is an objection to the adjudication register, the aggrieved party is authorized to bring the matter before an adjudication officer, an adjudication committee or arbitration board established under the Act.³¹³ These bodies must be comprised of residents of the adjudication area, and not by persons with pecuniary or personal interest in the land in question, or in the adjudication process.³¹⁴
- I. Preparation of forms for every parcel of land. In the process of recording of interests and demarcating parcels of land therefore, forms are to be prepared for every parcel of land shown on the demarcation map (in duplicate) (which may be land belonging to an individual, or to a group).³¹⁵ These forms, together, comprise an adjudication record.³¹⁶ Each form is required to contain the number of a parcel as shown on the

311 Land Adjudication Act section 18(1) (d)
 312 Land Adjudication Act Cap 284 section 16
 313 Cap 284 section 6 7 8 21 22
 314 Cap 284 section 8
 315 Cap 284 section 19
 316 Cap 284 section 23

demarcation map and its approximate area, the name and description of the owner, year and number of the Kenya Gazette notice setting apart land and purpose for setting apart, in cases of land set apart, the fact that land is in the ownership of a county council and remains trust land, in cases of land entirely free from private rights or all rights have been relinquished in favour of a county council; and indication that any person or group is entitled to any interest in land not amounting to ownership (including any lease, right of occupation, charge or other encumbrance including those recognized under customary law), and an indication of joint or ownership in common, where two or more persons are recorded as owners of land³¹⁷

- L Correction of errors in the adjudication record: Adjudication officers are authorized to correct any errors in adjudication records³¹⁸ When completed, the forms are to be signed by the chairman and executive officer of the adjudication committee and by the owner of each interest in the parcels of land demarcated. No alterations are to be made after the forms are so signed, unless an adjudication officer does so upon objection and arbitration, or appeal to the minister³¹⁹
- I Display of the original adjudication register for inspection Upon completion of the adjudication register, the adjudication officer is required to so certify on the adjudication record and map and then deliver the duplicate adjudication record (bearing a copy of the certificate) to the Director of Land Adjudication; display the original adjudication register for inspection at a convenient place within the adjudication section and give notice to residents that the adjudication register had been completed and may be inspected at a particular place during a period of sixty days from the date of the notice³²⁰ Any objections may be raised during the period and the adjudication officer is authorized to determine them, and to alter the register as he deems necessary *It is curious that the Act allows the adjudication officer to recommend compensation to the Minister rather than rectification of adjudication records in cases where he "considers that altering an adjudication register would incur unreasonable expense, delay or inconvenience."*³²¹ The statute does not give any guidance as to

317 Cap 284, section 23 Where a group is recorded as the owner of land or as entitled to an interest not amounting to ownership of land the adjudication officer is authorized and required to cause the group to be advised to apply for group representatives to be incorporated under the Land (Group Representatives) Act Cap 287, cause the recording officer to record that the group has so been advised and notify the Registrar of Group Representatives that the group has been so advised. See section 23(5)

318 Cap 284, section 11

319 Cap 284 section 23(7) The demarcation map and the adjudication record are collectively known as the adjudication register section 24

320 Cap 284, section 25

321 Cap 294, section 27(2)

circumstances under which rectification of the register may be deemed as unnecessarily expensive or inconvenient. It also authorizes divesting an individual of interests in land without due consideration of the statutory requirements for compulsory acquisition of land.

- Presenting adjudication register to Director of Land Adjudication. After determination of all objections and appeals, the adjudication officer is required to send the adjudication register, along with particulars of all determinations and objections to the Director of Land Adjudication. At that point, only the director is authorized to make any alterations and then certify on the adjudication register and its duplicate that it has become final (subject to outstanding appeals) and then forward the register to the Chief Land Registrar, together with a list of the appeals.³²² Here lies another loophole.
- Certification of the adjudication register. The Act authorizes the Director of Land Adjudication to certify that an adjudication register has become final so that the Registrar can proceed to register and issue titles to land when there are outstanding appeals that might even require overhauling of the whole adjudication exercise.
- Registration of titles. Upon receiving the adjudication register, the Chief Land Registrar is authorized to cause registrations to be effected in accordance with the adjudication register. The Act authorizes registrations of lands on which there are outstanding appeals as well, except that restrictions are to be placed on them until the appeals are determined.³²³ Moreover, it prohibits any person from instituting suits and any courts from hearing suits concerning an interest in land in an adjudication section, unless that person has first obtained consent of the adjudication officer.³²⁴ This provision defeats all suits that might arise from the conduct of an adjudication official with respect to trust lands. Moreover, suits can only be filed after the adjudication register has become final, by which time interests in land are authorized to be registered, including land on which there are outstanding disputes.³²⁵
- Issuance of titles. The LAA is a procedural statute providing for ascertainment and registration (recording) of individual or group interests in trust lands. It does not clearly specify the manner of registration, or the nature of titles to

322 Cap 284 section 27

323 Cap 284 section 28

324 Cap 284 section 30

325 Cap 284 section 28 & 30

be issued with respect to registered (recorded) interests in parcels of trust lands. Therefore, we look to the Registered Land Act (RLA), Cap 300, which is specifically referred to in Rule 5 of the Land Adjudication Regulations.³²⁶ The RLA, which commenced on September 16, 1963, is an Act of Parliament to make further and better provisions for the registration of titles to land, and for the regulation of dealings in lands so registered, and for purposes connected therewith.³²⁷

320 The RLA applies to trust lands by virtue of section 2 thereof, which provides, *inter alia*, that the Act shall apply to any area which immediately before its commencement, the Land Registration (Special Areas) Act (Ordinance) applied,³²⁸ any area to which the LAA has been applied for purposes of ascertainment, recording and registration of interests in land,³²⁹ and to all land which from time to time, is set apart under sections 117 and 118 of the Constitution. Under section 4, the RLA prevails over any written law that conflicts with its provisions (here, with respect to trust lands).³³⁰

321 This leads one to the section of the Act that provides for registration of titles, specifically section 32. Section 32 of the RLA authorizes the Registrar of Titles to issue a proprietor of land or lease (if requested by that proprietor) with a title deed or a certificate of lease where no certificate of lease or title deed has been issued in the prescribed form. The effect of this section is that a proprietor of land, whose proprietorship has been evidenced (in the case of rights ascertained in trust lands) by the recording of the interests of that person in an adjudication register, and by the registration of that interest in the prescribed form, shall be issued with a title deed, and in cases of leasehold interests, a certificate of lease and that a title deed or certificate of lease shall be the only *prima facie* evidence of ownership of land. The meaning conveyed is that issuance of first registration titles to trust lands are to be effected under the RLA.

322 The provision goes further to state that only a title deed or a certificate of lease shall be issued in respect of each parcel of land,³³¹ and that a title deed or

326 The Rule provides that a party to section 29 of the LAA (which provides for appeals to the Minister against determinations made in the process of adjudication) are entitled to obtain copies of demarcation maps on payment of fees at the rates prescribed for certified copies of registry maps by the Fifth Schedule to the RLA, as well as copies of relevant documents, including the proceedings and decisions of committees, boards and adjudication officers in respect of the holdings in dispute.

327 See Preamble to the RLA.

328 These areas were later included in the designation of trust lands.

329 Section 2 of the RLA.

330 Section 4 of the RLA provides that "Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act, so far as it is inconsistent with this Act. Provided that, except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law requiring the consent or approval of any authority to any dealing."

331 Certificates of lease are issued only if leases are for a period exceeding 25 years.

certificate of lease shall be the only *prima facie* evidence of matters of ownership. Further, the Act provides that when there is more than one proprietor, the proprietors shall agree among themselves as to who shall receive the title deed or the certificate of lease,³³² yet section the Act also provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of that land, together with all rights and privileges belonging or appurtenant thereto.³³³

Alienation of trust lands at the instance of the government

323. The procedures for alienation of trust lands at the instance of the government, which would lead to the issuance of titles thereof to the government, are established under section 118 of the Constitution, and sections 7, 8, 9 and 10 of the TLA

- i. The President's satisfaction. The first statutory requirement in the process is that the President be satisfied that the use and occupation of an area of trust land for specified purposes, namely the purposes of the government of Kenya, the purposes of a body corporate established by an Act of Parliament, the purposes of a company registered under the law relating to companies in which shares are held by or on behalf of the government, and for purposes^o of prospecting or extraction of minerals and mineral oils.³³⁴ The laws do not state exactly how the President gets satisfied of the need of land for these purposes and there is no requirement for verification of the needs and the suitability of the lands in question for the purposes.
- ii. Consultation with respective county councils. Upon satisfaction with matters as stated, the laws authorize the President to consult with the respective county council and to give them notice that land is required for one or more of the specified purposes for the setting apart of land. After consultation and notice, land is set apart in the same manner as in section 117 of the constitution. The setting apart extinguishes any rights, interests and benefits of local residents of the land provided that compensation is paid as in cases of compulsory acquisition under section 75 of the constitution. Payment must be made promptly and in full.

324. Since this setting apart, or alienation of land is to be conducted in a similar manner as under section 117 of the constitution, a county council may subject the land in

³³² Section 32(3) of the RLA. Failing agreement, the title deed or certificate is to be filed in the land's registry.

³³³ RLA, section 27.

³³⁴ The Constitution, section 118(2) (a)-(d).

question to “any law” for purposes of issuing a grant, or making a disposition of some other kind of any estate, interest or right in the land (including leaseholds, freeholds and licenses) to the government of Kenya, a body corporate, or any other body or person for purposes of prospecting minerals or mineral oils. This permits the issuing of a grant, a title deed, a certificate of lease or a license to the government or any one or more of ten other bodies and persons upon demarcation of land and execution of conveyance documents in respect thereof by the Commissioner of Lands on behalf of the government or one or more of the listed persons and bodies.

- 325 Where lands so conveyed are no longer required for the purposes for which they were alienated, the TLA requires that they revert to the respective county council, that is, they revert to trust lands³³⁵. There is no authorization for lands no longer needed to be disposed of to private individuals and bodies as has been happening in some parts of Kenya including Kajiado District and any titles issued in respect of land that should have reverted to trust land as provided by law will be irregular (unlawful). Similarly, any titles issued without following any aspect of the stipulated procedure for alienation of trust land at the instance of the government will be irregular.
- 326 Parties aggrieved by the setting apart or any other dealings with trust lands are authorized to seek redress in the High Court, but the provisions regarding law suits are contradictory and difficult to reconcile. Section 54 of the TLA prohibits actions against the government or its officers for acts done for purposes of carrying out the provisions of the Act into effect. Section 58 thereof prohibits appeals from any decision given, order made and matters and things done under the Act. Yet section 63 of the same Act states that nothing contained in the TLA shall prevent a prosecution under any other law, so long as a person is not punished twice for the same offence.

How privately-owned lands come into being

- 327 Consideration of procedures for issuing titles to private lands (or lands privately owned) requires a summary of how original titles were/are acquired in the first place. As already noted, in the region now Kenya, land was communally and customarily owned in pre-colonial societies without any formal titles. In the colonial era, first, all land was ‘Crown’ land and subsequently, trust lands were delineated and through tenure reform, large portions of trust lands all over the country have been registered in the names of private individuals and private

³³⁵ Trust Land Act section 119

groups of individuals, and land titles signifying ownership thereof issued, these being first registrations. It has also been noted that even before this process of creation of private land ownership began, white settlers had been allocated titles to private lands as early as 1902 (if not earlier).

- 328 Colonial legislation, which introduced the idea of private ownership of land and post-colonial legislation outline three distinct stages in the process of tenure reform - the process leading to the issuance of first registration titles to private owners of land
- i. Ascertainment of individual or group interests in land. The first stage involves ascertaining individual or group rights under customary tenure. Rights were, or are to be determined according to native law and custom and with the assistance of adjudication committees constituted from the inhabitants of the adjudication sections.
 - ii. Consolidation of land. The second stage involves the aggregation of all pieces of land over which each individual or group has rights and the allocation to the individual or group of a single consolidated piece (that is the process of consolidation).
 - iii. Recording of rights in an official register. The last stage involves the entry of rights shown in the Record of Existing Rights or Adjudication Register into an official Land Register.
 - iv. Issuance of title deeds. Entry of rights in an official land register is followed by the issuance of a certificate of ownership or a title deed. That is the process of registration.
- 329 Land registration in the trust lands started in 1956 and has been completed in most of the regions in the country with high agricultural potential, including Nyanza, Western and Central Provinces. In the areas with low agricultural potential where pastoralism is predominant, a slightly different registration system with respect to trust lands was adopted under the regime of the Land (Group Representatives) Act. Under this regime, communal lands were registered into group ranches (comprised of smaller units of land) in the names of three to ten members of the group for the benefit of all members. In recent years, the group ranches have been subjected to sub-division, registration and the issuance of freehold titles thereon to individual members, thereby making the lands subject to disposal through sales by the owners.

330. In addition to these, freehold and leasehold titles have been issued upon alienation to private individuals and bodies upon alienation of government lands as discussed in previous sections. These form the basis of private ownership of land in respect of which subsequent titles (of the registered lands) may be issued upon sale by owner, sale by chargee (mortgagee) exercising statutory power of sale, by transmission (upon death), upon liquidation or winding up of a company, upon registration of a land trust, and in pursuance of a court order.

The substantive and procedural law governing privately-owned land

- 331 The RLA lays down the legal framework that governs registered land³³⁶ The Act expressly applies to areas of trust land to which the LAA has been applied, meaning that it applies to portions of trust lands alienated to private owners through the consolidation, adjudication and registration process already discussed All dealings with registered lands must be in conformity with the RLA and it supersedes any law that conflicts with it with regard to registered lands³³⁷
- 332 One of the key provisions of the RLA with respect to privately-owned land and the issuance of titles thereto is that registration of a person as the proprietor of land vests in that person the absolute ownership of the land, together with all rights and privileges relating thereto Similarly, the registration of a person as the proprietor of a lease vests in that person the leasehold interest described in the lease, together with all implied and express rights and privileges relating thereto.³³⁸ Such rights cannot be defeated, save as provided for in the Act, and are to be held free from all other claims and interests³³⁹
- 333 The rights conferred on a registered proprietor of land as foretasted were part of a process intended to transform the legal status of registered land from one susceptible to multiple customary claims, to individual absolute ownership that would secure credit for purposes of development However, the guaranteed rights of a registered proprietor of land have caused considerable confusion and insecurity of tenure in many parts of rural Kenya with respect to customary rights of family members who entrusted one person to be registered as a proprietor in trust for the rest, only for it to turn out that the registered individual had secured absolute title

336 The preamble states that it is an Act of parliament to make better provisions for the registration of titles to land and for the regulation of dealings in registered land

337 Section 4 Cap 300

338 RLA section 27

339 RLA, section 28 The title, if freehold, is however, subject to such leases charges, conditions and restrictions shown on the register, and the rights of compulsory acquisition, but do not include rights of people claiming as beneficiaries of a land held in trust

- 334 Section 28(b) of the RLA states that nothing contained in the provisions for absolute ownership and absolute rights should be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee, but it is mandatory that a person be described in the register as holding land as a (customary) trustee³⁴⁰ Moreover, customary interests over land are not among the overriding interests that the RLA recognises³⁴¹ These provisions have caused considerable difficulty of interpretation, particularly with respect to the effects of registration on customary property rights and interests
- 335 In the confusion surrounding tenure reform, land is still regarded largely as a communal (family/clan) asset The predominant belief is that registration did not oust family or clan title, especially where a family or clan member was registered as proprietor with the understanding that he would hold for the benefit of all others, but changed his mind once absolute title is issued This has led to the filing of many land cases in various courts across the country and increased disputes and litigation with regard to land, challenging registered title on the basis that the registered land is former family or clan land In the court, the legal provisions have given rise to two interpretations in the High Court, which is yet to be resolved
- 336 One of the views is that registration of a person as an absolute proprietor extinguishes all customary rights and interests,³⁴² the only exceptions being overriding interests and beneficial interests under a trust The position here is that customary rights and interests if not noted in the register are consequently extinguished since they are not overriding interests within the meaning of the Act.
- 337 The Court of Appeal has advanced this view further by holding that once land is registered, not only are customary rights extinguished, but customary property law is also, by the fact of registration, ousted by statute and Common Law³⁴³ Given the history and objectives of the tenure reform in Kenya, this would be the correct interpretation under the law However, a minority opinion in the High Court that has found favour in the Court of Appeal asserts that in settling disputes arising out of land registration, the vital consideration is to determine the capacity in which the "absolute proprietor" was registered³⁴⁴ If in the capacity of a trustee, then he or she must be called upon to perform the obligation inherent in that status

340 This was the holding in the case of *Mwangi Muguthu vs Maina Muguthu* HCCC No. 377 of 1968

341 See section 30 of the RLA

342 This was the position in the case of *Selah Obiero vs Oregu Opiyo* [1972] E.A. 227

343 See the case of *Belinda Murai & Ors vs Amos Wainaina* C.A. No. 46 of 1977

344 The view was advanced in the cases of *Mwangi Muguthu vs Maina Muguthu* H.C.C.C. No. 377 of 1968 *Samuel Thata Micheck & Ors vs Pnscilla Wanibu & Another* H.C.C.C. No. 1400 of 1973 *Edward Limuli vs Marko Sabayi* H.C.C.C. No. 22 of 1978 *Alan Kiama vs Ndiya Mudhunya & Others* C.A. No. 42 of 1978

This position ought to be supported by law to redress cases where family or clan members were disinherited by registration of clan or family land in the name of an individual

338. Land problems are compounded by provisions of the RLA that authorise rectification of the register of titles, amendments and cancellation of titles where the registrar is satisfied that registration was obtained, made or omitted by fraud or mistake, but prohibits rectification of a first registration³⁴⁵ This has allowed people who intentionally defrauded relatives and clan members of their land to acquire and remain in possession of absolute titles thereto³⁴⁶

339 The RLA also prohibits rectification of registration that would affect the title of a proprietor who is in possession of land, having acquired the land, lease or charge for valuable consideration, unless he had knowledge of the omission, fraud, or mistake in consequence of which rectification is sought It is not clear whether knowledge on the part of a purchaser that warrants rectification is actual or constructive What is clear is that lack of clarification creates room for one to insist that knowledge must be actual It has also given rise to many cases where people purchase land with full knowledge of fraud, mistake and/or omission but take cover under these provisions and insist that they had no actual knowledge After all,

No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned-

(a) to inquire or ascertain in or the consideration for which that proprietor or any previous proprietor was registered, or

(b) to see to the application of any consideration or any part thereof, or

to search any register kept under the land Registration (Special Areas) Act, the Government Lands Act, the Land Titles Act or the Registration of Titles Act

340 In the interest of justice, knowledge should be both actual and constructive (covering even cases where a party negligently fails to find out details about a particular title), to make it possible for registers to be rectified and titles cancelled where a title holder ought to have known of fraud, mistake or omission

³⁴⁵ RLA section 143

³⁴⁶ This was the case in *Selah Obiero V. Oregu Opyo* (1972) E.A. 227 in which the court ruled that the title fraudulently obtained was indefeasible because it was a first registration

Issuance of title to registered land

(i) *Upon sale by a proprietor*

341. Sale transaction. Section 27 of the RLA provides that registration of a person as proprietor of land - here first registration vests in that person the absolute ownership together with all rights and privileges belonging or appurtenant thereto. These rights and privileges include the right to sell, charge (mortgage) or convey land as a gift.
342. Registration of transfer. Upon sale, ownership passes to a new owner (proprietor/purchaser) and a new title is issued to the purchaser. The RLA, the Land Control Act, the Government Lands Act and other laws regulate sale of registered land and provides, first and foremost that transactions in respect of registered lands shall be conducted in accordance with its provisions. The procedure for (voluntary) sale leading to the issuance of title to a purchaser requires that an agreement for sale be entered into between a proprietor and a purchaser³⁴⁷ and that rules and conditions developed by the Law Society of Kenya and the minister be adhered to.
343. The procedure also requires that in cases of agricultural land, consent to transfer of the respective Land Control Board must be obtained, that the subject land be free from encumbrances including cautions and caveats and that where land is charged or mortgaged, consent of the chargee or mortgagee to transfer be obtained.
344. Further, it requires that in case of leases from the government, prior written consent to transfer must be obtained from the Commissioner of Lands, that transfer be effected by an instrument (a transfer form) in the prescribed form and that all land rents, rates and all outgoings due to local authorities be paid in advance. Stamp duty must be paid to the Commissioner of Lands as assessed and instruments of disposition (transfer forms) executed by the person shown by the register of lands to be the proprietor of the interest affected and the purchaser. Executions of parties to a sale transaction must be verified (attested) and the transfer instrument registered by the Registrar of Lands making an entry in the register of lands in respect of the subject land³⁴⁸.
345. Issuance of a title deed or certificate of lease. After registration, the purchaser or transferee is issued with a title deed or a certificate of lease (in case of transfer or sale of lease for a period of more than 25 years)³⁴⁹. The RLA provides that a title

³⁴⁷ A proprietor is defined as the person named in the register as the proprietor thereof (in case of leases) and in relation to a charge of land or lease, the person named in the register of the land or lease as person in whose favour the charge is made.

³⁴⁸ See among others section 85 of the RLA.

³⁴⁹ RLA section 32.

deed or certificate of lease shall be the only *prima facie* evidence of ownership³⁵⁰ If any of the stipulated procedures is not followed, but in the end, title is issued, the title will have been irregularly issued

346 It should be noted that in cases of irregularities, although rectification of the register and cancellation of titles is authorised in cases where titles are obtained by fraud, omission or mistake, under the current legal regime, there is no system for the Registrar of Land, or the lands office to deal with cases requiring cancellation of titles fraudulently obtained. One has to go to court and seek an order for cancellation before the lands registry can act to rectify such a situation. The matter is complicated by the difficulty of telling (by the lands office) that a title has been obtained by fraud, unless and until evidence is tendered from external sources

(ii) Issuance of titles pursuant to the exercise of chargee's power of sale

347 One objective of tenure reform in Kenya was to enable proprietors of land (including farmers) to obtain credit for purposes of agricultural and other developments on the security of their land. In line with this objective, the RLA accords wide powers of ownership including the power to lease, mortgage or charge one's land³⁵¹ In case of default in repayment of loans, the RLA accords chargees and mortgagees wide powers of sale of the charged (mortgaged) property, without first seeking any orders for sale from the courts³⁵² Once the proprietor (debtor) is given notice of the chargees' intention to sell the charged property, the statute authorises sale to proceed by public auction for which a reserve price is required to be established at the discretion of the chargee exercising the power of sale. There is no statutory requirement that charged properties scheduled for auction be valued before reserve prices are established

348 Further, although the statute requires a chargee to have regard to the interest of the chargor in exercising the power of sale,³⁵³ it authorizes the chargee to concur with any person in selling the charged property. It would appear that the statutory authority to concur has been interpreted in many cases to include collusion by the chargee with anyone to arbitrarily sell charged property without any regard for the interests of the chargee. What happens in practice is that in many cases, creditors arrange for sale of charged properties upon payment default, without proper notice to the chargor, to their employees, friends, and relatives, often at gross undervalue

350 RLA section 32(2)

351 RLA sections 27, 28, 47, 49 & 66

352 See RLA, section 74 & 77

353 RLA, section 77(1)

- 349 The situation requires statutory intervention through provisions that would allow chargers (property owners) to be involved in establishing a sale price, or to challenge sale and to recover their property upon payment of outstanding debts, but the RLA provides that a person suffering damage by an irregular exercise of the chargee's power of sale has his remedy in damages only against the person exercising the power of sale³⁵⁴ This forecloses any last-minute effort by chargors or their family members to redeem family land (property)
- 350 Once charged property, be it family agricultural land or a town plot or house is sold as authorised, the chargee is authorised to prepare a transfer in favour of the purchaser in the prescribed form and thereafter, to effect transfer by executing the transfer form as if the owner of land³⁵⁵
- 351 Upon execution of the transfer form by both chargee and purchaser, the form is presented for registration and at that point, the law authorises the Registrar of Lands to register the transfer in favour of the purchaser, at which point, the property passes and vests in the purchaser Thereupon, the purchaser (transferee) is issued with title to the land - a title deed or a certificate of lease to the property³⁵⁶ Once property vests in the new owner, he (the new owner) is freed and discharged from all liabilities that might arise on account of the charge, or on account of any other encumbrance to which the charge has priority (other than a lease, easement or profit to which the chargee had consented in writing)³⁵⁷
- 352 The exercise of the power of sale as authorised has occasioned great suffering to many family members across Kenya in cases where family land used to secure a loan by the head of the family or some other person (with consent of the head of the family), usually without first consulting with family members In a lot of cases, family members are not even notified of the charge of family property to secure a loan After sale of family land, many families have found themselves landless and without any recourse to the law An attempt has been made in recent years to moderate the harshness of the provisions regarding a chargee's power of sale by requiring that in cases of agricultural land, a notice of intention to sell be served on the District Commissioner of the area in which the land is situated by the chargee³⁵⁸ Upon receipt of notice, the DC may, at the instance of an affected party, petition the High Court to postpone sale for a definite period of time on grounds that the sale would result in persons being evicted from the charged

354 RLA section 77(3)

355 RLA section 77 (3) A chargee exercising his power of sale has the same powers and rights as a proprietor section 77(5)

356 RLA section 32

357 RLA, section 77(4)

358 See Act 14 of 1991

land, thereby occasioning undue social difficulties, or cause public disorder in the neighbourhood. However, such application cannot be made to court if the people who would suffer eviction or some other difficulty are the family members of the chargor, or the chargor himself.

353. Therefore, the power of sale of a registered proprietor still has great potential of exposing members of a family, among others, to great suffering and of causing social disorder. It would be in order for the law to prohibit use of agricultural, or family land to secure credit altogether, in the interest of social order and security. Some banks and other credit institutions have resolved not to accept agricultural land as collateral. In addition to voluntary sales and transfers upon the exercise of chargee's power of sale, the legal regime governing private ownership of land (especially the RLA) authorises issuance of land titles to personal representatives, administrators of the estate of a deceased person, and to an executor of the will of a deceased person by transmission, upon the death of a sole proprietor, upon production of grant of letters of administration, grant of probate of the will, or grant of summary administration of the estate in favour of, or issued by the public trustee.³⁵⁹
354. Titles to land can also be issued in respect of land owned by a company upon winding up or liquidation of the company, in which case, a transfer may be executed on behalf of the company by a liquidator, or sealed with the common seal of the company and attested by the liquidator.³⁶⁰ A liquidator may also be registered as proprietor of land upon the making of a vesting order under section 240 of the Companies Act.
355. In addition, the law permits registration and issuance of land title to a person in whose favour a court has made an order of entitlement to land or lease.³⁶¹ The kind of evidence of entitlement the registrar should require ought to be stipulated by law, instead of leaving it up to the registrar to determine what kind of supporting evidence he deems fit to in cases where applications for registration pursuant to court orders are made. This is necessary, especially in view of rampant forgeries, even of court orders that have been occurring in recent years.

359 RLA, section 119

360 RLA, section 124

361 RLA, section 125

Breaches of the Applicable Provisions of Laws Governing Land

Irregularities and illegalities involving government lands

- 356 Over time, both the substantive and procedural safeguards in the Government Lands Act, Cap 280 have been blatantly disregarded as senior government officials, their cronies and relatives enrich themselves, at the expense of the public. In numerous cases, public land has been in post-independence Kenya, acquired and allocated in total disregard of the law, including the public trust doctrine. Instead of maintaining government land in various parts of the country for development purposes, senior government officials, over the years, intensified illegal transfer of land from the public domain to private individuals and entities through practices that have become commonly known as land grabbing. The practices, which became part of official grand corruption, has diminished government land to a point where it has become difficult to find land for public purposes, including establishment of government offices that are urgently required to establish regional governments in the country.
- 357 This section of this chapter on land presents a number of cases involving land grabbing from the public domain, by private individuals and entities, mostly senior government officials. It demonstrates that land allocation through direct grant which, in colonial times, succeeded in preserving government land and in ensuring justifiable and merited allocation for private purposes, failed in the period after independence. After independence, the very system of land grant that succeeded in colonial times facilitated massive illegal allocation of government land, largely because the government, specifically the president(s) and the Commissioner(s) of Land, abandoned a public auction system ingrained in the law and gave themselves opportunity to illegally acquire land in ways that amounted to flagrant abuse of office. In Kenya, the very officials supposed to be the custodians of public land under the public trust doctrine, became the facilitators of illegal allocation of the same and thereby, increased landlessness and land scarcity, especially of people who were living on government land in the hope that they would be resettled there, many of them having lost the same land to the government during the colonial period. The practice of land grabbing also, in many cases, resulted in violence, as 'squatters' on government land expecting to be settled on the land lost it to land grabbers.

■ **The case of Karura Forest**

358 In 1997, 85 hectares of Karura Forest were illegally excised and allocated to S K Macharia, Joseph Gilbert Kibe and Ngengi Muigai. The beneficiaries almost immediately sold the land, registered as L R No 216/8 to the Kenya Re-Insurance Corporation for KSh550 million. Allocation of the land coincided with the 1997 General Election, creating the impression that public land may have been illegally allocated as a political reward³⁶². It is recommended that all such illegal land allocations should be nullified. Land should be repossessed and restored to the purpose for which they were reserved, in this case, a forest reserve.

■ **The Case of Ngong Forest**

359 In the year 2001, land which formed part of Ngong Forest was excised, sub-divided into thirty two plots and sold to 13 private companies. The 13 companies, in turn, sold the land to the Kenya Pipeline Company for KSh262,388,487³⁶³.

■ **The Case of Bellevue**

360 On unspecified dates, Micah Cheserem, Joshua Kulei and David Komen, all key government officials at the time, illegally acquired an undeveloped government land in Bellevue, Nairobi, registered as L R No 209/10212, measuring 1.6 hectares. They subsequently sold the land to the Kenya Airports Authority for the sum of KSh2.6 million in 1985³⁶⁴.

Illegal allocation of land compulsorily acquired for public purposes

361 In addition to illegal acquisition of unalienated government land, land compulsorily acquired from individuals and families have been the subject of land grabbing, especially by key government officials. Under the Land Acquisition Act (now repealed), the government acquired large tracts of land in Nairobi, Mombasa and other towns for the construction of road by-passes to ease traffic congestion on the main roads. However, in disregard of the provisions of the former constitution and the Land Acquisition Act land set aside for road expansion was later allocated to private individuals who subsequently sold them to third parties. In Nairobi, land previously reserved for by-passes in several areas was allocated to Sterora Investment Ltd, Munir M. Chohan, Heron Trading Co., Henry Musamate, Maya Consultants Ltd, Lawinex Agencies Ltd, James S. Nyaga, Samuel Kiprono

362 Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 83. See also Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) Annexes Volume II Annex 1 page 6.

363 Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 93-94.

364 Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 95.

Chepkonga, Esther Rotich, Kenneth Wainaina and other current owners³⁶⁵ in many of such areas, violence has broken out as new illegal owners seek to evict 'squatters' in a bid to develop the land

Local Authority Involvement in Illegal Land Allocations

- 362 Local government lands, including houses, have also been subjected to land grabbing, especially by local authority officials. In many cases, local authority officials have, especially during the Kenyatta and Moi administrations, illegally allocated property set aside for public purposes within their jurisdictions to themselves and their associates, without obtaining full council approval and without following other due procedures of law. A case in point is Woodley Estate in Nairobi. The estate was planned as a housing facility, complete with a primary school, playing ground, a public garden and a shopping centre for the benefit of City Council staff. However, in September 1992, Kuria wa Gathoni, then Director of City Planning, prepared a Part Development Plan, changing the user of the open public spaces in the estate into residential and other private purposes of a commercial nature.
- 363 The Part Development Plan was approved by the then Commissioner of Lands Wilson Gachanja, and title deeds for each sub-plot subsequently issued in the name of the Council in 1993. In 1994, Zipporah Wandera, then Nairobi town clerk, prepared and signed documents transferring some of the public plots to Kuria wa Gathoni and companies and individuals related to him, including Ali Mwanzi, Andrew Isaac Hayanga, Wilson Chebyegon, Mary Akoth, Tom Koros, John Mwangi, and Archman Holdings, among others, who subsequently sold them to current owners³⁶⁶. It is noted that the allocating authority in all the cases involving the Woodley property was the Commissioner of Lands. It should be recalled that the wanton allocation of Woodley property attracted public protests that resulted in the death of at least one person.
- 364 Illegal allocation of open spaces in estates for public use did not only affect Woodley Estate only. It has been a common occurrence affecting many estates and their developers in Nairobi and other towns in the country, including Lake View Estate in Nairobi. In the housing scheme, as was, in the case of Woodley Estate, the City Council of Nairobi required the developer to surrender 10 percent of land to be developed for public purposes as a condition for development permission. A developer would, as did in this case, surrender the acreage required to the government, on trust, for public purposes.

³⁶⁵ Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) Annexes Volume 1 at pages 25 - 39

³⁶⁶ For a full list of original and current allottees see Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) Annexes Volume 1 annexe 5 at pages 49- 85

- 365 However, once surrendered, the plot would not be used for the intended public purposes. Instead, certain private companies, mostly associated with government officials, individuals and their cronies, would immediately apply to the Commissioner of Lands to be allocated the surrendered land. A part development plan would subsequently be prepared in respect of the land and submitted to the Commissioner of Lands for approval and a letter of allotment would then be issued to the applicant(s) upon payment or promise to pay a token sum as standard premium.³⁶⁷ In the process of issuing part development plans, the Master Plan for the City of Nairobi was completely ignored to facilitate illegal allocation of land reserved for public utilities.
- 366 Thereupon, the letter of allotment would be used to transfer the unsurveyed plot to a third party for millions of shillings by the allottee. The plots would be subsequently surveyed and a Grant of Lease made to the third party. In many cases, the entire process, from the surrender of the plot to the grant of lease over the plot to a third party would take a few months and at times, a number of days. As a result, there is hardly any open space in estates in Nairobi.
- 367 In the case of Lake View Estate, land surrendered by the developer of the estate was illegally allocated to four individuals in the manner described above. The original title, L R No. 2951/80 was held by New Homes Developers Limited. The company applied to the Nairobi City Council for consent to develop an estate. Consent was granted but on condition that the company surrenders a percentage of the land to the government to be used as a public utility. Consequently, the company surrendered plot L R No. 2951/89 to be used as a public open space. In 1992, four individuals, namely, J.K. Chepkwony, Geoffrey Kosgey, Peter Kosgey and J. Cheruiyot applied to the Commissioner of Lands to be allocated the plot which had been surrendered for public purposes. A part development plan was subsequently prepared and the land in question subdivided into three plots. Letters of allotment were issued to the applicants who paid a standard premium of KSh97,470 for each plot. The allottees then transferred the unsurveyed plots to Jitesh Shah and Highland Textile Ltd as co-owners for KSh1.7 million each. Titles were subsequently issued to the purchasers.³⁶⁸
- 368 As a result of illegal acquisition of plots surrendered by private developers for public purposes, there have been battles between estate residents who were intended to benefit from the surrendered lands/plots and new illegal owners.

³⁶⁷ See findings of the Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 79.

³⁶⁸ Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 80.

In recent years, political representatives in Nairobi, especially in Eastlands have also been involved in public protests against illegal acquisition of open spaces reserved for public purposes which, sometimes, result in violence. Illegal allocation of public utility lands in estates has also diminished the concept of open spaces, with the result that there is hardly any open space for children to play and for estate residents to conduct public activities, thus denying many of them the right to a clean and healthy environment now incorporated in the Constitution.

Illegal alienation of state corporations' land

- 369 Many of the 140 state corporations or parastatals have lost land reserved or set aside for their use through land grabbing. Due to the nature of functions of state corporations, large amounts of land were allocated for their use, thus becoming "alienated government land." However, in total disregard of the law, during both Kenyatta and Moi eras, such land was, in many cases, allocated to individuals and companies with close ties to senior government officials, largely through the schemes of Commissioner(s) of Land. The lands so alienated were subsequently sold by allottees to other corporations and private individuals and entities for large sums of profit at the expense of the development objectives of the corporations and the public that was intended to benefit from their activities.
- 370 In every case involving illegal allocation of state corporations' land, the process was initiated by the Commissioner of Lands through correspondence, followed by issuance of a letter of allotment of land belonging to a state corporation to an individual or private entity, without any consultation with the management of the state corporation. In many cases, the managers of state corporations were surprised to learn that all or portions of their land had been hived off, allocated to private individuals or entities and titles issued therefore. There were also cases where illegal alienation of state corporations' land were triggered by illegal surrender of the land by corporations' management whereupon, the land became available for alienation, through allotment, to private or other public entities.
- 371 Subsequently, allottees would sell the land for large sums of money. The following state corporations, among others, lost land in such schemes: the Kenya Railways Corporation, Kenya Agricultural Research Institute, Kenya Power and Lighting Company, Kenya Airports Authority and Kenya Industrial Estates Ltd.³⁶⁹ In addition to alienation of state corporations' land at the instance of the Commissioner of

³⁶⁹ For a complete list of state corporations that lost their land through land grabbing, see Report of the Ndung'u Commission of Inquiry Into the Illegal/irregular Allocation of Public Land (2002) Annexes, Volume 1, Annex 22 – 33 at pages 449 – 549.

Lands, state corporations also, in many cases, illegally sold their land at very low prices to individuals and entities that ended up selling them to third parties at colossal sums of money, thereby making huge profits. An example is the case of L R No 209/6439 on Ojjo Road, a prime land which belonged to Kenya Railways Corporation. On 31 January 1996, the corporation illegally sold the land to Guardian international Ltd for KSh77 million. A few days later, on 8 February of the same year, the beneficiary, in turn, sold the land to the National Social Security Fund (NSSF) for the sum of KSh178 million.³⁷⁰

Settlement schemes for undeserving people

- 372 To establish human settlements and address the problem of landlessness facing many Kenyans at independence and stimulate agricultural production, the government, in both the Kenyatta and Moi administrations, introduced settlement schemes countrywide, besides the One Million Acre Scheme and others negotiated as part of independence package. The establishment of the settlement schemes has been a continuous process since independence.
- 373 However, in mainland Kenya, as at the Coast, the main beneficiaries of the 418 government settlement schemes in both high and low potential areas in mainland Kenya, were undeserving individuals, families and communities, especially those associated through ethnic affiliation to the two presidents.³⁷¹ In the period immediately after independence, the Settlement Fund Trustees (SFT) was in total control of allocation and management of settlement schemes. However, in time, its role was diversified among the Ministry of Lands and Settlement and the provincial administration. The practice that emerged was that the government would set aside land for settlement, which land would, technically, fall under the administrative jurisdiction of the SFT. However, actual implementation of a settlement programme would be taken up by a District Plot Allocation Committee which comprises the DC as chairman, the District Settlement Officer as secretary, the local Member of Parliament, the District Agricultural Officer, the chairman of the local county council and the clerk to council. The committee of six, and not the SFT as was the case in the early days of independence, has wielded enormous powers in land allocation processes, with the SFT having no supervisory powers over them at all.
- 374 Left to their own devices, District Plot Allocation committees have, over the years, taken into consideration irrelevant and extraneous factors in allocation of land in settlement schemes. The committee in almost every case allocated land

370 Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 102

371 Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002), at page 125

to totally undeserving people including the official members themselves, their relatives, MPs, councillors and prominent politicians in areas where settlement schemes were established, Ministry of Lands and Settlement officials, other civil servants and individuals with connections to politicians. In the absence of accountability, settlement scheme procedures and outcome occasioned abuses and poverty and destitution of deserving Kenyans. Numerous irregularities also characterised allocation processes in newly-created settlement schemes, thus eliciting widespread public outcry and protests from members of the public, like in the case of the Kinale Settlement Scheme in Kiambu.

