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REPORT ON THE 2007/2008 POST ELECTION VIOLENCE RELATED CASES

PRESENTED BY:

THE MULTI-AGENCY TASK FORCE ON THE 2007/2008
POST ELECTION VIOLENCE

VOL. 7

OFFICE OF THE DIRECTOR
PROSECUTIONS



REPORT ON THE 2007/2008 POST ELECTION
VIOLENCE RELATED CASES

PRESENTED BY
THE MULTI AGENCY TASK FORCE ON
2007/2008 POST ELECTION VIOLENCE

TABLE OF CONTENTS

LETTER OF TRANSMITTAL	3
ACKNOWLEDGEMENT	5
LIST OF ACRONYMS	6
CHAPTER 1: OVERVIEW	7
1.1. Executive Summary.....	7
1.2. Mandate of the Task Force	9
1.3. Process and Methodology	9
1.4. Challenges in the Implementation of Assignment.....	10
1.5. Report Purpose.....	11
1.6. Key Findings	12
1.7. Key Recommendations.....	13
CHAPTER 2: REVIEW OF POST ELECTION VIOLENCE RELATED REPORT.....	14
2.1. Wahi Report.....	13
2.2. Kriegler Report.....	14
2.3. Kenya National Commission on Human Rights Report.....	14
2.4. Truth Justice and Reconciliation Commission Report	15
2.5. Report of Government's Working Committee on the International Criminal Court	15
2.6. Report of the Judicial Service Commission Committee on the Establishment of an International Crimes Division of the High Court.....	16
CHAPTER 3: ANALYSIS OF POST ELECTION VIOLENCE CASE FILES	17
3.1. Evaluation	17
3.2. Evaluation and findings of files	19
CHAPTER 4: CONCLUSION AND RECOMMENDATIONS	25
4.1 & 4.2 Conclusion and Recommendations	25
4.2.1 Office of the Director of Public Prosecutions.....	25
4.2.2 National Police Service.....	26
4.2.3. Administrative Action.....	27
4.2.4 Judiciary.....	23
5. ANNEXES.....	29

LETTER OF TRANSMITTAL

Dear Sir,



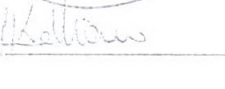


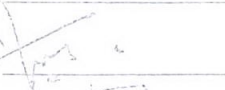




Pursuant to Gazette Notice No. 5417 of 20th April, 2012, we the Multi-Agency Task Force hereby submit a final report on 2007/2008 Post Election Violence Cases.

The attached report relates to all Post Election related files submitted to and analyzed by Multi-Agency Task Force and presented herein are findings and recommendations which have been included to inform the relevant authorities. The report is divided into four parts as follows:-

1. Overview
2. Review of Post-Election Violence Reports
3. Analysis of Post-Election Violence Case Files
4. Conclusion and Recommendations

We have the singular pleasure therefore to forward herewith a final report.

We remain,

1. Dorcas Oduor, OGW	- ODPP	- Chairperson	
2. Mohammed I. Amin, MBS,OGW	- DCI	- Vice-Chairperson	
3. Lilian Kiamba, OGW	- DCI	- Member	
4. Patrick Ndeto	- DCI	- Member	
5. Thomas Kathuli	- DCI	- Member	
6. Joseph Kingari	- SLO	- Member	
7. James Marienga	- SLO	- Member	
8. Emily Chweya	- MOJCA	- Member	
9. Sebastian Mutinda	- MOJCA	- Member	
10. Lilian Okumu Obuo	- ODPP	- Member	

11. Alexander M. Muteti	- ODPP	- Member
12. Zachary Omwega	- ODPP	- Member
13. George Murithi	- ODPP	- Member
14. Geoffrey Obiri	- ODPP	- Member
15. Mary Wang'ele	- ODPP	- Member
16. Katherine Kithikii	- ODPP	- Member
17. Peter Kiprop	- ODPP	- Member
18. Terry Kahoro	- ODPP	- Member
19. Armstrong R. Shikuku	- WPA	- Member



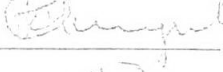














ACKNOWLEDGEMENT

The taskforce appreciates that the preparation and completion of this report has been made possible by the collaboration efforts of a number of people and organization to whom we owe our most sincere gratitude.

