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LIST OF ACRONYMS

ACP	Assistant Commissioner of Police
AIDS	Acquired Immune Deficiency Syndrome
AP	Administration Police
APRM	African Peer Review Mechanism
ASK	Agricultural Society of Kenya
BBC	British Broadcasting Corporation
CIPEV	Commission of Inquiry Into Post Election Violence
CREAW	Centre for Rights Education and Awareness
CSC	Cabinet Security Committee
CW	Commission Witness
DC	District Commissioner
DCIO	District Criminal Investigations Officer
DO	District Officer
DSIC	District Security and Intelligence Committee
ECK	Electoral Commission of Kenya
FIDA	Federation of Women Lawyers
FM	Frequency Modulation
FSO	Force Standing Orders
GBVU	Gender-Based Violence Units
GEMA	Gikuyu, Embu, Meru Association
GK	Government of Kenya
GOK	Government of Kenya
GSU	General Service Unit
GVRC	Gender Violence Recovery Centre
ICD	Independent Complaints Directorate
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Person
IPCA	Independent Police Conduct Authority
KADU	Kenya African Democratic Union
KAG	Kenya Assemblies of God
KAMATUSA	Kalenjin, Maasai, Turkana and Samburu.
KANU	Kenya African National Union
KARI	Kenya Agricultural Research Institute
KBC	Kenya Broadcasting Corporation

KEFRI	Kenya Forestry Research Institute
KHRC	Kenya Human Rights Commission
KICC	Kenyatta International Conference Centre
KNCHR	Kenya National Commission on Human Rights
KSIM	Kenya Security Intelligence Machinery
MOU	Memorandum of Understanding
MP	Member of Parliament
MUHURI	Muslims for Human rights
NARC	National Rainbow Coalition
NCCK	National Council of Churches of Kenya
NCPB	National Cereals and Produce Board
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NSAC	National Security Advisory Committee
NSIS	National Security Intelligence Service
OCPD	Officer Commanding Police Division
OCS	Officer Commanding Station
ODM	Orange Democratic Movement
PEV	Post Election Violence
PNU	Party of National Unity
PPO	Provincial Police Officer
PSIC	Provincial Security and Intelligence Committee
PSV	Public Service Vehicles
RDU	Rapid Deployment Unit
RRC	Revolutionary Republican Council
SLDF	Sabaot Land Defence Forces
SOP	Standard Operating Procedures
SSP	Senior Superintendent of Police
UCL	Universal Corporation Limited
UNFPA	United Nations Fund for Population Activities
UNIFEM	United Nations Development Fund for Women

Executive Summary

The mandate of the Commission of Inquiry into Post-Election Violence (CIPEV) was to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters.

The Report comprises 5 Parts. Part I of the Report is an Introduction which discusses the historical context of the violence; Part II is a narration of the violence province by province. Part III deals with four cross cutting issues: sexual violence, internally displaced persons, the media and the nature and impact of the violence. Part IV deals with acts and omissions of state security agencies and impunity; and Part V contains recommendations made with a view to the prevention of future reoccurrence of large scale violence; the investigation of alleged perpetrators; and how to tackle the culture of impunity that has become the hallmark of violence and other crimes in the country.

Sadly, violence has been a part of Kenya's electoral processes since the restoration of multi party politics in 1991. However, the violence that shook Kenya after the 2007 general elections was unprecedented. It was by far the most deadly and the most destructive violence ever experienced in Kenya. Also, unlike previous cycles of election related violence, much of it followed, rather than preceded elections. The 2007-2008 post-election violence was also more widespread than in the past. It affected all but 2 provinces and was felt in both urban and rural parts of the country. Previously violence around election periods concentrated in a smaller number of districts mainly in Rift Valley, Western, and Coast Provinces.

As regards the conduct of state security agencies, they failed institutionally to anticipate, prepare for, and contain the violence. Often individual members of the state security agencies were also guilty of acts of violence and gross violations of the human rights of the citizens.

In some ways the post-election violence resembled the ethnic clashes of the 1990s and was but an episode in a trend of institutionalization of violence in Kenya over the years. The fact that armed militias, most of whom developed as a result of the 1990s ethnic clashes, were never de-mobilized led to the ease with which political and business leaders reactivated them for the 2007 post-election violence. Secondly, the increasing personalization of power around the presidency continues to be a factor in facilitating election related violence.