Kinale Settlement Scheme in Kiambu

- 375 In the scheme, intended for deserving individuals, the total number of plots scheduled for allocation to genuine allottees was 1 427. However, a second list including undeserving beneficiaries was prepared for 1 526 plots and a third and final one for 3 503 plots, without any explanation. To compound the problem, the original list of genuine allottees mysteriously disappeared from the records of the District Commissioner, Kiambu, who was the chairman of the allocation committee.
- 376 A Task Force appointed to inquire into irregularities attendant the establishment of the scheme concluded that many undeserving people were allocated plots in the settlement scheme, while genuine landless were struck off from the allocation list.³⁷²

Illegal settlement in the Mau Forests

- 377 With respect to government lands, the issuance of titles to the Ogiek community over portions of the Mau Forests provides a good example. Forests or 'Forest Areas' in Kenya are government lands that have been reserved for purposes of protection of the forests and forest catchments, among others. Procedures stipulated for alienation of forests or forest areas for whatever purpose, are stipulated under the Forests Act, which requires that first, a declaration be made by the minister that a forest area shall cease to be a forest area, and secondly, that the declaration, which amounts to de-gazettement of the forest or forest area (and thereby removes it from legal protection), be published in the *Kenya Gazette*.
- 378 In breach of this legal requirement (among others), the government made efforts to settle members of the Dorobo, also known as the Ogiek community between

³⁷² Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 127

1990 and 1993 Available information indicates that the process began when the provincial administration, including the local police moved into the forest and began allocating areas of the forest to members of the community, without any prior notice of intention to do so to the responsible minister, not to mention that there had been no publication of a notice that the areas would cease to be forest areas in the *Kenya Gazette* prior to the move

- 379 In the end, some 3 000 households (some sources indicate 3 500 households) were allocated portions of the forest (of 5 acres per household), when the number of the Dorobo (Ogiek) community that were to be settled was only 1 800 Further, although the settlement was intended to provide permanent homes for the Dorobo, allottees were issued with temporary occupation licenses. It was not until the year 2001 that several forest areas were de-gazetted by publication of notices in the *Kenya Gazette*, ostensibly to “regularize” some of the previous forest excisions, including areas allocated to the Ogiek However, settlement of the community was never finalized, thus exposing the community to further evictions
- 380 Further, between 2005 and 2011, the government, in a bid to conserve Mau Forests as a water catchment area, evicted the Dorobo from the settlements, prompting the community to file a case against the government in the African Commission on Human and People’s Rights (ACHPR) The ACHPR ruled against the Government of Kenya, directing that the community’s land be restored

Other settlement schemes illegally established

- 381 Other settlement schemes that were riddled with irregularities including allocation to undeserving individuals, allocation of plots that exceeded recommended acreage and allocation of plots in a settlement scheme illegally established on government lands such as forests include the Kiboko “B” Settlement Scheme in Kibwezi,³⁷³ Ndathi, Tinet, Ndoinet, Kapsita-Molo, Kibunja, Tinet, Sigotic, and Kapchorwa settlement schemes in various parts of the Rift Valley and Central provinces³⁷⁴ Further, there were settlement schemes illegally established in Agricultural Development Corporation (ADC) farms, including ADC Tall Trees Settlement Scheme in Nakuru, ADC Zea Settlement scheme, ADC Sirkwa in Nakuru, ADC Nyota Complex, ADC Jabali, Moi Ndabi Settlement Scheme, Ol Jorai Settlement Scheme and Miliman Settlement Scheme³⁷⁵

373 Report of the Ndung’u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002), Annexes, Volume 1, Annex 53, at pages 876 – 884

374 Report of the Ndung’u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002), Annexes, Volume 1 Annex 54, at pages 885 – 886

375 Report of the Ndung’u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) Annexes Volume 1, Annex 55 at pages 887 – 900

382 In all of the cases of settlement in ADC farms, not only were the settlements illegal because it was government land; land allocations were made to undeserving individuals with connections to government officials, including key politicians and, in almost all cases, the acreage allocated exceeded what was recommended by far. In some cases, beneficiaries were allocated double of the recommended acreage.³⁷⁶ In all of the foregoing cases, settlement schemes were established by the offices of the two presidents, outside of the established framework, at the personal initiative of the presidents. The mechanism used was a presidential directive to the provincial administration to settle specific groups of people, mainly members of their ethnic communities, in specified areas. No official records were kept detailing the procedures followed in the establishment of the schemes, but there was evidence that the due process of law was not followed. For example, schemes that were established in gazetted forest areas were not preceded with official degazettement of the forests as required by law.³⁷⁷

Illegal acquisition of ADC farms

383 The Agricultural Development Corporation (ADC) was established under the Agricultural Development Corporation Act, Cap 444 of the laws of Kenya in 1965, with the objective to promote the production of the country's essential agricultural inputs.

384 The corporation was intended to provide an important link to the agricultural industry through specialized activities and services and in that regard, to produce seeds and pedigree and high grade livestock including hybrid maize seed, provide agricultural finance by means of loans and undertake such other activities as it deemed fit to promote agricultural production in specific areas or specified fields of production.

385 The corporation was expected, with intensified government support, to double or even triple its efforts in rendering scientific and productive support to the agricultural industry that had long been recognized as Kenya's economic backbone. In that regard, the corporation was expected to acquire more land for its activities and had no authority to dispose of government land allocated to it. However, like other government entities placed with trust over land for public purposes, the corporation became subject of land grabbing.

376 See Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002), Annexes Volume 1 Annex 55, at pages 887 – 900.

377 See Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 132.

- 386 Landgrabbing avenues were deliberately opened by the unexplained amendment, in 1991 of the ADC Act which changed its specific mandate to a general one by inserting a new section 12 which stated that the function of the corporation shall be to promote and execute schemes for agricultural development and reconstruction in Kenya by the initiation, assistance or expansion of agricultural undertakings or enterprises
- 387 The amendment provided basis for subsequent executive orders for dealings with ADC lands in ways that were totally incompatible with its genuine mandate. In 1994, an executive order was issued, directing the allocation of eight ADC farms to individuals under the guise of settlement schemes to be financed by the SFT. Subsequently, the corporation's farms in various parts of the country were sold as political reward or patronage. Others were sold to individuals favoured by the Moi and Kenyatta administrations including L.R. No. 9917/9 measuring 5 518 acres in Machakos (formerly, ASTRA ADC farm) that was allocated to Professor Philip Mbithi, L.R. 8466 measuring 893 acres in Uasin Gishu (formerly ADC Edge Farm) which was sold to Karuna Units, L.R. 4486 measuring 795 acres in Trans Nzoia (formerly ADC Edge Farm) which was sold to V arap Too, L.R. 9069 and 9062 measuring 149 33 acres in Nakuru (formerly, ADC Avondale farm) which was allocated to Njenga Karume; and L.R. 9867 measuring 1 040 acres in Nakuru (formerly, ADC Baraka farm) ³⁷⁸
- 388 These are just a few of the ADC farms that were illegally acquired by private individuals and entities, including high-profile government officials ³⁷⁹. Interestingly, illegal allocation of ADC farms to politically-connected individuals became the subject of investigation by the parliamentary committee on investment following the audit of its accounts for the year ending 30 June 1997
- 389 In its findings published in its Eleventh Report, the committee heavily criticized allocation of the farms to politically-connected and well-to-do individuals and private entities, but fell short of making specific recommendations for revocation of titles or nullification of allocations. It is recommended that all ADC farm lands that were allocated to government officials, including members of Parliament and their families, local authority officials and politically connected individuals be annulled, the lands repossessed and restored to the public domain

³⁷⁸ See Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002), at page 134 and 135

³⁷⁹ For a complete list of all illegal allocations of ADC farms see Report of the Ndung'u Commission of Inquiry Into the Illegal/Irregular Allocation of Public Land (2002), Annexes Volume 1 Annex 55 at pages 887 – 900

Illegal Sub-Division and Allocation of Trust Lands

■ *Illoodo-ariak adjudication section*

- 390 The case of Illoodo-ariak serves to illustrate the extent of breach of customary land rights by deliberate failure to comply with applicable laws. The adjudication section is situated in Kajiado District. The Illoodo-ariak land is situated south-west of Nairobi, in the district and used to be occupied and utilized in common by over six thousand members of the Maasai community. Under the Trust Lands Act and the former constitution, the land was designated as trust land and placed with OI Kejuado County Council to hold for and on behalf of the Ilkeekonyokie clan of the Maasai community who were entitled to occupy, utilize and transmit it to succeeding generations, but this was not to be
- 391 In 1979, the Illoodo-ariak area was declared an adjudication area under section 5 of the Land Adjudication Act, but with no indication of any consultation with the Maasai owners. Subsequently, land adjudication officials were appointed and posted to the area. The process of land adjudication was completed in 1989 and an adjudication register was opened for inspection and objections invited within a period of 60 days. However, the adjudication process was fraudulent in many respects. The names of many government officials, including non-Maasai ones, were entered on the adjudication register as owners of the land, making a total of 362 persons who were not local residents of the area but were recorded as owners of the land and issued with title deeds. Many rightful Maasai inhabitants of the area were omitted from the register and disinherited from their ancestral land³⁸⁰
- 392 Obviously, the process violated the old constitution but attempts by affected inhabitants to seek legal redress were frustrated, especially by the barriers presented by section 143(1) of the Registered Land Act (now repealed), which made first registrations of land under the law indefeasible, regardless of irregularities. It is recommended that in light of enabling provisions of the current Constitution and the Land Act of 2012, titles issued to all non-Maasai individuals for land in the Illoodo-ariak Adjudication Section should be revoked.

■ *Mosiro adjudication section*

- 393 With respect to trust lands, the matters concerning the Mosiro Land Adjudication Section in Kajiado District provide a classic case of irregularities involved in the issuance of titles to land. These matters appear more elaborately in H.C. Misc

³⁸⁰ Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 141

Civil Application No 312 of 1991, *James Ndungu Wambua vs Director of Land Adjudication*, in *James Ndungu Wambua vs The Republic & Others*, Civil Appeal No 85 of 1992, and in the *Kenya Times* of 28 January 1991.³⁸¹

394 By Legal Notice Number 137 of 1970, the minister approved the application of the Land Adjudication Act to trust land, subsequently defined as the Mosiro Land Adjudication Section in Kajiado District as required under section 3 of the Land Adjudication Act. Subsequently, the process of adjudication commenced, in which rights of ordinary residents over parcels of land in the adjudication area were to be ascertained and recorded, and eventually parcels of land demarcated (after mapping and survey) and registered in their names.

395 Contrary to the provisions of the LAA, setting out the procedure for adjudication (as already discussed), the adjudication officials, among other irregularities, failed to give any of the ordinary residents of the Mosiro Land Adjudication Section [hereinafter, MLAS] any opportunity to point out or to demarcate the boundaries of lands the people claimed, nor were they accorded opportunity to make claims to any land in the section. They allocated land to people on a map without such map or allocation being preceded by actual demarcation of the respective parcels of land on the ground. They further allocated some 52 452 hectares of land in the adjudication section to people mainly from the Central Province (Kiambu), about 27 of them (including the daughters of the [then] Director of Land Adjudication- Rose Muthoni Muthuri and Karen Kaguria Njuguna), and to at least 31 government officials. The officials failed to display the original of the land adjudication register at a convenient place or at any place at all so residents could peruse it to verify information respecting lands allocated to them,³⁸² and proceeded to register parcels of land wrongfully allocated to the outsiders (non-residents) under section 32 of the Registered Land Act, Cap 300, and to issue title deeds in respect thereof.

■ ***Kimuri 'A' adjudication section, Meru***

396 The area in question, which constituted trust land for the Kagwanja clan of the Ameru community, was declared an adjudication section and the process of adjudication commenced and completed in clear breach of the provisions of law.

397 As a result, land adjudication officials of the area allocated land to themselves, their relatives and friends, while denying members of the clan who were entitled to the

³⁸¹ Irregularities that occurred in the process of adjudication in the Mosiro Land Adjudication Section gave rise to the cases cited and to the minister's comments that were reported in the *Kenya Times*.
³⁸² See section 25 of the Land Adjudication Act.

land their rights³⁸³ Resulting titles issued to non-members of the clan are illegal and this study recommends that they be revoked

■ **Fourteen Falls land in Thika**

398 The land, which was held in trust by the Fourteen Falls Integrated Programme in Thika County, forms part of the Ol Donyo Sabuk Wetland ecosystem and is trust land. In spite of the facts, the land, measuring 11.6 hectares and registered as L.R. no. 22425, has been illegally sub-divided and allocated to private individuals, at the expense of ecosystem services and the rights of people in the surrounding areas to a clean and healthy environment. It is recommended that all of the titles issued be revoked and the land restored to the public.³⁸⁴

■ **Manga Orotuba community forest land**

399 The forested land in question is located in Mwamanwa Sublocation, Kiungo Location, Kisumu County and forms part of Manga Escarpment. It is a hilltop which the local Abagusii community claim to have been set aside for their use as trust land, under the trusteeship of Nyamira County Council. However, in 1991, the council, without consulting the community, sold a piece of the forested land to the Catholic diocese of Kisumu. The council, again, in 2006, "granted" 20.23 hectares of the land to the same diocese for construction of a monastery, on land now registered as Central Kitutu/Mwamanwa/1594. Surprisingly, the title deed that the Catholic Church holds over the land does not bear any name of the previous owner. It is a clear case of illegal sale of community land by the trustee, Nyamira County Council.³⁸⁵

400 In efforts to recover the land, community members, through an environmental organization, filed Civil Suit No. 38 of 2010 in the Environment and Land Court in Kisumu. The case was still pending for hearing by the time of writing this report. The same community environmental group also challenged the issuance of an environmental impact assessment licence by National Environmental Management Agency (NEMA) to the Catholic Church. They were seeking to stop the church from constructing a house, as part of its monastery for Carmelite Brothers on the land (NET/99/2012).

401 It is recommended that the title deeds granted the Catholic Church over the two large parcels of land illegally annexed by the Catholic Church out of Manga Orotuba community land be revoked and the land be restored to the community.

³⁸³ Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 142

³⁸⁴ Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 142

³⁸⁵ See Report of the Public Complaints Committee on Environment dated 10th December 2012

■ ***Forced eviction in Thessalia and Buru farms in Kericho***

402 To most Kenyans, inhumane treatment, torture and killing of innocent Kenyans within church grounds evoke quick memories of the recent happenings at Kiambaa church in Eldoret during the 2007/2008 post-election violence. What most people do not know is that other ethnic communities, especially members of the Luo community, long before Kiambaa, suffered a similar fate at the hands of tribalist community members and tribalist government officials, especially officials in the notorious provincial administration. The case of forceful evictions of members of the Luo community from, first, Buru Farm and subsequently, Thessalia Farm, demonstrate the widespread nature of forced evictions meted against innocent Kenyans by provincial administration officials.

403 In efforts to find a lasting solution to their problem of landlessness, some members of the Luo community who had been working in Kericho area as farm labourers and 'squatting' on the farms where they worked since the colonial days, formed the Buru Farmers Society, while members of the Kipsigis community in a similar situation formed the Kipsigis Farmers Society. The idea was first implemented in 1972, with encouragement of the then Kericho District Commissioner Milton ole Ncharo. Members of each of the societies paid all dues to the Kericho District Treasury as required for the purchase of two separate tracts of land for sub-division to each contributing member.³⁸⁶

404 Tribalism as manifested by favouritism appeared for the first time when the provincial administration assisted the group owned by Kalenjin to quickly acquire title deeds to their lands, while offering no similar assistance to the Luo.³⁸⁷ Unbeknown to members of the Luo community, the failure of the provincial administration was intentional - its plan was, as it later turned out, to extort money from them and then forcibly evict them from the lawfully acquired Buru Farm. Without any plausible explanation, members of the Luo community who had fully paid Kericho District Treasury for the purchase of Buru Farm were later asked to pay a further KSh21,180 10 each, which they paid.

404 However, the provincial administration declined to extend any assistance to them to acquire ownership documents as it did for members of the Kalenjin community.³⁸⁸ Members of the Luo community first realized that the Kipsigis and their leaders, including those in provincial administration were opposed to their acquisition of Buru Farm in 1988 when a member of the Kipsigis community by the

³⁸⁶ Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 26

³⁸⁷ Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 26

³⁸⁸ Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 26

name Noah informed a *baraza* held by the provincial administration to tell the Luo that they would eventually be evicted from Buru Farm because the land belonged to the Kipsigis.³⁸⁹ In another *baraza*, the local councillor informed the meeting that the Luo who were then living in Kericho area were “milking” Kipsigis land and that land in Kericho should only be owned by the Kipsigis.³⁹⁰

- 406 As political debates for the multi-party system of democracy increased towards the year 1991, the Kalenjin, including officials in the provincial administration perceived members of the Luo community in their midst as being sympathetic to the multi-party system and exploited their own perception, without any basis, to forcefully evict the Luo from Buru Farm on 16 November 1991. With the open incitement of the then local District commissioner Timothy Sirma, several members of the Kipsigis community invaded Buru Farm on the fateful day, burned down houses belonging to the Luo, took away their cattle, torched sugar cane plantations and forcibly evicted the Luo, while the local chief and administration police officers bulldozed their houses.³⁹¹ In just one night, members of the Kalenjin community burned down more than 140 houses together with all belongings and grain stores, but when the matter was reported to the chief, he callously retorted that “the Luo had encroached on Kipsigis land and were expected to move out.”³⁹²
- 407 The Luo were thereby rendered homeless and without security. Some of the arsonists and stock thieves from the Kalenjin community who had rendered the Luo homeless and destitute were known to them. Despite reports that were specifically made against the arsonist thieves at the Kericho police station, the police took no action whatsoever.³⁹³ Thus the Kalenjin were emboldened to undertake future acts of arson, killing and property destruction against members of other ethnic communities living in the Rift Valley, including the atrocities at Kiambaa, which drew the attention of a wider segment of Kenyans.
- 408 Members of the Luo community who were evicted from Buru Farm sought refuge at Thessalia Mission in Kericho, where they camped outside in makeshift structures. The notorious Timothy Sirma, again, ordered for their forceful eviction from the mission. On 13 December 1993, their eviction was carried out by the provincial administration “in a most cruel and inhumane manner.”³⁹⁴ The people were surprised at daybreak by armed policemen who woke them up and ordered them to leave immediately. They were not allowed time or opportunity to remove their

389 Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akhwumi Commission) 1998 at 26

390 Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akhwumi Commission) 1998 at 26

391 Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akhwumi Commission) 1998 at 27

392 Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akhwumi Commission) 1998 at 27

393 Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akhwumi Commission) 1998 at 27

394 Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akhwumi Commission) 1998 at 31

personal effects Luo 'squatters' were in a most inhuman manner evicted from a mission centre where they had peacefully sought refuge, without causing anybody any harm, thanks to the local provincial administration and its known notorious perpetrators such as Sirma

- 409 It is people like Timothy Sirma, brutal acts of administration police on orders of district commissioners, provincial commissioners and district officers and both acquiescence and perpetration of similar acts by chiefs that make the provincial administration most abhorrent in the current governance setup. It is recommended that the case concerning Buru Farm be investigated thoroughly and that all government officers who participated in the forceful eviction be prosecuted. It is also recommended that the farm be restored to the Luo who purchased it and that they be issued with title documents to it. Alternatively, they should be paid for the land at current rates and those who are not able to acquire land for settlement should be assisted to re-settle elsewhere

■ ***Forced eviction of the Endorois community***

- 410 The Endorois indigenous community that speaks a language closely related to Kalenjin resides in the current Baringo County in the Rift Valley. The community, estimated to comprise 60 000 persons, used to live mainly around Lake Bogoria. A few of the members of the community lived in Nakuru and Laikipia districts. The Endorois were accepted by all neighbouring tribes and as the *bonafide* owners of the land around Lake Bogoria. They continued to occupy and enjoy undisturbed use of the land during the colonial British administration even though the British claimed overall title to the land as part of 'Crown' land under the Crown Lands Ordinance. At independence, the land occupied by the Endorois community was passed on to the respective county councils as trust land, to be held by the councils for the benefit of all of the members of the community
- 411 In 1970, they were forcibly evicted by the government, without consultation or compensation, to pave way for the establishment of the Hannington Game Reserve, which was done the following year, in 1973. Their right to their homeland was further diminished by the re-gazettement of Lake Bogoria as a game reserve in 1978. At the time of eviction from their homeland which they had occupied for centuries as the authentic occupants, the Endorois were neither consulted nor compensated. The government also did not offer them any alternative settlement. The community suffered loss, not only of ancestral land where they had lived sustainable livelihoods, but also natural resources and cultural and religious sites³⁹⁵

395 Endorois Welfare Council Memorandum of Endorois Community to the Truth Justice and Reconciliation Commission. Kabarnet-Baringo County 24 – 26 October 2011 (BRG/002) at 1 & 5

412. Shortly after the creation of the protected wildlife area around Lake Bogoria, the Kenya Wildlife Service (KWS) undertook to compensate Endorois families, then numbering 400, and in addition, allocate to them 25 percent of revenues generated from the game reserve and 85 percent of the jobs created thereby. However, KWS failed to honour its undertakings. Further directives by President Moi that KWS honours its undertakings also failed, prompting the community to sue Baringo County Council in *William Yatich Sitet, alias William arap Ngasia, et Al v Baringo County Council* in High Court Civil Suit No. 183 of 2000. Although in the judgment issued in 2002, the High Court dismissed the community's suit, it did recognize that Endorois land around Lake Bogoria was trust land under management by the Baringo County Council but that they lost their right to the land when a game reserve was established thereon in 1973 and 1974.
413. The Endorois later learnt that parts of their land over which a protected wildlife area had been established was allocated to a private mining company and another portion, to a foreign investor who established thereon a private wildlife conservancy, both in the year 2002. Subsequent presentation of the matter to the National Assembly did not yield fruit as Parliament failed to address the issue, prompting the Endorois to sue the Kenya government in the court of the African Commission on Human and Peoples' Rights (ACHPR), under the African Charter on Human and People's Rights. The court ruled in favour of the community, against the government of Kenya, directing, among other things, that the government recognizes the right of the community to its ancestral land.
414. The court also ruled that the government ensures that the community has unrestricted access to Lake Bogoria for religious, cultural and grazing purposes and that the government pays adequate compensation to the community for the loss incurred. The government was also ordered to pay royalty to the Endorois from the economic activities to which their land was devoted and to table a report on the implementation of the ACHPR's recommendations within three months from the date of recommendation.³⁹⁶ To date, the ACHPR's ruling has not been effected by the government. It is recommended that the terms of the judgment be implemented in favour of the community without any further delay.
- ***Hill Farm Kamwenja, Mathari, in Nyeri District***
415. The land in question is registered as L.R. No. 9464 and measures 1,089 hectares. It formed part of trust land, being ancestral land of residents of Mathari sub-location in Nyeri. However, during the colonial emergency period in the late

³⁹⁶ Endorois Welfare Council, Memorandum of Endorois Community to the Truth, Justice and Reconciliation Commission, Kabarnet-Baringo County, 24 – 26 October 2011 (BRG/002) at 9.

1950s, residents of the area were moved to emergency villages in 1955. Before then, the Catholic Church had, in 1929, purchased 1 054 hectares of land, forming part of the trust land from families living there at the time (before the emergency), a fact which residents acknowledge. However, when residents were moved to emergency villages in 1965, the church irregularly acquired an additional 2 577 hectares from the same trust land while residents were away in emergency villages, and registered the land in two parcels - LR. No. 1356 and L.R. No.4166.³⁹⁷ It is recommended that this matter be investigated further and, if all the facts are established, title for the additional land irregularly acquired while residents were away in emergency confinement be restored to them.

Involvement of land-buying companies in illegal acquisition of land

416. In addition to individuals who applied for land in the various settlement schemes that were implemented after Kenya attained independence, many land-buying companies were formed comprising mainly the farming communities of Central Province to freely buy land from white settlers. By 1978 there were over 1 000 land-buying companies in the country, with more than two-thirds of them belonging to influential individuals and groups from Central Province and a few from Rift Valley, Western and Kisii regions. A few of these land-buying companies did commendable work to assist their members or shareholders to settle on parcels of land they purchased collectively. One such company is reported to have "settled their kin on 51 539 acres of land in Laikipia, 21 050 acres in Njoro and Nakuru, 1 200 acres in Molo, more than 4 000 acres in Bahati area of Nakuru and 1 400 acres in Mau Narok, all parts of traditional Maasai territory."
417. Settlement of individuals and families especially from the Kikuyu community in areas considered part of Maasai homeland was to later result in violent conflicts between members of the two communities, especially around the time of elections in 1992, 1997, 2002 and 2007 in Molo and other parts of the Rift Valley.³⁹⁸ GEMA Holdings Ltd formerly chaired by Njenga Karume, is one of the land buying institutions owned by members of the Kikuyu community that acquired land in areas occupied by other communities for settlement of their kin.
418. It acquired 20 000 acres of land in Molo and 16 000 acres in Naivasha. It is not surprising that it is in Molo where ethnic-related violence broke out first in 1991. Ngwataniro Mutukanio Company and Miteitei Company Ltd also acquired land

³⁹⁷ Report of the Ndung'u Commission of Inquiry Into the Illegal/Irregular Allocation of Public Land (2002) at page 142

³⁹⁸ Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 2 – 4.

in Nandi, where ethnic violence also broke out in 1991. In addition, Kiambaa Cooperative Society acquired the 500 acre of land in Kiambaa farm located in Eldoret in 1967 from a Mr Giuseppe Morat and it should be recalled that Kiambaa is the area that witnessed one of the worst forms of ethnic-related violence during and after the elections of December 2007 and that many of the members of the Kikuyu community who had settled in the area were evicted and became internally displaced persons (IDPs), some, to this day. Other private institutions that also purchased land for their members or shareholders in the Rift Valley were Ngati Farmers Cooperative which purchased 16 000 acres in 1965 in Naivasha from Maiella Limited and Kipsiet Farmers Cooperative which purchased a 2,302-acre farm in Kericho from Margaritis Ltd. The other farms purchased under similar arrangement were Kamwaura Farm measuring 1,636 acre in Molo, which was purchased in 1976 from a Lionel Caldwell, Munyeki Farm measuring 4,000 acres which was purchased in Trans Nzoia, in which case, Munyeki stood for Murang'a, Nyeri and Kiambu, being the origins of the business shareholders and beneficiaries.

- 419 Besides community strife that settlements established on the basis of land-buying companies engendered, the companies themselves also engaged in numerous acts of fraud against their members or shareholders, thus promoting landlessness, scarcity and related poverty. The majority of the companies turned into dens of corruption and many swindled large sums of money or shares from their members, without any compensation. Notable among land buying companies in which corruption was pervasive was Ngwataniro Group, led by maverick politician by the name Dickson Kihika Kimani. Rampant fraud and corruption in the company leading to the loss of large sums of shareholders' money resulted in tensions and violent conflicts between the company management and would-be beneficiary contributors that went on for years.
- 420 Another land-buying company with a similar record is Mbo-i-Kamiti land-buying company, which had branches in Kiambu and Thika areas. By late 1970, over 70 000 contributors had not received any parcel of land, despite clearing payments. As a result, numerous legal cases were filed against many of the land-buying companies, which were mainly owned by influential individuals and companies. Moreover, the establishment and financial support of land-buying companies was discriminatory. Members of the Kikuyu ethnic seem to have received government financial support to establish land-buying companies in areas considered as homelands of other communities such as the Kalenjin and the Maasai. In contrast, other communities in Kenya whose members were facing landlessness, destitution and poverty were not similarly facilitated,

especially with provision of funds to purchase land from the departing white settlers. The fact is attributed to political patronage, entrenched negative ethnicity in Kenyatta's administration and dominance of members of the Kikuyu ethnic community in key financial institutions in the country during Kenyatta's administration, as rightly observed:

Kikuyu elite had overwhelming influence on officials in the Ministry of Lands and Settlement as well as the financial institutions that were providing loans for the land purchases. The Kalenjin, however, had no senior officials in these institutions or in the government. They had Daniel arap Moi as Vice-President to President Kenyatta, but he lacked the influence required to commit himself to competition with the powerful Kikuyu elite. Both groups were competing to purchase settler farms, but the Kalenjin were standing on relatively weaker ground. Each group nonetheless mobilized support from the political elite in its respective ethnic region to bring political influence to bear on the land control boards, which authorized transactions in the land market.³⁹⁹

- 421 To complicate the involvement of land-buying companies further, there were numerous cases of conflict within communities that benefited from land-buying companies. Conflicts arose between peasant contributors of money for land and the wealthy individuals who owned and operated the companies, mostly Kikuyu elite. Conflicts also arose among the owners and operators of the companies over who had the rights to acquire or purchase certain parcels of land or specific farms. There were also cases of double and multiple claims and multiple registrations of the same plots of land and farms to more than one individual. As a result, by the early 1980s, there were thousands of contributors who had not received any parcel of land, despite making all required payments. This increasing alienation and fraudulent activities related to land purchases led to more tensions and violent conflicts in different sites involving influential individuals and land-buying companies as well as shareholders or contributors. In response, President Moi, upon taking office, demanded the disbandment of the over 1 000 land buying companies that were still operational by the early 1980s. He also ordered for subdivision of the large farms that they had purchased on the basis that the companies had defrauded citizens.

399 Karuti, Kanyinga, 'Land Redistribution in Kenya' in HP B Mkhize Et al (eds) *Agricultural Land Redistribution Towards Greater Consensus* (2010) at 107

Illegal Land Alienations during President Moi's Administration

- 422 In August 1978, Daniel arap Moi took over as the second President of the Republic of Kenya following the death of Jomo Kenyatta. He promised to follow the footsteps of his predecessor. Moi's 'Fuata Nyayo' philosophy literally meant that he would follow in the footsteps of his predecessor in critical aspects of policy and governance, including approval of illegal land allocations, and he did, with the exception of minor policy departures, especially in relation to his pro-pastoralist policy and his new focus on the development of arid and semi-arid lands. During his tenure, every category of government-owned land including military establishments, road reserves, public parks, bus parks, public toilets, forests and cemeteries as well as trust lands were illegally acquired in what became publicly known as the widespread phenomenon of land grabbing, mainly by the president himself, his family, officials in his administration, politicians, civil servants, and military officers.⁴⁰⁰ In the process, more than 200 000 illegal title deeds were acquired which ought to be revoked.⁴⁰¹
- 723 This section of the chapter on land demonstrates that like his predecessor Kenyatta, President Moi adopted the policy and practices that facilitated the illegal allocations of land, especially government land, in ways similar to those of Kenyatta's administration. In the end, there was no meaningful attempt during his administration to redress illegalities that had characterized dealings in land during Kenyatta's administration. By the time Moi took over power in 1979, there were no more parcels of land in the former White Highlands that could be purchased from white settlers for resettlement of landless or land-scarce Africans who had lost their land during the colonial administration, even though there were still large numbers of communities at the Coast and in mainland Kenya in need of settlement. Also, there was hardly any more unalienated government land that could be utilized for settlement or farming by private entities, or for political patronage.
424. In the prevailing circumstances, Moi and his close associates resorted to massive illegal allocations of unalienated government land and other real property in virtually every part of the country. To facilitate unquestioned dealings in land, Moi re-organized key ministries, including the Ministry of Lands and Settlement and the Ministry of Defence by placing his cronies, mostly members of his ethnic Kalenjin community in strategic positions. Moi's close associates in key government

400 Republic of Kenya. Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at 154 – 160

401 Ibid. pp 154-160. Appendix one of Ndung'u Report. Document prepared by the chief Conservator of Forests

positions included former powerful Permanent Secretary in charge of Internal Security Zakayo Cheruiyot,⁴⁰² former Energy Minister Nicholas Biwott,⁴⁰³ former Central Bank Governor Micah Cheserem⁴⁰⁴ and former of Kenya Seed Company Ltd Managing Director Nathaniel Tum⁴⁰⁵

- 425 Once in office, Moi's cronies engaged, with his apparent approval, in massive illegal acquisition of lands owned by the Agricultural Development Corporation (ADC), forest lands including land in the Mau Forest complex, protected wildlife areas, wildlife migration corridors, public beaches, government houses and lands reserved for public utilities across the country.⁴⁰⁶ Land was mostly used during his administration as reward for political patronage. It was also used to selectively settle members of his community while in other cases, illegal alienation of land led to the forceful eviction of members of other communities. During his tenure, private entities also acquired public lands and other property across the country illegally, with wanton impunity. Local authorities similarly participated in massive illegal land allocations to themselves and close associates under the cover of corrupt officials in Moi's administration. The following paragraphs detail pervasive cases of illegal land allocations during Moi's tenure, which, in the new constitutional dispensation, require redress in order to avoid violent conflicts

Continued irregularities in land allocation at the Coast

- 426 Official documents indicate that land problems at the Coast were of concern to Moi's administration and, in the National Development Plan of 1979-1983, he promised a review of land rights in the area. He proceeded to freeze and review the existing allotments of beach plots, which had, previously, been massively and illegally allocated mainly to Kenyatta's close associates, including his family members
- 427 As a show of the seriousness of his efforts to address land issues at the Coast and in other parts of the country, President Moi had curtailed the immense powers of the Ministry of Lands and Settlement, effectively reducing it to a department reporting directly to him. However, his well intentioned land reforms for the benefit of coastal communities were never realized

402 Ndung'u Report p 155 on Illegal/Irregular Allocation of land in South Western Mau Forest

403 Ibid p 158 Nicholas Biwott was irregularly allocated land excised from Kaptagat forest under a private trust known as Maria Soti Memorial Trust (Maria Soti was the late mother of Biwott)

404 Ibid , p 95 The three sold illegally/irregularly acquired land to the Kenya Ports Authority. Undeveloped plot L.R No 209/10212 Bellevue, Nairobi (1.6Ha)

405 Nathaniel Tum is on the list of powerful individuals in the Moi administration that benefited of Liyavo Farm that was meant to settle squatters in Trans Nzoia

406 See full details in the Ndung'u Report various secondary sources of information and various memos from the TJRC Hansard

428 Failure to complete the process of land adjudication and registration, as well as failure to purposefully resettle the landless individuals and communities at the Coast were, perhaps the twin evils that facilitated official acquisition of land in the region in ways that were not at all lawful or acceptable. The situation was well presented by an affected community member who observed that at the Coast

Moi's government continued dishing out land as reward to councillors and MPs. You would find a councillor from Duruma selling land in Digo land and that brought a lot of enmity among the people. That is why the coastal community feels that all people from upcountry are bad because all their land has been given free of charge to people from upcountry. A councillor is given a beach plot and he then sells it and buys a nice car yet the people do not have anything.⁴⁰⁷

429 Communities at the Coast did not expect officials in Moi's administration to continue illegally acquiring their land because when he came to power, he was not happy with the kind of illegal alienations of land that had occurred at the Coast and soon after taking office in 1978, he ordered that illegally acquired land revert to the real owners, that is, the locals. However, his wish was never actualized because, apparently, political leaders who perceived that they had a chance to enrich themselves through illegal land deals approached President Moi and told him that they were not willing to return land to the locals, neither were they willing to stop illegally acquiring land in the area.

430. Instead of acting firmly to redress the land-related injustices that coastal communities had suffered for a long time, Moi directed that land be acquired at the Coast on a willing-buyer, willing-seller basis, yet affected communities at the Coast were too poor to afford land purchases. Moreover, what land dealers were offering local communities for their land was far too little compared to the actual value of land at the time and the huge profits that speculators were making from subsequent sale of land that they had acquired from locals for very little. In the words of an affected community member

They came back and told us that the owners of the land would be given KSh20 000 per acre. There are those who took the money, but my father and others refused to take it. I worked for Diamond Trust for 20 years. I knew the worth of our land. I used to earn KSh15, 000, but an Indian would bring a title deed and he would be given KSh430 million for ten acres of land. He had been given 14 acres by Moi. He was given plot number 14897 which is adjacent to Sheshe Beach Hotel. He demarcated two acres and Joseph Leting was given No 13438. Two other acres, No 13439, were given to Mark Too. Some other two acres were given to a European called Guy Barrington Bromnel that is No 13440. I could not take a loan then. Moi's son took a plot whose number is 13441. It is undeveloped to date. Ten acres are with Travellers Beach Hotel. It was my dad's plot.⁴⁰⁸

407 TJRC/Hansard/Public Hearing/Kwale/23 January 2012/p. 11 para 3

408 TJRC/Hansard/Public Hearing/Kwale/23 January 2012/p. 38 para 1-4

- 431 From the testimony of affected family members who testified before the TJRC, it appears that officials in Moi's administration and his political cronies demanded land from coastal communities for very little money and that where families objected to their acquisition of land, they took it by force and for subsequent sale, to make profit. Just as it was in Kenyatta's administration, during Moi's time, "people from far" places and privileged senior officers (government workers) and politicians were allocated huge chunks of land at the expense local squatters who have completely and have virtually ended up as paupers since the colonial times⁴⁰⁹

Illegal acquisition of land in mainland Kenya

■ *The cases of 'squatter' societies*

432. Unlike in Kenyatta's administration when a number of landless individuals and families pooled resources to acquire land in the Rift Valley and other parts of Kenya and succeeded in settlement, in many cases, during Moi's era, efforts by the landless to attain settlement through loan schemes were deliberately thwarted by officials in the administration who flagrantly took away land from them. There were cases of people who purchased land through SFT, facilitated by the Agricultural Finance Corporation (AFC)

- 433 However, upon making full repayment of the loans, group members or members of the cooperative societies did not get title to the land. Instead, their land was, without their consent or approval, allocated to prominent persons, some of whom resorted to harassing the members to ensure that they did not revolt against their illegal moves. In this regard, the Livayo, Maridadi and Sitatunga self-help schemes in Trans Nzoia and the Koriny Tich Farmers' Group provide good examples of the deliberate historical land injustices. In the case of Livayo Farm which was meant to resettle the landless in western Kenya, on their own initiative

Land meant for 'squatters' in the farm was dished out as a gift to people who supported the then president Daniel arap Moi and the then ruling party KANU, with a classic example of Tolosho Ltd whose directors and owners are Mart Properties, Dinal Chelal Chelimo, Tim Tim Holdings, Mart Holdings Ltd, Tiwai Holdings and Sammy Silas Komen Mwaita, a former Commissioner of Lands according to the Ndung'u Commission report revelation who blessed himself with 80 92 ha (about 200 acres) that could settle about 80 squatters given two and a half acres on equitable basis⁴¹⁰

⁴⁰⁹ TJRC/Memo/M0791/ p 4

⁴¹⁰ TJRC/Memo/M079/p 2 para 4

434 Similarly, members of Koriny Tich Farmers' Group took a loan with the AFC to purchase their land in 1965 which loan they completed paying by 1973. Instead of the group getting title to the land, the land was, during Moi's administration, illegally transferred/ allocated to Edward Kiptanui, a former Baringo South MP. Ironically, Kiptanui had neither been one of the members of the group nor contributed towards repayment of the loan.⁴¹¹ The group is said to have filed a case against the illegal allocation and obtained judgment in their favour, upon which the members were able to obtain a provisional title to the land, which they intended to sub-divide amongst themselves. However, at that point, they realized that there were unscrupulous sellers who were trying to sell their land to the government of Kenya for the resettlement of other internally displaced persons.⁴¹²

435 There is also a case of another self-help groups whose members came together and purchased land facilitated by a loan from the SFT. However, upon completion of repayment of the loan, the local District Commissioner took over the farm and sold it to non-members. The DC is also said to have allocated portions of the land to the DO and Chief who in turn sold it to third parties and to him. The DC further sold, for his own benefit, all other assets belonging to the group members that were in the farm, including livestock, without consulting the members.⁴¹³

● ***Illegal alienation of forest catchment areas***

436 In addition to Karura Forest, there were other forests forming part of government land in the country that were similarly illegally excised and allocated to government officials and their close associates during Moi's administration. One of such national forests is the Mau Forest complex, which serves critical ecological functions to the whole of the East Africa region in terms of being a catchment area and a source of trans-boundary rivers between Kenya and Tanzania.

437 First, a decision was made to settle people in portions of the forest without following due procedures of law which require, among other things, de-gazettement. Kiptangach Extension Settlement Scheme is one of such settlement schemes that were illegally established in the Mau Forests. Moreover, a Mau Task Force found out that instead of settling the landless, prominent people in the government and their cronies acquired land in the forest catchment area that had been set aside, ostensibly to settle squatters. A list of land allottees in the extension settlement scheme showed that prominent government officials and political leaders were each allocated land, some in excess of 5 000 acres. Retired president Daniel Moi,

411 TJRC/Hansard/Public Hearing/Nakuru/23 September 2011/p. 14

412 TJRC/Hansard/Public Hearing/Nakuru/23 September 2011/p. 14

413 TJRC/Hansard/Public Hearing/Kericho/20 September 2011/ p. 31 para 7

some cabinet ministers and MPs, former and current key civil servants benefited from the illegal/irregular land allocations in the Mau Complex.⁴¹⁴

■ *Land and re-settlement conflicts*

- 438 There was increasing feeling among the long –disadvantaged pastoral communities and the Kalenjin in particular (both herders and farmers) that they should fight at all cost to reclaim their ‘stolen land from the rich ‘foreign’ (black) settlers. Although no attempt was made by the Moi government to revoke the land settlements of the Kenyatta regime, it became increasingly difficult for non-indigenous people to buy land north of Nakuru. The non–Kalenjin individuals and groups who had bought parcels of land in Kalenjin-dominated areas found it hard to get them demarcated or obtain title deeds. Indeed, just like in the previous regime, ethnicity played a significant role on the ground, especially in the former White Highlands, in terms of land allocation and employment. Although the policy of ‘willing-seller, willing-buyer’ remained unchanged, in practice it was slowly diminishing in parts of Rift Valley.
- 439 During the Moi regime as was the case before, settlement schemes were often used to settle immigrant communities, while local officials, ministers, and influential civil servants allocated some plots to themselves, their families or cronies. The result of such irregular land initiatives was often violent ethnic conflicts and legal cases. In the meantime, the land adjudication and registration process slowed, as roughly two- thirds of agricultural land had been demarcated by 1980. The remainder was mostly pastoral land, grazed in common and very difficult to demarcate. There were few individual or group title registrations after 1983, leaving North Eastern Province, Marsabit, Isiolo, Turkana, Samburu and much of the Coast un-adjudicated.
440. In some recorded instances, development partners and donor agencies tried repeatedly to improve the lot of pastoralists through irrigation projects that encouraged the Turkana and Boran to become farmers. The Moi period witnessed a change of policy and government and development agencies attitudes towards the semi-arid and arid lands in Kenya. In fact, Moi created a special Ministry for Reclamation and Development of Arid and Semi- Arid Lands. The ministry was based in the Office of the President and it coordinated programmes across the 14 mapped districts, funded by eight different donors. However, in reality, very little was accomplished to improve the livelihoods of communities in the areas. Moi’s good intentions seem to have been overridden by the land grabbing phenomenon that pervaded his regime. As a result, many communities that were awaiting his

⁴¹⁴ See Ndung’u Report, is a catalogue who is who in the Moi era that benefited from illegal/irregular allocation of public land

intervention in land-related injustices were frustrated and expressed it in ways that threatened the peace and security of other Kenyans

- 441 Among pastoral communities that had been disadvantaged during Kenyatta's era, especially the Kalenjin, there was growing feeling that they should fight at all cost to reclaim their "stolen land" from the people they considered as rich foreign black settlers. Therefore, although no attempt was made by the Moi government to revoke or nullify the land settlements established in the Rift Valley during the Kenyatta regime, it became increasingly difficult for the non-Kalenjin to buy land in many parts of the Rift Valley. Those who had already acquired land in the region also found it very difficult to have them demarcated or obtain title deeds. Further, tension built up between the Kalenjin and other ethnic communities living in the Rift Valley and in many cases, violence erupted, especially around the time of national elections, as explained in the following section of this chapter on the land question in Kenya.