The team is grateful to Mr. Kariako Tobiko, CBS, SC, and the Director of Public Prosecutions for establishing contributing and facilitation of the task team towards successful completion of this exercise. We would like to express our deepest appreciation to all those who provided us with the possibility to prepare and complete this report. A special gratitude is given to the Director of Public Prosecutions, whose contribution in stimulating suggestions and encouragement helped us formulate and coordinate workable terms of reference that immensely assisted members of the task force to prepare and actualize this report.

We also thank:

1. The Office of the Attorney General
2. The Ministry of Justice national Cohesion and Constitutional Affairs (as was known then)
3. The National Police Service; and,
4. The Witness Protection Agency for seconding officers with immense experience to assist the TF.

Furthermore, we would also like to acknowledge with much appreciation the crucial role of the Office of the Director of Public Prosecutions for the facilitation by providing the required equipment and the necessary materials to complete the task at hand. Special thanks go to the Chairperson of the Taskforce for coordinating the team in line with the agreed Terms of Reference. To the members of the Taskforce who are engaged in other official duties, their participation and contributions in the preparation and compilation of the final report are highly appreciated.

LIST OF ACRONYMS

1. CIDHQ - Criminal Investigation Department Head Quarters
2. CIPEV - Commission of Inquiry on Post election Violence
3. IREC - Independent Review Electoral Commission
4. NCIC - National Cohesion and Integration Commission
5. TJRC - Truth, Justice and Reconciliation commission
6. DPP - Directorate of Public Prosecutions
7. MOJCA - Ministry of Justice, National Cohesion and Constitutional Affairs
8. SLO - State Law Office
9. NPS - National Police Service
10. WPA - Witness Protection Agency
11. PEV - Post Election Violence
12. SGBV - Sexual and Gender Based Violence
13. PC - Penal Code
14. SOA - Sexual Offences Act
15. CPC - Criminal Procedure Code
16. ICA - International Crimes Act
17. NIATF - Multi-Agency Task Force
18. PAKA - Pending Arrest of Known Persons
19. PUI - Pending Under Investigations
20. NVCF - National Victims Compensation Fund
21. LSK - Law Society of Kenya
22. KNHCR - Kenya National Human Rights Commission
23. FIDA - Federation of Kenya Women Lawyers
24. KRC - Kenya Red Cross Society
25. DCI - Director of Criminal Investigations
26. NALEP - National Legal Aid and Awareness Programme
27. ADR - Alternative Dispute Resolution
28. DPP - Director of Public Prosecutions
29. ODPP - Office Of the Director of Public Prosecutions

CHAPTER 1: OVERVIEW

1.1. Executive Summary

Kenya held its General Elections both Presidential and Parliamentary elections on the 27th December, 2007 against a background of a highly polarized and charged political environment pitting three main political parties, that is, Party of National Unity of Kenya (PNU), Orange Democratic Movement (ODM) and Orange Democratic Movement of Kenya (ODM – K). The results of the Presidential elections were announced on the 30th December, 2007 by the then Chairman of the Electoral Commission of Kenya, the late Samuel Mutua Kivuitu at the Kenyatta International Conference Centre – Nairobi.

Following the announcements, a wave of violence engulfed the country degenerating into massive displacements, wanton destruction of property, massive killing of innocent Kenyans and gross human rights violation. It was expected that the perpetrators of the crimes would be promptly investigated and prosecuted. Indeed, the Government responded to the crisis by deploying security agencies to the affected areas and in appropriate cases identified the perpetrators who were arrested and prosecuted. The Government thereafter, instituted various constitutional, legislative, institutional and administrative reforms geared toward preventing such occurrences in the future.