The widespread belief that the presidency brings advantages for the President's ethnic group makes communities willing to exert violence to attain and keep power. Inequalities and economic marginalization, often viewed in ethno-geographic terms, were also very much at play in the post-election violence in places like the slum areas of Nairobi.

One of the main findings of the Commission's investigations is that the post-election violence was spontaneous in some geographic areas and a result of planning and organization in other areas, often with the involvement of politicians and business leaders. Some areas witnessed a combination of the two forms of violence, where what started as a spontaneous violent reaction to the perceived rigging of elections later evolved into well organized and coordinated attacks on members of ethnic groups associated with the incumbent president or the PNU party. This happened where there was an expectation that violence was inevitable whatever the results of the elections.

The report concludes that the post-election violence was more than a mere juxtaposition of citizens-to-citizens opportunistic assaults. These were systematic attacks on Kenyans based on their ethnicity and their political leanings. Attackers organized along ethnic lines, assembled considerable logistical means and traveled long distances to burn houses, maim, kill and sexually assault their occupants because these were of particular ethnic groups and political persuasion. Guilty by association was the guiding force behind deadly "revenge" attacks, with victims being identified not for what they did but for their ethnic association to other perpetrators. This free-for-all was made

possible by the lawlessness stemming from an apparent collapse of state institutions and security forces.

In general, the police were overwhelmed by the massive numbers of the attackers and the relatively effective coordination of the attacks. However, in most parts of the country affected by the violence, failure on the part of the Kenya Police and the Provincial Administration to act on intelligence and other early warning signs contributed to the escalation of the violence.

The post-election violence is also the story of lack of preparedness of, and poor coordination among, different state security agencies. While the National Security Intelligence Service seemed to possess actionable intelligence on the likelihood of violence in many parts of the country, it was not clear whether and through which channel such intelligence was shared with operational security agencies. The effectiveness of the Kenya Police Service and the Administration Police was also negatively affected by the lack of clear policing operational procedures and by political expediency's adverse impact on their policing priorities.

The report recommends concrete measures to improve performance and accountability of state security agencies and coordination within the state security mechanism, including strengthening joint operational preparedness arrangements; developing comprehensive operational review processes; merging the two police agencies; and establishing an Independent Police Complaints Authority.

To break the cycle of impunity which is at the heart of the post-election violence, the report recommends the creation of a special tribunal with the mandate to prosecute crimes committed as a result of post-election violence. The tribunal will have an international component in the form of the presence of non-Kenyans on the senior investigations and prosecution staff.

PART I

OVERVIEW

CHAPTER ONE

Introduction

The Commission of Inquiry into the Post Election Violence (CIPEV) began on 23rd May 2007 with an announcement published in the Kenya Gazette Notice No.4473 vol. cx-no.4. The members of the Commission as appointed were its Chair, Mr. Justice Philip Waki, a judge of Kenya's Court of Appeal and two Commissioners, Mr. Gavin McFadyen and Mr. Pascal Kambale respectively nationals of New Zealand and the Democratic Republic of Congo respectively. Two Kenyans, Mr. David Majanja and Mr. George Kegoro, were appointed the Counsel Assisting the Commission and Commission Secretary.

The international members of the Commission arrived in Nairobi within a week of the publication of the Gazette notice. As required by law, the Commission took an oath of office before the Chief Justice on 3rd June 2008. The Commission held its first press conference the same day.

Both the Government of Kenya (GOK) and the multi donor Trust Fund for National Dialogue and Reconciliation, managed by the United Nations Development Programme (UNDP), funded the Commission's work. The former provided the Commission with office space, security, and transport, while the latter paid the Commission's expenses, including staff costs. The GOK also assisted the Commission during field visits and hearings. In addition, the Commission received support from the Nakuru, Eldoret, Kisumu and Mombasa local authorities as well as from several religious organizations during its field visits. Assistance included various types of facilitation from the Anglican Church of Kenya's Naivasha Diocese and the Catholic Dioceses in Nakuru, Kisumu, Eldoret and Mombasa.