Land and Multi-Party Politics in Kenya

- 442 It is important to demonstrate the critical linkage between the unresolved land question, multi-party politics and ethnic violence in Kenya. The foregoing discussions explain that by the end of Moi's era, none of the outstanding issues concerning land, especially the irregular acquisition of land from communities by the colonial administration and later during Jomo Kenyatta's administration, had been resolved. The situation of affected communities that had been rendered landless or who had become 'squatters' and poor was made even worse after independence. Their resentment of other communities was kindled by the sustained preferential resettlement of other ethnic communities, especially the Kikuyu, on their lands and direct grabbing of their land by officials in the Kenyatta and Moi administrations.
- 443 The discussion demonstrates that because of official failure to address the perennial land problem at the Coast and in mainland Kenya, the problems remained, lingering in the minds and agenda of members of affected communities and their political leaders and over time, fomented anger and resort to self-help measures in the form of violent ethnic clashes and secessionist movements.
- 444 It is demonstrated that affected community anger and resolve to rise against those perceived as 'outsider invaders of other people's homelands' has often been expressed through politics, especially multi-party politics that seem to hold the promise of change in leadership which could, hopefully, result in genuine

resolution of the troublesome questions concerning land. Forceful evictions was also resorted to, especially by the Kalenjin during President Moi's era in retaliation against communities living in areas considered by the Kalenjin as their tribal homelands for the perceived support of multi-partyism by the non-Kalenjin communities.⁴¹⁵ Further, politicians from many affected communities in Kenya have never refrained from using political platforms to promise their constituents to resolve the problems once in office, and to mobilize their communities to rise against those considered as 'outsider invaders of their homelands'. Such calls intensify around every election time, when politicians have ample opportunities to interact with their constituents. It has been observed that election campaigns have always been used as platforms where affected host communities and their political leaders remind immigrants that they are living on 'stolen' lands that were unfairly alienated by the colonial administration but later irregularly acquired or grabbed and awarded or sold by a syndicate in the Kenyatta administration.

- 445 At such times, for some unexplained reasons, the national security apparatus is also usually lax, thus providing opportunities for community resolution of land problems through violence.
- 446 One other matter that ought now to seriously concern the government is the tendency, over the years, to link the possibility of meaningfully addressing land questions through politics of *majimbo*, meaning regionalism. It was explained in the first section of this chapter that as the country prepared for self-rule, it was agreed among Kenyans preparing to take over power that governance would be based on regionalism to allow the different communities to live on and manage their homelands in their own ways. The position was affirmed by President Kenyatta who promised the people of Kenya at the time he took over power that there would be regional governments through which communities/'tribes' would regain and exercise control over their lands. However, this was not to be.
- 447 Kenyatta abolished regional governments soon after taking office, to the disappointment of many. That placed regionalist (*majimbo*) on the agenda of many affected communities. Whatever communities intended to do under a *majimbo* system was reflected in violent ethnic clashes in bids to rid specific regions in the country of people considered as outsiders. Apparently, politicians have also abused their constituents' trust in resolving land problems through a regional system of government to unleash violence against members of other communities whom they believe to be unsupportive of their candidature.

⁴¹⁵ See Republic of Kenya: Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 12, 26 – 31 & 49.

448 Now that we have attained regionalism without having also resolved the land problems, might calls for ethnicised regions/countries result in violent uprisings against perceived outsiders? Might such calls generate more calls for secession? In order to foreclose all of such chances, the following section should provide some lens through which political connections to the existing land problems should be clearly understood and measures urgently taken, on the basis of recommendations of this report, to avert looming dangers to cohesion and peaceful co-existence in Kenya

■ *The danger of violence during multi-party elections*

449 It appears that political leaders are determined to take cover under politics and related debates to address land problems through all means, including violence. This is a glaring sign of official failure to address the challenge, yet all post-independent governments in Kenya have had adequate chances and means to address the problems with finality

450 On the eve of the re-introduction of multi-party politics in Kenya in 1992, there was looming danger of renewed ethnic conflicts due to the increasing tension between those who were agitating for pluralism and those against it. Moi repeatedly warned and predicted that multi-parties would cause ethnic conflicts and increase tribal hatred in the country. His predictions came true as the country faced a series of ethnic conflicts on the eve of the 1992 multi-party elections and subsequent ones. The land question has, since the colonial era to the present time, been interwoven with the majimbo debate, which has been resurfacing in almost all the national elections in the country

451 In fact there was tension between the Kikuyu and the Kalenjin as well as the Maasai over the long-simmering issue of land in the Rift Valley that had now acquired political undertones. The political alignments at that particular time were influenced mainly by conflict over land rights and negative ethnicity, resulting into "them versus us" type of confrontation in the former White Highlands, including Maasailand. For instance, in February 1991, in a phrase that came to epitomise his confrontational ethno-Maasai nationalism, veteran Maasai political leader William ole Ntimama demanded that the Kikuyu residents of Maasai land should 'lie low like an envelope' or they would suffer the consequences. During the era of multi-party politics, the Kalenjin and Maasai revived their clarion call for majimbo or regional type of government, in which most of the public affairs, including land, would be run by regions, except foreign affairs and defence

- 452 The pro-*majimbo* group of leaders convened a series of rallies in Nandi, Kericho, Eldoret and the Coast Province to disseminate and explain their positions to the local people in the respective regions. They agitated for a devolved and decentralized federal system to counter the centralised system that was being championed then by the Forum for Restoration of Democracy (FORD) under the leadership of Oginga Odinga and other opposition figures. The pro-*majimbo* group publicly called upon their supporters to expel those who had acquired land in their Rift Valley and Coast provinces. The notion of Rift Valley as the sole entitlement of the Kalenjin, Maasai, Turkana and Samburu (KAMATUSA) was affirmed openly.
- 453 A few days after the series of pro-*majimbo* rallies in the country, violent conflict erupted along the border of Nandi and Kisumu districts, pitting the local Nandi against a mixed group of other ethnic communities who had migrated there after independence. The conflicts spread rapidly to the other farms in the area and to the nearby Kisumu District. This period witnessed the emergence of organized groups like the 'Kalenjin Warriors', who were armed with poisoned bows, arrows and machetes which they used to kill many people from other ethnic communities.
- 454 They attacked the Luo and other pro-multi-party supporters in Nandi and Kericho, looting and burning their homes and destroying crops and fences. Leaflets were circulated in these areas calling for all non-Kalenjin to leave the area and go back to their original home lands elsewhere. In November of the same year, ethnic conflicts spread to Trans Nzoia, when 'Kalenjin Warriors' attacked members of the Luhya and Kikuyu communities in the Rift Valley and also burnt their homes and drove them away from settlement schemes in the area.
- 455 That December, violent conflicts spread to Mount Elgon and Bungoma Districts between the pro-Majimbo Sabao and Teso and the pro-FORD Bukusu. It took the personal intervention of President Moi to calm the situation through a series of peace rallies in the region. However, violence did not end. Violent conflict spread to other areas of the Rift Valley, where members of other ethnic communities, especially the Kikuyu from Central Province had been settled, especially to hotspot areas of Molo and Olenguruone in the larger Nakuru District. In the areas, leaflets were first circulated, demanding that non-Kalenjin (madoadoa or spots in Kalenjin land) vacate the area or face dire consequences. Violent conflicts in the area led to a number of deaths, injuries and rape. The most visible and unique feature of these conflicts was between the Kikuyu Mungiki militia group who were using pangas and rungas versus the 'Kalenjin Warriors' who were using poisoned arrows and spears. The violent conflicts spread further to Narok and Bomet, along the Kipsigis-Kisii border. Here the main victims were the Abagusii.

and Kikuyu immigrants. There were other areas where ethnic violence similarly broke out in the country.

- 456 In Burnt Forest, Uasin Gishu District, violence broke out with just three months to the December 27, 1992 elections. In this conflict, 'Kalenjin Warriors' drove away about 15 000 Kikuyu and Luhya immigrants. The intention of the warriors was to create a pastoralist-dominated Rift Valley as a buffer zone against perceived land-hungry members of other ethnic communities – the Kikuyu, Luhya, Ameru and Abagusii. There was also an underlying fear that if Moi lost political power through the elections, then the Kalenjin would lose their communal land rights. The fear drove many Kalenjin to arm themselves to defend their traditional homeland from encroachment by those considered as outsiders or immigrants. The negative perception and related violent conflicts continued throughout the Moi regime, especially in Rift Valley and were perpetrated mostly by the Kalenjin, Maasai and Samburu.
- 457 Unfortunately, the government's response to ethnic violence was half-hearted, often engaging in blame-games with political leaders in the opposition parties. The opposition also counter-accused Moi of facilitating ethnic conflicts to prove his earlier prediction that multi-parties would create violence in the country. Moi's inability to address land-related conflicts was demonstrated by his failure to act firmly against Maasai political leaders who facilitated violent evictions of members of other communities living in Narok and Enosupukia in 1993 and the Kalenjin who participated in acts of violence against the Luo and other communities in the Rift Valley, not to mention several acts of violence targeting upcountry communities at the Coast which were never punished, even though in many cases, perpetrators were well-known.⁴¹⁶
- 458 However, it should be noted that the occupation of land by persons considered as outsiders is not the only cause of land problems in Kenya. In many cases, the politicians themselves, as well as affluent members of communities have grabbed land from their own, especially in areas where land was, originally owned communally.
- 459 In the case of the Maasai community, intermingling of other factors apart from outsider occupation in land problems, especially scarcity and landlessness has been explained as follows:

the problems the Maasai are encountering are not caused by non-Maasai. They are just a secondary factor. The biggest cause of land problems in Maasai land generally are the Maasai leaders. It is the leadership. They now use the land to secure political favours from the powers that be. Look at any grabbing taking place in Maasailand and at the centre of it is one or two Maasai leaders. With the competitive politics that we now have

⁴¹⁶ See, for example, Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 12, 26 – 31 & 49.

because of multi-partyism since 1992, we have now seen Maasai leaders disposing of public land to get money for campaigns⁴¹⁷

460 Apparently, politicians have extended land grabbing practices to their own communities and constituents and are significantly contributing to landlessness of their community members as well as land scarcity on the part of government. Therefore, efforts to address land problems should exceed the establishment of settlement schemes and completion of land adjudication and registration to actual prosecution of perpetrators of land grabbing.

■ ***Land and political conflict over the 2005 Draft Constitution***

461 The centrality of land to the structure of governance and related politics appeared during campaigns in preparation for a national referendum over the current Constitution. Political conflicts arose between those who supported the adoption of a new constitution (the 'Yes' group) and those who opposed it (the 'No' group) not just over the Draft Constitution in general, but also over the wording of the land chapter therein. To many people, the wording of the land chapter in the Draft Constitution, also known as the Wako Draft, conveyed the government's intention to centralize decisions on land issues, including decisions on acquisition, management and use and were objectionable because it was feared that they might support the detestable return of outsiders to areas where local communities had resisted their presence, especially the return and occupation of members of the Kikuyu ethnic community in the Rift Valley. The situation led to violent referendum campaigns where a number of people were killed and scores injured as leaflets circulated in many parts of the country warning "outsiders" in Rift Valley and Nyanza to prepare to leave should the Wako Draft Constitution be approved during the 2005 National Referendum. The constitutional referendum held in 2005 failed to gather enough public support for a new constitution and the people of Kenya were, once again, left with no constitutional basis for addressing land issues.

■ ***Land and politics in the 2007 elections***

462 The 2007 General Election presented another opportunity for individuals and for members of Kenyan ethnic communities affected by illegal land alienation during the colonial and post-colonial period to base their hope for resolution of land-related injustices in political change, especially given the likelihood of a win by the Orange Democratic Movement (ODM) that was perceived to be favourable to change, including in the lands sector.

⁴¹⁷ TJRC/Hansard/Public Hearing/Kajiado/08 December 2011/p. 28

- 463 Because Kenyans have, over the years, linked resolution of land injustices to political change, especially the introduction of a federal (*majimbo*) government, it was anticipated that an ODM government would establish necessary structures for land to be managed at regional levels to eliminate, among other things, chances of illegal land alienation by central government functionaries. However, instead of waiting for change to unfold through laws and policies in a new government, members of communities and their political leaders in many parts of the country, once again, took advantage of the lax security situation in the country during and after the campaigns to resort to self-help measures in attempts to rid their homelands from immigrant communities. In the Rift Valley, the Kalenjin community was concerned about eviction of members of the Kikuyu community whose presence in their homeland had been considered detestable and unacceptable for many years.
- 464 A similar situation prevailed at the Coast. At the Coast, indigenous communities, especially the Mijikenda, had over the years, strongly opposed the settlement of members of the Kikuyu community on their lands and perceived the anticipated political change as embodying the only chance for their final resolution of land problems.
- 465 In Nairobi, property owners, especially from the Kikuyu community, considered the likely political change as ominous because of fear that house rents might be controlled by central government, thereby diminishing their profits. In Western Province, land problems of the Sabaot persisted and the possibility of change in governance held the promise of a final resolution resulting in the settlement of many landless members of the community who had been rendered destitute for decades.
- 466 In other parts of the Rift Valley, members of the Maasai community were expecting political change to usher in resolutions of land conflicts with the Kikuyu who were unacceptably settled on their homelands. It is, perhaps for these reasons that Mwai Kibaki lost the support of Kalenjin, Maasai and the Mijikenda, among other communities affected by illegal land alienations. However, all the expectations were dashed by irregularities and illegalities that characterized especially the presidential election of the time.
- 467 As a result of many communities' failed expectations of political change that could have facilitated the final resolution of persisting land issues, members of almost all affected communities resorted to violent means to address the persistent land problems from the colonial times to post-independence Kenya. These communities also sought to vent pent-up anger at the resented dominance of members of the Kikuyu, Meru and Embu communities in Kenya's Treasury, Kenya Revenue Authority, Central Bank, Internal Security and Provincial Administration, among

other key sectors, which formed part of the broader inequalities and historical injustices persisting in the country

- 468 In various parts of the country, several more organized militia or ethnic “self-defence” groups emerged, with support of local politicians, to either defend their land against invasion by members of other communities or avenge previous alienations of their land and displacement from their homelands. In the Rift Valley, there emerged and re-emerged ‘Maasai Warriors’ and ‘Kalenjin Warriors’, among others; in western Kenya, there emerged the Sabaot Land Defence Force (SLDF), in Kisii, the Chinkororo re-emerged, and at the Coast, there emerged various militia groups, eventually culminating in the establishment of the broader Mombasa Republican Army (MRC), whose agenda include secession of the Coastal Strip from Kenya ⁴¹⁸
- 469 The unprecedented violent activities of the various militia groups nearly drove Kenya into civil war between December 31, 2007 soon after flawed presidential results were announced and February 2008 when a National Peace Accord was eventually agreed. A report of the Commission that investigated post-election violence in Kenya traces roots of the 2007-2008 violence to inequalities in land acquisition and settlement ⁴¹⁹ and states that as a result of the widespread violence, more than 350 000 people were displaced from their homes and farms and at least 1 200 killed ⁴²⁰. The suffering and destitution that resulted has been described in many ways that convey a sense of urgency in resettlement as been explained here.

During the displacement many people died, more than what is documented by the Government. We lost our children, fathers and other relatives. Even it goes beyond what the government said, 1,333 people died. We know of people who died and were buried even before it was reported. Our property and everything that we had was destroyed. Others were looted. Some of us sustained injuries. We are suffering because we do not have money to buy drugs or seek medical care. It is very expensive for us because we do not have money. Therefore, many people have died after displacement because of psychological trauma. Some relatives got lost and have not been found to date. There are parents who do not know where their children are to date. There are children who cannot trace their parents. People lost their jobs. All our rights were violated. Our human basic rights were abused. Some women and girls were raped. There are violations in the camps. Among many violations, there is lack of shelter. IDPs are just living in those tents that were given out in 2008. These are old and worn out tents ⁴²¹.

- 470 The severity of the 2007-2008 post-election violence brought to the fore the critical nexus between land-related injustices and politics and the potential of a mix of both to destroy the country. It also presented, in no uncertain terms, the need for

⁴¹⁸ See Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (2008) at 27

⁴¹⁹ Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (2008) at 21-30

⁴²⁰ Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (2008) at 271-346

⁴²¹ TJRC/Hansard/Public Hearing/Nakuru/23 September 2011/ p 35 para 2

urgent redress of existing land-related injustices. However, while lessons for the nation concerning failure to resolve land-related disputes were clear, the manner in which the problem of internally displaced persons was handled reflected what Kenyans, by then, knew too well - the preferential treatment of members of certain communities in Kenya at the expense of others

- 471 The convergence of political factors with land problems brought about displacement of people of virtually all ethnic communities in Kenya but mostly the Kikuyu, Luo, Kalenjin, Luhya and Kamba. However, by then, there were large numbers of other people and communities already internally displaced in historical and political circumstances already explained, who had been awaiting settlement for many years while living on abject poverty. Therefore, efforts to settle the most recent IDPs, mostly members of the Kikuyu tribe, while others have been awaiting similar government intervention for years, especially at the Coast, in the Rift Valley and in western Kenya demonstrated, again, bias by Kibaki's administration in favour of members of the Kikuyu ethnic community against all others who were similarly affected and whose discontent has been expressed as follows

While the Kenyans who were displaced by the post-election violence of 2007 are considered Internally Displaced Persons (IDPs), little consideration has been given to the Lamu community members who were forced out of their farmland in 12 villages, including in Shakani, Shendeni, Vundeni by the security forces during the Shifta War in the 1960s. These locals, who were, in essence, the first IDPs in Independent Kenya, were forced to move into slums in Lamu or to migrate to other areas of Kenya and Tanzania and, to date, no form of redress has been given.⁴²²

- 472 It is the view of many affected Kenyans that the earliest IDPs in the land have suffered for too long and, therefore, the government should give them the highest priority in settlement.⁴²³ It has also been emphasized by affected communities that to avoid problems that might arise from continued selective settlement, all persons and families currently living as squatters in the country should be settled. In the words of an affected individual

When it comes to resettlement, all tribes should be resettled because there are squatters even among the Kalenjin. Those differences in resettlement are causing problems and it should be uniform.⁴²⁴

- 473 Discrimination in settlement of IDPs worsens existing land injustices which, in totality, contributed significantly to the post-election violence of 2007-2008. Contributions of existing land-related injustices to the violence were clearly demonstrated by host community resistance to the return of IDPs to their homelands. The matter was aptly described as follows

422 TJRC/Hansard/Public Hearing/Lamu/9 January 2012/ p 4 para 3

423 TJRC/Hansard/Public Hearing/Nakuru/23 September 2011/ p 5

424 TJRC/Hansard/Public Hearing/Nakuru/23 September 2011/ p 46, para 2 & 6

Some decided to go back to where they had been displaced. However, they were not received well. Nobody welcomed them there. They were not even given a chance to enter into their farms. Some of them stay here with us. They went back into their farms, but they are still living in these transit camps. These are just camps that are in shopping centres. Others are near the District Commissioner's office, where they feel there is safety. It is at this point where they can do their farming during the day and return to the tents in the evening.⁴²⁵

474 Obviously, resettlement of IDPs alone is not adequate. A lot of peace building initiatives ought to accompany resettlement of all affected persons to promote acceptance of co-existence and integration in order to avoid resurgence of violence after settlement. Also, the fact that a very high level of ethnic violence was witnessed in Kenya for the first time in 2007-2008 and that it was largely prompted by land-related injustices should bring the need for resolution of all pending land issues to the fore of the government's agenda.

475 Since Kenya bases its development largely on agriculture, meaningful development will not take place unless all pending land-related issues that hamper agriculture are resolved with finality. Moreover, resettlement efforts targeting the latest stream of IDPs have been riddled with the same corruption that characterized dealings in land in both the Kenyatta and Moi administrations. The following is an account of circumstances surrounding IDP settlement efforts in the absence of transparency and accountability.

After people are resettled, they are given tents. They are given one tent for a whole household with adult children. They live in the same tent with their grown up children. We know that there are iron sheets that were donated by the government of China. Where are these iron sheets? The government says people should stay there for a whole one year without proper shelter. Why can they not give us those iron sheets? Many of us are exposed to cold. In such conditions, we are bound to fall sick. Malaria and pneumonia are common diseases in those areas and even in these transit camps. After people were settled, many of them died. With regard to water and sanitation, we feel the government is not doing enough. After the government had taken us there, it did not care to see where these people would get their water. I thank the Nakuru District Commissioner then. He gave people piped water. But unfortunately, we learnt recently that there is a bill of Ksh3.4 million, which they never knew that they were supposed to pay, and the water was disconnected. So many toilets in the camps are full. During the rainy season, waste overflows into the tents. This is very dangerous and poses health risks.⁴²⁶

476 It appears that efforts to address past and current land injustices would have to be accompanied with efforts to eradicate corruption in order for success to be realized.

⁴²⁵ TJRC/Hansard/Public Hearing/Nakuru/23 September 2011/ p.35 para 2

⁴²⁶ TJRC/Hansard/Public Hearing/Nakuru/23 September 2011/ p.36 para 2, 3 & 4

Key Actors and Factors in Land-Related Problems

477 In this chapter, origins of the current land problems persisting in the country have been traced from the colonial period to the present time. Land-related injustices including instances of illegalities and irregularities attendant acquisition and ownership of land have been presented. In the foregoing elaboration, certain factors and actors emerge that are considered to be key in the emergence and facilitation of acts and omissions in relation to land that today, threaten to destroy the fabric of Kenya, as a nation. It is deemed necessary that the key facts and actors be presented here to highlight their contributions to existing land problems so that expected redress efforts are undertaken with them in mind to avoid impeding the efforts.

The provincial administration and illegal acquisition of land

478 Whether or not officers falling under the gamut of the provincial administration will continue to form part of the governance structure of Kenya is debatable but as things stand today, they are likely to be erroneously subsumed in the county structures countrywide. Therefore, with their past participation in land deals in mind, their presence and likely contributions, negatively or positively to the expected land reforms in the country ought to inform decisions to either include or exclude them altogether. The provincial administration is one of the systems of governance that Kenya inherited from the colonial government, with authority, power and influence. It is (until subsumed in the county governance structure, if at all) a department in the Office of the President.⁴²⁷ It has, over the years, been heavily relied upon by post-independence governments for general control and implementation of government policies.

479 In addition, during the reign of KANU as a political party, the provincial administration took over certain important responsibilities of the party, such as recruitment and registration of its members, organization of KANU elections, collection and custody of KANU funds and the issuance of permits for public meetings.⁴²⁸ Between 1963 and 1992 when the defunct Electoral Commission of Kenya was established, the provincial administration also conducted national elections.⁴²⁹ As the central government's principal public relations officer, an important feature of the day-to-day functions of provincial administration officers is the holding of *barazas*, an age-old forum of communication with the public.⁴³⁰ Barazas are intended for government to make known its intentions and to also seek support from the public.

427 Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 27.

428 Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 27.

429 Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 27.

430 Republic of Kenya. Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 27.

- 480 Barazas should also allow the public to register their views and reactions, including those concerning simmering problems and conflicts between and within communities⁴³¹ Moreover, the provincial administration has also played significant roles with regard to internal security Provincial commissioners have been the chairmen of provincial security committees and provincial intelligence committees. At the district level, district commissioners are the chairmen of district security committees and district intelligence committees.
- 481 Other members of the committees at provincial and district levels are, respectively, the provincial heads of the various departments of the police force and district heads of similar institutions Sub-district security committees are chaired by district officers and also a similarly composed organ exists at the divisional level Representatives of the army may be co-opted as members of the security committees.⁴³² Even though the role of provincial administration and that of the police force, may, as far as security matters are concerned, be said to be complementary, in reality, the provincial administration dominates over the police force Clearly, the provincial administration has been occupying a position of considerable power as the political agent of the Executive.⁴³³ The provincial administration consists of a network of officers at various levels countrywide There have been a total of eight provincial commissioners, 604 district officers (DOs), 2 190 and 6 029 assistant chiefs countrywide⁴³⁴
482. Regardless of their prominent positions in government and the potential to contribute significantly to the economic and social development of the country throughout post-independence Kenya, officers serving in the provincial administration have blatantly subverted the law, participated in various acts of lawlessness, committed atrocities on the people of Kenya and remained complacent when their action was required to redress wrongs For example, a report of the Commission of Inquiry into Tribal Clashes⁴³⁵ established that officers in the provincial administration of various ranks turned a blind eye to reprehensible acts of KANU leaders in the misconception that it was their duty to sustain a continued ascendancy of a political party under which they had thrived in power⁴³⁶
483. They also directly participated in the forceful evictions of innocent Kenyans who did not belong to their ethnic communities,⁴³⁷ directed armed administration police officers to bulldoze houses of innocent Kenyans and thereby subjected them to poverty and destitution⁴³⁸ The officers were found to have withheld vital security

431 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 27

432 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 28

433 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 28

434 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 27

435 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998

436 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 29

437 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 30

438 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 30

information that would have averted tribal clashes at the Coast, among other parts of Kenya, including the attack on the Likoni police station⁴³⁹ They condoned actions of Digo youth who had attacked Likoni police station, killing at least 10 police officers⁴⁴⁰ and remained partisan when tribal clashes broke out in Gucha District⁴⁴¹ They generally maintained a lukewarm attitude towards addressing real threats of tribal clashes between 1991 and 2007,⁴⁴² deliberately declined to undertake their security-related duties and duties related to maintenance and restoration of law and order⁴⁴³ Further some of them perpetrated acts of violence including the burning of peoples' houses in collaboration with the administration police in Nakuru and Kericho, among other places⁴⁴⁴ These are just a few of the illegal activities of officers serving in the provincial administration, which leads to the conclusion that the persistent land-related problems are due, largely to their acts of commission and omission

- 484 For the same reasons, the provincial administration is unsuitable to serve in the new county structures and should be scrapped Details of their illegalities are presented in the following paragraphs The provincial administration is one institution that has been used by past governments to implement settlement and re-settlement programmes and decisions, but their participation has had disastrous consequences In many cases, they facilitated illegal and irregular allocation of land for their own benefit, their cronies, collaborators and family members and, in many cases, carried out unjustifiable and illegal evictions of landless Kenyans in different parts of the country Chiefs, DOs, DCs, PCs and officers in the district and divisional plot allocation committees in various parts of the country participated in illegal acquisition of land meant for settlement of the landless and in the sale of some of the land meant for settlement for their own benefit
- 485 Some also engaged in extorting money and other commodities, including livestock, from the landless and landed community members For example, in an exercise that was intended to settle members of the OGREK community, both the local chief and the assistant chiefs who were trusted with the process of issuing title deeds sold them to non-deserving individuals, even in the presence of landless community members who were waiting to be issued with the same⁴⁴⁵ An affected community member present at the time of the illegal sale of the land described the illegal transaction as follows

⁴³⁹ Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 31

⁴⁴⁰ Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 31

⁴⁴¹ Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 32

⁴⁴² Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 32

⁴⁴³ Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 33

⁴⁴⁴ Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 35 – 36

⁴⁴⁵ TJRC/Hansard/Public Hearing/Kericho/19 September 2011/ p. 36 para 3

Some of them were actually being sold at that time. One of them was actually negotiating with someone. He received money, but no action was taken despite our complaints at the chief's office. This is the letter from Kenya Anti-Corruption Commission (KACC). This letter shows that the chief was actually selling the land. He was selling it to people and issuing them with title deeds immediately. The chief would meet somebody and give him the card. This card entitles you to five acres of land. The chief was selling each at KSh500,000. I have the evidence here.⁴⁴⁶

486. The testimony describes the blatant manner in which members of the provincial administration illegally acquired community land with wanton impunity in not just one, but several parts of the country. It is interesting that in the case described above, members of the affected community fought for their land to the point of reporting the case to the Kenya Anti-corruption Commission (KACC), but apparently no action was taken against the thieving officers.
487. During the exercise intended to re-settle members of the Ogiek community, a DC also, with the aid of administration police, forcibly evicted some genuine landless who should have been allocated land and in the process, forcefully took away their livestock, leaving them destitute.⁴⁴⁷ The act was additional to committing several other human rights atrocities against members of the community, causing many of them to flee.⁴⁴⁸
488. In Sotik, community members struggled to establish a trust fund to jointly purchase a farm for their settlement in 1968. However, after making all the payments, including repayment of the loan that they had obtained for that purpose, Mr Harry Wamubey, a former Kericho District Commissioner, illegally sold the land to a different community and pocketed the money. As if his act of corruption was not damaging enough to the community members, he returned, took their prime livestock and sold them for his own profit.⁴⁴⁹ The DC's gross violation of the community's land and other rights was described as follows:

we bought our farm in 1968. I am before you this morning because of the problems caused by the DC. He has taken away the land we had bought. We bought the land on 20th August 1968 through trust fund. We sold milk to Sotik KCC and also sold 200 cows every year to raise this money. In 1973, we sold 200 cows, in 1974 we sold others and paid a total of KSh70,000. Later we paid KSh12,616. In 1975, we sold another 200 cows to the Kenya Meat Commission (KMC). In 1976, there was drought and we sold more cows to add to the loan we had. Each member contributed three bulls and we paid KSh120,000. In 1980, we sold 500 cows to KMC and sold pyrethrum to the Pyrethrum Board of Kenya (PBK). We also sold maize. In 1981, we completed repaying the loan.

⁴⁴⁶ TJRC/Hansard/Public Hearing/Kericho/19 September 2011/ p. 36 para 3

⁴⁴⁷ TJRC/Memo/M0013/ p. 23-25

⁴⁴⁸ TJRC/Memo/M0013/ p. 23-25

⁴⁴⁹ TJRC/Hansard/Public Hearing/Kericho/20 September 2011/ p. 31-32

amounting to KSh200,023. After completing paying the loan on 26th, 27th and 28th January in 1982, the former Kericho DC, Mr Harry Wamubey, came. We stayed for a while and heard that he had sold the farm to a different community of 363 people. He sold our farm and the people paid him some money. He took KSh3,162,000 from those people. He banked the money in Acc.No.001784 in Kisumu so that we could not know what was going on. On 14th December 1982, the DC came back and sold some of the 11 heifers that were on that farm at a cost of KSh55, 553...In 1999, the DC sub-divided the farm again. He got a piece for himself.⁴⁵⁰

489. The account described by the affected community member smacks of looting from poor Kenyans by an officer entrusted with the responsibility of their protection and improvement of their livelihoods. For such kind of heinous acts, it is not right for the provincial administration to be incorporated in county establishments all. In Bomet, a District Officer who was placed in charge of sub-division of a farm for distribution to community members illegally took a plot for himself, which was registered as plot No.547, which he subsequently sold to one Micah Ng'erechi.⁴⁵¹
490. In the same fraudulent exercise, Assistant Chief Moses Rop took plot No.462 which he subsequently sold to Edward Rotich.⁴⁵² Senior Settlement Officer Isaya Nyamache also, illegally acquired plot No.426 which he sold to one Chemutai Lang'at.⁴⁵³ Other officers in the provincial administration also illegally acquired land as follows:

The fourth person was the chief called David Kiplang'at Ng'eno who also irregularly acquired plot No.425 and gave it to his driver called Reuben Tanui. The other one of the plots he acquired was No.348 which was sold to Mr Joseph Kirui. The person who was employed as the manager of Mr Joseph Ng'eno also irregularly acquired land parcel No.443. He gave it to his wife claiming that she was among the members. Out of all those people, we are 234 who are original members. We have a register.⁴⁵⁴

491. Where evidence is available as in the case described above, action should be taken, without any further delay, to prosecute the errant provincial administration officials. Community members in many parts of the country complained that the heinous practices of provincial administration officials was not only an unfair and irregular, but they also created inequalities in land ownership. They also denied the country the full benefits of environment and cultural heritage because in many cases, officials in the provincial administration also encroached onto protected lands such as road reserves, forests, riparian reserves, wetlands, foreshores, monuments and historical sites as well as spiritual (shrines) sites of some communities. In many cases, officers in the provincial administration did not act alone; they acted

450 TJRC/Hansard/Public Hearing/Kericho/20 September 2011/ p. 31-32.

451 TJRC/Hansard/Public Hearing/Kericho/20 September 2011/ p. 31-32.

452 TJRC/Hansard/Public Hearing/Kericho/20 September 2011/ p. 31-32.

453 TJRC/Hansard/Public Hearing/Kericho/20 September 2011/ p. 31-32.

454 TJRC/Hansard/Public Hearing/Kericho/20 September 2011/ p. 31-32.

in collaboration with elected members of Parliament, among others, to illegally acquire land, including land forming part of group ranches. With reference to some of the group ranches, the problem was explained as follows

The issue with all these group ranches (Kuku Group Ranch, Kimana, Ikiondo Group Ranch, Mbirikani) is that it has been a play ground where Group Ranches Management Committee, the local member of Parliament and the DC have made them their cash cows. All revenues earned from the eco-tourism activities are just taken by the DC and the management committee. The group ranch members have been silenced by the provincial administration through the use of excessive force, arrests and manipulation of the land controls. The Land Adjudication Officer and the Registrar of Group Ranches have become tools of approving these malpractices.⁴⁵⁵

492. In many cases, as in the one above, community members protested against illegal acquisition of their land and related resources by members of the provincial administration. However, their protests were often violently thwarted in ways that were likely to generate more violence and conflicts, as described below.

When he realized that we were very keen on following up this matter although we were not being listened to, they came back and started arresting people.⁴⁵⁶

493. Apparently, provincial administration officials enlisted the aid of police officers to arrest and torture community members who complained against their illegalities. As the following sentiment discloses, provincial administration officers abused their offices whenever the citizens protested illegalities relating to land by using the police to effect arrests as a way of intimidating protesters. In other cases, officers serving in the provincial administration, in total disregard of the law, entrenched robbery of poor community members in their daily operations for very long period of time. In this connection, former Baringo District Commissioner Philemon Mwaisaka and his cohort, Ezekiel Barng'etuny, were notable.⁴⁵⁷ In addition to committing other human rights violations against the very communities that they were assigned to serve, they also, for as long as 10 years, robbed the community of livestock, their only means of subsistence. Their deplorable conduct was described as follows.

We are seeking also direct compensation in respect of the robbery with violence charge and our goats which we lost during the famous 'Kimalel Goat Auction'. We were literally robbed of our goats by Mr Philemon Mwaisaka, who was the former Baringo District Commissioner. The goats were being auctioned by Mr Ezekiel Barng'etuny. I want to state clearly that we never volunteered to sell goats in Kimalel. You would wake up in the morning and find a lorry outside with administration police inside. They

455 TJRC/Hansard/Public Hearing/Kajiado/08 December 2011/ p. 30, para 2

456 TJRC/Hansard/Public Hearing/Kericho/19 September 2011/ p. 36, para 4

457 TJRC/Hansard/Public Hearing/Nakuru/23 September 2011/ p. 6, para 1 & 2

would descend on your *boma* and take your goats in the name of orders from the DC. They took them to auction in Kimalel. There was no meaningful development given to us. So, we lost goats for nearly 10 years. I wish the Commission could investigate and see what we were given or if anything was built on our behalf. There is nothing in place. If that was not an economic crime, then it should have been something else like being robbed.⁴⁵⁸

- 494 It is recommended that all of the officers who participated in such acts of human rights violations including illegal land acquisition while serving in the provincial administration, who are still alive, be prosecuted.

Multiple claims over land

- 495 The Commission established that multiple claims over land are a cause of tension and violent conflicts in the country. Multiple claims over land have arisen as a result of the willing-buyer, willing-seller land transactions without a ceiling on the maximum amount of land that one could privately own, the sale of allotment letters to third parties, claims over land based on ancestral homelands and related abuse of office, political patronage, official corruption, and ignorance among the majority of citizens.
- 496 As elaborated below, a mix of these factors has resulted in physical violence, bodily injuries, deaths, community displacements and violation of the human rights and freedoms of many individuals and communities.
- 497 Proponents of historical claims over certain territories include the Maasai, Kalenjin, some communities at the Coast and in the North Eastern regions who originally lost their land either through annexation, forced evictions or irregular land agreements by the colonialists. The claims find support in those who believe that communal land tenure based on the traditional African customary land tenure was the most suitable system of land tenure for indigenous Africans. Those who maintain the position often cite the unfair, brutal and unjust means by which they lost their land as well as the assurances by Jomo Kenyatta and KANU during the struggle for independence which were never honoured.
- 498 For example, with reference to land over which some of the communities that now live in the Rift Valley lay claim, it was stated that

I have also included an abstract from the Provincial Commissioner in 1961, which indicated where people were supposed to be settled, but instead people from other

⁴⁵⁸ TJRC/Hansard/Nakuru/ New County Hall Nakuru/Harun Chemjor Chepketani/23 September 2011 p. 21 & 22

provinces were transported and allocated land. This land includes Wanyororo, Engashura, Limuru Pyrethrum, Lari-Nyakinyua, Endarasha and Ikure. However, the natives were not settled.⁴⁵⁹

- 499 It appears that communities that do not currently live in the foregoing areas, having been occupied by other tribes, maintain an entitlement to the areas as their ancestral homelands on the basis that they were the original inhabitants of the areas. A similar situation prevails in the Rift Valley, where various communities including the Maasai, the Pokot, the Ogiek and the Kipsigis, to mention just a few, all claim to have been displaced because of the historical injustice orchestrated by both the colonial government and the successive post-colonial regimes. As elaboration in the foregoing sections of this report reveal, such claims have been the cause of violent evictions of members of certain ethnic communities in Eldoret, Burnt Forest, Molo, and several parts of the Coast, among others.
- 500 The likelihood of violence over multiple land claims based on historical homelands is increased by the failure of Kenyatta's administration to apply settlement funds provided by the British government and other donors as part of the independence package to benefit all deserving communities. It is on record that the British government, through the Colonial Development Fund, gave the Kenya Government 0.75 million for purchase of farms for settlement of all tribes that were in need of settlement or re-settlement.
- 501 To the contrary, members of mainly one tribe benefited, at the expense of others who have, over the years, maintained the view that they were cheated.⁴⁶⁰ The view that members of particular ethnic communities are entitled to their historical/original homelands has not remained unscathed. There are opponents of the historical claims model of land rights and redress on that basis, comprising mainly those who believe in the modern individual land rights based on the English property rights system that has firmly taken hold in the country. Such proponents support the willing-buyer, willing-seller model of land tenure, based on sanctity of land titles. The two positions conflict, not only where historical claims over land exist, but also where land was illegally acquired but title to it made indefeasible, especially by the Registered Land Act (now repealed), making it difficult, if not impossible for those with genuine claims to recover their "stolen" land. It is necessary to exercise a careful balance of all the interests raised in order to find acceptable solutions to the problems, especially of persisting landlessness and incomplete adjudication and registration processes.