The Constitution of Kenya 2010 remains one of the greatest milestones that the country has registered since independence towards addressing social, political and economic inequalities that informed the widespread violence witnessed in 2007-2008. The constitution established an independent principal prosecutorial authority namely the Office of the Director of Public Prosecutions in Kenya with the mandate to institute, undertake, take over and/or control criminal proceedings within the Republic as spelled out in Article 157 of the Constitution. In addition, the Director of Public Prosecutions is empowered to direct the Inspector General of the National Police Service to investigate on any criminal matter.

The Social and Political Pillars of the Vision 2030, identifies the ideal of Kenya as being a well-ordered democratic society that respects the rule of law, human rights and whose politics is

issue-based. The post-election violence of 2007-2008 revealed underlying weaknesses in the justice system and other state institutions; and the need to revisit their efficacy in the society.

In November, 2011 the Director of Public Prosecutions (DPP) in exercise of the State's prosecutorial powers established this taskforce to review the 2007/2008 PEV related cases. This was in furtherance of the initiative began in January 2008 by the then Attorney General and Commissioner of Police addressing post-election violence. The findings and recommendations of this team are contained in their report to the Director of Public Prosecutions of December, 2011.

Based on recommendations of the said teams, the Director of Public Prosecutions (DPP) found it necessary to constitute a Multi-Agency Task Force to undertake an all inclusive review, reevaluation and reexamination of all the cases arising out 2007-2008 Post Election Violence and make appropriate recommendations to the Government. Consequently this taskforce was established vide Gazette Notice No. 5417 of 20th April, 2012 to undertake the task. (annex 1)

In performing its duties, the taskforce called for all PEV related cases from the Inspector General / Director of Criminal Investigations for review, re-evaluation and re-examination. The Taskforce learnt that a total of 6081 cases were reported for investigations to the police arising out of PEV. However, the taskforce received a total of 4576 case files from the DCI for review, re-evaluation and re-examination. After review, re-evaluation and re-examination of the files, the information in the files was condensed into templates.

In addition, the Taskforce reviewed judicial decisions relevant to PEV that were considered of great public interest. The taskforce reviewed a total of 366 cases taken court but not all Post election Violence cases. This is because not all reported cases were taken to court.

Accordingly, the taskforce advised on the 4336 case files. In the letter resubmitting the files to the DCI for further investigations as per the templates, the taskforce directed that upon completion of investigations, the same should be resubmitted for further perusal and directions as a supervisory measure. The taskforce further noted that there were numerous cases where perpetrators could not be specifically identified by the victims and could generally

describe them as their neighbors or members of a particular ethnic community. The taskforce recommends that such cases be dealt with by way of alternative dispute resolution mechanisms including the establishment of Standing Peace Committees. The Committees would promote reconciliation through mediation and arbitration.

1.2. Mandate of Task Force

The Taskforce was constituted on the 6th of February 2012 and gazetted on 20th April, 2012 with the following Terms of Reference: -

- a) To undertake a countrywide review, re-evaluation and re-examination of all the cases arising out of the 2007/2008 Post-Election Violence and make the appropriate recommendations;
- b) To review any report, publications and judicial decisions that are relevant to Post-Election Violence cases and advise on their implementation;
- c) To recommend to the Government on how all Post Election Violence cases can be expeditiously disposed off;
- d) To advise and supervise and guide any investigations and prosecutions being undertaken in relation to the Post Election Violence;
- e) To recommend and facilitate prosecution and other alternative dispute resolution mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms;
- f) To recommend the co-option of any other relevant person or agency with expertise for specific tasks as may be necessary;
- g) To recommend any legislative, administrative, institutional and regulatory reforms;
- h) Liaise with any Government agency or institution in furtherance of its mandate;
- i) Make appropriate periodic reports to the Director of Public Prosecutions for directions;
- j) To ensure public participation where necessary;
- k) Undertake any other responsibilities or assignments as may be assigned by the Director of Public Prosecutions, from time to time;
- l) Regulate its proceedings including the development of a work plan, implementations matrix and the rules of procedure.