Setting up the Commission

Initially the Commission attended to a number of logistical and administrative matters before beginning its substantive work. These included obtaining office

space, hiring staff, and collecting background documents. One time consuming matter that kept the Commission from immediately addressing its substantive work was the lack of office space. This was something the Commission did not and could not have anticipated. The Panel of Eminent African Personalities kindly assisted with temporary quarters even though they were not formally responsible for the Commission. However, it took three weeks of discussions with the Panel and various government officials until the Commission was properly settled and was able to clarify which entities would provide the logistical support needed to move forward.

During this period, the Commission assembled background documents and other necessary material. The Commission also identified, interviewed and completed staff recruitment. A full list of Commission staff is annexed. To ensure the independence of its investigators, the Commission advertised locally and internationally for these positions. For the same reason, the Commission decided that the head of its team of investigators should be an international rather than a local. The Commission recruited a Canadian, Robert Grinstead, for this post. Later, the Commission also recruited an international consultant, Dr. Suzanne Mueller, a political scientist.

Apart from the above, it was agreed that because part of the Commission's mandate was to investigate the role and conduct of the security forces in the post election violence, none of their serving members would be eligible to apply for positions with the Commission. In addition, the Commission also recognized the need for specialists who could investigate sexual violence. This was an important part of the post election violence and something the Commission wanted to probe comprehensively as an integral part of its mandate. The Commission, therefore, recruited two female investigators to examine sexual violence: one international, Ms. Melinda Rix of New Zealand, and another Ms. Gladys Mwariri, a Kenyan. The Commission also had the assistance of a full time psychologist counsellor, Ms Nyawira Kuria. The Commission also received assistance from various UN, government agencies, and NGOs specializing in this area, something discussed in detail in the full report below.

The Commission finally acquired office space on 17th June 2008. By 25 June 2008, most of the staff was on board and the Commission was able to begin substantive work. Initially, the Commission consulted informally with a variety of groups and held a number of consultative meetings.

The Commission concluded early in its tenure that it would not have enough time to visit all areas that had been heavily affected by the post election violence. The life of the Commission, as provided in the Gazette, was only three months and set to expire on 22 August 2008. Hence, the Commission immediately wrote to His Excellency the President of Kenya and to the Panel of Eminent African Personalities asking for a 60 day extension so that it could plan ahead. While the Panel supported the request, the National Dialogue and Reconciliation team, which was the final decision maker, did not. Instead the Commission was granted only a 30 day extension, published in the Gazette Notice no. 7288 Vol. cx – no. 67 dated 12th August 2008.

The Commission conducted hearings in public in the following areas: Nairobi between 9 and 25 July 2008 and again from 19 to 27 August 2008, Naivasha on 28 and 29 July, Nakuru from 30 July to 1 August 2008, Eldoret from 5 to 7 August 2008, Kisumu from 11 to 13 August 2008, Borabu on 14 and 15 August and Mombasa on 1 and 2 September 2008. Because of the failure to obtain a 60 day extension of time the Commission abandoned its original plans to conduct public hearings and investigations in Kakamega, Busia, Kericho, Bungoma, Laikipia, Thika and Limuru. Eventually, the Commission received another two-week extension for the purpose of preparing this report through Gazette Notice No. 8661 in Vol CX – 74 dated 12th September 2008. The difficulty of receiving limited extensions piecemeal rather than all at once diminished the capacity to engage in forward planning.

Establishing a communication strategy

The public legitimately expected the Commission to work transparently and to keep the public informed. Both to manage public expectations concerning

information and to develop a reciprocal relationship with the media, the Commission appointed Ms Mildred Ngesa, an experienced journalist, as media relations officer.

In addition, the Commission designed and established a website www.cipev.org to facilitate public access to information about our mandate and our work. The Commission also set up a secure email address, info@cipev.org for receiving confidential information and correspondence. Once the Commission began hearings, the verbatim record of public proceedings was posted on the website.

Aside from the above, the Commission conducted periodic media briefings to inform the public of its work. The three Commissioners appeared together on television interviews in the initial phase after which the Chair issued press releases and engaged with the media in other ways.

Publication of Rules and Procedure

The Commission also used its initial period to develop and publish its own rules and procedure. The capacity to make rules is granted under the Commissions of Inquiry Act and also under the terms of reference for the Commission. These rules, other than providing guidelines to assist the Commission in its work were designed to allow partnerships between the Commission and as many interest groups as possible. The rules and procedure for the Commission were published in the Gazette as Notice No. 4923 on 13 June 2008 as well as the newspapers on 24 June 2008.