⁴⁵⁹ TJRC/Hansard/Public Hearing/Nakuru/23 September 2011/ p 6 para 4

⁴⁶⁰ TJRC/Hansard/Public Hearing/Kericho/19 September 2011 p 29 para 7

Allotment letters as catalyst for land grabbing

502 During the colonial era and part of the post-independence period, letters of allotment given to qualified applicants were never transferable to a third party, since such letters did not create an interest to be traded until registration was completed. However, in 1994, Legal Notice No. 305 was passed, which allowed for the sale of allotment letters to third parties on payment of consent fees equivalent to 2 percent of the selling price or capital value of the land, whichever was higher. This provided a leeway for and fuelled land grabbing in the country, where individuals would be allocated land and immediately make arrangements to sell it for millions of shillings without first paying the standard premium. The ensuing land grabbing and forceful evictions, especially by politicians and their cronies affected the enjoyment of other rights such as access to water, freedom of movement, and access to education as illustrated in the following sentiment:

My sentiments here are movement and accessing water. This land where we are disputing is possessed by the family of Moi. They have fenced along the river and for us to get water. Molo River is the only source of water. Since Molo River passes through that farm, they have erected gates and you do not go through them without paying. So, you pay for natural water. We cannot also cross to the other side called Emining or Noyuet. We are forced to go 15 or 20 kilometres until Mogotio and then back again, yet a public road used to exist. If you have to pass through the road, payment must be made. For our children to go to school, they have to pass through that path, but payment must be made. We consider that as an atrocity.⁴⁶¹

503 Hindrance of access to water and other amenities as a result of illegal sale of allotment letters has had worse effects on communities living in marginal unproductive areas where they were selectively settled during the colonial period. For example, communities in Cherangany have complained that:

Where we were placed by the colonial government is a place where water is not available, it is rocky. Our lives centre on animals. Without grass and water, no animal will survive. So, this river must be made accessible to us. We cannot plant maize or other crops and so we have to be in Lomolo in order to survive.⁴⁶²

504 Forceful evictions of communities in the area can be traced to the colonial period and later acquisition of their land by politicians after colonialists left, as already elaborated. In the current Cherangany constituency in Trans Nzoia East, there have not only been forced evictions, but the area has also experienced official brutality, forcing many residents to flee to market centres such as Nzoia, Kaplamai, Moi's

461 T.JRC/Hansard/Public Hearing/Nakuru/23 September 2011/ p. 15 para 8

462 T.JRC/Hansard/Public Hearing/Nakuru/23 September 2011/ p. 16 para 8

Bridge slums, Sibanga and Maili Saba (Sirende) for shelter⁴⁶³ In many of the places, community members who ones lived in the security of their homesteads have been exposed to hunger, destitution, insecurity, prostitution and related vices⁴⁶⁴

Ethnicity as a cause of land-related tension and conflicts

505. Ethnicity and ethnic stereotypes and perceptions created by the colonialists and later entrenched by post-independence political leaders are critical variables in the analysis of the complexities of land problems and related injustices in Kenya. It is not unusual for members of a particular community in Kenya to stereotype another by use of derogatory and, in some cases, dehumanizing names, terminologies, references, characteristics and/or features that exhibit, on the part of perpetrators and attract, from subjects, hatred, animosity, resentment, discrimination, conflict and, in some cases, violence
- 506 Soon after independence and for many years since then, ethnic consciousness and drive to control political power in Kenya has largely been influenced by the struggle to maintain land and related assets illegally and unjustly acquired, especially from the now landless and land-scarce, in the midst of affected communities seeking to restore lost land rights, including those arising from colonialism and those generated by post-independence land grabbing⁴⁶⁵ The point is made plain by the not uncommon promises by politicians to assist their communities to recover “stolen” land when they come to political power Obviously, those who have benefited from illegal land deals also seem to be determined to hang on to power, at all costs, in order to protect their illegally acquired lands, among other assets
- 507 For these reasons, ethnically-instigated conflict, especially those that revolve around politics and political power, have endured over the years, despite many efforts to build national identity The vice has shaped Kenya’s political system, as influenced perpetually by Kenyan politicians and the public institutions they occupy including the Legislature, the Executive and the Judiciary⁴⁶⁶ It could also have influenced the resolve of national leaders, expressly and impliedly, not to address land-related injustices The situation has to quickly change for Kenya to remain one nation

⁴⁶³ TJRC/Memo/M0791/ p 1

⁴⁶⁴ TJRC/Memo/M0791/ p 1

⁴⁶⁵ There is indeed a warped picture of the historical land injustices consisting of historical claims, multiple claims, skewed distribution of land during resettlement, illegal and irregular land deals that has not only caused confusion but also made the process of addressing the land problem more complex and political

⁴⁶⁶ This can be ascertained by examining the nature, magnitude, pattern and impact of the various ethnic and political conflicts that have occurred in Kenya since independence, where the magnitude and impact seems to be multiplying before, during and after every electioneering period. The information about the perennial conflicts is contained in official government reports, including the Kiliku Parliamentary Select Committee Report on Ethnic Conflicts, The Akiwumi Commission of Inquiry Report and more recently the Waki Commission of Inquiry Report



Mrs. Salome Matakwei, widow of the late Sabaot Land Defence Force (SLDF) leader Mr. Wycliffe Matakwei, testifying before the TJRC

509. For example, the marginalised Sabaot took up arms in 2004 in Mount Elgon area to protest decades of conflicts over land allocated to them as ‘squatters’ when, in fact, they were the true owners of the land.
510. The unchecked violence in Mount Elgon area escalated in 2006 and 2007 when the Sabaot Land Defence Force (SLDF) killed hundreds of people perceived to be outsiders, and their collaborators in protest over grabbing of their land and settlement rights in Chebyuk area in Kopsiro Division. During the Kibaki administration, historical inequalities and injustices underlying many of the instances of ethnic violence were exposed but so far, there has been no official action targeting the causes. Moreover, the Ndung’u Report, so far the most detailed on land illegalities, failed to trace the existing land problems in many parts of the country to their historical roots.
511. Mount Elgon area is not the only part of the country that experienced land-related violence triggered by negative ethnicity. There was also conflict between the Maasai and the Kipsigis in Trans Mara in 2004. Water and land rights were

also the main causes of the violent conflict that broke out in January 2005 in Naivasha between the Maasai and the Kikuyu, where 15 people were killed and several houses burned down. Surprisingly, instead of addressing the causes of the violence, warring communities received reinforcements from members of their communities. While the Maasai in Naivasha received reinforcement from their kin (morans) in Narok, the Kikuyu received reinforcement from their kin (Mungiki) from Kiambu. In other parts of the Rift Valley, messages prompted by ethnic hatred, as far back as 1993, raised claims that Rift Valley was for the Kalenjin, Maasai, and other pastoralists, and that immigrants must leave, keep silent or support Moi, from the region, to avoid death or eviction from their land.

512 For instance in October 1993, then cabinet minister Francis Lotodo demanded that all the Kikuyu leave West Pokot within 48 hours, or they would be dealt with "mercilessly"⁴⁶⁷. There were similar anti-immigrant threats in Turkana and other parts of Rift Valley, particularly Kericho, Bomet, Trans-Nzoia and Uasin Gishu. On several occasions, the Kikuyu were warned that they must "toe the line" in Maasailand or they would be punished. The numerous cases of ethnically-instigated violent evictions in many parts of the country appeared to be eroding the 'willing-buyer, willing-seller' system that was beginning to be closely associated with development in the country and Kenya appeared to be heading towards a balkanised system of ethnic fragmentation and the institutionalization of negative ethnicity, nepotism ethnic discrimination and stigma/stereotyping. By 1997, ethnic-related trouble revolving around land and politics spread to the erstwhile peaceful areas along the Gucha-Trans Mara-Migori border between the Maasai, the Abagusii and the Luo, largely prompted by differing party allegiances.

513 The Akiwumi Commission of Inquiry established in 1998 to investigate into the ethnic clashes related to the 1997 General Election vividly demonstrated how the skewed land allocation and ownership has over the years fuelled ethnic tensions and subsequently led to violent ethnic conflicts in different parts of the country, particularly in the Rift Valley and Coast regions of Kenya.⁴⁶⁸ The Commission heard that there was a long standing Kalenjin and Maasai aversion or grudge to 'outsiders or strangers' living in their midst and on their ancestral land, which were alienated by the colonial administration for white settlers, but at independence were not returned to the 'first owners or traditional owners' as a key factor that caused recurrent ethnic conflicts. The long-simmering

⁴⁶⁷ Economic Review 1 November 1993 p 8

⁴⁶⁸ See Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 27 – 31, 49 and 53 – 55

ethnic tensions over land have often been exploited by the politicians to cause conflicts around the time of elections as witnessed in the trends of 1992, 1997 and 2007/8 ⁴⁶⁹

- 514 There has also been a gap between the government's policy directives and their implementation, as illustrated by a typical case in parts of the Rift Valley involving the Maasai and immigrant communities in the Enoosupukia area of Narok District (now Narok County). Retired president Moi is on record to have ordered the resettlement of internally displaced persons (IDPs) in this area, but Maasai leader William ole Ntimama and the local administration were unwilling to comply with his directive. In fact, most of the IDPs congregated in makeshift camps in Nakuru for a very long time. On 23 December 1994 the police forcibly rounded up 2 000 displaced persons from the Nakuru camp and dumped them at what was said to be their "ancestral homes in Central Province"
- 515 The camp was destroyed and the message it sent was loud and clear for immigrants, "leave Enoosupukia and Maasailand"⁷⁰. It is not surprising that violence involving the same ethnic communities recurred in Enoosupukia.⁷¹ Ethnicity appears to be reflected even in the settlement of internally displaced persons, or lack of it. During the Moi administration, the large numbers of IDPs from Enoosupukia area who were, from 1993, being driven away by communities believing the area to be their homeland remained largely unsettled.⁷² Efforts of the regime to settle the IDPs remained slow, selective and in some cases, inappropriate. For example, the government often used to declare curfews from 6pm to 6am, whenever ethnic conflicts occurred, instead of decisively addressing its causes and effects. For instance, in September 1993, Moi's government declared Molo, Burnt Forest and part of Kericho security zones and continued to exercise emergency powers until 1995.
- 516 The entry of journalists and observers was restricted, while attacks on IDPs occurred.⁷³ The result was that that over 30 people were killed, hundreds injured and between 25 000 and 30 000 displaced from their land and residential homes.⁷⁴ The treatment seems to have been reciprocated when negative ethnicity spurred violence in late 2007 and early 2008.

⁴⁶⁹ See Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 27 – 31, 49 and 53 – 55.

⁴⁷⁰ Republic of Kenya Report of the Judicial Commission appointed to inquire into Tribal Clashes in Kenya (Akiwumi Report) Nairobi 1999 pp 165-170.

⁴⁷¹ Republic of Kenya Report of the Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Report) Nairobi 1999 at 51.

⁴⁷² Republic of Kenya Report of the Judicial Commission appointed to inquire into Tribal Clashes in Kenya (Akiwumi Report) Nairobi 1999 pp 165-170.

⁴⁷³ Sunday Nation 18 June 1995 p 3.

⁴⁷⁴ Sunday Nation 18 June 1995 p 3.

- 517 There were no government efforts to settle IDPs who were not from the Kikuyu ethnic community when Mwai Kibaki was in power. It appears that non-members of the Kikuyu community, including large numbers of the Kalenjin, the Luo, the Luhya and even Tanzanians who were evicted, especially from Nakuru and Naivasha, were not even officially recognized as IDPs, thanks to negative ethnicity and tribal hatred and animosity that appear to pervade even high-ranking government decisions.

Commissions of Inquiry and Land

- 518 Before its formation by law in the year 2008, previous independence governments had made a number of efforts to investigate land related injustices, sometimes directly and other times in the course of investigating other national maladies, such as prevalent tribal clashes. The discussion below focuses on just a few of those commissions of inquiry.

Select committee on issue of land ownership along the 10-mile Coastal Strip

- 519 The first national commission to investigate land-related problems in the country after independence was established during the Kenyatta administration in 1976, in the nature of a Select Committee on the Issue of Land Ownership Along the 10-mile Coastal Strip of Kenya.⁴⁷⁵ As the title suggests, the committee's mandate with regard to land-related injustices was limited to the coastal area, specifically, the 10-mile Coastal Strip. Establishment of the committee and its mandate was premised on the recognition of the fact that

land tenure system along the ten-mile Coastal Strip along the Coast Province has created a lot of problems for the indigenous people in that they are regarded as 'squatters' who have no right to own that land.⁴⁷⁶

- 520 The committee was tasked with the responsibility of probing the origin of the problem and making recommendations to Parliament on how to resolve the problems "permanently."⁴⁷⁷

- 521 Previous sections of this chapter have cited some of the committee's findings, hereby summarised for purposes of analysing recommendations made and

⁴⁷⁵ Republic of Kenya, *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (government Printers, Nairobi: April 1978) at 1.

⁴⁷⁶ Republic of Kenya, *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (government Printers, Nairobi: April 1978) at 1.

⁴⁷⁷ Republic of Kenya, *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (government Printers, Nairobi: April 1978) at 1.

determining if, at all, any of the recommendations has ever been implemented. The committee found, that the Coastal Strip has the largest single concentration of landless people in Kenya and that⁴⁷⁸ most of the landless live as 'squatters', licencees and unprotected tenants on private or government land in both rural and urban areas at the Coast.

- 522 The communities affected by landlessness are mostly the Mijikenda, the Pokomo and the Taita.⁴⁷⁹ The origin of the problem of landlessness at the Coast was traceable to the slave trade and control of the region by Arabs, which, in subsequent years, was made worse by British colonial policies, laws and practices and discrimination in re-settlement programmes soon after independence.⁴⁸⁰
- 523 The committee also established that the problem of landlessness at the Coast is an emotive issue,⁴⁸¹ deserves urgent attention, is of national significance and needs urgent attention.⁴⁸²
- 524 The independence constitution of 1963 contained section 75 which ruled out any possibility that historical claims would ever be the basis of land distribution after independence.⁴⁸³ A presidential committee was established in 1972 to look into land problems in the 10-mile Coastal Strip but the select committee was not able to determine what became of its recommendations.⁴⁸⁴
- 525 The pattern of land ownership structure at the Coast has fundamentally changed, mainly as a consequence of tourism.⁴⁸⁵ Changes in the structure of land ownership in the area will have a direct bearing on the success or failure of any attempt to solve the initial problem of landlessness however well-intentioned the effort might be.⁴⁸⁶

⁴⁷⁸ Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 1.

⁴⁷⁹ Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 1.

⁴⁸⁰ Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 1 & 4.

⁴⁸¹ Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 1.

⁴⁸² Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 1.

⁴⁸³ Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 4.

⁴⁸⁴ Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 4.

⁴⁸⁵ Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 5.

⁴⁸⁶ Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 6.

- 526 Mass evictions in many coastal areas in post-independence Kenya have raised anew the old question of the nature of the 'squatters' interests in permanent improvements made by them on land,⁴⁸⁷ and the 'squatter' problem is a major hindrance to land developments in the area.⁴⁸⁸
527. On the basis of its findings, the select committee made a number of recommendations, including the development on national guidelines on landlessness clarifying how existing and future claims of landlessness could be resolved.⁴⁸⁹
- 528 It also recommended the development of a national land policy on landlessness and the immediate registration of people claiming to be absolutely landless at the Coast for evaluation of their claims, based on national guidelines.⁴⁹⁰ Further the committee called for urgent and accurate determination of the amount of land available for distribution from the public and private domain and the⁴⁹¹ immediate commencement of compilation of a national data of the absolute landless for purposes of redistribution of land.⁴⁹² The committee also recommended the establishment of a government programme for acquisition of land for settlement of the absolute landless only,⁴⁹³ and the establishment of an agricultural land tribunal with power to, among other things, fix rent approve quit notices, and assess necessary compensation for fixed improvements on land.⁴⁹⁴
- 529 The Committee emphasised that in order to give effect to its recommendations, personal economic advantages should not be allowed to frustrate national goals.⁴⁹⁵ Although the select committee's report was submitted to Parliament, it is not easy to determine with accuracy, the nature of implementation measures or mechanisms that the government may have established on the basis of the committee's findings because of absence of relevant literature. However, persistence of landlessness

487 Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 6

488 Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 7

489 Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers, Nairobi April 1978) at 8

490 Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 8

491 Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 8

492 Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 8

493 Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 9

494 Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 11

495 Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten-mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 13

and related land injustices at the Coast which only got worse in subsequent years, suggests that not much was done to address the issues

530. It is noted that some of the recommendations that the committee made, for example, mandating land control boards at the Coast to ensure that land is sold to the landless first and then to others with economic interest⁴⁹⁶ may have been overtaken by subsequent developments, especially the substantial change in the pattern of land ownership in the area
531. However, other recommendations that the committee made may still be valid and should be explored in the context of recently-created enabling law and implementation institutions, especially the National Land Commission. The recommendations include the urgent and accurate determination of amount of land available for distribution from public and private domain and the immediate registration of people claiming to be absolutely landless at the Coast for evaluation of their claims, based on national guidelines
532. They also include the immediate development of national guidelines on landlessness, clarifying how existing and future claims of landlessness could be resolved, the immediate commencement of compilation of a national data base of the absolute landless for purposes of redistribution of land and establishment of a government programme for acquisition of land for settlement of the absolute landless only. The Environment and Land Court already established should exercise power to determine claims of a historical nature involving agricultural land

The Akiwumi Judicial Commission of Inquiry

533. The Judicial Commission of Inquiry Into Tribal Clashes in Kenya (the Akiwumi Commission) was established in 1989 by President Moi (by Legal notice No 3312 of 1 July 1989) to investigate the ethnic clashes that had occurred since 1991 with a view to establishing and determining the origin, probable, immediate and underlying causes of the clashes and actions taken by the police and other law enforcement agencies with regard to any incident of crime arising out of or committed in the course of the tribal clashes.
534. It was also mandated to establish the level of preparedness and effectiveness of law enforcement agencies in controlling tribal clashes and in preventing their future occurrence, and to inquire into and investigate any other matter that was incidental to or connected with the foregoing. In addition, the commission was

⁴⁹⁶ Republic of Kenya *Report of the Select Committee on the Issue of Land Ownership Along the Ten mile Coastal Strip of Kenya* (Government Printers Nairobi April 1978) at 12

required to make recommendations as necessary, including prosecution of persons who participated in the offences as well as ways and means that must be taken to prevent, control or eradicate clashes ⁴⁹⁷ With the exception of one hearing held *in camera*, the Commission conducted its business through public hearings held in Nairobi, Mombasa, Nakuru, Kisumu and Eldoret.⁴⁹⁸

- 535 In summary, the commission found out, among other things, that since the amendment of section 2A of the former constitution to allow multi-parties in Kenya, there had emerged political parties dangerously based on tribal allegiances,⁴⁹⁹ that ordinary Kenyans regard themselves, firstly as members of their tribe and only secondly as nationals of a country ⁵⁰⁰ Tribal clashes had occurred in virtually every province in Kenya since acceptance of multi-partyism, especially around election time in 1992 and 1997 ⁵⁰¹ It also established that by the time Kenya attained independence, tribalism was deeply rooted in Kenya largely due to lack of contact between the ethnic communities during colonialism, which subsequently led to brutal expulsion of, in the form of ethnic cleansing, of members of certain communities considered as outsiders by others and that independent governments have done little to eliminate or contain tribalism ⁵⁰²
- 536 In its report, the commission elaborated the participation of the provincial administration in the perpetration of ethnic clashes, stating, among other things that officers in the administration turned a blind eye to reprehensible acts of KANU leaders in the misconception that it was their duty to sustain a continued ascendancy of a political party under which they had thrived in power ⁵⁰³
- 537 It stated that they also directly participated in forceful evictions of innocent Kenyans who did not belong to their ethnic communities,⁵⁰⁴ directed armed administration police officers to bulldoze houses of innocent Kenyans and thereby subjected them to poverty and destitution ⁵⁰⁵ They also withheld vital security information that would have averted tribal clashes at the Coast and other parts of Kenya, including the attack on Likoni police station,⁵⁰⁶ condoned actions of Digo youth who had attacked Likoni police Station, killing at least 10 police officers ⁵⁰⁷

497 Republic of Kenya Judicial commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) was established in 1989 by President Moi (Legal notice No 3312 of 1st July 1998) at iii

498 Republic of Kenya Judicial commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) was established in 1989 by President Moi (Legal notice No 3312 of 1st July 1998) at 3

499 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 22

500 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 23

501 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 25 & 26

502 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 26

503 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 29

504 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 30

505 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 30

506 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 31

507 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 31

- 538 Some members of the provincial administration were also accused of remaining partisan when tribal clashes broke out in Gucha District,⁵⁰⁸ and maintaining a lukewarm attitude towards addressing real threats of tribal clashes between 1991 and 2007.⁵⁰⁹ They deliberately declined to undertake their security-related duties and duties related to maintenance and restoration of law and order,⁵¹⁰ and perpetrated acts of violence including burning peoples' houses in collaboration with administration police in Nakuru and Kericho, among other places.⁵¹¹
- 539 These are just a few of the illegal activities of officers serving in the provincial administration which would lead to the conclusion that persistent ethnic clashes, including those related to land are due, largely, to the acts of commission and omission of the provincial administration.
- 540 Although the commission's mandate did not specifically relate to land, it did investigate clashes arising as a result of conflicts over land and those affecting land ownership, occupation and used part of its mandate to determine, "the origin, the probable, the immediate and the underlying causes of such clashes."⁵¹² Also, during its investigations, the commission received information on matters related to land and ethnic clashes, which it ably presented in detail in its report.
- 541 Of significance to the TJRC are findings, among others, that the provincial administration participated in forceful evictions of Kenyans in many places including the Rift Valley.⁵¹³ Certain ethnic communities, especially in the Rift Valley, expected and intended the introduction of *majimboism* to lead to the expulsion of members of communities considered as "outsiders" from the Rift Valley.⁵¹⁴ The issue of land in Kenya is often treated with fervent sentimentality and sensitivity and is in many ways, considered explosive.⁵¹⁵ Although the Constitution guarantees the right of ownership of property anywhere in the country, the peaceful co-existence of the 42 ethnic communities that live within the national borders appears to have been profoundly undermined by diverse man-made problems directly or indirectly connected to land.⁵¹⁶
- 542 The Akiwumi commission noted that developments in the political arena tended to exacerbate rather than ameliorate the situation and by the same token, ushered in such problems with far-reaching implications for communities living within

508 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 32

509 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 32

510 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 33

511 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 35 – 36

512 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at iii

513 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 30

514 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 49

515 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 53

516 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 53

multi-ethnic farm settlements⁵¹⁷ It stated that some tribal conflicts stemmed from the pre-independence era, while a host of others emanated from government policies and programmes⁵¹⁸ A lot of land was taken away from the Kalenjin in the Rift Valley to settle members of other ethnic communities and as the Kalenjin population increased, many were rendered landless, living in conspicuous poverty, while members of other ethnic communities exclusively occupied the most fertile arable rain-fed lands.⁵¹⁹

- 543 The commission's report detailed a number of cases of forceful evictions of members of particular communities, including the Luo from Buru and Thessalia farms in Kericho⁵²⁰ and the Kikuyu from Enoosupukia⁵²¹ It also elaborated, in a whole chapter on land and politics as key determinants of tribal conflicts, land issues which underlie tribal wars between the Sabaot and the Luhya in western Kenya, explaining the injustices committed against the Sabaot in terms of illegal alienation of their land [p 10-13 titled *Land and politics at Centre of Chaos in Western Kenya*]
- 544 The commission established that the Sabaot land problem was addressed during the colonial period in 1932 when the Carter Commission recommended that the community be granted 80 000 acres of land on the slopes of Mount Elgon behind and above the forest reserve Another 40 000 acres in the moorland area which they already occupied was to be added to them, but the recommendation was never considered when the independent government finally acquired and turned certain former white settler farms in Trans Nzoia into settlement schemes open to all Kenyans to purchase⁵²² This, the commission states, was the genesis of the never-ending Sabaot wars⁵²³ The commission found out that the Sabaot, to date, consider the farms in Trans Nzoia as part of the 80 000 plus acres of land which the Carter Commission had proposed should be set aside for their exclusive use and occupation in compensation for the land they lost to the white settlers in Trans Nzoia⁵²⁴
545. The commission further established that because the issue of the Sabaot's land was not addressed by the post-independence governments and which issues had been pending for a long time, were exploited by the Sabaot at the introduction of multi-party politics to evict the non-Sabaot from the area for political gain⁵²⁵

517 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 54

518 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 54

519 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 55

520 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 26 – 33

521 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 51

522 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 13

523 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 13

524 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 13

525 Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 12 & 13

546 The commission made a number of recommendations specifically related to the elimination of tribal clashes, including the investigation and prosecution of named security agencies due to their involvements in the commissions and omissions that fueled tribal clashes. In addition, the Akiwumi Commission made recommendations that would reduce or eliminate land-related injustices that also fuel tribal clashes. In this regard, it stated that

- (i) since land ownership and use in the various clash areas was given as one of the causes of conflict and tribal clashes, the government should embark on an ambitious programme to issue title documents to all persons who were either allocated land there by the government or who bought the same from previous owners but have not got title, to minimize land disputes and conflicts in the areas,⁵²⁶
- (ii) the government should protect and respect rights over land,
- (iii) in order to inspire confidence in the government, **all** of the people who were displaced during tribal clashes should be re-settled,
- (iv) tribal-based settlements should be discontinued, and that
- (v) the public should be educated on land rights.⁵²⁷

547 It is proposed that recommendations of the Akiwumi Commission should be carefully evaluated in light of the provisions of the 'new' Constitution and the recently-enacted land laws. One of the most important points that emerges, as a finding of the Akiwumi Commission is that some ethnic communities in Kenya are "ready for the introduction of *majimboism* whereby every person will be required to go back to his motherland"⁵²⁸ The perception and expectation of Kenyans, both at independence and several years after independence was that with the introduction of a regional government, regions would have absolute control over land within their jurisdictions for purposes which appear to be, among others, to recover or restore the lands that they lost. The position appears to have been guaranteed by Jomo Kenyatta in his remarks just before independence as stated previously in this chapter

548 So firmly rooted in the belief that regionalism would provide structures to remove persons and communities considered as outsiders from other communities' homelands that one member of the Kalenjin community once remarked that:

526 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 Chapter Four at 2

527 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 Chapter Five (Recommendations) at 2

528 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 49

Once we introduce *majimbo* in Rift Valley, all outsiders who acquired our land will have to move and then leave the same land to our children⁵²⁹

- 549 Now that regional governments are being firmly established on the basis of permissive provisions of the 2010 Constitution, what mechanisms does the government have to ensure that exclusionist tendencies and practices that were expected to be facilitated by *majimboism* are not manifested in the new *majimbo* (regions/counties) governments? Could implementation of any of the foregoing recommendations help to avert *majimboism*, with its original intent, in relation to land or should new and innovative mechanisms be devised to hold the country together?

The Ndung'u Commission of Inquiry into illegal/irregular allocation of public land

- 550 The Ndung'u Commission was established by President Mwai Kibaki by the *Kenya Gazette Notice No 4559 of 30 June 2003* to inquire into illegal or irregular allocation of public land and lands reserved for public purposes to private individuals and corporations. The commission was mandated to prepare a list of lands so irregularly acquired, collect and collate data on the nature and extent of unlawful or irregular allocations of public land and ascertain the identities of perpetrators, including public officials. The commission was to make recommendations on legal and administrative measures for restoration of the lands to their proper title or purpose⁵³⁰
- 551 Obviously, the focus of the commission was illegally or irregularly alienated public land. The mandate of the commission did not extend to illegal alienation or acquisition of private land by private individuals and entities. Also, an analysis of the commission's report indicates that although in the introduction, it presented information in relation to land of a historical nature, stating briefly, for example, public land under African tenure [p2] some of the laws introduced in the colonial period to provide basis for alienation of land by the colonialists [p3], policy and administrative changes in relation to land after 1948 [p3], the practice of land allocation after 1951 and the legal position regarding allocation of public land before and after independence, it did not present a detailed analysis of existing land alienation problems in a historical context
- 552 It is noted and appreciated that the Ndung'u Commission report presents numerous cases of illegal alienations of public land, but its analysis was, in the

529 Republic of Kenya Judicial Commission of Inquiry into Tribal Clashes in Kenya (Akiwumi Commission) 1998 at 49

530 Republic of Kenya Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at xvii xviii

absence of any indication of scope of work in terms of time or period of coverage, focused on the Moi administration, without similarly presenting cases of illegal alienations of public land that occurred during Kenyatta's administration. This observation, in the absence of any explanation why the commission never considered cases of illegal land alienation that occurred during Kenyatta's era, helps to understand that there are more cases of illegal alienations of public land that should be included in a broader scheme of government to address the problem as a whole. In any case, the commission completed its investigations of land-related irregularities and illegalities in 2004, leaving cases of illegal acquisition and use of land that occur in Kenya on a daily basis, from 2004 to date, outside of its purview.

- 553 It has also been stated the commission focused its work on public land without investigating, in a historical perspective, cases of illegal alienation of privately-owned or occupied land which has been one of the causes of devastating ethnic clashes, not to mention landlessness, under-development and destitution that has resulted therefrom.
- 554 The gap in information had to be filled by the TJRC, not only as a matter of execution of its mandate, but also to investigate, gather and present detailed information as much as possible to provide the basis for incisive understanding of the origins, nature and magnitude of the problem, which have to be very well understood in order for responsible government agencies to know what kinds of measures or schemes could be devised to best address them. It would not be honest to recognise the limitations of the Ndung'u Commission's work without similarly acknowledging the tremendous work that the commission undertook to investigate and subsequently, produce a reliable source of information on illegally acquired public lands that could provide basis for both private and public entities to make informed decisions on transactions relating to land.
- 555 Without legal challenge to specific aspects of the Ndung'u Commission's report, it remains one of the few valuable official documents that one would rely on, for example, to determine which land would be risky to purchase, having been irregularly or illegally acquired from the public domain. The report has also formed the basis of government actions to recover private lands that were illegally acquired from the public domain. It has also prompted, in a few cases, the voluntary return or restoration of public lands that were illegally acquired by private entities. Moreover, the commission's report was also found useful by the TJRC in validating some of its own findings that have been presented in various sections of this chapter on land.

556 For all the foregoing reasons, the Ndung'u Commission's report should be carefully evaluated, together with this report, by the National Land Commission and other government agencies that will have the responsibility to address all cases of land-related injustices to provide permanent solutions. Herein below are some of the findings and recommendations of the Ndung'u Commission that should be carefully evaluated in light of detailed information availed by the TJRC

- ┆ For all the foregoing reasons, the Ndung'u Commission's report should be carefully evaluated, together with this TJRC Final Report, by the National Land Commission and other government agencies that will have the responsibility to address all cases of land-related injustices to provide permanent solutions. Herein below are some of the findings and recommendations of the Ndung'u Commission that should be carefully evaluated in light of detailed information availed by the TJRC. Clear provisions of law, including sections 3, 7 and 15 of the Government Land Act were flouted as personalities, including senior government officials, participated in land grabbing⁵³¹. Officials of local authorities in various parts of the country, in collaboration with those within and outside of government, participated in numerous cases of illegal acquisition of government land, especially through the means of letters of allotment.⁵³²

Unauthorized persons, including district commissioners and provincial commissioners took part in illegally allocating public land to themselves and their cohorts⁵³³.

- ┆ Some of the illegally acquired public lands have been allocated to diplomatic missions, contrary to the Vienna Convention on Diplomatic and Consular Relations⁵³⁴. The government established settlement schemes for the landless but land therein were distributed to undeserving people⁵³⁵. Many parcels of land reserved for public utilities have been alienated and allocated to private individuals and entities⁵³⁶. The phenomenon of land grabbing in Kenya rendered the perceived sanctity of land title a myth⁵³⁷. Past efforts to reclaim public land

531 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at 7

532 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at 11 – 15

533 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at 14

534 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at 187

535 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at 126 – 127

536 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at 128 – 132

537 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at 15 – 16

did not bear fruit due to what may be described as official lethargy or lack of political will to do so.⁵³⁸ Although the phenomenon of land grabbing was known to the public in general, its exact nature and extent was not known to the public.⁵³⁹

557. The gap in public information was filled, in relation to public land, by the Commission's publication of two volumes of approximately 800 pages detailing cases of illegal acquisition of public land in virtually every part of the country, including protected wildlife areas, land for public schools and ADC farms, among many others. For the first time in Kenya, the commission also provided the public with names of individuals and entities that illegally benefited from public land.⁵⁴⁰ The Ndung'u Commission made valuable recommendations that offer some of the practical approaches that should be taken to address land-related injustices, including those relating to public land. It recommends that all land allocated in settlement schemes which were made to people who were, at the time, public officers, members of Parliament, councillors, political operatives and other undeserving people at the expense of the landless and contrary to established policies and procedures, should be revoked. The lands in question should be repossessed and allocated to the landless.⁵⁴¹
558. The possibility of the expeditious implementation of this recommendation should be explored, in the light of more information availed by the TJRC. A problem that is likely to arise, which should be anticipated and measures designed to address is that of *bonafide* purchaser for consideration, without notice of the illegality. Mechanisms should be designed to address cases where lands illegally acquired have subsequently been sold, especially to individuals who purchased it without notice of illegalities attendant to the first title, in order to avoid exposing more people to what may be perceived as another form of land-related injustice.
559. The commission also recommended that all public officials, especially those in the department of settlement, who facilitated illegal allocations of land in settlement schemes should be investigated and prosecuted where offences were committed by them in the process of such allocations.⁵⁴² These recommendations should be

538 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission, 2004) at 17 & 18.

539 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission, 2004) at 19.

540 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission, 2004), Annexes, Volume I and II. See, also, pages 93 – 108 of the Report.

541 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission, 2004) at 36.

542 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission, 2004) at 137.

implemented in the light of Chapter Six of the Constitution which renders such officers unfit for public service. The Ndung'u Commission also recommended the establishment of a land titles tribunal,⁵⁴³ the second time a land titles tribunal was proposed, the first was made by the select committee in 1978. The proposal should be evaluated in the light of establishment of the Environment and Land Court, especially to determine whether cases proposed for a land titles tribunal would adequately fall under its jurisdiction. These recommendations should be evaluated and where suitable,⁵⁴⁴ integrated in a broader scheme of redress actions proposed by the TJRC.

Other land reform initiatives in Kibaki's administration

560 Mwai Kibaki ascended to power as the third President of Kenya in 2002 through a popular vote on a National Alliance Rainbow Coalition (NARC) party ticket that saw the end of close to four decades of KANU rule. In terms of the land question, Kibaki was faced with similar land issues and challenges that were encountered during the previous regimes.

561 One of the first challenges that the Kibaki administration faced when it came to power in 2003 was how to deal with the historical claims over land that were not resolved at Lancaster and remained unresolved throughout the Kenyatta and Moi administrations. In addition to the establishment and operationalisation of the Ndung'u Commission already elaborated, the following initiatives were undertaken during his administration:

562 The initiatives included formulation of the National Land Policy, completion of the constitutional review process culminating in the adoption of a new Constitution with key provisions of land elaborated in subsequent sections of this TJRC Report, appointment of new Ministers of Lands and Settlement including Amos Kimunya and James Orengo who showed willingness to revoke illegally acquired title deeds and the prosecution of key personalities including William Ruto, Wilson Gachanja, Joshua Kulei and Sammy Mwaita over land-related offences.⁵⁴⁵

563 Further, in 2005, a Forest Act was eventually enacted, to help secure the county's remaining forests and encourage commercial forestry. Illegal logging was reduced and some parts of Karura and Ngong' forests repossessed, although the Kibaki administration sooner or later proved more reluctant to act when

543 Republic of Kenya Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at 188 – 199.

544 See Republic of Kenya Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission 2004) at 188 – 200 which details recommendations of the Commission.

545 See for example Daily Nation 16 April 2004 online edition.

politicians and senior officials had been allocated the land. A number of land laws were also passed, including the Land Act of 2012 whose details and significance are presented in the next section of this Report

- 564 During Kibaki's regime, the then Prime Minister Raila Odinga also took a courageous step in confronting land-related issues in the Mau Forests complex in Narok North. He based actions to restore the health of the forests on the plausible argument that Kenya's declining rainfall was mainly caused by the destruction of forest water catchment areas around Mau and other water towers. His argument attracted the support of some external development partners and development agencies, including the Bill Clinton Foundation. Through this institute, the government formed a task force to review the irregular/illegal allocation of land in the Mau Forest and to restore the health of the forest through a re-forestation programme.
- 565 The initiative should have been complemented by action on the part of the Ministry of Lands and Settlement to finally re-settle members of the Ogiek community who were claiming residence in the protected area. Opposition of the restoration of Mau Forests by the very ministers of government then, including William Ruto, who is now the Deputy President of President Uhuru Kenyatta, signal the need for unanimity in the design and implementation of government programmes.⁵⁴⁶ The challenge for the new government is to sustain efforts that have, so far, been implemented to genuinely address land-related issues, while also implementing recommendations of this TJRC Report, alongside others, including those made in the Ndung'u Commission's Report, as appropriate.

Conclusion

- 566 The bulk of the statements and memorandum, more than 40 percent, that the Commission received related to land grievances and disputes. There are close linkages between land injustices and ethnic violence in Kenya. More specifically, land related injustices are prominent factors that precipitate violence between and within ethnic communities in Kenya. Since independence, there has been no genuine political will on the part of the state to address grievances and disputes relating to land. Policy initiatives have more often than not failed to address the root causes of land related grievances and disputes. As such, one thing is clear, the stability of Kenya depends to a great extent to the willingness of political actors to address these grievances and disputes. The creation of the National Land Commission is a step in the right direction. But this step must be backed by genuine commitment to support its work.

⁵⁴⁶ See Daily Nation, 1st November 2009, on-line edition.



Economic Crimes and Grand Corruption

Introduction

1. This Chapter focuses on the phenomenon of corruption, the causes and effects of corruption especially on the citizenry's enjoyment of socio- economic rights, efforts made in Kenya to combat corruption, the challenges faced, and institutional, administrative and legislative measures that may be put in place to address its violation of the economic rights of Kenyans.
2. The Truth, Justice and Reconciliation Commission (the Commission) was empowered, amongst other functions, to establish an accurate historical record of violations and abuses of human rights and economic rights inflicted upon persons by the state, public institutions and holders of public office between 12 December 1963 and 28 February 2008. The Commission was required to achieve this through investigations and holding of public hearings in order to establish the causes, nature and extent of these violations.
3. The specific mandate to look into economic crimes is found in Section 5 of the Truth Justice and Reconciliation Commission Act (TJR Act), which outlines the objectives of the Commission. Section 5(d) provides for investigation of economic crimes, including grand corruption, and the exploitation of natural or public resources. Upon completion of investigations and hearings, the Commission is required to make recommendations with regard to policy, prosecution of

violators of human and economic rights, and any institutional, administrative and legislative measures that may be put in place to address these violations

4. The following issues are considered in the Chapter definition of economic crime and grand corruption, causes and effects of corruption, the linkage between grand corruption and gross violation of human rights, initiatives to combat corruption in Kenya since 1956; the anti-corruption legal framework in Kenya, recent legislative developments on leadership and integrity, the magnitude and scale of grand corruption in Kenya; challenges of fighting corruption in Kenya (legal, institutional, political, etc). Recommendations are provided at the end.

Definition of Economic Crimes and Grand Corruption

5. The TJR Act did not define economic crimes or grand corruption. The Commission therefore resorted to definitions provided for in relevant international and regional instruments to which Kenya is a signatory, and the relevant domestic laws. Additionally, it became imperative to consider definitions used by other institutions that are actively involved in combating corruption, for example the World Bank and Transparency International.
6. In order to comprehend the meaning of economic crime and grand corruption, it is essential first to try and understand the phenomenon of corruption generally, and the specific types of corruption referred to as grand corruption, petty corruption and systemic corruption. An attempt will also be made to understand economic crimes as they are defined under the Kenyan law, and how they differ from corruption offences.

The meaning of corruption

7. There is no single, comprehensive, universally accepted definition of corruption, and there are many definitions given by different scholars, institutions, practitioners and writers. Attempts to develop such definition invariably encounter legal, criminological and in many countries, political problems. This is largely due to the broad nature of the phenomenon and the fact that it manifests itself in various ways, depending on the culture of the society where it is taking place. Since the nature and effects of corruption are unique to each country and society, it is therefore not possible to confine it to one particular set of facts or circumstances.