1.3. Process and Methodology

In undertaking the assignment, the taskforce;

- i. Reviewed, re-examined and re-evaluated the physical post-election violence related files.
- ii. Invited views from the public on post-election violence related cases through newspaper adverts. Advertising in the local dailies, Nation, standard and people of the 24th August, 2012, invited the public to submit their views to the taskforce regarding its mandate. The TF received views from a few members of the public. Annex 2.
- iii. Invited and reviewed views of various civil society organizations on post-election violence related cases. The TF Invited specific organizations to second officers to the TF. The following organizations were invited. (i) LSK, (ii) COVAW, (iii) FIDA (iv) KNHRC (v) Kituo Cha Sheria (vi) Muhuri (vii) ICJ. Out of the seven organizations invited, only LSK and COVAW responded to the invitation but noted that they were unable to send a representative to assist the TF. Annex 3.
- iv. Reviewed the previous reports on post-election violence.
- v. Held working retreats and numerous board room meetings during which the taskforce focused on reviewing the files and advising the investigators accordingly.
- vi. Reviewed newspapers, articles and other publications related to PEV.

1.4. Challenges in the Implementation of Assignment

The Task Force experienced challenges relating to its work including:-

- i. Lack of centralized record system within the criminal justice actors to enable easy access to information.
- ii. Time constraints given to high number of files that the taskforce was required to review, re-evaluate and re-examine.
- iii. Failure by the public and other stakeholders to provide information that could assist the taskforce effectively to discharge its mandate.
- iv. Inadequate facilitation of the taskforce thus disrupting its schedule of its activities.

1.5. Report Purpose

At the conclusion of the exercise, the Task Force Report is expected to facilitate prosecution and other alternative dispute resolution mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Accordingly, a Table of Cases where accused persons have been charged but have absconded and warrants of arrest issued. In cases where there were known suspects and evidence disclosed prosecutable cases, the taskforce recommended that the suspects be arrested and charged.

The taskforce noted that there were numerous cases where perpetrators could not be specifically identified by the victims and could generally describe them as their neighbors or members of a particular ethnic community. The taskforce recommends that such cases be dealt with by way of alternative dispute resolution mechanisms including the establishment of Standing Peace Committees. The Committees would promote reconciliation through mediation and arbitration. T

The Report will also be used to implement legislative, administrative, institutional and regulatory reforms. In this regard, laws that have been earmarked for review include the Constitution of Kenya, 2010; International Crimes Act; National Police Service Act; ODPP Act; National Cohesion and Integration Act; Internally Displaced Persons Act; The Assumption of Office of the President Act; Independent Electoral & Boundaries Commission Act; Elections Act; Campaign Funding Act; Leadership and Integrity Act; Political Parties Act; Devolution Act. The justification for these reviews is that despite the enactment of these legislations, there do exist the challenges including, for instance, the period provided for resolution of presidential disputes and the lacuna on the conduct of a presidential runoffs.

1.6. Key Findings

At the conclusion of the exercise of the Taskforce, the team established the following:

- i. Post-Election Violence was widespread. The epicenter of the violence was the Rift Valley which recorded the highest number of post-election violence cases.
- ii. There was massive displacement of people who ended up in camps either at police stations, show grounds, schools, churches or other public facilities.

- iii. In some cases affected or displaced persons were hosted by friendly neighbors from the opposing communities.
- iv. Large-scale destruction of properties through arson and malicious damage.
- v. Mass killings by civilians and police officers who were quelling the violence.
- vi. Sexual violence was rampant during the conflict period and several cases were prosecuted successfully leading to sentences ranging from jail terms and life imprisonment.
- vii. Case files remain under investigation to date.
- viii. Inquest files were opened where there were no known suspects who could be prosecuted for the killings.
- ix. The government has since resettled a majority of the profiled internally displaced persons.
- x. In 152 case files, suspects have been identified and categorized by the police as pending arrests.
- xi. Ten (10) murder cases were filed and prosecuted in relation to post election violence.
- xii. Attackers were carried out by gangs that in some instances singing war songs and had their faces smeared with cow dung ostensibly to camouflage and conceal their identities.
- xiii. In some instances, law enforcement agents were accused of perpetrating crimes against the people or overseeing the commission of the crime thus eroding public confidence in their ability, commitment to deal with any incidences related to PEV.
- xiv. The police were overwhelmed in dealing with the large scale violence during the PEV.

1.7. Key Recommendations

- i. Fast tracking police reforms in line with Article 243, 244 and 245 of the Constitution.
- ii. The Judiciary should work out modalities in consultation with the ODPF and DCI to ensure all election related offences are robustly prosecuted as is the case with election petitions.
- iii. The Government should consider making reparations to victims of PEV where such victims cannot otherwise access justice.

- iv. The Government should develop a martial plan for youth empowerment and creation of more employment opportunities.
- v. National reconciliation peace and integration should be given top priority by the Government as a deterrent measure to any conflict.
- vi. The Government jointly with the media owners should develop a media policy to promote responsible journalism.
- vii. Information to be shared on a routine basis between Judiciary, Inspector General and the Director of Criminal Investigations, Director of Public Prosecutions.
- viii. Strengthen human resource capacity of the National Police Service.
- ix. Training and Capacity Building of the Police
- x. Establish fully equipped forensic laboratories in each county.

CHAPTER 2: REVIEW OF POST ELECTION VIOLENCE RELATED REPORTS

2.1. Waki Report

The Commission in its report at pages 21-36 and 443 – 469 noted that:-

- Political leaders adopted violence as the method of choice to resolve a range of political differences and obtain or retain political power.
- Politically instigated violence in the past has not been properly addressed through prosecutions.
- Because of the ethnic nature of post election violence, ethnic fears and hatred have been elevated and could turn violent again more easily than before.
- There is need for political will and decisions to change the way politics is conducted.
- There is need for the government to address underlying causes of political violence such as marginalization, ethnicity, land, inequality and economically empower the youth.
- The commission discouraged blanket amnesty saves for minor offenders in exchange of truthful confessions and willingness to testify against any of the organizers, financiers and masterminds of the violence.

- The government should stamp out impunity as a deterrent to political violence in the future.

2.2. Kriegler's Report

The taskforce established from the Commission's recommendation at page 141 that post election dispute resolution mechanism in Kenya was identified as one of the main contributors to the tension and eventual violence after the 2007 general elections. However, this challenge has since been addressed through law reform process undertaken since then.

2.3. Kenya National Commission on Human Rights Report

The taskforce noted at pages 7-11 that the Kenya National Commission on Human Rights in its report of August 2008 entitled "On the Brink of the Precipice: A Human Rights account of Kenya's Post 2007 Election Violence" that:

- The violence was widespread.
- Forcible evictions and mass displacement of people not indigenous to particular regions took place.
- The ideology and infrastructure of the post election violence predated the 2007 general elections.
- There was organization and method to the violence.
- The violence was characterized by widespread or systematically targeted killings of people, looting and destruction of property belonging to communities aligned to PNU and ODM.
- The infrastructure of violence was financed and sustained mainly by local politicians and business people.
- The violence was largely instigated by politicians throughout the campaign period and during the violence by use of incitement to ethnic hatred.
- Sexual and gender based violence occurred during the conflict.
- Human rights violations were perpetrated during the Post-Election period.