- 8 The difficulty in defining corruption was evident during the negotiations of the United Nations Convention Against Corruption (UNCAC) in 2002.¹ According to information contained in the UN Anti-Corruption Toolkit, when the negotiations began in early 2002, one option under consideration was not to define corruption at all but list specific types or acts of corruption. Proposals to require countries to criminalise corruption mainly covered specific offences or groups of offences that depended on what type of conduct was involved, whether those implicated were public officers, whether cross border conduct or foreign officials were involved, and if these cases related to unlawful or improper enrichment.²
- 9 Nevertheless, many specific forms of corruption are clearly defined and understood, and are the subject of numerous legal or academic definitions. Many are also criminal offences, although in some cases governments consider that specific forms of corruption are better dealt with by regulatory or civil law proceedings. Although the varied definitions emphasize varying elements of corruption, they generally acknowledge corruption as dishonest behaviour where individuals or groups of individuals abuse public office for private profit.
- 10 At the international level, the United Nations Convention Against Corruption (UNCAC), to which Kenya is a signatory, does not define corruption. In Chapter 3 Articles 15 to 24, it lists circumstances or situations that could constitute corruption. The Convention requires each State Party to adopt legal measures to establish certain criminal offences, including bribery, embezzlement, misappropriation or other diversion of property by public officials, trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, embezzlement in the private sector, money laundering, concealment of property obtained as a result of any of those offences, and obstructing justice. These provisions reflect the tendency of international bodies to regard offences of corruption as including offences beyond the confines of bribery as popularly understood.
- 11 Within the African continent, the African Union Convention On Preventing and Combating Corruption (AUCPCC), to which Kenya is also a signatory, describes corruption as solicitation or acceptance, directly or indirectly as by a public official or any other person of any goods of monetary value or other benefit such as a gift, favour or advantage for himself or herself or for another person or entity in exchange for any act or omission in the performance of his or her functions.

¹ The Global Programme Against Corruption: UN Anti-Corruption Toolkit, 3rd Edition, Vienna, September 2004.

² For a detailed discussion of the attempts made to define corruption, see the UN Manual on Anti-Corruption Policy, Part II.

- 12 Transparency International, one of the global organisations actively involved in the fight against corruption, has defined corruption as the “misuse of entrusted power for private gain” The definition reflects the current approach to the topic, but its usefulness is debatable It has the advantages of simplicity as it embraces offences of corruption strictly so-called, and related offences such as misconduct in public office, extortion, embezzlement, fraud and theft which are distinct offences Although these are distinct offences, they are usually committed in the course of corruption The World Bank, on the other hand, defines corruption as the abuse of power for personal gain or for the benefit of a group to which one owes allegiance
- 13 In Kenya, the Anti-Corruption and Economic Crimes Act of 2003(ACECA) does not define corruption but outlines conduct that would constitute an offence of corruption. The Act stipulates that corruption means an offence under sections 39-44, 46 and 47 of the Act, and certain other wrongs The wrongs as listed under section 2 of the Act are breach of trust, an offence involving dishonesty in relation to taxes or elections to public office The offences enumerated under sections 39-44, 46 and 47 are bribing agents, secret inducements for advice, deceiving principal, conflict of interest, improper benefits to trustees for appointment, bid rigging, abuse of office and dealing with suspect property
- 14 In what is seen as a major improvement and deviation from the other legal instruments at both international and regional levels, the ACECA creates and defines a special category of offences referred to as economic crimes Greater details of the meaning of economic crimes will be explained in a later portion of this chapter when defining the term as it relates to the major concept of corruption

Grand corruption

- 15 The term grand corruption is used to describe cases where massive personal wealth is acquired from States by senior public officials using corrupt means³ It arises mostly where high officials have power over the granting of large public contracts and a local agent receives a commission if the transaction is won It has three main criteria: size, immediacy of its rewards and mystification The more technical and complicated a transaction is, the less likely it is that questions will be asked Some of its key mechanisms have been fully described in George Moody Stuart’s book, *Grand Corruption in Third World Development*⁴

3 Report of the Anti-Corruption Working Group of the Society for Advanced Legal Studies “Banking on Corruption, The Legal Responsibilities of Those Who Handle the Proceeds of Corruption” February 2002

4 Berlin Transparency International, 1994

- 16 The Society of Advanced Legal Studies Anti-Corruption Working Group concluded that grand corruption involves two main activities: bribe payments and the embezzlement and misappropriation of state assets. The bribe can either be a direct payment in return for showing favour or payment of part of the proceeds of a contract granted as a result of the bribe, called a kick back. For example, Benazir Buto's husband, Asif Zardari, was convicted in Pakistan of taking secret kickbacks from airline, power station, and pipeline projects, rice deals, customs inspections, defence contracts, land sell offs, and even government welfare.⁵
- 17 Another good example of grand corruption is the embezzlement and misappropriation of state assets by the late Nigerian President Sani Abacha. In addition to taking hefty cuts before approving contracts, he siphoned off fortunes from sales of Nigerian crude oil as well as diverting huge sums from four state-owned oil refineries leaving them in near-total collapse.⁶

Petty corruption

- 18 Although the focus of this chapter of the Commission's Report is grand corruption, it is important to also understand the other type of corruption commonly referred to as petty corruption. Petty corruption, as the term implies, may involve small amounts and junior officials but it also has a huge impact on people's enjoyment of their basic rights like the rights to water, health, food, clothing and shelter. It cannot therefore be ignored or wished away in discussing the phenomenon of corruption. Admittedly, a discussion of grand corruption will not be complete without mentioning the corresponding petty corruption.
- 19 The term "petty corruption" is sometimes used to distinguish between grand corruption practised by senior officials, and the petty corruption to which, for example magistrates and judges, are subject due to inadequate remuneration and facilities. The term is more used however to describe "facilitation" or "grease payments" sought by officials for services the public are entitled to free of charge. Examples are payments to customs officers to pass goods through a road border, to immigration officers to have travel documents accepted, to medical staff to receive prescription drugs or other benefits, payments for fictitious services, or to avoid prosecution for traffic offences, real or imagined.
- 20 The distinction from grand corruption is that an official is paid for what he is lawfully required to do. The sums involved are usually small and paid to cut through

5 The Court in Pakistan convicted Mr and Mrs Zardari of corruption, sentenced them to 5 years imprisonment, ordered fines of US \$ 5m, and disqualified both from holding public office. *Eastern Economic Review* 29 April 1999

6 Davi Orr. *The Scotsman* 4 December 1998

bureaucratic red tape. In most cases it is assumed that the service required would not be obtained without the additional payment, so there is an element of extortion.

Grand corruption Vs Petty Corruption

21. Grand corruption is corruption that pervades the highest levels of national government, leading to broad erosion of confidence in good governance, the rule of law and economic stability.⁷ Petty corruption on the other hand, can involve the exchange of very small amounts of money, the granting of minor favours by those seeking preferential treatment, or the employment of friends and relatives in minor positions. The most critical difference between grand and petty corruption is that grand corruption involves the distortion or corruption of the central functions of government, while petty corruption develops and exists within the context of established governance and social frameworks.
22. Experience and testimony received by the Commission shows that both grand and petty corruption occurs in Kenya, with consequential violation of economic rights. The mandate of the Commission was however specific to grand corruption.

Systemic corruption

23. Another type of corruption that may be visible in Kenya though not expressly mentioned in our mandate is systemic corruption. Systemic corruption or institutional or entrenched corruption, as it is sometimes called, is corruption brought about, encouraged or promoted by the system itself. It occurs where bribery is routine on a large scale. The causes are usually brought about by inefficiency, inadequacy, or undue laxity in the system.
24. Systematic corruption arises where corruption permeates a country's political and economic institutions and is no longer restricted to a few dishonest individuals. It thrives where institutions are weak or non-existent and is closely related to poor governance, where there are inadequate legislative controls, no independent judiciary, or oversight, and where independent media and civil society agencies are absent.
25. In Kenya, the judiciary and media are now relatively independent and civil society is largely free to operate without restrictions. There is a plethora of anti-corruption laws and an independent constitutional anti-corruption commission dedicated

⁷ Rose-Ackerman S. "Democracy and Grand Corruption", UNESCO 1996(ISSI49/1996) reprinted in Williams R Edition "Explaining Corruption" Elgon Reference Collection UK 2000 PP 321-336

fully to the fight against corruption. Experience shows that corruption has however permeated almost all sectors of the Kenyan society and there is need for more much more to be done to combat corruption and its insidious effects on Kenyans.

Economic crimes

26. The Anti-Corruption and Economic Crimes Act (ACECA) of 2003 goes further than the UNCAC and AUCPCC in defining corruption by isolating special corruption related offences referred to as economic crimes. According to ACECA, an economic crime is any act or omission by any person that results in loss or destruction of public property, revenue or other resources. This is clearly distinguished from corruption that is broadly seen as the improper use of power, privilege or office for benefit to oneself or another person(s).
27. The ACECA defines economic crimes as an offence listed under section 45, that is
 1. Illegal acquisition, mortgage and disposal of public property service or benefit
 2. Unlawful damage to public property
 3. Failure to pay taxes, fees, levies or charges that are payable to a public body
 4. Causing or obtaining the non-payment of taxes, fees, levies, or charges that are due to a public body
28. Furthermore, an officer or person who is in charge of public revenue or property commits an economic crime if he illegally makes payment or excessive payment from public revenue for sub-standard or defective goods, for goods not supplied or not supplied in full, for services not rendered or not adequately rendered. This provision has the effect of creating offences in the sphere of public procurement that consume a huge chunk of public funds.
29. Economic crimes are also committed when a public officer wilfully fails to follow the law or applicable procedures on procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditure. Good examples of such laws are the Public Finance Management Act, the Public Procurement and Disposal of Goods Act, together with the regulations made there under.
30. Finally, the ACECA makes it an economic crime for a public officer to engage in a project without planning. This crime was intended to save deliberate wastage of public funds by senior officials who initiate projects without any prior planning, with the sole aim of making personal gain from such projects, in collusion with persons or companies.

awarded the contracts. Most of these projects were never included in the planned projects for the financial year in focus. Many projects in Kenya remain incomplete many years after their construction commenced. This has resulted in loss of shillings that could have been used to provide basic services to millions of Kenyans.

31. Having looked at the meaning of economic crimes as defined in ACECA, it is evident that there is a close link between economic crimes and grand corruption in Kenya. Economic crimes result in loss or destruction of public property or revenue, especially in the area of public procurement, public contracts, public land and general management of public funds. These crimes inevitably involve very senior powerful public servants awarding large public contracts running into billions of shillings, with the assurance of getting a certain amount as a commission. This ultimately constitutes what is referred to as grand corruption. Grand corruption is therefore a direct product of economic crimes. In other words, economic crimes result in grand corruption. The two are inextricably linked to each other, and for our purposes, we use the terms interchangeably.

Causes and Effects of Corruption

32. Since 1994, unprecedented global efforts have been made to raise awareness about corruption, its insidious nature and damaging effects it has on the welfare of entire nations and their peoples. Corruption not only distorts economic decision-making, it also deters investment, undermines competitiveness and ultimately, weakens economic growth. There is evidence that the social, legal, political and economic aspects of development are all linked, and that corruption in any one sector impedes development in them all.⁸
33. The United Nations Office on Drugs and Crime (UNODC) describes corruption as a complex social, political and economic phenomenon that affects all societies all over the world. Corruption undermines democratic institutions, slows economic development and contributes to government instability. Corruption attacks the foundation of democratic institutions by distorting electoral processes, perverting the rule of law and creating bureaucratic quagmires whose only reason for existing is the soliciting of bribes. Economic development is stunted because foreign direct investment is discouraged and small businesses within the country often find it impossible to overcome the start up cost required because of corruption.⁹

⁸ The Global Programme Against Corruption: UN Anti-Corruption Toolkit, 3rd Edition, Vienna, September 2004.
⁹ <http://www.unodc.org/en/corruption/index.html>, accessed on 26/2/2013.

- 34 The UN Secretary General, Ban Ki-Moon, said at the occasion of the International Anti-Corruption Day on 9/12/2009, that it is the world's vulnerable who suffer "first and worst" such as the theft of public money or foreign aid for private gain. The result, he said, is fewer resources to fund the building of infrastructure such as schools, hospitals and roads. Mr Ban however noted that corruption "is not some vast impersonal force but the result of personal decision, most often motivated by greed"¹⁰
- 35 In a nutshell, corruption is caused by pure greed on the part of the perpetrators, and those who are affected most are the poor in society. Corruption deprives them of their basic rights to shelter, food, education, decent housing, good roads and education for their children. Although most Kenyans are now aware of the causes and effects of corruption on their lives, it nevertheless is paramount to briefly discuss these two issues as a basis for further in depth analysis of the phenomenon of corruption in Kenya.

Causes of corruption

- 36 As part its mandate to create awareness about the dangers of corruption and to enlist public support in the fight against corruption, the now defunct KACC published a lot of Information, Communication and Education (IEC) materials, including manuals for public officers and members of the public. In trying to explain the causes and effects of corruption, this chapter will borrow heavily from the manual titled 'The Anti-Corruption and Economic Crimes Act, 2003 Explained'¹¹
- 37 KACC identified some causes of corruption, which sometimes operate in combination and should not be seen singularly or as isolated derivatives. These are
- 1) **Political patronage** When holders of public office give their loyalties to those individuals who appoint them to their positions instead of being loyal to their duties, the law, integrity and set standards, they stop being accountable to the public, clients and colleagues
 - 2) **Bad governance** Poor leadership and management practices and styles that provide opportunities and loopholes for corrupt conduct is a major cause of corruption. Leaders who are inept and who do not inspire a culture of achievement provide a poor model to those below them resulting in poor performance and mediocrity

¹⁰ <http://www.unodc.org/en/corruption/index.html>- accessed on 26/2/2013

¹¹ *The Anti-Corruption and Economic Crimes Act 2003 Explained: A Manual for Public Officers and Members of the Public* a publication of the Kenya Anti-Corruption Commission Directorate of Preventive Services

- **Lack of political will:** For the fight against corruption to succeed, there has to be willingness on the part of political leaders to show by word and deed that they are committed and supportive of the fight. For example, they must not only facilitate an enabling climate of corruption intolerance by enacting laws, policies and systems but they must also provide operational support and tools.
- **Breakdown or erosion of societal values and norms** When a society disregards or ignores positive moral values and laid down procedures and regulations, it opens itself up to anarchy, ineptitude and failure. A positive value system in society helps to benchmark individual conduct and guides collective behaviour.
- **Weak or absent management systems, procedures and practices:** In organizations where systems, procedures, standards, policies and practices are weak or absent, individuals take advantage to exploit such loopholes leading to loss of public resources.
- **Misuse of discretionary power vested in individuals or offices** Use of discretionary powers without checks and balances encourages corruption because of families, friends and other connections.
- **Weak civil society and general apathy** When civil society and the general public fail to exercise vigilance over management of public affairs, we abandon our oversight and responsibility and fail collectively in our civic duty.
- **Lack of professional integrity** When those trained and paid to offer professional services lack personal ethics and integrity, they rob their institutions and the country a chance to develop thus leading to wastage of valuable resources.
- **Lack of transparency and accountability** Public affairs should always be conducted in an open, fair and responsible manner. Opaqueness fuels corruption because it brings an atmosphere of secrecy.
- **Tribalism, favouritism, nepotism and cronyism** All four have one thing in common – a favoured entity gets to enjoy public resources at the expense of others. Merit is disregarded and benefits such as contracts, employment, tenders are enjoyed on the basis of favor. People are discriminated against and generally denied equal opportunity.
- **Inefficient public sector.** An inefficient and bureaucratic public service where delays and under-performance are a hallmark of its culture encourages people to seek shortcuts while seeking for services. This situation creates room for endemic corruption.

- **Greed** The tendency to live beyond one's means or to acquire excessive wealth without working for it contributes significantly to corruption and economic crime. It is therefore not surprising that some of the wealthiest people in society are also the most corrupt.
- **Non-enforcement of the law.** Laws and regulations are made and yet they are not implemented or there is reluctance to enforce them. In this way, wrongdoers are encouraged to behave with impunity.

Effects of Corruption

- 38 The introductory pages to the KACC Manual correctly point out that corruption is harmful to the economy and has caused much destruction to Kenya as a country. Corruption, according to the KACC Manual, greatly impedes the realization of durable development at many levels thereby increasing poverty and fuelling inequities and vulnerabilities in society. It affects everyone but harms more those in society who are already vulnerable. This is the same observation that has been made by the United Nations Office on Drugs and Crime, and supported by the UN Secretary General, Ban Ki-Moon during the International Anti-Corruption Day on 9/12 2009, that corruption affects the poor "first and worst"
- 39 Some of the effects of corruption include but are not limited to
- **Poor health services** – Looting of funds intended for buying drugs and the theft of the drugs already bought leads to lack of adequate medical supplies. When public medical practitioners run down public health facilities in order to refer patients to their private clinics, for example, the majority will not have access to affordable medical services leading to increased sickness and deaths.
 - **Poor transport and communication networks** – Diversion and theft of funds meant to construct or repair infrastructure like roads, telephone network, water supply and so on leads to poor infrastructure making less money available for such purposes and at the same time leading to dilapidation and wastage.
 - **Reduced investment and relocation of investors to other countries** – Corruption increases the cost of doing business, which scares off current and potential investors. They move instead to countries which are considered to be more conducive to the realization of their investment. Lack of investment affects all wealth creation plans.
 - **Increased cost of goods and services** – When a country's economy is run-down through corruption, the cost of living rises and the poor are affected.

immensely. Corruption translates into high costs of goods and services causing inflation and economic vulnerability.

- ↳ **Delay, denial and sale of justice in courts** – Justice delayed is justice denied. When the courts become corrupt, cases are delayed and judgments favour the unmerited sides. With access to justice dependent on corruption, administration of justice will be compromised or frustrated thereby affecting individuals, businesses, commerce and the economy. These lead to breakdown in law and order.
- ↳ **Increased poverty** – Corruption leads to misallocation of resources. It causes scarce resources to be confined to a few undeserving hands leading to the majority being denied access to basic necessities such as food, water, shelter, health and education.
- ↳ **Shoddy work and stalled projects** – Once money intended for certain projects has been stolen or embezzled, the little that is left is hardly adequate for the planned jobs leading to substandard/incomplete work.
- ↳ **Unemployment** – With the relocation and reduction of investment, business activities decline, industries are shut down and jobs are lost.
- ↳ **Loss of confidence in government** – Corruption leads to widespread dissatisfaction with the general management of public affairs causing loss of public goodwill and confidence in government leading to social unrest.
- ↳ **Rise in crime rate and insecurity** – Corruption increases poverty, contributes to high rates of unemployment and aggravates the levels of frustration in society, leading to a corresponding rise in the crime rate and insecurity.
- ↳ **Negative international image** – Image is an important ingredient in the development of a country. The perception that a country is corrupt paints a bad image of the country to the rest of the world, negatively affecting tourism, investment, donor relations, trade, travel and national prestige.
- ↳ **Irregular/illegal acquisition of public land, property and utilities** – Individuals who are corrupt are capable of using their ill-gotten wealth and authority to steal even more public property such as playgrounds, schools, hospitals, government houses, court premises and land, thereby denying the public access to and use of public utilities.

The Linkage Between Economic Crimes and Gross Violation of Human Rights

- 40 The fight against corruption is central to the struggle for human rights. Corruption has always greased the wheels of exploitation and injustice which characterize our world. From violent ethnic cleansing to institutionalized racism, political actors have abused their entrusted powers to focus on gains for the few at great cost for the many. The Lord Chancellor, Lord Falconer, wrote in his Foreword to the UK draft Corruption Bill in 2003 "Corruption worldwide weakens democracies, harms economies, impedes sustainable development and can undermine respect for human rights by supporting corrupt governments with widespread consequences"
- 41 It is essentially important to give attention to the impact of corruption on economic, social and cultural rights. Corruption is likely to undermine enjoyment of these rights in relation to the state's duty to provide or regulate public services in relation to health, housing, water and education. These services generate large public contracts which not only create opportunities for corruption but have a disproportionate impact on vulnerable and disadvantaged groups, in particular women. Widespread corruption in health or educational services deters the poor from seeking health care and education, and depresses living standards and opportunities for poorer people in particular.
- 42 International human rights standards require states to realize socio-economic rights progressively, prioritize human rights when allocating resources, and thereafter respect, protect and fulfill these human rights. This is based on the principle of availability and accessibility of public services to all citizens, especially the cost and proximity. Corruption not only reduces the resources available to implement programmes to achieve human rights but also reduces the delivery of services. This leads to under provision, poor quality, exaggerated prices, wastage, fraud and unavailability. Money lost to corruption could have been used to buy medicine, equip schools or supply water. When corruption is rampant, it implies that the state is not taking steps in the right direction.
- 43 Corruption may also violate the principles of equality and non-discrimination which are fundamental principle of human rights. This is because corruption produces unequal and discriminatory outcomes with regard to human rights for example, those who cannot bribe police officers are the ones who are arrested and charged

Similarly, those who cannot bribe judges are the ones who are jailed. Bribery, extortion and inducement may also scare away witnesses and entrench corruption

- 44 Corruption also violates the right to political participation. In Kenya, these are referred to as political rights enumerated under Article 38 of the COK 2010. These include the right to vote for a candidate of one's choice, and the right to stand for elections. These rights may be violated by corrupt practices such as bribing voters, election officials, intimidation, inter alia. Corruption is incompatible with a free and fair electoral process or a merit-based approach to appointment in public service.
- 45 Corruption also violates the right to a fair trial (Article 50) and effective remedy. This occurs due to bribery, extortion and intimidation by police, prosecutors and judges. This violates a suspect's right to presumption of innocence.
- 46 It is the vulnerable and marginalized – women, children and the minority groups – who often suffer corruption's harshest consequences. While dealing with police, judges, hospitals, schools, and other basic public services, poor citizens tend to suffer more violations than the rich and see a larger share of their resources eaten away. It is therefore correct to state that systemic corruption facilitates, perpetuates and institutionalizes human rights violations, and therefore prevents individuals from realizing and enforcing their basic human rights.
- 47 Corruption destroys the fundamental values of human dignity and political equality, making it impossible to guarantee the rights to life, personal dignity and equality. These daily realities are a direct contravention of many human rights conventions and basic principles enshrined in those conventions.

Human Rights Conventions

- 48 Chapter Four of the Constitution of Kenya of 2010 (COK 2010), applies at the national level, Kenya's international human rights obligation undertaken through ratification of the major instruments. Chapter Four of the COK 2010 sets out the rights and fundamental freedoms to be enjoyed by all Kenyans.
- 49. Article 19 states that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. It further stipulates that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities, and to promote social justice and the realization of the potential of all human beings. Of utmost importance is the provision in Article 19(3) which provides that the rights and fundamental freedoms in the Bill of Rights belong to each

individual, are not granted by the state, and are subject only to the limitations contemplated in the Constitution

50. Kenya, therefore, has an obligation to respect, protect and promote the human rights of its citizens, and to ensure that corrupt acts do not violate these human rights
51. These human rights conventions set out the legal obligations of a government to ensure that people living in a country enjoy equality, a fair justice system, access to public goods and services. States have an obligation to respect, to protect and to fulfill human rights. A country's ability to respect, protect and fulfill these rights will ultimately be defined by the levels and systematic nature of corruption. A violation of human rights therefore occurs when a state fails to respect, protect and fulfill recognized human rights of its citizens. It follows that where rights are guaranteed and implemented, corruption will drastically reduce

Corruption as a violation of human rights

52. Before attempting to connect corruption to human rights, it is important to point out that not all acts of corruption imply a violation of rights. All forms of corruption, may however, in the long run, have an impact on human rights
53. The United Nation Convention Against Corruption (UNCAC) provides a solid basis for holding states accountable and offers a path towards stopping human rights abuses. The convention does this by criminalizing acts of corruption, for example bribery, embezzlement, abuse of office, illicit enrichment, inter alia. One glaring anomaly however is that international anti-corruption conventions rarely refer to human rights, and major human rights conventions rarely mention corruption. International anti-corruption treaties give little guidance on how officials are to reconcile their commitment to fight corruption with their obligation to protect human rights
54. Some linkages between corruption and human rights are however visible in some anti-corruption and human rights instruments. For example, the Preamble of the Council of Europe Criminal Law Convention on Corruption emphasizes that "corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundation of society"
55. Another linkage between corruption and human rights is seen in the Preamble to the Declaration of Human and Citizen's Rights of 1789. It considered that

ignorance, forgetfulness or contempt for human rights are the only causes of public misfortune and the corruption of governments

- 56 Nevertheless, it is indisputable that where corruption is widespread, states cannot comply with their human rights obligations. This has been concluded by UN treaty bodies and UN special rapporteurs. For example, the Committee on Economic, Social and Cultural Rights states that "states face serious problems of corruption, which have negative effects on the full exercise of rights covered by the Covenant"¹²
- 57 The Committee on the Rights of the Child stated thus "it remains concerned at the negative impact corruption may have on the allocation of already limited resources to effectively improve the promotion and protection of children's rights, including their right to education and health"¹³

Victims of corruption and human rights violation

- 58 While corruption violates the rights of all those affected by it, it has a disproportionate impact on people that belong to groups that are exposed to particular risks. Examples of these are minorities, indigenous people, the disabled, those with HIV/AIDS, refugees, prisoners, the poor, women and children. They are more exploited and less able to defend themselves. Their vulnerability makes them easy victims of corruption.
- 59 Women are over-represented in the poorest social segments of society and under-represented in decision-making bodies. They are less able to afford bribes, depend much more on public servants and sometimes that men do not, especially during pregnancy.
- 60 Corruption affects children's right to life, right to health, right to education. They also suffer from child trafficking, sexual exploitation and child labour. A good illustration of corruption thrives in inter country adoption where judges and orphanages are bribed to speed up the process or they accept fake adoption papers.
- 61. Poor people are affected by corruption because it diverts public resources from investment in infrastructure that is crucial to lift them out of poverty. Grand corruption damages the quality of public services on which the poor depend particularly to meet basic needs.

¹² E/C.12/1/ADD.91/CESCR.2003 paragraph 12

¹³ CRC/C/COG/COG/CO/1 paragraph 14

- 62 The indigenous and minorities, especially those linked to land that they own collectively, suffer effects of corruption when they are displaced by infrastructure projects, illegal/irregular sale of public land and fraud in registration of land

Types of human rights violations in relation to corruption

- 63 Three types of violations linked to corruption are direct, indirect and remote violations. Direct violations that occur where corruption is the direct cause of the violation for example a parent whose child is denied entry into a public school because the parent is unable to bribe the head teacher of the school. This directly violates the child's right to education. Indirect violation where corruption is a necessary condition, for example when a traffic police man allows an overloaded public service vehicle to pass a police road block in return for a bribe, and that vehicle is later involved in a road accident killing the passengers. The right to life would be indirectly affected as a result of the bribery. The bribe is an essential factor without which the violation would not have occurred. Remote violations where corruption is one factor among many, for example electoral corruption may lead to protests but may not be the cause of riots or repression.
- 64 A practical illustration of the link between corruption and violation of human rights is shown in Appendix 1 in a table depicting selected corrupt practices and their impact on human rights. Although Kenya has made some strides in fighting corruption and protecting human rights, there still exists grand corruption that grossly violates human rights. This aspect will be analyzed later in this chapter, when looking at the challenges of fighting corruption in Kenya, and recommendations on the way forward in terms of legal, institutional and administrative frameworks.
- 65 One fact that is certain however is that anti-corruption agencies need to collaborate with human rights activists in order to adequately address violation of human rights caused by corrupt acts. Such collaboration may take place in participatory budgeting, tracking of public expenditure, naming and shaming of corrupt public servants, lobbying and advocacy, raising awareness and empowering people about the effects of corruption on violation of human rights. Corruption is a complex phenomenon with a "no one fits all solution" but a multi-disciplinary approach is critical.
- 66 Before assessing Kenya's compliance with legal obligations to combat corruption and protect human rights, it is important to first of all briefly look at the initiatives made to combat corruption in Kenya, since colonial times to date. This will form the basis of determining whether or not Kenya has protected its citizens from violation of human rights caused by corrupt acts.

Magnitude and Scale of Grand Corruption in Kenya

67. In order to appreciate the magnitude and scale of grand corruption in Kenya, the Commission resorted to documented cases of grand corruption from as early as the KenRen scandal in the 1970s up to the IEBC's procurement of biometric voter registration kits in 2013. Kenya's post-independence history has been marred by successive cases of huge scandals, commonly referred to as grand corruption. In the last two decades, the media and civil society exposed numerous multimillion dollar financial scams. A few select cases of grand corruption will be briefly mentioned, to demonstrate how much the country has lost.

The Ken Ren Scandal

68. Sometime in the early 1970s, the Kenyan government entered into a joint venture with an American company called Ken Ren Chemical and Fertilizer Company, to establish a fertilizer processing plant in Mombasa. The deal collapsed, the plant was never built, the government owned company ended up in liquidation and was embroiled in enduring cycles of litigation in Europe.¹⁴ At the time, the treasury was headed by Mwai Kibaki as Minister for Finance. He would later become President and serve between 2003 and 2013. In 2007, parliament was informed that Kenya still owed Ken Ren Kshs 4.3 billion, which was being repaid using taxpayers' money. For example, in the 2007/2008 Budget Estimates, the Treasury made a provision for Kshs 192,982 million as principal repayment of the Ken Ren loans to Austria-Bawag.¹⁵

The Goldenberg Scandal

69. The Commission analysed the Report of the Judicial Commission of Inquiry into the Goldenberg Affair (Bosire Commission) that was established by President Kibaki in February 2004, barely a month after he was sworn into office.¹⁶ It was chaired by Justice Samuel Bosire and was mandated to inquire into allegations of irregular payment of export compensation to Goldenberg International and into payments made by the Central Bank of Kenya (CBK) to the Exchange Bank Limited in respect of fictitious foreign exchange claims.

70. In the late 1980s, President Daniel Arap Moi introduced the infamous export compensation scheme to encourage legitimate export of gold and to eliminate smuggling of gold, thereby increasing revenue from such export business. The

¹⁴ SA Coopee Lavalin vs Ken Ren Chemicals and Fertilisers Limited (1994) 2 All ER 449. Republic of Kenya -vs- Bawag of Austria (2000). In both cases awards were made against Kenya.

¹⁵ Government of Kenya 2007/2008 Estimates of Recurrent Expenditure for the Year ending 20th June 2008 (June 2007). See also Mars Group Kenya "The Mystery of Ken Ren Fertilizer Company" at <http://www.marsgroup.org/pages/stories/ken-ren>

¹⁶ The Goldenberg Report, which runs into some 848 paragraphs and appendices marked "A" to "Q", is a collation of oral evidence of over 102 witnesses, whose Hansard ran into a staggering 18,824 pages.

relevant legislation, the Local Manufacturers (Export Compensation) Act, Chapter 482 of the Laws of Kenya, provided that the scheme was intended to encourage trade and foreign exchange earnings. Unfortunately, this was never to be

- 71 The Goldernberg scandal, which began in 1991, was a massive economic scam that cost the Kenya government over Kshs 60 billion (approximately USD 750 million). This loss was occasioned by illegal/irregular and fraudulent foreign exchange claims and dubious export compensation awards to Goldernberg International Limited (GIL), based on fictitious gold and diamond jewellery exports. The architects of the scheme also used instruments and mechanisms like pre-shipment finance facility and Export retention schemes to defraud Kenyans of the billions of shillings, under the watch of the CBK. In a nutshell, the scam was a high level conspiracy between senior government officials and unscrupulous well connected businessmen, to plunder the country's resources at will.
- 72 The scam came into the public limelight in April 1992 through the courageous actions of a whistleblower, the late David Munyakei, a clerk at CBK. He passed on some damning information to opposition MPs, who tabled the same in Parliament. The Daily Nation, a major media house in Kenya, also published the first story.¹⁷ Following the exposure, the payment scheme was stopped.
- 73 After nearly three years of intensive inquiry, the Bosire Commission produced the famous Goldernberg Report, listing several names for the Attorney General to either prosecute or take civil action. The following individuals were adversely mentioned in the report of the Commission,
 - a) Mr Kamlesh Mansukhlal Damji Pattni (the Director, promoter and shareholder of GIL),
 - b) Mr James Kanyotu (Pattni's business partner and former head of the dreaded Special Branch, deceased);
 - c) Prof George Saitoti (former Vice President and Finance Minister during former president Moi's reigns, deceased),
 - d) Mr Charles Mbindyo (former Treasury PS),
 - e) Dr Wilfred Karuga Koinange (former Treasury PS),
 - f) Mr Collins Owayo (former Commissioner of Mines and Geology),
 - g) Mr Arthur Ndegwa (then Senior Mining Engineer in the Office of the Commissioner of Miners and Geology),

¹⁷ See P. Warutere "Goldernberg's Sh 186 million Pre-shipment Scheme" Daily Nation(21 April 1992)

- h) Mr Eric Kotut (former CBK Governor),
- i) Mr Francis Chelego Cheruiyot (former Commissioner of Customs and Excise),
- f) Mr Eliphas Riungu (former CBK Deputy Governor),
- k) Mr Elijah Arap Bii (former Kenya Commercial Bank General Manager),
- l) Mr Tom Kilalya Werunga (former CBK employee),
- m) Mr. Michael Wanjihia (former CBK employee), and
- n) Mr Job K Kilach (former CBK employee)

- 74 In respect of “those whose specific roles could not be established, [the Commission] recommend[ed] that at the discretion of the Attorney General further investigations be undertaken against them to determine their respective roles, if any, in the whole scam, and whether they were in any way, involved in any wrong doing Falling in this category are, among others, former president Daniel Arap Moi, Mr Joseph Magari (former Treasury PS), Mr Joshua Kulei (Moi's former personal aide), and Multiphasic Co Ltd A number of individuals like Professor George Saitoti successfully moved to court to have their names expunged from the report
- 75 Apart from identifying individuals involved, the Report also made a startling finding that the alleged gold and diamond jewellery exports were non-existent and that no exports or earnings were made to warrant export compensation Further, the irregular payments to GIL flagrantly flouted the provisions of the Export Compensation Act as the compensation rate of 35% was above the ceiling of 20% The Bosire Commission could not execute its mandate relating to the tracing of assets acquired with monies illegally obtained from the Goldernberg scam, as it correctly pointed out that this was a Herculean task involving a thorough forensic audit both locally and internationally
- 76 Although the Goldernberg scam was undoubtedly a massive rip off perpetrated by greedy individuals, the full extent of the damage is unknown The Commission is of the view that the report is yet to be meaningfully implemented, particularly in the realm of conducting further investigations and prosecution of those behind the scam A few senior public officers in the Ministry of Finance, like Dr Wilfred Koinange, Eliphas Riungu, Elijah Bii were dismissed and charged with abuse of office Others like Michael Wanjihia and Joshua Magari were dismissed but not charged with any offence, although Joshua Magari was later charged with abuse of office in another grand corruption case commonly known as Anglo- Leasing

- 77 In relation to asset recovery, the CBK repossessed the multi-billion Grand Regency Hotel from Kamlesh Pattni, the chief architect of the Goldenberg scam. The hotel was later sold by the Bank to the Libyan Arab African Investment Company Kenya Limited (LAICO) under mysterious circumstances, and is now known as Laico Regency. Following public outcry over the sale, a Commission of Inquiry set up by President Kibaki made adverse findings against the then Minister for Finance Amos Kimunya and Professor Njuguna Ndungu the CBK Governor, but no action was taken against them. To date, the contents of the said report have never been released to the public.

The Charter House Bank Scandal

- 78 The Charterhouse Bank Scandal is perhaps one of the most profound scandals in Kenya's banking sector to date. Though it only received much attention in the media in the recent years, the scam dates back to March/April 2004, when some former employees of the bank blew the whistle on a raft of irregularities involving the bank and a host of its customers, including tax evasion, money laundering and off-shore money transfers. This was being allegedly done in collusion with Nakumatt Holdings.
- 79 The bank was in June 2006 placed under statutory receivership by the CBK. The investigative audit uncovered considerable evidence pointing at strong indications that the Bank's customers were involved in tax evasion and money laundering. The Bank was also found to have grossly violated the Banking Act and CBK's prudential regulations. Similar concerns had earlier been raised by the government's Joint Investigation Task Force.
- 80 In January 2010, attempts were made to have the bank re-opened. The attempts to have the bank reopened resurfaced on 7 July 2010 when Yatta MP Charles Kilonzo presented a petition to Parliament on behalf of 35 depositors seeking to have the bank re-opened. In September 2010, the Bank was the focus of a fresh probe by the Parliamentary Committee on Finance, Planning and Trade.
- 81 The Committee, chaired by Nambale MP Chris Okemo summoned and heard from, among others, the then Finance Minister Uhuru Kenyatta, former Finance Minister Amos Kimunya, KRA Commissioner-General Michael Waweru, CBK Governor Prof Njuguna Ndung'u, KACC Acting Director John Mutonyi, Deputy Solicitor-General Muthoni Kimani, and the Director of Public Prosecutions Keriako Tobiko. In a strange twist, the senior government officials backtracked on the government's earlier position, recommending the re-opening of the bank. Through its

Commissioner-General, Michael Waweru, KRA, for instance, absolved the Bank of any wrong-doing, asserting that its investigations on tax evasion focused on the bank's customers, and not the bank itself. Clearly, this contradicts KRA earlier position (in July 2006) that the Bank had abetted massive tax evasion by its customers

82. On its part, through its Governor, Prof Ndung'u, CBK told the Committee that it did not object to the re-opening of the Bank. Through its then Acting Director, John Mutonyi, KACC informed the Committee that it would have no objection to the bank's re-opening, and that the evidence of money laundering uncovered by the task force could not be acted upon as money laundering was not an offence in Kenya at the time
83. So far, nothing substantial has been revealed to the public concerning the operations of the Bank, as well as the circumstances surrounding its closure. Apparently, the concerned government institutions and agencies have much to hide. Since Kenyans have a right to the truth of the matter, it is only prudent for the government to conduct in-depth investigations and reveal the truth

The Anglo-Leasing Scandal

84. The Goldenberg Affair was only a precursor to other cases of grand corruption in the government. Early in 2004, Kenyans awoke to the news of an even more monstrous scandal, the "Anglo Leasing Scam". Sadly, the precise story of the scam cannot, as yet, be conclusively narrated as too much still remains unravelled, the scam is heavily shrouded in secrecy
85. The Commission looked at the scam through the eyes of an "insider", the former Permanent Secretary in the Office of the President (in-charge of Ethics and Governance), Mr John Githongo, who blew the whistle on the scandal. Mr Githongo, a former head of TI-Kenya, was once forced into exile (in the UK) amidst threats to his life and personal security. He has since returned to Kenya after President Kibaki's government pledged to ensure his security. The Commission regrets that Mr Githongo could not appear before it to shed light on the saga. The Commission therefore relied on reports by various government agencies, including the National Assembly's Public Accounts Committee (PAC), the Kenya Anti-Corruption Commission (KACC), the defunct Office of the Controller & Auditor-General (C&AG). The Commission also considered reports by various non-state actors (NSAs), including the media and civil society organizations (CSOs)

- 86 The multimillion dollar scandal, which Transparency International (TI) has described as an "albatross around the Kibaki government's neck",¹⁸ involved an array of contracts with non-existent entities for various fictitious security projects.¹⁹ The scam, which was predicated on the condition that payments of the contract sum of KES 56.3 billion would be in the form of *irrevocable* promissory notes to the order of Anglo Leasing & Finance Company (ALFC) and other similarly fictitious entities,²⁰ was reportedly intended to raise funds for President Kibaki's re-election in December 2007.
- 87 The scandal started when, sometime in 2001, the government wanted to replace its old passport printing system with a state-of-the-art tamper-proof system. Between late 2001 and December 2002, the Moi government had signed an overwhelming USD 443.36 million worth of contracts with a fictitious company, Anglo Leasing and Finance Limited. In January 2003, the Kibaki government ratified the scam, between January 2003 and January 2004, it had signed an additional USD 277.7 million worth of contracts, once again with the fictitious company. This eventually saw Kenya grappling with massive scams to defraud public coffers.
- 88 At the height of the scandal, the PS in the Office of the President (in Charge of Governance and Ethics), Mr. John Githongo, conducted an investigation into the scam. He shared his findings with President Kibaki on 22 November 2005, while in exile in the UK. This is because he "thought it wise to wait until the conclusion of the politically intense referendum-related campaigning period." And wise it was, as he notes, once again, a release of the dossier during the campaign period "[would have been] construed to be part of a politically-motivated action in favour or in opposition of any political formation [of the time]." In the report, he indicates that the President was well aware of all that was going on.
- 89 The Githongo Dossier reveals that the scam involved senior-most officials in the then infant Kibaki regime, the majority of whom were the President's closest associates. Adversely mentioned in this respect are
- (a) Dr. Moody A. Awori (former Vice President),
 - (b) Mr. Kiraitu Murungi (former Minister for Justice and Constitutional Affairs),

18 "It's Time To Tell Kenyan People The Truth About Anglo-Leasing Corruption Scandal" TI Press Release, Jan 22, 2006, http://www.transparency.org/news_room/latest_news/press_

19 J. Githongo "Findings Of Graft In The Government Of Kenya" (November 2005) at http://news.bbc.co.uk/1/shared/bsp/hi/pdf/09_02_06kenya_report.pdf

20 Kenya National Audit Office Special Report by the Controller and Auditor General on the Procurement of Passport Issuing Equipment (May 2004)

- (c) Amb. Francis Muthaura (former Head of Civil Service),
- (d) Mr David Mwiraria (former Minister for Finance),
- (e) Mr Chris Murungaru (former Minister for Internal Security);
- (f) Mr. Dave Mwangi (former Permanent Secretary for Internal Security),
and
- (g) Mr. Joseph Magari (former Permanent Secretary for Treasury).