2.4. Truth Justice and Reconciliation Commission's Report

The TJRC in its report volume 2A at pages 756, 760 and Volume 2B pages 310 – 314, noted that:-

- Lax security situation in the country during and after the campaigns for the 2007 general elections allowed individuals to resort to self help measures in an attempt to rid their homeland of immigrant communities.
- The attackers were venting pent up anger at the resented perceived dominance of particular communities.
- Land injustices were a major contributor to the Post election violence.
- Loss of elections by ODM which was hitherto perceived to be favorable to change including in the lands sector triggered the chaos.
- Government officers were perceived not to have been impartial in handling the crisis.
- There was need for immediate resettlement of IDPs and afford them all equal treatment without discrimination on account of ethnicity.
- Peace building initiatives should be put in place in order to promote acceptance, co-existence and integration.
- All pending land issues be resolved.
- The establishment of the International Criminal Division (ICD) to try International and cases referred to DPP by TJRC be fast tracked.
- The Taskforce finds the report more objective and an accurate representation of the happenings, save to state that the violence was wide spread abrupt and the same could not be easily contained by the law enforcement agencies.

2.5. Report of Government's Working Committee on the International Criminal Court

The Attorney General appointed this Committee to advise him on the cases before the ICC. It submitted its report on 16th of March 2012. The Committee, in Paragraph 28 of its report, noted the establishment of this Taskforce by the DPP. In Paragraphs 43-46 and 70 -88 the Committee recommended: -

- That there should be a comprehensive prosecutorial policy to deal with all allegations and cases arising from PEV 2007-2008.
- That all existing cases arising from PEV be audited in order to identify all cases that had been "genuinely" closed; cases where victims were no longer interested in seeking the intervention of Penal sanctions; cases that needed further investigations; cases where prosecution was necessary.
- That the State meets its obligations, both under International Human Rights law and the Constitution, to make reparations to victims of serious crimes. It noted that the government had made some reparation but had, overall, not complied fully with this obligation.

2.6. Report of the Judicial Service Commission Committee on the Establishment of an International Crimes Division of the High Court

The Committee was appointed by the Judicial Service Commission on 9th May, 2012 with the mandate to look at the modalities of establishing an International Crimes Division to try PEV cases. The committee observed that the High Court had jurisdiction to try crimes under the International Crimes Act, 2009 (ICA); the rule against retroactivity did not apply and the High Court could try cases arising from PEV 2007/2008; there was public demand to deal with pending PEV cases since the special tribunal proposed by CIVEP was not acted upon.

The Committee thus recommended as follows: -

- The Chief Justice establishes an ICD within the High Court to try international crimes cases under the ICA.
- The ICD be modeled against the International Criminal Court with the same rules of practice and procedure. That the ICD should be housed in a separate facility where all its organs should be based.
- That the ICD be conferred with the jurisdiction to hear PEV crimes and that cases that were pending before courts shall be deferred to the ICD.

- That there be establishment a well-facilitated and independent Prosecution Unit within the Office of the Director of Public Prosecutions headed by an independent Special Prosecutor (page 153).
- Enactment of legislation to provide for appointment of a special prosecutor under Article 157 (12) of the Constitution.
- The taskforce has reviewed the report of the committee appointed to advise the government on ICC cases among the proposed methods of disposing cases as creation of an ICD whose jurisdiction will include among others trying post-election violence related cases. Further, the TJRC in its report has made a similar recommendation PEV matters pending investigations has established that there are no active files that could immediately be placed before I.C.D for trial in relation to PEV.

CHAPTER 3: ANALYSIS OF POST ELECTION VIOLENCE CASE FILES

3.1 Evaluation

The taskforce reviewed judicial decisions that the members considered to be of great public interest on Post-election violence. The decisions include:

i. Republic vs. Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa¹

In this case, the accused persons were convicted with the counts of the offence of murder c/section 203 as read with 204 of the Penal code. They were both sentenced to suffer death in count 1 and sentences in counts 2, 3 and 4 held in abeyance.

ii. Republic vs. Andrew Mueche Omwenga²

The accused was charged with two counts of murder. The offence was reduced to the lesser one of manslaughter and sentenced to serve 10 years imprisonment.

iii. Republic vs. Ben Pkisch Loyatum³

¹Kitale 811/30/2008 Kitale HRCC NO. 19 OF 2008.

²Nakuru HRCC No. 11 of 2008.

The accused was charged with the offence of murder. He was found guilty and sentenced to suffer death as by law provided.

iv. Republic vs. Robert K. Kemboi & Another⁴

The accused persons were jointly charged with the offence of murder. The court relied on circumstantial evidence in convicting them of the offence. They were sentenced to suffer death.

v. Republic vs. Edward Kirui⁵

The accused was charged with two counts of murder but the court held that the prosecution had failed to prove that the fatal bullet was discharged from the gun, the accused person had. The state has since moved to the court of appeal vide Criminal appeal no 9/2009. The court of appeal reversed the acquittal by entering declaratory judgment on count 1 and ordering a retrial on count 11. The suspect has since been charged afresh vide criminal case No. 67/14.

vi. Republic vs. Stephen Kiprotich Leting & 3 Others⁶

The accused persons were jointly charged with seven counts of murder. The court held that the prosecution failed to place any of the accused persons at the scene of crime and as such acquitted all of them.

Further, the Taskforce reviewed, re-evaluated and re-evaluated and re-examined 4336 case files which includes 4118 general cases and 218 Sexual Gender Based Violence cases.

The files were categorized as hereunder;

- i. Cases pending before court
- ii. Files pending under investigations
- iii. Pending arrest of known persons
- iv. File withdrawn
- v. Inquests
- vi. Murder
- vii. Sexual Gender Based Violence cases

³ Eldoret HRCC No. 5 of 2008.

⁴ KERICHO HCCR NO. 17 OF 2008.

⁵ NAIROBI HCCR NO. 9 OF 2008.

⁶ NAKURU HCCR No. 34 of 2008.

The task force since its constitution received 4575 files related to PEV 2007/2008 cases. An interim report was prepared by the task force providing a summary of its findings and interim recommendations. The said report was circulated to various stakeholders partisan to the task force for perusal, comment and advice. The task force reviewed, re-examined and re-evaluated the 4575 files which process entailed a thorough analysis of the evidence reduced into templates and statistical data annex 4. The 4575 files were thereafter returned to the Director of Criminal Investigations vide a letter dated 15th February 2013 with the inclusion of the template in each file citing the recommendations of the task force, directing on further areas of investigation and/or the next cause of action.

A response was received from the Director of Criminal Investigations vide a letters dated 17th January 2014 and 31st July 2014 in respect of the 4575 files returned by the task force. Notably several challenges were experienced and as such hindered completion of further investigations. Some of the challenges experienced entail the unavailability of the complainant due to relocation and as such could not be traced to provide further information or the inability of a complainant identifying the culprits, as some of the offences were committed while the complainants were away among many other challenges.

In respect of Sexual and Gender Based Violence Cases, although there were 368 cases reported, the task force received 215 files from the Director of Criminal Investigations that were substantively reviewed, re-evaluated and re-examined. Notably a review of the said files revealed that a large number of the victims were gang raped by assailants who were not known or could not be identified. These files were returned to the Director of Criminal Investigations with recommendations made by the task force however upon re-submission, it was unfortunate to note that further investigations yielded no positive results or explanations. In respect of the remainder of the 368 cases reported, 123 cases were filed in court and finalized and 38 cases are pending before Court.

3.2 Evaluation and Findings of Files to the Police

The ODPP re-submitted all of the 4575 files to the police that had been received from the police. These files were re-submitted to the police for further investigations as the files did not meet the evidential standards required to institute charges. These files were re-submitted to the