90 In April 2004, the Parliamentary Accounts Committee (PAC) requested the Controller and Auditor General (C&AG) to conduct an audit report on the Anglo Leasing transactions relating to procurement of passport issuing equipment. From 28 April 2004 to 7 May 2004, the C&AG conducted the audit and presented his report, which was eventually tabled before the National Assembly on 18 May 2004. The report disclosed that

- (a) the Department of Immigration (DOI), the actual client of the project, was not involved in the procurement process,
- (b) no due diligence tests were carried out to verify ALFC's financial and technical capacity,
- (c) Anglo Leasing had fore-knowledge of DOI's plans to modernize its passport issuing system.

91 After scrutinizing the report, PAC tabled the report for debate and adoption by the House. This was not to be as the report was subjected to heavy mutilations. For instance, the recommendation that the then Minister for Finance, Hon. Mwiraria, be held responsible for involving the government in the fraudulent project was expunged from the report, following a successful amendment motion by the then Minister for Water, Hon. Martha Karua. Further, the recommendation that Ministers be held responsible for any fraudulent activities or embezzlement of funds in their ministries was also expunged. Consequently, the motion for the adoption of the Committee's report was defeated on a vote by the House.

92 This conduct by MPs clearly demonstrates the greatest challenge to fighting corruption in Kenya; lack of political will and impunity. Disappointed, the Committee deliberated at length over the rejection of its report by the House. It resolved that the only way to push the report through the House was to collect further evidence to establish the real movers of the scam, after which it would table a comprehensive report in the House. Thus, from 7 February 2006 to sometime in March 2006, under the leadership of its Chair (Hon. Uhuru Kenyatta), it embarked

on a process of summoning and hearing various witnesses “star witnesses” In total, about 22 sittings were held, with the view of collecting further evidence to establish the real identities of individuals and entities behind the scam The Committee received both oral and written submissions

- 93 In the company of a representative from the Office of the Controller & Auditor-General and four members of staff of the National Assembly, the Committee members also travelled to London, where they heard the evidence of Mr Githongo (on 11th and 12th February 2006), which was entirely based on his earlier dossier The decision to take Mr Githongo’s evidence in London was based on the fact that though he was willing to give evidence on the subject, he had alleged that he was receiving threats from powerful personalities
- 94 In its consensual report, the Committee observed that, generally, the witnesses who appeared before it cooperated and gave vital information However, it regrettably noted that some witnesses sought refuge under the *sub judice* rule in their bid to escape giving evidence More importantly, though he appeared before the Committee, Mr Murungi refused to testify, contesting the legality of the probe On the identity of ALFC and its “shareholding”, the Committee heard evidence pointing to the fact that the fictitious firm
- (a) “is part of an organized, systematic and fraudulent scheme to fleece the government through the so-called special purpose financing vehicles for purported security contracts”, and
 - (b) is associated with Mr Deepak Kamani, Mr Anura Perera, Mr Amin Juma, Dr Merlwyn Kettering and Mrs Ludmilla Kuschenko
- 95 On the features of the security contracts, the Committee observed
- The Security contracts all have the same design and features The contracts are all for large sums of money, and have been entered into by single sourcing In each case, there are two role players, a financier and a supplier [Sometimes] the financing company and the supplier are related companies At other times, the supplier is a reputable international company [while] the financing company is a shadowy entity whose exact identity could not be legally verified It seems that the role of the financing company is to necessitate the creation of debt by the government, as opposed to outright payments for the goods or services procured Once debt is created, it is the responsibility of the Treasury to service it through the Consolidated Fund Service, as opposed to the line ministry paying for it through its voted funds In effect, therefore, the government paid money to the financing company which then paid to the supplier, using that money, who then supplied the goods or services The government then paid interest to the financing company on its own money

- 96 On the procurement process, the Committee heard that “security was used as an excuse to procure [the] contracts using single sourcing, even where the projects merely involved the postal services and meteorological department”. The Committee noted with grave concern that
- (a) key ministers (in the Kibaki government) attempted to cover-up the scam, and also hindered investigations into the same (Hon Mwiraria and Hon Murungu were adversely mentioned in this respect);
 - (b) the Treasury abdicated its role, and particularly failed to advise the government on the grossly unfavourable terms of the contracts,
 - (c) the AG was not involved in the negotiations for the contracts,
 - (d) there is no evidence that the Cabinet approved the contracts,
 - (e) “KACC was initially eager to investigate the case . . . [as] demonstrated by the preliminary report that named the vice president, Minister for Finance and their respective permanent secretaries, and civil servants as among the individuals that could provide useful information” but “when the final list of names was presented to the Attorney General for prosecution, only the names of permanent secretaries and other civil servants were included [but those of] political figures were notably missing”; and
 - (f) it was not convinced about the ability of KACC to prosecute the cases fairly, given its selective exclusion of political figures.
- 97 Mr Murgor was sacked and replaced with Mr Keriako Tobiko, a former Chief Defence Counsel in cases involving Mr Cheruiyot and others in respect of the Forensic Science Laboratory project — *a clear case of conflict of interest*, as Mr Tobiko was expected to continue with prosecution of the cases. The Committee accepted Mr Githongo’s evidence that
- (a) the discussion between Mr Githongo and Hon. Mwiraria is “authentic”,
 - (b) the Vice President (Hon Awori) was aware of the Anglo Leasing affair;
 - (c) President Kibaki was also up to date, having been “regularly briefed on the Anglo Leasing contracted and the related contracts from the time Anglo Leasing became the subject of a parliamentary inquiry [sometime in 2004]” In this respect, it observed.
- 98 The Committee was of the view that the Anglo Leasing arrangement “[was] not possible without the most elaborate collusion on the part of all concerned” — the business people involved in the supply of goods and services, civil servants (as negotiators of the terms of contracts), and the political leaders in the concerned

Ministries or departments. In this respect, the Committee went ahead to identify "culpable" individuals at all the three levels. The Committee particularly found Hon Awori culpable, making its finding in the following unequivocal terms

There is abundant evidence on record that [Hon Awori] was, contrary to his evidence before the committee, sufficiently involved in the implementation of the Anglo Leasing contracts as to take responsibility for its shortcomings. First, on the evidence of his Permanent Secretary, the [he] was involved in the procurement of the contract and was kept informed at every stage. Secondly [he] read a ministerial statement in Parliament in which he exonerated himself from any wrong doing in respect of the contract and further informed Parliament that the passports contract with [ALFC] was valid. [He] could only have read the ministerial statement with either the intention of facilitating a cover up, or he was unconcerned as to whether or not the statement was true. Thirdly, [he] misleadingly defended the reputation of Anglo Leasing in his ministerial statement. Fourthly, [nowitstanding Mr Githongo's warning], [he] abdicated responsibility which allowed Anglo Leasing to sign a contract that was outrightly disadvantageous to the public interest. His inaction, when his ministry was involved in a procurement process that was questionable is completely inexcusable.

99 Even more culpability was attributed to Hon Mwiraria, in whose respect the Committee made the following categorical observation

The Minister for Finance, Hon David Mwiraria, MP displayed a most cavalier attitude towards the Anglo Leasing and related contracts, failing to give the much needed leadership in the search for the resolution of these contracts. To begin with, according to his own testimony before the Committee, [he] was only interested in the recovery of the money paid to [ALFC] and once this had been recovered, he considered himself discharged from any further responsibility. In the view of the Committee, [he] displayed greater fear in finding out who was behind the Anglo Leasing contracts, as if he already knew

100 From the evidence presented to it, the Committee particularly inferred that Hon Mwiraria knew the identity of the highly fictitious Anglo Leasing. Thus it noted

The evidence of Mr Githongo, which the Committee accepts, was that Hon Mwiraria, MP had instructed Mr Oyula to call the principals of Anglo Leasing and ask them to refund the money. There is evidence of expensive trips to Europe that were made by law enforcement officers with a view to establishing the owners of Anglo Leasing when, all along, Hon Mwiraria and his Financial Secretary [Mr Oyula] appear to have known them. Mr Oyula's testimony also confirmed that he was instructed by Hon Mwiraria, MP to seek a refund from [ALFC].

101 The Committee was satisfied that Hon Murungi "acted to protect Hon Murungaru, MP and Mr [Alfred] Gitonga and hence obstruct justice given that he was in charge of [the] ministry [responsible for providing leadership in the fight against corruption]" The Committee observed that Mr Mwaliko misled it by, for

instance, claiming that due diligence was done (when, in fact, it was not done), and claiming that all comments forwarded to his office from the AG's office had been incorporated into the final project documents, when that was not the case Mr. Cheruiyot (former PS for Internal Security) was found to be "most evasive and unreliable" as "[h]e appeared not to remember only those matters that were prejudicial to him and remembered the details of everything else" In light of the role he played in the Forensic Laboratory Project, the Committee recommended "[f]urther inquiry involving persons who worked with [him], for example his minister and the Head of Public Service at the time"

102. On Amb Muthaura, the Committee was of the view that "[t]he head of civil service had in the advertisement misled the public that there had no wrong doing by anybody" Further, it opined that — "[t]he Principal Immigration Officer (PIO) was transferred within the knowledge of the head of the public service fully aware that he was one of the few officers who were opposed to the manner in which the passport project was handled. In fact he could not offer an explanation as to why Mr Ole Ndiema was transferred. The Committee found it difficult not [to] believe that he was not transferred because of being a 'stumbling block' in the passport procurement contract
103. Based on the above (and other findings), the Committee recommended further investigation into the conduct of, among others, Hon Awori, Hon Mwiraria, Hon Murungi, Mr Mwaliko, Mr Cheruiyot, Amb Muthaura and Mr Dave Mwangi. Unfortunately, the Committee shied from making any recommendation in respect of the President, yet it was of the unanimous view that the President was aware of all that was going on but failed to act
104. Further, the Committee recommended, among other things, that:
 - (a) the KACC Director should liaise with the AG, the Police Commissioner and other relevant bodies, with a view to ensuring prosecution of those involved in the negotiations and approval of the passport procurement project,
 - (b) the AG should ensure legal termination of projects that had not taken off,
 - (c) government programmes, whether security related or otherwise, should be included in the National Budget and tabled before the House;
 - (d) the office of the C&AG should urgently table its report (on the 18 "Anglo Leasing and Anglo Leasing type" contracts),
 - (e) a Departmental Committee called "Parliamentary Security Committee" be established to deal with national security related issues,

- (f) KACC should hasten its investigations and make its report public as soon as possible, and
- (g) all government projects, whether security related or otherwise, should receive cabinet approval before the signing of any contract or payment of any funds

105 The Committee's report was presented to the National Assembly (for tabling) on 28 March 2006. Initially, the government characteristically attempted to block the tabling of the report, questioning the legality of the same. However, on 30 March 2006, the then Speaker of the House (Hon. Francis Ole Kaparo) made a landmark ruling that, in light of the coming to fore of new evidence, PAC's re-opening of the investigations was justified.²¹ This effectively paved way for the tabling and eventual adoption of the report (on 18 April 2006). In sanctioning the tabling of the report, the Hon. Speaker ruled:

I am persuaded to take the view that auditing is a continuous process that moves forward and backwards. Its aim is to establish whether public funds have been utilized in the intended way, economically, efficiently and within the legal framework. It is also meant to establish whether there has been impropriety in the utilisation of funds, and if there has been, to seek redress, close the gaps and stop further impropriety. In short, to stop waste/misappropriation of public funds. It is a continuing process. In the same breath, the PAC, being the first Committee ever to be created in the history of the House of Commons of the United Kingdom, from where we derive our own procedures, is a Select Committee as opposed to ad hoc, Sessional and Departmental Committees. It is alive all the time. It watches over the application of taxes collected from the people by the Executive. It is for this reason that it is referred to as the "Watchdog Committee". The "dog" must watch. The "dog" in the Committee is not allowed to sleep in its watch, and so must the Committee. It must be vigilant and watchful on behalf of the House at all times. It is dynamic and not static in its very nature. It is for this greater public interest, in spite of my misgivings on the procedure used in compiling this Report, that I am inclined to admit this report for consideration by this House.

106 During 2004/2005 and part of 2005/2006, the C&AG carried out audits of the 18 security related projects funded through foreign supplier/credit arrangements. The culminating report, which was presented to the National Assembly in April 2006, summarized the outcome of the audit, particularly highlighting issues relating to financing, procurement and implementation of the projects.²² The report came hot on the heels of the PAC Report.

²¹ National Assembly Official(Record) Hansard: 30/3/2006: 236-239

²² Kenya National Audit Office: Special Report of the Controller and Auditor General on Financing, Procurement and Implementation Strategy Related Projects; April 2006)

- 107 The audit made a number of serious revelations about the scam, which, in many respects, corroborated the findings made in the *Githongo Dossier* and the PAC Report. For instance, the audit report revealed that
- (a) Out of the 18 projects, 12 were contracted and respective agreements signed between 1997 and December, while the remaining six were contracted and signed between January 2003 and January 2004. Out of the latter six, three were initiated and negotiated between the years 2000 and 2002, no information was available regarding the initiation and negotiation of the other three.
 - (b) The policy regarding consideration and use of lease financing and supplier credit arrangements in respect of key priority security projects had been approved by the cabinet in 2001, as an alternative to the unreliable and fast-dwindling donor support.
 - (c) Through the 18 contracts, the government had been committed to spending a total of KES 56.33 billion. The commitments, whose net value is equivalent to 16.21% of Kenya's Gross Annual Expenditure for the year 2003/2004, assumed the character of "irrevocable Promissory Notes which were given to the credit providers on the dates the respective credit agreements were signed".
 - (d) Competitive bidding as provided for in the Public Procurement Regulations (2001) was not applied in the identification and award of the contracts to the various suppliers. In the absence of this, it was not possible for the audit team to ascertain how the contract sums were determined and accepted by the government as fair and competitive.
 - (e) Similarly, no competitive bidding was used to identify the financiers/credit providers. In the absence of this, the audit team could not ascertain how the terms of the credit, including the interest rates chargeable, were determined and agreed upon. As a result, it was equally not possible to ascertain whether the respective interest rates and other terms were fair and competitive.
 - (f) For most of the contracts, the suppliers were not subjected to due diligence tests. Consequently, it was not possible for the audit team to establish how the competence, capacity and capability of the contracted suppliers were ascertained.
 - (g) Seven of the supplier/credit providers do not exist in the countries in which they are purported to be registered/domiciled, and may therefore not be

bona fide registered business firms. The seven are: *Forensic Laboratories* (purportedly based in Edinburg, Scotland), *Anglo Leasing & Finance Ltd* (purportedly based in Liverpool, UK), *Sound Day Corporation* (purportedly based in Daventry, Scotland); *Infotalent Ltd* (purportedly based in Geneva, Switzerland), *Midland Finance & Securities Ltd* (purportedly based in Geneva, Switzerland), *Apex Finance Corporation* (purportedly based in Geneva, Switzerland), and *First Merchantile Securities Corporation* (purportedly based in Geneva, Switzerland). The audit team further expressed fears that additional firms may also prove fictitious if probes are made into their identities.

- (h) The audit team could not establish the amounts of credit disbursed or the amounts which remained undisbursed as there were no invoices, delivery notes or certificates of completion of works, which would ordinarily indicate the value of the contract deliverables accomplished as at the date of payment. In fact, the team was surprised to find out that none of the contracts had provision requiring the suppliers to submit these documents to the government.
- (i) From the evidence and information gathered, it was evident that "the contract sums and particularly the prices of goods/equipment were grossly inflated compared to the market prices at the time"
- (j) In the absence of complete information on the work/goods/services delivered in respect of each of the 18 contracts, the audit team could not establish the extent of actual losses suffered by the government.

108 On the basis of this revelations, the C&AG recommended, among other things, that

- (a) immediate steps be taken to establish the legal status of the respective suppliers/financiers, including the seven earlier mentioned,
- (b) the responsible Accounting Officers should be required to provide all information and documentation necessary for the determination of the actual losses suffered by the government in respect of each of the 18 contracts,
- (c) where overpayment to the suppliers/financiers is proved, or where payments have been made but no work/goods/services have been received, efforts (including legal action) should be made to recover such overpayments,

- (d) all security projects' budgets be presented to Parliament for approval under the respective Ministry/Department's estimates/votes,
- (e) a Special Procurement Committee to oversee the procurement of security related equipment/services be established, and
- (f) consideration be given for the establishment of a Special Parliamentary Committee to deal with Defence/National Security issues, including the related accounts and audit reports

Implementation of the various reports: Review of KACC's responses

- 109 An analysis of KACC's response to the various PAC and C&AG reports reveals a mixed record. It was surprised that the first time KACC conducted an investigation was in the quarterly period January-March 2005, yet the matter had come to public limelight as early as April 2004. In the first place, why it took KACC this long to respond was beyond the TJRC's comprehension.
- 110 In the January-March 2005 quarterly period, KACC inquired into contracts relating to the CID Forensic Laboratories Project.²³ Its investigations revealed, among other things, that "the government procurement procedures were not followed in awarding the contract" and "the contract was signed before establishing the legal status of the two companies." Though it could not establish the identity of the Directors of the two companies, the investigation revealed that, by 14 June 2004, "all the money paid to [ALFC] [had been] paid back to the Government." On this basis, KACC recoiled the prosecution of Mr. Cheruiyot (former PS), Mr. John F.A. Agili (former Finance Officer in the Office of the President) and Mr. Francis Sang (former Director of CID). The file was forwarded to the AG on 11 February 2005. On 2 March 2005, the AG accepted the recommendation to prosecute Mr. Cheruiyot and Mr. Agili, but recommended that Mr. Sang be treated as a witness "as his evidence would be vital."
- 111 During the January-March 2005 quarterly period, KACC also investigated the contract relating to the supply and installation of new passport issuing system for the Department of Immigration. Investigations revealed that "[ALFC] is not registered either in UK or in Kenya" and "[the] contract was entered into without verifying the legal status of the company and in total breach of procurement procedures." The investigation further established that "the money paid to [ALFC] was paid back to the Government by 13th May 2004"

²³ Kenya Anti-Corruption Commission (KACC) Quarterly Report for the Period January-March 2005 (April 2005) 2-3

- 112 Based on its findings, KACC recommended the prosecution of Mr Mwaliko (former PS in the Office of the Vice President), Mr Magari (former Treasury PS), Dr Wilson Kipsang Sionik (former Director of the Treasury's Government Information Technology Systems) and Mr David L Onyonka (former Head of the Treasury's Debt Management Division). The file was forwarded to the AG on 11th February 2005 and the recommendation to prosecute was accepted on 16th February 2005
- 113 In the July-September 2006 quarterly period, KACC inquired into allegations of irregular contract involving Globetel Inc (UK) relating to the supply and installation of a multi-channel security system for the Administration Police, and found out that the procurement process was marred with various irregularities. For instance, "[t]he project was [neither] planned for nor was it budgeted for as required by law", "[n]o due diligence was done to assess the competence and capability of the contractors", and "[f]urther, commitment fee and the first instalment were paid before anything was done to implement the project". The file was reportedly forwarded to the AG on 27 September 2006, with clear recommendations that the former PS, OP (in charge of Provincial Administration & International Security), the former Deputy Chief Finance Officer, the former Finance Minister and the former Treasury PS be charged with criminal offences
- 114 The quarterly period also saw investigations into other "Anglo Leasing and Anglo Leasing type" projects
- 115 **The e-Cops Project** Investigations into this ambitious project — which was intended to see countrywide computerization of the security, law and order systems — established various irregularities in the procurement process. For instance, it revealed that "[t]he project was not planned for nor was it budgeted for as required by law" and that "[n]o due diligence was done to assess the competence and capability of the contractors". The file was forwarded to the AG on 27 September 2006, with recommendation that the former PS in the Office of the President in-charge of Internal Security, *Mr Mwiraria* (former Finance Minister) and former Treasury PS be charged in court
116. **The NEWSS Project:** KACC inquiries into this project — which was intended to modernize the country's early warning food security system at the Meteorological Department — established that "[t]he project was approved despite the fact that no budgetary allocation had been made". It also revealed that "[t]he procurement procedures were not followed". The file was forwarded to the AG on 29 September 2006, with recommendation that the former Director of the

Meteorological Department, former Transport Minister, former Finance Minister and former Financial Secretary be charged in court

- 117 **The Spacenet Project:** KACC's investigations into this project — which was intended to install VSAT-based internet services in all post offices in Kenya (even in rural post offices where there is no electricity!) — revealed that the project had been secretly negotiated between the former Postmaster General of the Postal Corporation of Kenya and one Mr Michael Alan of Spacenet Corporation of USA, with the cumulative approval of the former PS, Ministry of Transport, the former Minister for Transport and the former Minister for Finance. The investigation further revealed that the project was camouflaged as a security project. The file was forwarded to the AG, with the recommendation that the former Postmaster General, the former Minister for Transport, the former PS in the Ministry of Transport, the former Minister for Finance and the former Financial Secretary be charged in court.
- 118 **The Police Department Modernization Project:** KACC also inquired into this project, which was intended to secure financing for the modernization of Police equipment and accessories (including an assortment of arms and ammunitions). The investigations revealed that "there was no budgetary allocation for the project", and that a commitment fee of EUR 1.2 million was paid upfront, but no supplies were made. The file was forwarded to the AG on 29 September, with recommendation that the former PS in the Office of the President in-charge of Internal Security, the former Minister for Internal Security, the former Treasury PS, former Finance Minister) and former Head of Treasury's Debt Management Department be charged.

Anglo Leasing and Related Prosecutions: Progress Review

- 119 So far, the government has done little to implement the PAC Report. Mr Mwaliko was charged in court alongside Mr Onyonka (Debt Management Department) and Dr Wilson Sionik. In March 2012, the latter two were acquitted for lack of sufficient evidence while Mr Mwaliko was put on his defence. It suffices to note that prosecution of the trio started way before the PAC recommendations. Recently, some leaked US diplomatic cables (from the US Embassy in Nairobi) detailed how the former AG (Wako) and the former Director of the defunct KACC (Ringera) frustrated efforts to prosecute the big names behind Anglo Leasing scam.
- 120 The Grand Regency saga was an outcrop of the Goldenberg Affair. It revolved around the famous Grand Regency Hotel, one of the properties believed to have

been acquired (by Kamlesh Pattni) with proceeds from the Goldenberg scam. The CBK came into the tussle via a credit of KES 9.9 billion to Mr. Pattni's Exchange Bank, which debt was passed on to Mr. Pattni sometime in June 1993.

- 121 When Mr. Pattni failed to fully repay the loan, the CBK secured a charge over the Hotel, then registered in the name of Uhuru Highway Development Ltd., one of the many companies owned by Mr. Pattni. On 15 April 1994, CBK appointed a receiver-manager. Later, it attempted to exercise its statutory power of sale under the charge. This prompted Mr. Pattni and UHDL to file a suit, which resulted in injunctive orders restraining the Bank from exercising its statutory power of sale.²⁴
- 122 In 2003, KACC filed a suit against Mr. Pattni and 16 others, with the intention of repossessing the hotel, arguing that it had been obtained using illegally acquired public funds.²⁵ In April 2008, after endless battles in court, Mr. Pattni and UHDL gave in, a settlement was registered in court, by which the pending suits were discontinued and terminated, and the hotel handed over to CBK. Thereafter, the hotel was controversially sold to the Libyan Arab African Investment Company Kenya Ltd (LAICO).
- 123 The controversy surrounding the sale of the Hotel surfaced in the National Assembly when, on 23 April 2008, the MP for Imenti Central, Hon. Gitobu Imanyara, sought a Ministerial Statement from the Minister for Finance. Hon. Imanyara specifically wanted to know (1) whether UHDL and CBK had sold, or were in the process of selling, the Hotel to a company known as Meridian Arab African Investment Company (MAAIC), and (2) whether the Government of Kenya had agreed to withdraw all civil and criminal cases revolving around Pattni and his companies.²⁶
- 124 On 29 April 2008, the Finance Minister Hon. Amos Kimunya issued the Ministerial Statement, wherein he indicated, among other things, that
- (a) he had directed CBK to move and dispose of the Hotel at the earliest opportunity,
 - (b) CBK would be selling the Hotel under its statutory power of sale,
 - (c) the public is assured that the sale value will not be less than the highest open market value obtained during the valuation of the hotel, and
 - (d) the Government had a keen interest in the sale, and that the Minister would consult and guide CBK in the sale process.

²⁴ Uhuru Highway Development Ltd. Kamlesh Pattni & Others –Vs- Central Bank of Kenya & Others. HCC NO. 589 OF 1999.

²⁵ Kenya Anti-Corruption Commission –Vs- Kamlesh Pattni & Others. HCC NO. 1111 of 2003.

²⁶ Kenya National Assembly Hansard (23 April 2008) xxxx.

- 125 Responding specifically to the issues raised by Hon. Imanyara, the Minister stated that “[i]t is not true that the hotel has been sold to Meridian Arab African Investment Company” and “[i]t is not true that the Government has given amnesty to Kamlesh Pattni and his associated companies” Certainly, this was not true as, by the time the Minister issued the Ministerial Statement, so much water had gone under the bridge in relation to the sale of the hotel (to LAICO) In fact, Kamlesh Pattni had already instructed his counsels to negotiate with CBK with a view to selling the hotel to LAICO, and the CBK had been negotiating the sale of the hotel (to LAICO) and its Board had already sanctioned the sale

The Cockar Probe

126. The Finance Minister’s Ministerial Statement did not settle the dust, in fact, it generated more heated debates, both within the House and in the public domain On 11 July 2008, the intense public pressure prompted President Kiabki to appoint a three-member Commission, with Justice (Rtd.) Abdul Majid Cockar, a former Chief Justice of the Republic, as its Chairperson Its terms of reference included a broad mandate to investigate the circumstances surrounding the sale of the hotel, the role played by named Treasury and CBK officials. In the end, it was expected to give recommendations on legal and administrative measures to redress the anomaly. On 24 November 2008, it submitted its final report to the President
- 127 The report contains a precise empirical analysis of the events leading up to the sale of the hotel The analysis is based on the oral and written presentations made by various individuals who appeared before the Cockar Commission, including CBK Governor Professor Njuguna Ndung’u, Lands Minister Hon. James Orendo, CBK Board Secretary Mr. Kennedy Kaunda Abuga, the Commissioner of Lands Mr. Zablon Mabea, Mr. Kamles Mansukhlal Pattni, the then KACC Assistant Director Ms. Fatuma Sichale, the then Interim Director-General of the Public Procurement Oversight Authority (PPOA) Mr. Robert Hunja, Mr. David Masika (a director of Lloyd Masika Ltd.), and three former receiver-managers of the hotel The Cockar Commission reported that former Finance Minister Hon. Amos Kimunya chose not to appear before it to give evidence
128. On the legal front, the Cockar Commission made two recommendations of a legal reform character First, it called for the amendment of the Public Procurement and Disposal Act, 2005 to explicitly extend the scope of its application to the disposal of real property The Cockar Commission observed that, as it is, the Act gives public officers room to circumvent its provision when disposing real property as the Act apparently governs disposal of “unserviceable, obsolete or surplus stores and equipment”

- 129 The Cockar Commission also recommended review of the CBK Act to strengthen the CBK Board's statutory responsibility of reviewing and checking any excesses of the Governor, who happens to be its Chairperson. The Cockar Commission pointed out that a similar recommendation had been made by the Bosire Commission, but regrettably noted that the same had not been acted upon.
- 130 The Cockar Commission found that the sale of the hotel was questionable and flawed, as it lacked transparency and "did not realise the best value for the Hotel". On the culpability of individuals involved in the irregular sale of the hotel, the Cockar Commission was of the view that, though he was not directly involved in the sale of the hotel, Hon. Kimunya was adequately briefed but failed to give Parliament and the people of Kenya the true picture on the sale of the hotel. Thus it concluded "As the Minister responsible for the affairs of the CBK, he must take responsibility for the questionable disposal of the Hotel".
- 131 As for the CBK Governor, the Cockar Commission was of the view that "[he] was not truthful to other public institutions about the sale of the Hotel". Particularly finding this conduct to be contrary to the provisions of section 18 of the Public Officer Ethics Act, 2003, it concluded that "[t]he Governor must take responsibility for the disposal of the hotel in a secretive and questionable manner". A similar finding was made in respect of Mr. Abuga. However, at the time of publishing this report, no action had been taken against Amos Kimunya, Njuguna Ndungu or Kennedy Abuga for their role in the clandestine sale of the Grand Regency Hotel.

Initiatives to Combat Corruption in Kenya

- 132 The defunct Kenya Anti-Corruption Commission (KACC) had carried out considerable research into prior efforts made to fight corruption in Kenya before 2003 when the law establishing KACC was enacted. This research, embodied in the manual developed to educate public officers and members of the public, forms the content on anti-corruption efforts in Kenya since colonial times.²⁷
- 133 There has been growing public awareness of the consequences of corruption, its negative and destructive effects on the economy and development, and the need to eliminate it. In seeking to forcefully address corruption, Parliament passed the Anti-Corruption and Economic Crimes Act 2003 and the Public Officer Ethics Acts

²⁷ The Anti-Corruption and Economic Crimes Act 2003 Explained: A Manual for Public Officers and Members of the Public, a publication of the Kenya Anti-Corruption Commission.

2003 (POEA). These Acts came into effect on 2nd May 2003, before Kenya signed and ratified the United Nations Convention Against Corruption (UNCAC).

- 134 Historically, the KACC Manual acknowledges the fact that corruption, as a problem in Kenya, dated back to the colonial times. In 1956, the Prevention of Corruption Act, Chapter 65 of the Laws of Kenya, was passed by the British colonial authorities in an effort to provide a legal framework for combating public corruption. It provided for the punishment of bribery involving holders of public office. The act was amended in 1991 to provide stiffer penalties for those convicted of corruption. In 1993 there was an established Anti-Corruption Squad in the Police force. The Squad was established administratively to spearhead the fight against corruption.
- 135 In 1997, the Prevention of Corruption Act was amended to establish the Kenya Anti-Corruption Authority (KACA). KACA existed until year 2000 when it was declared unconstitutional by a constitutional court. This declaration was on the basis, among others, that the powers of KACA to prosecute went against Section 26 of the Constitution which empowers the Attorney General to prosecute cases.²⁸ In 2001, the Anti-Corruption Police Unit was formed administratively to continue with the work of KACA. This Unit existed until 2nd May 2003 when the Anti-Corruption and Economic Crimes Act 2003 which established the Kenya Anti-Corruption Commission (KACC) as the main legal body with the mandate to fight corruption in Kenya came into effect. The Commission replaced the Anti-Corruption Police Unit.
- 136 The new Constitution of Kenya 2010 not only entrenched the anti-corruption commission in Chapter 6 but also, renamed it as the Ethics and Anti-Corruption Commission (EACC). Details of the new anti-corruption laws emanating from the new Constitution are contained in the following portion of this chapter that delves into the legal instruments governing anti-corruption efforts in Kenya.

The Anti-Corruption Legal Framework

- 137 This portion of the Chapter identifies and analyses all laws that have a bearing on anti-corruption efforts, acknowledge the gains made, and also point out legal and institutional weaknesses that need to be addressed. The observations made at this juncture will form part of the final recommendations by TJRC on what Kenya should do to address past violation of economic rights. At a quick glance, the following legal instruments govern the fight against corruption at the global, regional and domestic levels.

²⁸ Stephen Mwai Gachengo and Albert Muthee Kahuria –v Republic. NRB HC MISC APP NO. 302 of 2002.

- ┆ The United Nations Convention Against Corruption (UNCAC)
 - ┆ African Union Convention on Preventing and Combating Corruption
 - ┆ The Proceeds of Crime and Anti-Money Laundering Act of 2009
 - ┆ Anti-Corruption and Economic Crimes Act of 2003
 - ┆ Public Officer Ethics Act of 2003
 - ┆ Ethics and Anti-Corruption Commission Act of 2011
 - ┆ Leadership and Integrity Act of 2012

138 Other relevant laws that directly or indirectly strengthen the governance and anti-corruption efforts in Kenya are

 - ┆ Criminal Procedure Code
 - ┆ Mutual Legal Assistance Act of 2011
 - ┆ Public Finance Management Act, 2012
 - ┆ Public Procurement and Disposal Act, 2005
 - ┆ Banking Act, Chapter 488 of the Laws of Kenya
 - ┆ Foreign Judgements(Reciprocal Enforcement) Act, Chapter 45 of the Laws of Kenya
 - ┆ Civil Procedure Act, and Civil Procedure Rules of 2010

139 The fight against corruption in the entire world is now hinged on the United Nations Convention Against Corruption (UNCAC) Kenya was the first country in the world to sign and simultaneously ratify the Convention on 9/12/2003 in Merida Mexico At the regional level, Kenya has also ratified the African Union Convention on Preventing and Combating Corruption, and is working with other partner states of the East African Community (EAC) towards the development of the East African Community Protocol on Preventing and Combating Corruption All these efforts are aimed at promoting good governance, ethics and integrity in the management of public services and property

140 It is worth noting that Kenya's main anti-corruption statutes, namely the Anti-Corruption and Economic Crimes, 2003(ACECA) and the Public Officer Ethics Act, 2003(POEA) were enacted in May 2003 before the adoption of the UNCAC in December 2003 The ACECA established the Kenya Anti-Corruption Commission

(KACC) Kenya had therefore established her anti-corruption legal and institutional framework before the ratification of the UNCAC. This indeed is commendable on the part of the Government of Kenya. The lack of a national anti-corruption policy has however been blamed for the lack of focus and disconcerted efforts in this arena.

The United Nations Convention Against Corruption (UNCAC)

- 141 The four main pillars of UNCAC, that State Parties such as Kenya are measured against, are:
- ┆ Prevention of corruption in both the public and private sector by establishing anti-corruption bodies, strengthening transparency and accountability in financial matters, public procurement, funding of political parties, election campaigns, appointments and promotions on merit, development of codes of conduct, and the participation of the civil society and private sector in preventing corruption
 - ┆ Criminalization and law enforcement
 - ┆ International cooperation i.e. mutual legal assistance, extradition and the use of special investigative techniques, enact proceeds of crime and anti-money laundering law
 - ┆ Asset recovery i.e. the return of corruptly acquired assets to the country of origin through freezing, seizure, confiscation, repatriation, and compensation of victims and legitimate owners
- 142 The UNCAC Gap Analysis Report of 2009 showed that Kenya had substantially complied with the provisions of the UNCAC through enactment of the Anti-Corruption and Economic Crimes Act (ACECA), the Public Officer Ethics Act (POEA) and other laws on public finance, procurement and political party financing. There was however more to be done to strengthen public institutions in Kenya and enhance transparency and accountability. This opportunity presented itself in the promulgation of the new Constitution of Kenya on 27/8/2010, ushering in a new political, social and economic dispensation. Of relevance in the fight against corruption is Chapter Six on Leadership and Integrity that gave birth to the new Ethics and Anti-Corruption Commission (EACC) and the Ethics and Anti-Corruption Commission Act (EACC Act) No 22 of 2011.
- 143 Article 79 gave power to parliament to enact legislation to establish an Ethics and Anti-Corruption Commission (EACC) to ensure compliance with the provisions of Chapter Six. After consultations and various drafts passing from

one government office to another, parliament finally enacted the EACC Act that received Presidential assent on 27 August 2011

- 144 It is important to note that the EACC Act did not repeal the ACECA, but only repealed Part III of ACECA that establishes the KACC, the Advisory Board, their composition and respective functions. In a nutshell therefore, all the provisions of the ACECA save for Part III still form part of the anti-corruption legal framework in Kenya

Constitution of Kenya 2010

■ *Constitutional entrenchment*

- 145 Article 79, which is housed in Chapter 6 of the Constitution, obligates parliament to enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter 15, for purposes of ensuring compliance with and enforcement of the provisions of Chapter 6 on Leadership and Integrity. The new anti-corruption body is therefore entrenched in the Constitution, unlike KACC which was a creature of the statute. It is therefore a permanent creature of our governance system and cannot be disbanded at the whims or wishes or personal expediency of a few selfish individuals, as has been in the past.
- 146 However, Article 79, unlike other Articles establishing constitutional commissions, does not prescribe the specific functions required of an anti-corruption agency as provided for in the four (4) pillars of UNCAC. These are prevention, investigation, asset recovery and international cooperation.
- 147 Out of the eleven (11) Commissions established by the Constitution, it is only the EACC that is not listed as one of the Constitutional Commissions under Article 248 of Chapter 15, and whose functions are not outlined in the enabling Article. Other than the general objects, authority, funding, composition, removal from office, functions and powers of bestowed upon all Commissions and Independent Offices under Chapter 15, the specific functions and powers of the EACC are left to parliament to determine through legislation.
- 148 A keen perusal of the articles establishing the ten (10) other Commissions will illustrate this glaring legislative discrimination or bias in the establishment of EACC. Their composition and functions are clearly enumerated in the Constitution, thereby leaving no room for speculation, ambiguity or interference while enacting their respective enabling statutes. These are.

- Kenya National Human Rights and Equality Commission (Article 59)
- National Land Commission (Article 67)
- Independent Electoral and Boundaries Commission (Article 88)
- Parliamentary Service Commission (Article 127)
- Judicial Service Commission (Article 171)
- Commission on Revenue Allocation (Article 216)
- Salaries and Remuneration Commission (Article 230)
- Teachers Service Commission (Article 237)
- National Police Service Commission (Article 246)
- Commission on Implementation of the Constitution (Sixth Schedule-Section 5)

149 The anti-corruption commission is the key institution in the realm of good governance, and should therefore have been accorded superior or similar status to all the other Constitutional commissions. The importance of the EACC is further reinforcement by the power and authority conferred upon it, as a watchdog agency, to oversee issues of integrity and ethics in all the other public institutions, including the Commissions which have been accorded special treatment. The EACC is indeed the enforcer of the national values enshrined in Article 10 and Chapter 6 of the in the New Constitution. A weak constitutional basis is a recipe for a weak policy and legal framework, hence diluting all the gains made since Kenya signed and ratified UNCAC on 9/12/2003. This is the negative implication and ambiguity that Kenyans will have to grapple with until the EACC is given a sound constitutional grounding through amendment of the Constitution.

150 This apparent ambiguity in the Constitution may perhaps explain the varied opinions that emerged at the different stages of drafting the Ethics and Anti-Corruption Act of 2011, as it weaved its way through the Kenya Anti-Corruption Commission, Ministry of Justice and Constitutional Affairs, Kenya Law Reform Commission, Commission on Implementation of the Constitution, Attorney General's Office, Cabinet and Parliament. The Cabinet draft that was published on 19/8/2011 for introduction into the National Assembly, for example, gave prosecutorial powers to the EACC in case the Director of Public Prosecutions failed to act on recommendations from the EACC. Parliament deleted this provision, arguing that such a function is already constitutionally vested in the now independent office of the Director of Public Prosecutions.

- 151 Notwithstanding this weak constitutional mandate of EACC, it is a giant leap from the previous scenario where the body existed only in statutes. It gives hope to the future establishment and solid existence of a strong anti-corruption agency as envisaged in UNCAC.

New governance structure

- 152 Article 250 of the Constitution provides that "Each commission shall consist of at least three, but not more than nine commissioners" In line with the provisions of Article 250, the new law is a radical departure from the previous provisions relating to the composition, appointment and terms of office of the commissioners. Part III of ACECA, which created the Kenya Anti-Corruption Commission and Advisory Board, was repealed.
- 153 The effect of this new law is that the KACC Advisory Board under ACECA, which consisted of 12 persons nominated by private professional bodies and religious organisations, has been replaced by a Chairperson and two (2) Commissioners who will be openly and competitively recruited by a Selection Panel comprising representatives from the public, private and religious sector. The intention, it appears, was to have a lean team of experts steering the policy and strategic direction of the new EACC. Indeed, the number of Commissioners to serve on the EACC was a point of diversion between the stakeholders at different stages of the deliberations. Whereas the Cabinet had provided for nine (9) commissioners, parliament reduced it to only three (3) commissioners. This small number of Commissioners, although desirable, may present operational challenges.
- 154 Firstly, there is no provision in EACC Act on the mode of appointment or election of the Vice-Chairperson yet Article 250(10) of the Constitution provides that the members of a commission shall elect a vice-chairperson from among themselves. This ought to have been part of Section 6 of EACC Act or in the section appearing immediately thereafter.
- 155 Secondly, Section 14 of EACC Act empowers the EACC to establish committees for the effective discharge of its functions. With a small number of only 3 commissioners, it will be near impossible to establish any such committees. The effect of this is that all the 3 commissioners will belong to all the committees hence defeating the purpose of setting up different committees to deal with different aspects of the Commission's functions or powers.
- 156 Thirdly, and in what appears confusing, Section 6 of the Second Schedule to the EACC Act, that prescribes how the business and affairs of the EACC shall be conducted,

makes reference to a vice-chairperson who shall preside at meetings in the absence of the Chairperson. Where both are absent, the members shall elect one of them to preside. This is where the operational challenges and weaknesses of the new law become evident. The EACC commissioners are only three (3) in number including the chairperson. Assuming that they have elected one of the other two to be the vice chairperson, and that both the chair and vice chairperson are absent, this leaves only one commissioner to continue with the meeting. This is impossible because section 5 of the Second Schedule sets the quorum for the conduct of business at a meeting of the Commission at two thirds of all the members of the EACC.

- 157 Although Section 14 of EACC Act allows the EACC to co-opt persons into membership of the Committees, these persons may only attend meetings and deliberate but shall have no power to vote. No decision can therefore be made where there is lack of quorum, and this could delay and or paralyse the work of the Commission. For operational expediency and quorum requirements, it would have been prudent to have at least five or seven commissioners.
- 159 There are several positive aspects of the new governance structure that are worth noting
- ┆ The Commissioners will appoint the Secretary who will also be the Chief Executive Officer and accounting officer. This is a departure from the previous CEO who was appointed by the President, hence vulnerable to executive pressure and political interference.
 - ┆ The duties of the Secretary are also more explicit, clear and the chain of command between the Secretary, the Commissioners and the staff is clear.
 - ┆ The Commissioners and the Secretary will serve for a single term of 6 years in contradiction to the previous Board members who could be nominated to serve for another term by their professional bodies. This guards against the risk of top anti-corruption officials staying in office for too long and possibly getting too familiar with suspects.
 - ┆ The Commissioners will serve on a full time basis hence able to give policy and strategic direction by devoting all their time and energy to the affairs of the Commission. The previous Board members were 12 in number (too many!) and had several other public and private matters to attend to, hence diluting their commitment and quality of service to the Commission.
 - ┆ The Commissioners will also deal with complaints against the employees of the Commission, such as abuse of power, impropriety, misconduct, maladministration,

delay in investigations, unreasonable invasion of privacy, etc. Such complaints were previously handled by the Director in a secretive and unclear manner that left a lot of suspicion and or allegations of bias and favoritism, or outright inaction altogether. It is hoped that all complaints will now be fairly and openly addressed to their terminal stages. The abuse of power and delay in investigations is a particularly critical issue as concerns had been raised by members of the public that it took too long to investigate complaints of corruption, and or that the KACC appeared to conduct biased or shoddy investigations.

Code of Conduct

159 Section 21 of the EACC Act provides for a Code of Conduct contained in the Third Schedule of the Act that binds all the Commissioners and the staff of the EACC. This differs from ACECA which left the drafting of the Code to the CEO. Furthermore, the Code of Conduct for the Advisory Board was drafted by themselves independently of the Commission employees. The new law therefore ensures uniformity and equal standards of ethical behaviour for all persons working for the Commission. This Code is heavily borrowed from Chapter Six of the Constitution, which EACC is supposed to enforce. The enforcer must therefore be composed of persons of integrity before they can check on the integrity of others. The salient features of the Code are herein below summarized:

- ┆ Commissioners and employees are barred from doing business with the Commission, and are required to avoid, and to disclose any interest in a contact, or conflict between their personal and official duties
- ┆ Most importantly, they are not supposed to receive any gifts or favours that would influence their decisions, and not to actively participate in fundraisings
- ┆ The Act also clarifies that the provisions of this Code are in addition to the provisions of the Public Officer Ethics Act, and that where there is a conflict, the provisions of the POEA will prevail. Officers of the new EACC will therefore be expected to be people of unquestionable character and high levels of integrity

Mandate of the Commission

160 It is important to note that the new law does not repeal the entire ACECA of 2003 but has only two amendments captured in Sections 36 and 37 of the EACC Act. In the first amendment (under Section 36), Section 2 of ACECA is amended to delete the name "*Kenya Anti-Corruption Commission*" and substitute it with the new name "*Ethics and Anti-Corruption Commission*" established under Section 3 of the

EACC Act, pursuant to Article 79 of the Constitution. In the second amendment captured under Section 37 of EACC Act, Part III of the ACECA that establishes the Advisory Board was repealed.

161. The effect of this is that all the offences created under Part V of ACECA and the provisions relating to investigations (Part IV), compensation and recovery of improper benefits (Part VI), evidence (Part VII), execution (Part VIIA), miscellaneous provisions on suspension and disqualification of public officers charged with corruption, protection of informers, e.t.c (Part VIII), repeal, transition and amendments (Part IX) have been retained. This is contrary to public opinion that suggests that the new commission has been rendered weak or toothless, and that all the work that had been carried out for the last six years would go down the drain. On the contrary, the new Act, in the saving and transitional provisions, clearly stipulates that all the orders and processes of the old body shall be deemed to be carried out under the new body and new law.
162. The mandate of the Commission has, in effect been expanded, to give it more teeth as regards the mainstreaming of ethics and integrity in the public sector. Section 11 of EACC Act states provides for the following functions of the Anti-Corruption Commission
- (i) **General functions and powers under article 252 of the Constitution**
163. These include, conducting investigations on its own initiative or on a complaint made by a member of the public, powers necessary for conciliation, mediation and negotiation, recruiting its own staff and, other functions and powers prescribed by legislation.
- (ii) **Functions of the EACC under Chapter Six**
164. The EACC established by Article 79 of the Constitution is to ensure compliance with and enforce the provisions of Chapter Six on Leadership and Integrity as relates to State Officers. These are, the guiding principles of leadership and integrity(Article 73), oath of office(Article 74), conduct of state officers(Article 75), financial probity(Article 76), restriction on activities of state officers(Article 77), citizenship and leadership(Article 78)
165. In summary, the EACC will ensure that State Officers are
- ┆ selected to public office based on personal integrity, competence and suitability
 - ┆ elected in free and fair elections

- not influenced by nepotism, favoritism, other improper motives or corruption in making decisions
 - └ declare any personal interest that may conflict with public duties
 - └ subscribe to oath or affirmation of office
 - deliver gifts or donations given to them to the State
 - do not maintain bank accounts outside Kenya
 - └ do not participate in any other gainful employment
 - └ do not hold office in a political party
 - └ citizens of Kenya and do not hold dual citizenship
 - └ retired State Officers do not hold more than two concurrent remunerative positions in a state organ
- 166 Previously, the issue of ethics, development and enforcement of ethical standards was provided for in the Public Officer Ethics Act, which gave the powers to the Responsible Commissions to receive complaints and take disciplinary or other administrative action against the officers involved. Examples of the Responsible Commissions under POEA are the Public Service Commission, Teachers Service Commission, Judicial Service Commission, inter alia. The Kenya Anti-Corruption Commission (KACC) had no powers in this regard and appeared helpless when such conduct was reported or disclosed during investigations. The KACC could only refer such issues to the responsible commission to deal administratively or otherwise under Sections 35-39 of Public Officer Ethics Act (POEA)
- 167 Apart from investigating corruption, raising awareness about the dangers of corruption and examining the work processes in public institutions as provided for under the now repealed Section 7 of ACECA, the new EACCC's functions have been expanded, under Sections 11 and 13 of EACC Act, to include
- └ development of codes of conduct for public officers
 - └ oversee enforcement of codes of conduct for public officers
 - └ receive complaints on breach of codes of ethics
 - └ Investigate and recommend to the DPP prosecution for any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter 6 of the Constitution

- recommend appropriate action to be taken against public officers for unethical conduct
- Monitor the practices of public bodies to detect corruption and secure the revision of methods of work that are conducive to corrupt practices. This function is however subject to Article 31 (Right to Privacy) This function implies that the EACC can deploy undercover techniques to detect corruption. Note that the Right to Privacy is not absolute and can be limited in public interest, so long as the requirements of Article 24 of the Constitution are satisfied

Asset Recovery

- 168 Asset recovery, under Article 51 of UNCAC, is the fundamental anti-corruption objective. This function, that was previously conferred upon KACC under Section 7 of ACECA, has been retained in Section 11(1)(k) of the new Act. The EACC shall institute and conduct proceedings in court for purposes of recovery or protection of public property, or to freeze, confiscate proceeds of corruption, payment of compensation or other punitive or disciplinary measures.

Inter agency collaboration

- 169 This is a crucial provision that has been carried over from Section 12 of ACECA. The only difference is that ACECA was more specific in naming such bodies such as the Controller and Auditor General, and the Director of CID, among others. May be Parliament found it prudent not to limit the state organs or agencies that the new body may collaborate or work with.

International cooperation

- 170 Section 11(5) provides that the EACC may request and obtain professional assistance from such persons or organizations as it considers appropriate. This may loosely be interpreted to include requests for mutual legal assistance from other countries, but it is vague and subject to narrow, domestic application. The repealed Section 12(3) of ACECA was more explicit. It provided thus, "The Commission may in the performance of its functions work in cooperation with any foreign government or international or regional organization"
- 171 Indeed, this is the Section that KACC relied upon to successfully appeal against a court order that had barred it from seeking and obtaining evidence from a certain foreign government institution. The legal framework for recovery of corruptly

acquired assets is now found in the Mutual Legal Assistance Act of 2011 (MLAA). This Act provides for mutual legal assistance to be given and received by Kenya in investigations, prosecutions and judicial proceedings.

- 172 Prior to the enactment of this law, Kenya offered or received legal assistance through the Harare Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (commonly referred to as the Harare Scheme). It was signed between Ghana, Kenya, Nigeria and South Africa. Its purpose was to increase the level and scope of assistance rendered between Commonwealth governments in criminal matters. The measures enumerated in paragraph 1(3) (i) of the said scheme include, inter alia, the tracing, seizing and confiscation of proceeds and instrumentalities of crime.
- 173 The Mutual Legal Assistance Act (MLAA) of Kenya regulates the rendering of legal assistance to any requesting state unless otherwise regulated by agreement. It applies to requests for legal assistance from any requesting state or international entity to which Kenya is obligated on the basis of a legal assistance agreement or even where there is no such agreement.
- 174 The enactment of the MLAA by Kenya is a giant step forward in tracing and recovery of corruptly acquired assets that may be hidden outside Kenya. It is hoped that other countries, especially those that have ratified UNCAC, will give Kenya the desired cooperation and technical assistance in this regard.

Powers to conduct mediation, conciliation and negotiation

- 175 The new Constitution lays emphasis on Alternative Dispute Resolution (ADR) as a means of resolving disputes expeditiously in a less costly manner. It is a power that is vested in all Constitutional Commissions by Article 252 of the Constitution.
- 176 In the anti-corruption war, this new power that had already manifested itself in the 2007 amendments to ACECA and the recently enacted Amnesty Regulations of 2011 pursuant to Section 25A of ACECA. The purpose is to encourage out of court settlements on condition that the suspect fully discloses what they corruptly acquired and the matter is published in the daily papers in order to enlist comments from members of the public before the matter is settled. This is an expeditious and less costly form of determining disputes, although some Kenyans have opposed on the basis that it will encourage impunity.

Access to information

- 177 Any member of the public may request for information from the new body, upon payment of a fee, and subject to confidentiality requirements. This will make the EACC more transparent and accountable to the tax payers who fund its operations.

Financial provisions

- 178 Funds of the EACC will be derived from money allocated by Parliament and from grants, gifts or donations that must be disclosed to parliament and made public before use. This will ensure transparency and accountability in the use of public finance. This is in contradiction to the previous commission whose expenses were charged on and issued out of the Consolidated Fund without further appropriation other than the ACECA (See Section 13(5) of ACECA). This may be attributed to Article 249 of the Constitution that obligates parliament to allocate adequate funds to enable each commission to perform its functions, and that the budget of each commission shall be a separate vote. It is only the remuneration and benefits payable to a commissioner that shall be a charge on the Consolidated Fund (Article 250(7)).

Annual reports

- 179 Apart from financial and statistical issues, the EACC will report to the President and the National Assembly about recommendations made to state departments and any action taken upon those recommendations. Previously, the Anti-corruption Commission examined work processes and made recommendations that were never acted upon by state departments. It was often helpless in the face of such inaction. The presentation of these recommendations to the President and Parliament will ensure that government departments are held accountable for failure to act upon these reports. This will enhance transparency and accountability.

Independence of the Commission

- 180 This has been enhanced. Previously, KACC was accountable to Parliament (Section 10 of ACECA). The new law is however states that the EACC shall not be subject to the control or direction of any person or authority. This independence from legislative oversight, unless provided for in the Constitution or this Act, is good for the new entity.

Saving and transitional provisions

- 181 These provisions are good in so far as they preserve the processes and assets of the Commission. All orders, notices, transactions, investigations, prosecution, civil proceedings, any other process carried out under ACECA are deemed to be done under the new Act. Similarly, all the property, assets, rights, liabilities, obligations, agreements, shall vest in the new body. Any undertakings or responsibility of the Advisory Board will be assumed by the new Commission.
- 192 Staff of the Commission, except the Director and Deputy Directors, will transit to the new body and serve for their unexpired terms of their contracts. However this is not automatic. They will be required to apply and be vetted for their suitability to serve in the new body. This seems to be a trend in almost all the bodies that are being set up and the staffs of KACC are no exception. This could also be explained by the fact that the new EACC will be ensuring that other public servants maintain integrity in their service to the citizens. They must therefore, of necessity, be persons of unquestionable character and integrity as required by Chapter Six of the Constitution.

Weaknesses in the new law

- 183 The following are some of the weaknesses in the new law and which may hamper the fight against corruption in Kenya
- 1. Lack of prosecutorial powers by EACC is perceived by a significant proportion of Kenyans as an aspect that may hamper expeditious and independent determination of corruption cases. However, under Article 157(12) of the Constitution, Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions. There is therefore a window of opportunity for EACC to be granted prosecutorial powers, subject of course to proven efficiency, objectivity and fairness in investigations.
 - 2. Failure to criminalise some offences in UNCAC
 - 3. Bribery of foreign public officials and officials of international organizations (Article 16)
 - 4. Trading in influence (Article 18)
 - 5. Bribery in the private sector (Article 21)
 - 6. Embezzlement of property in the private sector (Article 22)

- └ Liability of legal persons (Article 26)
- └ Illicit enrichment (Article 20)
- └ Concealment or continued retention of property knowing it to have been corruptly acquired (Article 24)
- └ Opening and maintaining bank accounts abroad
- └ Failure to provide for anti-corruption measures targeting the private sector (Article 12) as well as failure to provide for lifestyle audit of public servants as a means of tracing and recovering corruptly acquired property Equally, there is no specific provision empowering the EACC to deploy special investigative techniques such as electronic or other forms of surveillance and undercover operations in order to combat corruption effectively as required by Article 50 of UNCAC Moreover, there is no provision for admissibility in evidence of evidence derived from special investigative techniques
- └ The anti-corruption legal framework is now contained in four (4) different statutes, namely the ACECA, POEA, EACC Act and the Leadership and Integrity Act (LIA). There is a lot of duplication especially in POEA and EACC Act in relation to matters of ethics and integrity For example, under POEA and LIA the Responsible Commissions are required to develop and ensure compliance with their respective Codes of Conduct Under EACC Act, the EACC is also legally empowered to develop and enforce codes of conduct for all public officers This will represent operational and jurisdictional conflict when dealing with breaches of ethics There is need to vest this powers in only one commission or clearly distinguish their roles to avoid confusion and duplicity

Recent Legislative Developments on Leadership and Integrity In Kenya

184. It has been acknowledged globally, that lack of integrity and ethics is what invariably results in corruption This chapter will therefore not be complete without looking at the twin issues of leadership and integrity, and how they have been addressed in order to combat corruption in Kenya There is no other chapter in the Constitution of Kenya 2010 (COK 2010) that is known and widely discussed in Kenya more than Chapter 6 It has been used to qualify or disqualify persons from seeking either appointive or elective positions in public office

- 185 Interestingly, neither the Constitution nor any other statute in Kenya defines the term “integrity” This could perhaps explain the various divergent opinions on what comprises lack of integrity, and the different integrity thresholds that have been set by both the Parliament and the Judiciary in Kenya At the onset, it is proposed that the term “integrity” should be defined in order to clear the ambiguity and confusion that seems to have dogged the implementation of Chapter 6 of the Constitution Such a definition may however beg the question whether issues of morality, as implied by the common meaning of integrity, should be the subject of legislation It remains a burning issue that may interest scholars, religious leaders and writers on corruption and governance issues
- 186 The promulgation of the new Constitution of Kenya on 27/8/2010 ushered in a new political, social and economic dispensation Of relevance in the fight against corruption is Chapter Six (6) on Leadership and Integrity that gave birth to the new EACC and the EACC Act Article 79 gave power to Parliament to enact legislation to establish an ethics and anti-corruption commission to ensure compliance with the provisions of Chapter Six (6) After consultations and various drafts passing from one government office to another, Parliament finally enacted the EACC Act that received Presidential assent on 27 August 2011 Closely related to Chapter 6 of the COK is the Leadership and Integrity Act (LIA) that was enacted by Parliament in August 2012
- 187 Following the promulgation of the Constitution of Kenya 2010, a lot of attention has been paid to Chapter 6 of the said COK that deals with Leadership and Integrity This chapter provides for the manner in which state officers shall conduct themselves both in their public and private lives
- 188 The EACC is tasked with the responsibility of ensuring compliance with, and enforcement of the provisions of Chapter 6 The Leadership and Integrity Act of 2012 establishes procedures and mechanisms for the effective administration of the legislation on leadership as required by Article 80 More specifically, it sets out standards of behaviour that a person seeking or already serving in public office may be judged against The intention of Chapter 6 was to ensure that only persons of high integrity standards are allowed to serve in public offices It was hoped that this would prevent corrupt persons from getting into or remaining in public office, and ultimately attain good governance This noble intention has however been met with a lot of legal challenges that are highlighted in this section
- 189 Of special concern in this chapter is Article 73(2) (a) that provides for *selection of state officers on the basis of personal integrity, competence and suitability, or election in free and fair elections*, as one of the guiding principles of leadership and integrity

Herein lays the distinction between appointive and elective positions in the public office. This distinction, as will be discussed later, has posed challenges to the implementation of Chapter 6 because it seems to place higher integrity standards on appointed officers more than elected officers. A further distinction that has created controversy is that between a state officer and a public officer, especially when it relates to the mode of appointment, election, remuneration and dismissal from office. It therefore becomes imperative to, as a preliminary issue, understand the different categories of public officers in Kenya.

190. The COK 2010 has also created a new category of public officers known as state officers. Previously, all officers serving in public service were all referred to as public officers, as defined in the Public Officer Ethics Act of 2003. Chapter 6 of the COK 2010 applies specifically to state officers, although the Leadership and Integrity Act (LIA) has extended the application of this chapter to all public officers, save for section 18 of the LIA that applies only to state officers. This distinction becomes important when looking at the qualification and disqualification criteria.
191. Before the promulgation of the new Constitution of Kenya 2011, there was no category of public servants referred to as State officers. All of them were referred to as public officers as defined in the Public Officer Ethics Act. However, the Constitution now creates a special category of senior public officers called state officers, and clearly separates them from the rest of the other majority public officers. Article 260 of Chapter 17 of the Constitution on General Provisions that deals with interpretation of the Constitution defines,
192. A public officer as a state officer or a any person, other than a state officer, who holds a public office. A public office means an office in the national government, a county government, or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.
193. A state officer is a person holding a state office. A state office means the,
- › President,
 - › Deputy President,
 - › Cabinet Secretary,
 - › Member of Parliament,
 - › Judges and Magistrates,

- 71 member of a Commission to which Chapter 15 applies,
 - 71 holder of an independent office ,
 - 71 member of a county assembly, governor or deputy governor, member of the executive committee of a county government,
 - 1 Attorney General,
 - 71 Director of Public Prosecutions,
 - 1 Secretary to the Cabinet,
 - 71 Principal Secretary,
 - 71 Chief of the Kenya Defence Forces,
 - 71 Commander of a service of the Kenya Defence Forces,
 - 71 Director General of NSIS,
 - 71 Inspector General and Deputy Inspector General of the National Police Service, and
 - 71 an office designated as a state office by national legislation
- 194 This distinction probably explains why there was need to have another law to deal with the newly created category of State officers, hence the drafting of the Leadership and Integrity Act 2012. State officers obviously perform more serious public functions than ordinary public servants do. Their process of selection and appointment is also quite rigorous, lengthy and subject to transparency requirements.
- 195 Going by the definitions of economic crime and grand corruption, State officers are also the ones most likely to engage in large procurement contracts involving large sums of money. These officers therefore require special mention in this chapter.

Relevant legal framework

- 196 In order to objectively and exhaustively deal with the twin issues of appointment and election to public office, one must of necessity identify and analyse all the relevant Constitutional and statutory provisions. It may also be prudent to look at them differently since there appear to exist legal provisions that apply differently to each of the two categories.

- 1 The Constitution of Kenya, 2010

- Ethics and Anti-Corruption Commission Act, 2011
- Leadership and integrity Act, 2012
- Anti-Corruption and Economic Crimes Act, 2003
- Public Officer Ethics Act, 2003

Constitution of Kenya

- 197 Article 73(1) (a) Chapter 6 of the COK 2010 sets out the guiding principles of leadership and integrity by providing for selection of state officers on the basis of personal integrity, competence and suitability, or election in free and fair elections, as one of the guiding principles of leadership and integrity
- 198 The EACC established by Article 79 of the Constitution is to ensure compliance with and enforce the provisions of Chapter Six on Leadership and Integrity as relates to State Officers. These are, the guiding principles of leadership and integrity (Article 73), oath of office (Article 74), conduct of state officers (Article 75), financial probity (Article 76), restriction on activities of state officers (Article 77), citizenship and leadership (Article 78)
- 199 In summary, the EACC will ensure that State Officers are
- selected to public office based on personal integrity, competence and suitability
 - elected in free and fair elections
 - not influenced by nepotism, favoritism, other improper motives or corruption in making decisions
 - declare any personal interest that may conflict with public duties
 - subscribe to oath or affirmation of office
 - deliver gifts or donations given to them to the State
 - do not maintain bank accounts outside Kenya
 - do not participate in any other gainful employment
 - do not hold office in a political party
 - citizens of Kenya and do not hold dual citizenship
 - retired State Officers do not hold more than two concurrent remunerative positions in a state organ

The Leadership and Integrity Act Of 2012

- 200 The Leadership and Integrity Act of 2012 is an Act of Parliament to enacted to give effect to, and establish procedures and mechanisms for effective administration of Chapter Six of the Constitution, and for connected purposes. According to section 3, the primary purpose of this Act is to ensure that State officers respect the values, principles and requirements of the COK.
- 201 The focus on state officers is based upon the provisions of Chapter Six, and the reality that state officers ordinarily hold the highest level of responsibility in terms of directing the management of affairs in the public service. The EACC is responsible for overseeing and enforcing the implementation of this Act. It is also expressly stated that the provisions of Chapter 6 of the COK and the Public Officer Ethics Act (POEA) shall form part of the General Leadership and Integrity Code.
- 202 The Act establishes a General Leadership and Integrity Code for all state officers that is distinct from the general Code of Conduct and Ethics prescribed for other public officers under the Public Officer Ethics Act of 2003. Closely related to this is the requirement for each public entity to have Specific Leadership and Integrity Codes, which borrow from the general Leadership and Integrity Code.
203. The new law also facilitates the extension of the application of the provisions of Chapter Six of the COK and the General Leadership and Integrity Code, except section 18 (on public collections) to all public officers as if they were State officers. This is found in section 52 of the LIA that makes reference to Article 80(c) of the COK.
- 204 It also worth noting that breach of the codes under the LIA results in *disciplinary* action (section 42) by the public entity responsible for the State officer, unless the behavior warrants the institution of civil or criminal proceedings against the State officer. The public entity shall refer civil matters to the Attorney General (AG), whereas criminal matters shall be referred to the Director of Public Prosecutions (DPP), or to any other appropriate entity. This will be done after investigations by the public entity and after it is of the opinion that civil or criminal proceedings ought to be preferred.
- 205 The only breaches that attract criminal sanctions under the LIA relate to opening or operating bank accounts outside Kenya without approval from the Commission (section 19), and acting for foreigners (section 20 as read together with section 48), obstructing or hindering persons under the Act (section 46).
- 206 An objective reading of Chapter 6 and the LIA does not clearly reveal the role of EACC before an individual is elected or appointed to a public office. The Leadership

and Integrity Bill had given the EACC a clear role of vetting such individuals and thereafter issuing a Clearance Certificate. These vetting provisions were however deleted by Parliament. The only duty left for EACC is to receive a Self Declaration Form from those wishing to be elected to a state office, thus leaving it to interested individuals to “vet” themselves.

207. An honest reading of Chapter 6 and the Leadership and Integrity Act shows that Parliament deliberately avoided the use of the word “vetting”. If Parliament intended to vest such a function or responsibility on the EACC, it would have expressly used this word or referred to it. A good example of such an express provision is found in Section 23(1) of the Sixth Schedule of the COK 2010 that requires Parliament to enact legislation establishing mechanisms and procedures for vetting the suitability of judges and magistrates to continue to serve.
208. Another example is found in section 34(3) of the EACC Act that empowers the EACC to vet any member of staff of KACC who wishes to work for EACC, to ensure that he or she is fit and proper to serve in the position applied for as a member of staff of EACC.
209. The LIA does not state what the EACC is supposed to do with this Declaration. However, it may be safe to infer that anyone who gives false information to the Commission commits an offence punishable by a fine not exceeding kshs 5 million, imprisonment for a period not exceeding 5 years or both, as per section 46(1) (d) of the Leadership Act. Since the EACC has no prosecutorial powers, the matter will be referred to the DPP for appropriate action. Should the officer in question be convicted, they may thereafter be disqualified from holding a state office if the law establishing that office provides for such action.
210. It is clear that the EACC only comes in after the state officer has assumed office to ensure that the Leadership Code is adhered to by state officers. This role is further expounded in the Ethics and Anti-Corruption Commission Act, which establishes the Ethics and Anti-Corruption Commission.

The Ethics and Anti-Corruption Commission Act of 2011 (EACC Act)

211. Apart from investigating corruption, raising awareness about the dangers of corruption and examining the work processes in public institutions as had been provided for under the now repealed Section 7 of ACECA, the new EACCC’s functions have been expanded, under Sections 11 and 13 of the Ethics and Anti-Corruption Commission Act to,

- development of codes of conduct for public officers
- oversee enforcement of codes of conduct for public officers
- receive complaints on breach of codes of ethics
- investigate and recommend to the DPP prosecution for any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter 6 of the Constitution
- recommend appropriate action to be taken against public officers for unethical conduct
- Monitor the practices of public bodies to detect corruption and secure the revision of methods of work that are conducive to corrupt practices This function is however subject to Article 31 (Right to Privacy) This function implies that the EACC can deploy undercover techniques to detect corruption Note that the Right to Privacy is not absolute and can be limited in public interest, so long as the requirements of Article 24 of the Constitution are satisfied.

Mandate of the Commission under the EACC Act

- 212 It is important to note that the new law does not repeal the entire ACECA of 2003 but has only two amendments captured in Sections 36 and 37 of the EACC Act
- 213 In the first amendment (under Section 36), Section 2 of ACECA is amended to delete the name "*Kenya Anti-Corruption Commission*" and substitute it with the new name "*Ethics and Anti-Corruption Commission*" established under Section 3 of the Ethics and Anti-Corruption Commission Act, 2011, pursuant to Article 79 of the Constitution In the second amendment captured under Section 37 of EACC Act, Part III of the ACECA that establishes the Advisory Board was repealed
- 214 The effect of this is that all the offences created under Part V of ACECA and the provisions relating to investigations (Part IV), compensation and recovery of improper benefits (Part VI), evidence (Part VII), execution (Part VIIA), miscellaneous provisions on suspension and disqualification of public officers charged with corruption, protection of informers, e t c , (Part VIII), repeal, transition and amendments (Part IX) have been retained This is contrary to public opinion that suggests that the EACC has been rendered weak or toothless, and that all the work that had been carried out for the last six years would go down the drain On the contrary, the new Act, in the saving and transitional provisions, clearly stipulates that all the orders and processes of the old body shall be deemed to be carried out under the new body and new law

- 215 The mandate of the EACC has, in effect been expanded, to give it more teeth as regards the mainstreaming of ethics and integrity in the public sector. However, it is notable that there is no provision in the Constitution or EACC Act empowering the EACC to vet, qualify or disqualify any individual from election or appointment to public office. The EACC steps into the arena after the public officer has assumed office, to oversee enforcement of codes of conduct

Qualification and disqualification for appointive positions in public service

- 216 Since there are no specific provisions in Chapter 6 or the Leadership Act for qualification or disqualification, the EACCC may be guided by Chapter 13 of the COK 2010 on Public Service. Article 232 lays down the values and principles of public service, whereas Article 233 enumerates instances that make one ineligible to serve as a member of the Public Service Commission. These criteria can be applied, and indeed has been applied, to everyone seeking to serve as a state officer in the public service
- 217 An individual is not eligible for appointment if the person
- ┆ has at any time within the preceding 5 years held office or stood for election as a member of Parliament or of a county assembly
 - ┆ a member of the governing body of a political party
 - ┆ holds any state office
 - ┆ is or has been a candidate for election as a member of Parliament or county assembly
 - ┆ is or has been the holder of an office in any political organization that sponsors or supports a candidate for election as a member of Parliament or county assembly
- 218 Apart from the Constitution, the Anti-Corruption and Economic Crimes Act has provisions on suspension on half pay after being charged in court (section 62), suspension without pay after conviction pending any appeal (section 63), dismissal and disqualification from being elected or appointed to public office after conviction for ten years if appeal is lost (section 64). However, a convicted public servant is disqualified only after exhausting their right of appeal in a superior court.
- 219 These provisions however do not apply to constitutional office holders, where the constitution provides for their qualifications, or disqualification or removal from office. They nevertheless guide the EACC and other state organs on criteria for

qualification and disqualification from elective or appointive offices, especially the category now referred to as public officers. State officers are covered by the Constitution and relevant enabling legislation. It is evident that the issue whether a person is qualified or not qualified to be elected or appointed to public office is best addressed by looking at the Constitution and the statute establishing that office or institution.

- 220 Article 38 of the COK on political rights, in summary, provides that every person is free to make political choices, the right to free, fair and regular elections based on universal suffrage, the free expression of the will of elections for any elective public body or office established under this Constitution. Article 38(3), in particular, stipulates that every adult citizen has the right, without unreasonable restrictions,
- a) to be registered as a voter
 - b) to vote by secret ballot in any election or referendum
 - c) to be a candidate for public office, or office within a political party of which the citizen is a member, and if elected, to hold office
- 221 Although political rights are not among those that may not be limited under Article 25, the State or any person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of Article 24 have been satisfied. This provision is found in Article 24(3). A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. These are enumerated in Article 24(2) and (3).
- 222 Simply stated, the right to vote or seek an elective office is a fundamental right that shall not be limited or taken away except as allowed by law. Therefore, before preventing voters from electing a person of their choice or disqualifying a person from seeking elective office, the State or person wishing to do so must first acknowledge that this action may limit political rights, and therefore such action needs to be justifiable within the constitutional limits.
- 223 In order to appreciate how important the political rights are, it is necessary to look at the Constitutional provisions on qualification or disqualification for election as Member of Parliament, President, Governor and member of the County Assembly.
- 224 Before looking at provisions of Article 99, it is important to note that the Parliament of Kenya consists of the National Assembly and the Senate. Reference to Member of Parliament therefore refers to National Assembly members and

Senators (Article 93) Article 99(1) provides that unless disqualified as stipulated in this Article, a person is eligible for election as a member of Parliament (MP) if the person,

- a) is registered as a voter
- b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament
- c) is nominated by a political party or is an independent candidate

225 Article 99(2) stipulates that a person is disqualified from being elected as an MP if the person,

- a) is a State officer or other public officer, other than an MP
- b) has within the last 5 years been a member of the Independent Electoral and Boundaries Commission(IEBC)
- c) has not been a citizen of Kenya for the last 10 years before the election
- d) is a member of a county assembly
- e) is of unsound mind
- f) is an undischarged bankrupt
- g) is subject to a sentence of imprisonment of at least 6 months, as at the date of registration as a candidate, or at the date of election
- h) is found in accordance with any law to have misused or abused a State office or public office or in any way to have contravened Chapter Six

226 The EACC must therefore bear this Article in mind, while developing guidelines to clear those seeking elective posts The ethical requirements referred to in Article 99(1) (b) are to be found in Chapter 6 of COK 2010, as read together with the Leadership and Integrity Act and the Public Officer Ethics Act These provisions and the role of EACC have been exhaustively discussed in the earlier portions of this Chapter

227 The Elections Act of 2011 borrows heavily from the Constitution. Section 24 guides the IEBC on the criteria to be used when deciding whether one is qualified or disqualified for election as a Member of Parliament

228 For its part, Article 99(3) provides that “a person is not disqualified under clause 2, unless all possibility of appeal or review of the relevant sentence or decision has been exhausted’ Article 99 therefore recognizes the right of appeal that is

found under the Bill of Rights, specifically Article 47 and 50. Article 47 on fair administrative action provides that if the right or fundamental freedom of a person is adversely affected by administrative action, the person has the right to be given written reasons for the action, and that this action can be reviewed by a court or independent tribunal. Closely related to Article 99 and 47 is Article 50 on fair hearing. Article 50(2)(q) provides that if convicted, a person has the right to appeal to, or apply for review by, a higher court as prescribed by law.

229. These constitutional provisions clearly mean that a person is not disqualified from elective positions merely because they have been charged or adversely affected by an administrative decision or convicted by a court of law. It is only after they have exhausted their right of appeal that they may be disqualified from seeking elective office. This constitutional threshold is aptly captured in Section 64 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) that provides that a person convicted of corruption is disqualified from seeking elective position or appointment to public office for 10 years, only after his or her appeal against conviction is lost.
230. Although ACECA applies to public officers whereas the Constitution applies to State officers, both legal instruments find congruence in the requirement that disqualification shall only take effect after the suspect or convict has exhausted their right of appeal. It is important for any State organ such as EACC, or any person seeking disqualification of persons seeking election as MPs, to bear in mind the provisions of Article 99 of COK.
231. According to Article 137(1), a person is qualified for nomination as a presidential candidate if the person
- a) is a citizen of Kenya
 - b) is qualified to stand for election as a member of Parliament
 - c) is nominated by a political party or is an independent candidate
 - d) is nominated by not fewer than two thousand voters from each of a majority of the counties
232. Article 137(2) lists the grounds for disqualification, that is, if the person
- a) owes allegiance to a foreign state, or
 - b) is a public officer, or is acting in any State office or other public office, except the President, Deputy President and MP

- 233 It is apparent that once someone is qualified to be an MP under Article 99, the person is, subject to a few other requirements, qualified to be President. The same qualification and disqualification criteria apply to the President and MPs. Any person or body seeking to disqualify such candidates must therefore bear these two Articles in mind. These Constitutional requirements for disqualification or qualification for election as President are echoed in Section 23 of the Elections Act of 2011.
- 234 Just as the President and MPs, Article 180 provides that to be eligible for election as county governor, a person must be eligible for election as a member of the county assembly. Article 193 sets out the criteria for qualification and disqualification for election as member of county assembly, and also governor. The criteria is the same as that for the MPs and President. Unless disqualified under this Article, a person is eligible for election as a member of a county assembly if the person
- a) is registered as a voter
 - b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament
 - c) is nominated by a political party or is an independent candidate
- 235 Article 193(2) stipulates that a person is disqualified from being elected as a member of a county assembly if the person
- a) is a State officer or other public officer, other than a member of the county assembly
 - b) has within the last 5 years been a member of the Independent Electoral and Boundaries Commission (IEBC)
 - c) has not been a citizen of Kenya for the last 10 years before the election
 - d) is of unsound mind
 - e) is an undischarged bankrupt
 - f) is subject to a sentence of imprisonment of at least 6 months, as at the date of registration as a candidate, or at the date of election
 - g) is found in accordance with any law to have misused or abused a State office or public office or in any way to have contravened Chapter 6
236. In similar fashion to disqualification for election as MP or President, Article 193 provides that "a person is not disqualified under clause 2 unless all possibility of appeal or review of the relevant sentence or decision has been exhausted". The

earlier analysis on the right of appeal also applies to disqualification for election as governor or member of county assembly. Any State organ or person seeking to disqualify a person from election as Governor or member of county assembly must bear this provision in mind. Just like in the case of the President and Members of Parliament, Section 25 of the Elections Act adopts the criteria laid down in the Constitution, for qualification or disqualification for nomination as a member of a county assembly.

- 237 Although included among the members of the National Assembly and Senate, it is important to mention that the following persons are State officers, subject also to the application of Article 99 and 193: Women representatives to the Senate, Youth, Persons with disabilities, Speakers of the National Assembly, Senate and County Assemblies.

Suggested framework for EACC in enforcing leadership provisions

- 238 In order to wade through this apparently complicated maze of legal framework, the EACC is advised to

- a) Categorize the persons seeking elective or appointive offices into either State officers or Public officers
- b) Whether they seek elective positions or appointive positions
- c) Consider the applicable constitutional provisions, e.g. Chapter 6, Bill of Rights, qualification/ eligibility, and disqualification
- d) Consider the applicable statutory provisions, e.g. Leadership and Integrity Act, Public Officer Ethics Act, Anti-Corruption and Economic Crimes Act, Ethics and Anti-Corruption Commission Act, etc
- e) Consider the law establishing those offices, e.g. the Public Service Commission Act, Police Service Commission Act, County Governments Act, etc

- 239 While the EACC has the express mandate to ensure compliance with Chapter 6 on Leadership and Integrity, and while the clamour for high ethical standards has reached fever pitch in Kenya, the EACC must not lose sight of the Bill of Rights and other constitutional provisions that provide for qualification or disqualification for appointment or election to public office. Chapter 6 must be read alongside other relevant constitutional and statutory provisions, such as political rights and right of appeal. Exercise of caution and restraint is called for, particularly at this critical point in time when Kenya is still implementing the new constitutional dispensation,

in the midst of different interpretations of the term “integrity” by Parliament and the Judiciary.

Emerging jurisprudence on leadership and integrity in Kenya

240. Soon after the promulgation of the new Constitution of Kenya in August 2010, most Kenyans were hopeful that a new crop of both appointed and elected leaders would be ushered into office, and hopefully bring honour and respect to state offices. It appears though that Kenyans may have to wait longer to enjoy the fruits of leadership that is governed by integrity. This is attributed to the different integrity thresholds that have been displayed by interviewing panels, parliament and the judiciary. Different standards seem to apply to those seeking appointment as opposed to those seeking to be elected to public office.
241. In order to illustrate the uncertainty and apparent bias, this Chapter will briefly consider the facts and judgements in five (5) major cases touching on eligibility of persons to serve as State officers based on Chapter 6 on Leadership and Integrity. These are
- a. Keriako Tobiko - Director of Public Prosecutions
 - b. Mumo Matemu- Chairperson of Ethics and Anti-Corruption Commission
 - c. Kiema Kionzo- Member of Parliament for Mutito Constituency
 - d. Mary Wambui- Member of Parliament for Othaya Constituency
 - e. Uhuru Kenyatta & William Ruto- President and Deputy President

Appointment of Keriako Tobiko as Director of Public Prosecutions

242. The first case that tested the integrity standard was filed against Mr Keriako Tobiko the Director of Public Prosecutions (DPP), soon after his televised public interview, approval by Parliament and appointment by the President.²⁹ The petitioners, a civil society group, sought to restrain the newly appointed DPP from assuming office after his appointment on 16/6/2011. They submitted that, in the light of allegations of corruption, incompetence, conflict of interest and lack of reform credentials labelled against him by various persons, Mr Tobiko lacked integrity as required by Chapter 6 of the COK and the Public Officer Ethics Act.

²⁹ *Kenya Youth Alliance- Vs Kenako Tobiko and others* (2012) Nairobi HC Petition No. 101 of 2011 (unreported)

- 243 In a unanimous decision delivered on 25 May 2012, the three judge bench dismissed the petition by holding that the allegations of integrity had been investigated by the selection panel and parliament, and that the court could not reopen the process and reconsider issues which were conclusively determined. They made the following observation,

The Constitution vests different functions to different organs, and to ask this court to fault processes by these organs without presenting material to prove any wrong doing, is to usurp the functions of those organs. That we shall not do. Those organs undertook their mandate and exercised their discretion after seeing those that presented complaints in whatever form. We cannot reopen the process and consider issues which were conclusively determined.

- 244 The court in Tobiko's case declined to interfere with the work of other organs which had already deliberated upon the integrity issues and found them baseless.

Appointment of Mumo Matemu as Chairperson of EACC

- 245 Parliament approved the nomination of Mr Mumo Matemu to serve as the Chairperson of EACC and the President and Prime Minister subsequently appointed him, but a bench of three (3) High Court judges found him unsuitable to serve after a civil society organisation challenged his suitability on integrity grounds.³⁰ The three judges held that although the Executive and Parliament had inquired into integrity allegations levelled against Mr Matemu while he served as the Legal Officer of Agricultural Finance Corporation (AFC), they interrogated the process of nomination and selection, found it wanting due to unresolved integrity issues, and set aside the appointment. The court found that Mr Matemu did not meet the integrity threshold set out in Chapter 6 of the COK 2010, despite the fact that the formalities of appointment were followed by the Executive and Parliament. According to the three judges

A person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, and soundness of his moral judgement or his commitment to national values enumerated in the Constitution. For the purpose of integrity test in Kenya's Constitution, there is no requirement that the behaviour, attribute, or conduct in question has to rise to the level of criminality.

³⁰ Trusted Society of Human Rights Alliance –VS- the AG and others. Nairobi High Court Petition No. 229 of 2012 (unreported).

246. This was the first major judicial pronouncement and interpretation of Chapter 6 in Kenya's Constitution, and was lauded by many Kenyans as setting out the integrity standards for those seeking public office. The judges seemed to have been persuaded by the very nature and functions of the office to which he was being appointed to, and wondered how he could preside over corruption investigations when he had unresolved integrity issues haunting him. Mr Matemu however lodged an appeal, whose outcome will help Kenyans understand this phenomenon.
247. It is worth noting that according to the submissions filed by the Director of Public Prosecutions (DPP), Mr Matemu was neither a suspect nor a witness in the criminal inquiry that was referred to by the petitioners to cast doubts on his integrity. File records show that the criminal inquiry was commenced after two directors, in a private company, differed in management of the funds allegedly borrowed from AFC. One director reported the matter to police in Nakuru, alleging fraud on the part of his co-director. The DPP further informed the court that the criminal investigation file had been closed due to failure by the complainant to submit an audit report as proof of the alleged theft or fraud. At the time of writing this report, the EACC has no chairperson and the matter is still pending in the Court of Appeal after Mr Matemu appealed against the High Court decision.³¹

Suitability of Kiema Kilonzo to continue serving as MP for Mutito Constituency

248. In another case involving a sitting Member of Parliament (MP), Mr Kiema Kilonzo and the Constituency Development Fund Committee,³² the petitioners alleged misappropriation of CDF monies allocated to Mutito Constituency by Mr Kiema Kilonzo and the CDF committee. They, inter alia, sought court orders that Mr Kiema had contravened Chapter 6 of COK, was unfit to hold any state office and should be disqualified from holding any state office. While dismissing the petition, Justice David Majanja held firstly, that the petitioners had not exhausted the dispute resolution mechanism provide for under section 52 of the CDF Act.
249. Secondly, he distinguished Kiema's case from Matemu's case by holding that the court, in Matemu's case did not purport to take upon itself the process of assessing,

³¹ Mumo Matemu –VS- Trusted Society of Human Rights Alliance and others. Nairobi Court of Appeal. Civil Appeal No. 290 of 2012 (unreported)

³² Benard Kasinga –VS- Kiema Kilonzo and Others. Nairobi High Court. Petition No. 402 of 2012 (unreported)

nominating or appointing a specific candidate to office. Justice Majanja observed that the court in Matemu's case interrogated the process, found it wanting in certain respects and intervened by setting it aside. Similarly, the judge declined "*to act as auditor general, make specific findings against the respondents, surcharge them, remove them from office and thereafter declare them unfit for office*" as prayed by the petitioners.

- 250 The snapshot of Justice Majanja's decision is that courts, while determining integrity issues, must respect the role of other entities. This seems to materially depart from Matemu's case wherein the judges not only interrogated the process of vetting, but also found it wanting. The principle of separation of powers between the executive, judiciary and legislature comes into play, although this is not the subject of discussion in this chapter of the Report.
- 251 Just before the 4 March 2013 elections in Kenya, several petitions were filed seeking to bar several persons from being elected to public office for contravening Chapter 6 of COK. Examples are the two petitions against Mary Wambui Munene who was seeking to replace President Kibaki as MP for Othaya Constituency, and the now famous petition seeking to bar Uhuru Kenyatta and William Ruto from seeking Presidency and Deputy Presidency respectively.

Eligibility of Mary Wambui for election as MP for Othaya Constituency

- 252 In the case involving Mary Wambui Munene³³, the petitioners challenged her educational qualification and integrity as required by Chapter Six of the COK 2010. Specific to her integrity, the petitioners averred that she had been adversely mentioned in various official reports prepared by constitutional bodies mandated to inquire into matters of public interest, for example, a report by the Kenya National Commission on Human Rights (KNCHR) titled "*On the Brink of a Precipice: A Human Rights Account of Kenya Post 2007 Election Violence*", the *Report of the Commission of Inquiry into the 2007 Post Election Violence* (Waki Report), the "*Report of Investigations into the Conduct of the Artur Brothers and their Associates*" prepared by the National Assembly Departmental Committee on Administration, National Security and Local Authorities, and Administration of Justice and Legal Affairs, an investigative journalistic piece aired in the local media (Kenya Television Network) titled "*Jicho Pevu*"; and several other press reports.
- 253 The petitioners contended that as a result, she did not meet the test of leadership and integrity spelt out in Chapter Six of the COK 2010, and the Leadership and

³³ Michael Wachira Munene-Vs- Mary Wambui Munene, Nairobi High Court Petition No. 549 of 2012 (unreported).

Integrity Act, No 19 of 2012 (LIA). The petitioners further averred that these issues had not been conclusively investigated or resolved

- 254 While dismissing the petition, Justice David Majanja held that although the LIA provides for procedures and enforcement of Chapter Six of the COK 2010, the issues as to whether Mary Wambui was qualified to vie for a parliamentary seat was not a matter for determination by the court but for the Independent Electoral and Boundaries Commission (IEBC), in accordance with electoral laws, in this case being the Independent Electoral and Boundaries Commission Act (IEBC) of 2011, Political Parties Act, and LIA. The judge further found the petition immature as the respondent had not presented herself to IEBC for clearance
- 255 The decision in this case seems to echo those made in the Tobiko, and Kiema Kilonzo cases, that courts should not usurp the functions of other constitutional organs. The only case in which the court seems to have questioned the inquiry of other state organs is that of Mumu Matemua

Eligibility of Uhuru Kenyatta and William Ruto for election as President and Deputy President

- 256 Soon after they expressed their intention of seeking election to the two top state offices in Kenya, four (4) petitions were filed in the High Court challenging the eligibility of Uhuru Kenyatta and William Ruto based on Chapter 6 of the Constitution. The petitions were later consolidated into one major petition for hearing and determination since they raised similar issues of law³⁴. The Chief Justice appointed a bench of five (5) judges to hear the petition that generated a lot of interest both locally and internationally. This was largely due to the fact that the International Criminal Court (ICC) had confirmed charges against the two suspects for crimes against humanity, following the 2007 post election violence in which they are alleged to have been behind the murder of over 1000 Kenyans, displacement, rape and destruction of property
- 257 It was the petitioners' submission that the confirmation of charges took away their honour, dignity and integrity to vie for the Presidency and Deputy Presidency respectively. The petitioners relied on the High Court decision in the Mumu Matemua case and argued that the integrity test was not one of criminality. They insisted that the candidacy of Uhuru and Ruto was contrary to the tenure, ideals and spirit of the COK, especially Chapter 6 on integrity and sovereignty. It

³⁴ International Centre For Policy and Conflict-Vs- Uhuru Kenyatta, William Ruto and Others, Nairobi HC Petition No. 552 of 2012 (unreported)

was their averment that the confirmation of charges met the integrity threshold required to bar them from assuming public office. They pointed out that there would be no confidence in those two offices if the two individuals were allowed to ascend thereto

- 258 In a unanimous judgement delivered on 15/2/2013, the five judges dismissed the petition. They held that although the court had jurisdiction to consider issues of integrity, any question relating to the qualification or disqualification of a person who had been nominated to contest the position of Presidency can only be determined by the Supreme Court. This, according to the judges, includes the determination of the question whether such a person meets the test of integrity under Chapter 6 in relation to Presidential elections, and that these two questions could not be determined by the court outside the context of elections to be held on 4/3/2013
- 259 The judges seemed to have many reasons for dismissing the petition. They are summarised below,
- a Even if Uhuru and Ruto had no integrity, the Independent Electoral and Boundaries Commission (IEBC) not the court, would determine their eligibility to seek elective office
 - b The IEBC, Supreme Court, National Assembly and Senate are the only institutions which may interfere with or invalidate the election of a President or Deputy President. The judges cited the case of *Blackburn –VS– the AG (1971) 1 WLR 1037* in which it was held that “ *Litigation should not influence political decisions. Courts should only look at the effect of decisions and enforce the law, but not say what it should be*”
 - c As regards the interplay between Chapter 6 and Chapter 4 (Bill of Rights), they stated that the Bill of Rights must prevail because the two suspects had not been convicted, they were presumed innocent until proven guilty, and they were entitled to a fair trial. These rights, although not absolute, could not be derogated from except as provided for by the law
- 260 The judges also paid special attention to the now contentious issue of the role of the court in interpreting Chapter 6 of the COK 2010. They made reference to the High Court decision in the *Mumo Matemu* case which had held that the court has power to review both the process of appointment and the legality. They concurred with the integrity standard laid down by their counterparts in *Matemu* case, that there is no requirement that the behaviour, attribute or conduct in question has to rise to

the threshold of criminality. According to the judges, the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not. In the judges own words, it is enough if there are sufficient, serious, plausible allegations which raise substantial unresolved questions about one's integrity.

261. The five (5) judges however disagreed with their counterparts in Matemu's case by stating that the court should not descend into the arena of inquiry as was the case in Matemu's case, wherein the three judges held that although some inquiry had been done into integrity allegations against Matemu by Parliament, they found it wanting. Still on the inquiry issue, the five judges found that there was no evidence adduced to show if any inquiry had been made into the allegations of lack of integrity against Uhuru and Ruto, unlike in Matemu's case where Parliament had debated the allegations of lack of integrity against him. It is important to note that both the EACC and IEBC had cleared the two gentlemen to vie for elective positions, without raising any integrity issues against them.
262. A reading of the judgement in Uhuru & Ruto case depicts a determined effort by the five judges to shift the responsibility of determining eligibility of Uhuru and Ruto, to vie for elective positions, to other state organs. Their decision also manifests the challenges that several institutions in Kenya are facing in trying to enforce the constitutional provisions on integrity, more so the different integrity standards that seem to apply to appointive and elective positions.
263. On one hand, the judges in the Uhuru case clearly assert that behaviour that is deemed lacking in integrity does not have to rise to the level of criminality, and that it is sufficient if there are allegations raising unresolved questions about one's integrity. Since at the time of delivering their judgement, there were unresolved issues about Uhuru and Ruto participation in the 2007 post election violence, one would naturally expect the judges to declare Uhuru and Ruto ineligible to vie for elective office. On this aspect, they shifted the responsibility to the IEBC, EACC, Supreme Court, National Assembly and Senate.
264. On the other hand, the judges also state that the two individuals are presumed innocent until proven guilty of any criminal charges. By stating so, they seem to imply that mere allegations alone do not suffice to disqualify them for lack of integrity, as happened in the Matemu case. Bearing in mind that Matemu was seeking an appointive position whereas Uhuru and Ruto were seeking elective

posts, Kenyan courts need to set establish clear consistent jurisprudence in the realm of the integrity threshold

Observations and way forward on integrity threshold

- 265 As it stands now, it seems as though the integrity standards differ, and that the one for appointive positions is much higher than that for elective positions. During the March 2013 general elections in Kenya, many individuals were cleared by both IEBC, EACC and the courts to seek elective posts, despite the fact that there had pending court cases raising unresolved integrity issues. Many other Kenyans seeking appointive positions have been barred due to unresolved integrity cases yet they neither face arrest nor prosecution before any court of law.
- 266 This is an unacceptable, discriminatory application of the law that is in gross violation of Chapter 6 Principles of leadership and integrity apply to all state officers, irrespective of their mode of ascension to office. This was the intention of Chapter 6 of COK 2010, and all those charged with making and interpreting the law, that is Parliament and Judiciary, should strive to uphold the national values and principles enshrined in Article 10 of COK 2010.
- 267 It is an onerous task to ensure that State offices are selected to office on the basis of personal integrity, competence and suitability. It is an even more onerous task to ensure State officers are elected to office in free and fair elections. The EACC may need to collaborate with the Independent Electoral and Boundaries Commission (IEBC) in designing the framework for eligibility for election as President, MP, Governor and member of county assembly. Collaboration with other public recruitment agencies like the Public Service Commission may yield a more coherent and harmonised approach pertaining to appointive posts.
- 268 Only a fair, objective and impartial reading and interpretation of the applicable legal framework will lend credence and credibility to EACC, IEBC and to some extent, the Judiciary, as they embark on this sensitive yet critical task of ensuring compliance with Chapter 6 of the COK 2010. There may also be need to come up with a clear statutory definition of integrity and the attendant integrity threshold that should be used to either disqualify or remove a person from public office. Chapter 6 of COK 2010, if properly interpreted and applied, will definitely be a major boost in the war against corruption in Kenya.

Corruption Reports received by the Commission

269 Apart from reliance on reports of other Commissions and agencies, the Commission also received complaints about corruption from various Kenyan citizens during the course of its hearings throughout the country. A total of 5,646 persons who spoke to the Commission complained about corruption as a major contributor to violation of their rights. A few examples are listed below

- 1 Residents of Eastleigh District Business Association (EBDA) reported that most of them are denied citizenship in a discriminatory manner due to their tribe, religion and ethnicity, resulting in inhuman and degrading treatment. They reported that they are referred to as 'Kenyan Somalis', and are forced to bribe in order to acquire Kenyan identity cards and passports from the immigration officials. Those who do not have identification papers are constantly harassed by the police and forced to bribe the police or judicial officers to avoid arrest, prosecution or conviction on charges of being illegally present in Kenya.
- 1 Residents from Kajiado district reported incidents of land grabbing, during land adjudication, which was facilitated by corruption among senior public officials. Before adjudication, land was communal and belonged to the whole community. They reported that during adjudication, land was illegally allocated to senior government officials, their friends and relatives who were not originally residents, in return for financial considerations. Most beneficiaries of the Moširo and Illodo-Ariak land in Kajiado were Ministers and MPs. The land was later sold to third parties despite restrictions placed on the titles. This again, was facilitated by corruption, at the expense of poor, illiterate residents of the Maasai community. Other reports from Kajiado indicated that forest land was being hived off and sold by corrupt government officials. Similar reports were received about land in Machakos, Meru, Makueni, Nyeri, Muranga, Pokot, Ilchamus, amongst others. Details of historical injustices pertaining to land issues are comprehensively captured in the chapter on land.
- 1 **The 7.2 billion purchase of mosquito control products in 1996:** An informer gave the Commission detailed information regarding the grand corruption surrounding the 7.2 billion purchases of mosquito control products in 1996. This was curiously done by the Ministry of Public Works and Housing instead of the Ministry of Health as was expected in such procurement. It occurred during retired President Moi's rule.

According to the informer, the price was not only inflated but the Government was supplied with the wrong chemical, that is, 'a little petroleum product with a little bit of insecticide' Further more, the Government bought massive quantities to last for five (5) years yet they only required two (2) years supply The chemical was supplied by Equip Agencies Limited at the unit price of Kshs 2,925/= instead of the market price of Kshs 2/= per litre

The informer also told the Commission that a report by Price WaterHouseCoopers indicated that the order for the malaria drugs was made well above the budget allocations for that period A number of people were associated with Equip Agencies Limited and some senior government officials were named in the scam The Commission's further inquiry into this matter disclosed the existence of a decision, Nairobi HCCC No 159 of 2006 filed by *Equip Agencies v Attorney general* (2011) The plaintiff was claiming a total of Kshs 1,873,335,880, being money owed to Equip Agencies for the anti- malaria equipment supplied, delivered and distributed to various units in the country in 1995 In a judgement delivered by Justice Muga Apondi on 2/12/2011, the court ordered the government to pay Equip Agencies the sum of Kshs 1,873,335,880 for the malaria drugs and equipment, and faulted the government for purporting to cancel the contract after goods had already been supplied, received and distributed for use by the government

Although this was a civil case that does not bar criminal proceedings for any acts of corruption, it may have an impact on any criminal proceedings that may be contemplated or commenced against any suspected loss or fraud in the said procurement This is due to the judge's finding that at that point in time, there was no complaint that the quantity, quality and price of the goods did not meet the required standards The judge also found that the goods were utilized for the purpose for which they were intended The government did not file a defence nor lodge an appeal against the final judgement It is not known whether the decretal sum was paid as ordered by the court

Interestingly, the informers told Commission that the goods were ordered by the Ministry of Public Works and Housing, whereas the evidence adduced before the High Court in the HCCC No 159 Of 2006 show that the contracts were awarded by the Ministry of Health The truth may only be unearthed after proper investigations are conducted by the EACC It was further alleged that despite a report being made to the Director of the defunct Kenya Anti-Corruption Commission, no action has been taken by the said Commission to date

- Procurement of electronic voter registration and identification devices by the IEBC:** The Commission obtained from informers volumes of documents and correspondence with various government agencies, pointing out the flawed procurement process that culminated in the failure of the electronic devices during the March 4 2013 General Elections in Kenya. Although this matter fell outside the Commission's mandate period, the Commission received the complaint under its mandate to 'investigate or make recommendations concerning any other matter with a view to promoting or achieving justice, national unity and reconciliation' He singled out the following tender awards that need to be investigated

 - a Biometric Voter Identification Kits (BVR) by Face Technologies of South Africa that cost the tax payer close to Kshs 9 billion
 - b Ballot papers by Smith and Ouzman
 - c Indelible marker pens from Mini Mix Agencies
 - d Polling station banners from Hopeland Advertising
 - e Solar lanterns from Solarmark Technologies
 - f General electoral materials by Africa Infrastructure Development Company

The informers pointed out that Face Technologies (FT) did not meet the technical specifications at the time they submitted their bid to IEBC. Furthermore, the devices supplied were different from the samples submitted at the bid opening as witnessed by all bidders who attended the bid opening. When the first sample failed, FT was allowed to produce another sample for testing, contrary to procurement law. Reports were made to the Public Procurement Authority, and it would be interesting to establish their findings.

In respect of the ballot papers, the informer alleged that the ballot printer was privately commissioned by IEBC outside a publication log ahead of the tender award. The entire procurement of all electoral materials was estimated to have cost the Kenyan taxpayer close to Ksh 15 billion. Sadly, the gadgets failed during voting on 4 April 2013 leading many Kenyans to question the procurement process and quality of the gadgets. The Commission recommends that the matter be investigated by the EACC to establish if any economic crimes were committed by the IEBC staff in collusion with the suppliers of the electoral materials. Appropriate recommendations must be forwarded to the DPP for appropriate action.

Challenges of Fighting Corruption in Kenya

270 The foregoing detailed discussions on the magnitude and scale of grand corruption in Kenya expose major challenges in the fight against corruption in Kenya. In brief, the following were noted and need to be addressed:

- 1. **The lack of a national anti-corruption policy:** The lack of a policy has resulted in lack of focus and disconcerted efforts in the fight against corruption in Kenya.
- 2. **Failure to fully domesticate the UNCAC:** Although Kenya has made great strides in domesticating UNCAC, some major gaps still exist especially in criminalisation of some acts that impede the fight against grand corruption. A glaring omission is failure to criminalise acts like illicit enrichment that would deter illegal acquisition of wealth, which has made it near impossible to trace and recover corruptly acquired wealth. Apart from illicit enrichment, the Anti-Corruption and Economic Crimes Act does not criminalise the following acts:
 - Bribery of foreign public officials and officials of international organizations(Article 16)
 - Trading in influence(Article 18)
 - Bribery in the private sector(Article 21)
 - Embezzlement of property in the private sector(Article 22)
 - Liability of legal persons(Article 26)
 - Illicit enrichment(Article 20)
 - Concealment or continued retention of property knowing it to have been corruptly acquired(Article 24)
 - Opening and maintaining bank accounts abroad
- 3. **Failure to fully entrench EACC in the Constitution of Kenya 2010:** Article 79 of the COK 2010, unlike other Articles establishing constitutional commissions, does not prescribe the specific functions required of an anti-corruption agency as provided for in the four (4) pillars of UNCAC. These are prevention, investigation, asset recovery and international cooperation. Other than the general objects, authority, funding, composition, removal from office, functions and powers bestowed upon all Commissions and Independent Offices under Chapter 15, the specific functions and powers of the EACC are left to parliament to determine through legislation.

This is a glaring omission that left room for speculation, ambiguity or interference while enacting the respective enabling statutes ambiguity, which are the EACC Act and the Leadership and Integrity Act. More ambiguity and confusion manifested itself in the definition of integrity threshold and the interpretation of the role of EACC, especially in ensuring compliance with Chapter Six together with the Leadership and Integrity Act. This may perhaps explain the varied definitions of the integrity threshold to be applied to those seeking public office, by Parliament, the Judiciary and civil society

Moreover, Out of the eleven (11) Commissions established by the Constitution, it is only the EACC that is not listed as one of the Constitutional Commissions under Article 248 of Chapter 15, and whose functions are not outlined in the enabling Article. Article 79 attempts to cure this glaring omission by stipulating that the anti-corruption agency established by Parliament through statute, "... shall have all the status and powers of a commission under Chapter Fifteen " This deliberate omission appears to diminish the important role of EACC and further dilute its powers and function

Insufficient number of Commissioners at EACC: The Ethics and Anti-Corruption Commission Act provides for a new governance structure of 3 Commissioners and a Secretary/CEO. This small number of Commissioners, although desirable, may present operational challenges

Firstly, there is no provision in EACC Act on the mode of appointment or election of the Vice-Chairperson yet Article 250(10) of the Constitution provides that the members of a commission shall elect a vice-chairperson from among themselves. This ought to have been part of Section 6 of EACC Act or in the section appearing immediately thereafter

Secondly, Section 14 of EACC Act empowers the EACC to establish committees for the effective discharge of its functions. With a small number of only 3 commissioners, it will be near impossible to establish any such committees. The effect of this is that all the 3 commissioners will belong to all the committees, hence defeating the purpose of setting up different committees to deal with different aspects of the Commissions functions or powers

Thirdly, and in what appears confusing, Section 6 of the Second Schedule to the EACC Act, that prescribes how the business and affairs of the Commission shall be conducted, makes reference to a vice-chairperson who shall preside at meetings in the absence of the Chairperson. Where both are absent, the members shall elect one of them to preside. This is where the operational challenges and weaknesses of the new law become evident. The EACC commissioners are only

three (3) in number including the chairperson. Assuming that they have elected one of the other two to be the vice chairperson, and that both the chair and vice chairperson are absent, this leaves only one commissioner to continue with the meeting! This is impossible because Section 5 of the Second Schedule sets the quorum for the conduct of business at a meeting of the Commission at two thirds of all the members of the Commission.

Although Section 14 of EACC Act allows the Commission to co-opt persons into membership of the Committees, these persons may only attend meetings and deliberate but shall have no power to vote. No decision can therefore be made where there is lack of quorum, and this could delay and or paralyse the work of the Commission.

For operational expediency and quorum requirements, it would have been prudent to have at least five or seven commissioners. However, with the establishment of 47 county governments after the March 4th 2013 general election, it may be necessary for the number of commissioners to be increased to the maximum constitutional limit of nine (9). An increased number of staff is also required to deal with the increased workload created by the two levels of government with the attendant huge sums of public funds being allocated to the 47 counties. There is a real danger of corruption being devolved to the counties unless the EACC is quickly restructured, empowered and visible at both levels of government.

- **Lack of prosecutorial powers by EACC:** This is perceived by some Kenyans as an aspect that may hamper expeditious and independent determination of corruption cases. However, under Article 157(12) of the Constitution, Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions. There is therefore a window of opportunity for EACC to be granted prosecutorial powers, subject of course to proven efficiency, objectivity and fairness in investigations. Priority must however be given to strengthening EACC's investigative capacity at both national and county levels of government.
- **Failure to provide for anti-corruption measures targeting the private sector:** Article 12 of UNCAC requires State Parties to enact legislation aimed at criminalising corruption in the private sector. This is borne out of the reality that the private sector companies and individuals are the ones who oil the wheels of corruption by colluding with public sector entities and officials.
- **Failure to provide for lifestyle audit of public servants:** The current anti-corruption laws have failed to provide a legal framework to audit the wealth

of public servants as a means of tracing and recovering corruptly acquired property. The wealth declaration process, which is now conducted once every two (2) years, is merely ritualistic. The information is never disclosed to the public to enable them monitor the wealth acquired by a public servant.

- **Lack of specific provisions empowering the EACC to deploy special investigative techniques** Article 50 of UNCAC requires State Parties to enact domestic legislation that empowers anti-corruption investigative agencies to use special investigative techniques such as electronic or other forms of surveillance and undercover operations in order to combat corruption effectively. In the same vein, the current Kenyan laws have also failed to provide for admissibility in evidence of evidence derived from special investigative techniques.
- **Proliferation and duplicity of anti-corruption laws** The anti-corruption legal framework is now contained in four (4) different statutes, namely the ACECA, POEA, EACC Act and the Leadership and Integrity Act (LIA). There is a lot of duplication especially in POEA and EACC Act in relation to matters of ethics and integrity. For example, under POEA and LIA the Responsible Commissions are required to develop and ensure compliance with their respective Codes of Conduct. The EACC is also legally empowered to develop and enforce codes of conduct for all public officers. This will represent operational and jurisdictional conflict when dealing with breaches of ethics. There is need to vest this powers in only one commission or clearly distinguish their roles to avoid confusion and duplicity.
- **Erosion of independence of EACC by involving Parliament in appointment of CEO:** Article 250(12) of the Constitution provides that each Commission shall have a Secretary who shall be appointed by the Commission. While enacting the Ethics and Anti-Corruption Act, however, Parliament required the EACC Secretary to be subjected to parliamentary approval before assuming office. This provision violates article 250(12) of COK, and is therefore null and void to the extent of its inconsistency. The EACC, like other constitutional commissions, is an independent body whose commissioners should be given a free hand in recruiting and supervising all their staff. The EACC Act therefore needs to be amended to delete the phrase that requires approval of the Secretary by parliament.
- **Conflicting definitions of integrity threshold pursuant to Chapter Six of COK 2010:** Interestingly, neither the Constitution nor any other statute in Kenya defines the term "integrity". This could perhaps explain the various

divergent opinions on what comprises lack of integrity, and the different integrity thresholds that have been set by both the Parliament and the Judiciary in Kenya

Soon after the promulgation of the new Constitution of Kenya in August 2010, most Kenyans were hopeful that a new crop of both appointed and elected leaders would be ushered into office, and hopefully bring honour and respect to state offices. It appears though that Kenyans may have to wait longer to enjoy the fruits of leadership that is governed by integrity. This is attributed to the different integrity thresholds that have been displayed by interviewing panels, parliament and the judiciary. Different standards seem to apply to those seeking appointment as opposed to those seeking to be elected to public office.

In order to illustrate the uncertainty and apparent bias, this Chapter, in its preceding discussion, briefly analysed the facts and judgements in five (5) major cases touching on eligibility of persons to serve as State officers based on Chapter 6 on Leadership and Integrity: Keriako Tobiko - Director of Public Prosecutions, Mumo Matemu - Chairperson of Ethics and Anti-Corruption Commission; Kiema Kionzo - Member of Parliament for Mutito Constituency; Mary Wambui - Member of Parliament for Othaya Constituency and; Uhuru Kenyatta & William Ruto - President and Deputy President respectively.

From the emerging jurisprudence on leadership and integrity in Kenya, it was not clear from these five (5) cases, at what stage an individual was considered ineligible to assume or remain in service as a state officer. Mr Matemu was found unfit to assume office due to unresolved allegations about his integrity, whereas the judges in the Uhuru and Ruto case stated that the duo were innocent until proven guilty, and that even if they were convicted, they could not be barred until they had exhausted their right of appeal. More confusion sets in when one considers the fact that Mr Matemu was not under any criminal investigation whereas Uhuru and Ruto had been indicted by the International Criminal Court and are facing trial.

As it stands now, it seems as though different integrity standards apply and that the one for appointive positions is much higher than that for elective positions. During the March 2013 general elections in Kenya, many individuals were cleared by both IEBC, EACC and the courts to seek elective posts, despite the fact that there had been pending court cases raising unresolved integrity issues. Many other Kenyans seeking appointive positions have been barred due to unresolved integrity cases yet they neither face arrest nor prosecution before any court of law.

In the Commission's view, this is an unacceptable, discriminatory application of the law that is in gross violation of Chapter 6 Principles of leadership and integrity apply to all state officers, irrespective of their mode of ascension to office. This was the intention of Chapter 6 of COK 2010, and all those charged with making and interpreting the law, that is Parliament and Judiciary, should strive to uphold the national values and principles enshrined in Article 10 of COK 2010.

At the onset, it is proposed that the term "integrity" should be defined in order to clear the ambiguity and confusion that seems to have dogged the implementation of Chapter 6 of the Constitution. Such a definition may however beg the question whether issues of morality, as implied by the common meaning of integrity, should be the subject of legislation. It remains a burning issue that may interest scholars, religious leaders and writers on corruption and governance issues.

- ▮ **Ambiguity in the role of EACC under Chapter 6 and the Leadership and Integrity Act (LIA):** An objective reading of Chapter 6 and the LIA does not clearly reveal the role of EACC before an individual is elected or appointed to a public office. The Leadership and Integrity Bill had given the EACC a clear role of vetting such individuals and thereafter issuing a Clearance Certificate. These vetting provisions were however deleted by Parliament. The only duty left for EACC is to receive a Self Declaration Form from those wishing to be elected to a state office, thus leaving it to interested individuals to "vet" themselves.

A reading of Chapter 6 and the Leadership and Integrity Act shows that Parliament appears to have deliberately avoided the use of the word "vetting". If Parliament intended to vest such a function or responsibility on the EACC, it would have expressly used this word or referred to it. A good example of such an express provision is found in Section 23(1) of the Sixth Schedule of the COK 2010 that requires Parliament to enact legislation establishing mechanisms and procedures for vetting the suitability of judges and magistrates to continue to serve. Another example is found in section 34(3) of the EACC Act that empowers the EACC to vet any member of staff of KACC who wishes to work for EACC, to ensure that he or she is fit and proper to serve in the position applied for as a member of staff of EACC.

The LIA does not state what the EACC is supposed to do with this Declaration. However, it may be safe to infer that anyone who gives false information to the EACC commits an offence punishable by a fine not exceeding kshs

5 million, imprisonment for a period not exceeding 5 years or both, as per section 46(1) (d) of the Leadership Act. Since the EACC has no prosecutorial powers, the matter will be referred to the DPP for appropriate action. Should the officer in question be convicted, they may thereafter be disqualified from holding a state office if the law establishing that office provides for such action.

Once again, there is no provision in the Constitution or EACC Act empowering the EACC to vet, qualify or disqualify any individual from election or appointment to public office. The EACC steps into the arena after the public officer has assumed office, to oversee enforcement of codes of conduct. Confidentiality of wealth declaration details submitted by public servants every two years in accordance with the Public Officer Ethics Act (POEA). This information should be made available to the public to enable Kenyans monitor wealth acquisition, especially by public servants.

- **Lack of political will to fight corruption:** According to observations made by some anti-corruption experts, “we have entrenched elite in power that is built and sustained by corruption, and then a wider national elite that is not necessarily in power but which has benefited in one way or another from graft or graft related activities”³⁵. Unless we deal with these challenges, anti-corruption institutions and other tools meant to fight corruption will be surrounded by a collective enemy so powerful that they will never succeed. These observations were made way back in January 2001 at a public forum organised by Transparency International, soon after a KACA was disbanded following a court order that declared the authority unconstitutional. Parliament and the Executive should demonstrate by words and deeds that they support the war against corruption.
- **Harassment and intimidation of whistle blowers:** Those who blow the whistle on corruption expose themselves to great risks of physical harm, death or dismissal from employment. The case of the late David Munyakei is a good illustration of such dangers. However, Kenya has since enacted the Witness Protection Act 2006 and set up a Witness Protection Agency to provide several protective measures to those willing to give information or testify about corruption. The only weakness in this law is the failure to criminalise the harassment of witnesses or provide any form of compensation for injury or loss suffered by whistle blowers.

³⁵ Report of a Public Forum held on the 17th January 2001 “KACA RULING: WHAT NEXT?” at page 50-51. A paper presented by Erastus Wamugū and John Githongo of Transparency International.

- D **Lengthy adjudication of corruption cases in court:** Although the ACECA establishes special magistrates courts to daily hear and expeditiously determine corruption cases, this has been made impossible due numerous to constitutional petitions filed by accused persons in the High Court, where they obtain orders restraining or staying proceedings in the magistrates courts. Ironically, they cite breach of their human rights, yet the majority of the victims of corruption are the ones who suffer gross violation of their basic human rights due to corruption. The courts ought to weigh public interest against individual rights, when determining such applications by suspects.

Conclusion

- 271 Grand corruption and economic crimes have had a profound and far reaching effects on the enjoyment of socio-economic rights by especially the poor in Kenya. These two interconnected crimes are insidious, they lessen the availability and access to the fundamental needs of human life: food, education, health care, shelter, etc. This Chapter of the Commission's Report has sought to make more apparent the huge cost that Kenya is paying through corruption.

Appendices

Appendix 1

SELECTED CORRUPT PRACTICES AND THEIR IMPACT ON HUMAN RIGHTS

Corrupt Practice	Act of Corruption (UNCAC)	Potential Harm	Possible Human Rights Violation
Officials bribed to allow toxic waste to be dumped illegally in an area planned for residential use	Bribery (UNCAC Article 15)	Exposure to radio-activity which has serious health and life consequences	Right to life (ICCPR, Article 6) Right to adequate housing (CESCR, Article 11) Right to health (ICESCR, Article 12)
Immigration or police officers bribed to allow trafficking, sale or abduction of children as sex workers or other forms of exploitation	Bribery (UNCAC Article 15)	Sexual exploitation and abuse, forced labor, denial of liberty and dignity	Right to be protected from trafficking and sexual exploitation (CRC, Articles 34 and 35) Right to be protected from child labor (CRC, Article 32) Right to freedom from slavery or servitude (ICCPR, Article 8)
Plaintiff offers a bribe to a judge to obtain a favorable ruling in a lawsuit	Bribery (UNCAC Article 15)	Unfair and partial trial, denial for the victim of a right to effective remedy and justice	Right to a fair trial (ICCPR, Article 14) Right to non-discrimination (ICCPR, Article 2(2)) Right to equal protection of the law (ICCPR, Article 26)

Corrupt Practice	Act of Corruption (UNCAC)	Potential Harm	Possible Human Rights Violation
Oil company offers bribes to public officials to build an oil pipeline on a site sacred to indigenous peoples, a business bribes official to seize lands of a minority group, or the shelter of urban slum dwellers	Bribery (UNCAC Article 15)	Arbitrary eviction and dispossession, denial of right to adequate shelter, denial of enjoyment of family heritage, denial of means of subsistence, restriction of access to natural resources	Right of self-determination (ICCPR, Article 1 and 47, ICESCR, Articles 1 and 25) Right to privacy, and family life (ICCPR, Article 17) Right to minority groups (ICCPR, Article 27), Right to adequate housing (ICESCR, Article 11)
Official demands a bribe to award state registration to religious group	Bribery (UNCAC Article 15)	Potential threat to freedom of religion if followers are unable to gather without state permission	Right to be protected from trafficking and sexual exploitation (CRC, Articles 34 and 35) Right to be protected from child labour (CRC, Article 32) Right to freedom from slavery or servitude (ICCPR, Article 8)
Bribery of voters and rigging of election by incumbent officer holders	Abuse of functions (UNCAC Article 18) Trading in influence (UNCAC, Article 19) Bribery (UNCAC, Article 15)	Denial of free and true participation in political and governance process	Right of political participation (ICCPR, Article 25)

Corrupt Practice	Act of Corruption (UNCAC)	Potential Harm	Possible Human Rights Violation
Bribery of labor inspector by an employer to prevent enforcement of labor law	Bribery (UNCAC Article 15)	Poor working conditions; unreasonable working hours, low remuneration, unhealthy or unsafe conditions of work	Right to just and favorable conditions of work (ICESCR, Article 7)
Companies offer illegal payment to water regulator, to exceed water extraction permit	Bribery (UNCAC Article 15)	Shortage of water to neighboring communities; water pollution	Right to water (ICESCR, Articles 11 and 12)
Illegal diversion or sale of medicines from public clinics to private practice by doctors and health officers	Misappropriation (UNCAC, Article 17)	Reduction in drug availability, poor and discriminatory service by health officials	Right to health (ICESCR, Article 12) Right to non-discrimination (ICCPR, Article 2(2))
Illegal payment to a judge or orphanage owner to speed up the adoption of a child in breach of rules	Bribery (UNCAC Article 15)	Loss of identity, family lineage, ethnic roots and medical history	Right to best interest protection (CRC, Article 3) Right of the child to preserve identity (CRC, Article 8) Right to best interest protection in adoptions (CRC, Article 21)

Corrupt Practice	Act of Corruption (UNCAC)	Potential Harm	Possible Human Rights Violation
Student at primary level has to bribe teachers to obtain a place at school	Bribery (UNCAC Article 15)	Restriction of access to education, unfair privilege given to certain students	Right to education (ICESCR, Article 13 and 14) Right to equality and non-discrimination (ICCPR, Article 2(1) and 26, ICESCR, Article 2(2))
Persons who request an official document, such as passport, visa or identification card, are asked for bribes to obtain them	Bribery (UNCAC Article 15)	Unfair privilege given to certain people, restriction of access to personal official documents, restriction in liberty to move within and leave a country	Right to equality and non-discrimination (ICCPR, Article 2(1) and 26; ICESCR, Article 2(2)) Right to liberty of movement (ICCPR, Article 12)
Corrupt police officers arrest individuals for no reason and without warrant and request bribes for their release	Bribery (UNCAC Article 15)	Arbitrary restriction of liberty	Right to liberty of movement (ICCPR, Article 12)

Corrupt Practice	Act of Corruption (UNCAC)	Potential Harm	Possible Human Rights Violation
<p>A public official obtains favourable press from a media group in exchange for extending the cable-television license of the group; or bribes are given to journalists to cover up or misrepresent information.</p>	<p>Trading in influence (UNCAC, Article 19)</p> <p>Bribery (UNCAC Article 15)</p>	<p>No fair and free information for population; no efficient and fair competition for cable- television license; deception of public and misinformation.</p>	<p>Right to freedom of opinion, expression and information (ICCPR, Article 19).</p> <p>Right to equality and non-discrimination (ICCPR, Article 2(1) and 26; ICESCR, Article 2(2)).</p>
<p>Hospital patients are asked for bribes to be treated.</p>	<p>Bribery (UNCAC Article 15)</p>	<p>Restriction in access to health; unfair privilege given to certain patients.</p>	<p>Right to health (ICESCR, Articles 12).</p> <p>Right to equality and non-discrimination (ICCPR, Article 2(1) and 26; ICESCR, Article 2(2)).</p>

Appendix 2

LIST OF PERSONS ADVERSELY MENTIONED IN GRAND CORRUPTION SCANDALS

Name	Corruption scandal	Year	Approximate loss in Kshs
Ministry of Finance officials at material time	Ken Ren Chemical & Fertilizer Co Ltd	1970	4.3 billion
Kamlesh Pattni Eliphaz Riungu Lazarus Wanjohi Wilfred Karuga Koinange Michael Wanjihia Onesmus Job Kilachi Professor George Saitoti Eric Kotut Joshua Magari James Kanyotu Elijah Arap Bii	Goldenberg International Limited	1991	60 billion
Moody Awori Kiraitu Murungi Francis Muthaura David Mwiraria Chris Murungaru Dave Mwangi Joseph Magari Deepak Kamani Anura Perera Dr Amin Juma Dr Merllyn Kettering Mrs Ludmilla Kuschenko Francis Oyula Wilson Sitonik	Anglo Leasing Finance Co Ltd & others	2004	56.3 billion
Amos Kimunya Professor Njuguna Ndungu Kennedy Abuga	Sale of Grand Regency Hotel		9.9 billion
Equip Agencies Limited	Supply of malaria control drugs to Ministry of Public Works and Housing	1996	7.2 billion
Independent Electoral and Boundaries Commission Face Technologies of South Africa Smith and Ouzman Mini Mix Agencies Hopeland Advert Solarmark Technologies Africa Infrastructure Development Company	Procurement of electoral materials for March 4 2013 General Election	2007-2012	15 billion