Consultations with Government Departments and Others

As part of its preparatory work, the Commission consulted with officials and departments of the government concerned with, or whose functions fell within the scope of the investigations. The purpose of these consultations was, firstly, to build a level of trust with these institutions that would facilitate the

Commission's investigations. Secondly, the Commission sought to explore with the concerned officials the various practical arrangements necessary to enable investigations. The initial meetings with officials were held in private. The officials with whom the Commission met at this stage included the Commissioner of Police, the Commissioner of Prisons, the Commandant of the Administration Police, the Chief of the General Staff, the Attorney General, the Chairman of the Electoral Commission of Kenya (ECK) (represented by members of his Commission), the Director General of the National Security Intelligence Service, the Permanent Secretary to the Ministry of Justice, National Cohesion and Constitutional Affairs, and the Permanent Secretary in the Office of the President in charge of Internal Security and Provincial Administration. This Commission appreciates the level of co-operation received from the various government departments throughout its work.

The Commission also sought audience with the political leadership and managed to interview the Vice-President, the Prime Minister and one Deputy Prime Minister. An appointment sought with the President did not materialize while the former President declined to meet with the Commissioners.

Initially, the Commission also visited a number of areas within Nairobi that had been severely affected by the post election violence, including Kibera. This enabled members to interact with local communities, obtain feedback from them, and also allowed the international members of the Commission to acquire a feel for the issues they would encounter elsewhere.

Role of Civil Society

The Commission deliberately decided to work closely with Kenyan civil society organizations and seek their assistance with information, contacts, and expertise in areas related to post-election violence. A number of these organizations attended the Commission's hearings through lawyers who represented victims and communities and provided useful feedback to members of the public on the Commission's work. These included Kenyans for Peace with Truth and Justice

(KPTJ), the Inter-Religious Forum, the Kenyan Section of the International Commission of Jurists, (ICJ-K), the Kenya Human Rights Commission (KHRC), the Kenya National Commission of Human Rights (KNCHR), different chapters of the Catholic Peace and Justice Commission, and various religious and faith based organizations.

Civil society and human rights organizations greatly contributed to the Commission's work by:

- Providing background material and reports concerning the history and patterns of human rights violations in Kenya. This helped the Commission establish a foundation from which to proceed;
- Giving access to their records, often including statements from witnesses they had interviewed and helping map out geographic regions that should be the focus of investigations;
- Providing contacts with local community leaders, individual victims, and other key contacts in communities where they had established trust and credibility;
- Assisting and providing victims the Commission interviewed in public and in private with emotional support, based on long established relationships with them; and
- Offering various types of assistance to victims, including medical services, counselling, and various types of community support.

Standing Before the Commission

The Commission addressed the question of legal standing from persons who wished to participate in its proceedings. The following government departments were covered by its mandate and hence were allowed to participate in the hearings: the Kenya Police Service, the Administration Police, the Provincial Administration, the Electoral Commission of Kenya, the National Security Intelligence Service, the Kenya Prisons Service and the Armed Forces.

Groups of citizens and civil society organizations also applied to participate in the proceedings. They included victims' representatives, experts on specific aspects of the Commission's work, and organizations that had been involved in addressing the post-election violence itself. All had useful information for the Commission.

The Commission considered that the quality of proceedings would benefit from allowing as many interest groups as possible to participate. In the end, the Commission gave legal standing to the Federation of Women Lawyers (FIDA) and the Centre for the Advancement of Women and Children, both of which were allowed to represent the interests of women in the context of the post election violence. The Commission also granted the Kenyans for Peace with Truth and Justice, the Rift Valley Internally Displaced Persons Association, the Centre for Justice and Crimes against Humanity, and the Tegla Lorupe Foundation standing as interveners. Outside Nairobi, the Commission granted regional law societies standing in its proceedings. These included the Rift Valley Law Society in Nakuru, the North Rift Law Society in Eldoret, and the West Kenya Law Society in Kisumu, and the Law Society of Kenya (South Rift Branch) even though the Commission did not hold proceedings in Kericho, where the society is based.

The Commission declined requests for standing by Kenya's two main political parties, the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) because it did not think their participation was necessary. However, each of them testified through their Secretaries General.

All groups participating in the proceedings were asked to furnish the Commission with lists of their witnesses and statements from the witnesses. A significant number of the witnesses who testified before the Commission were identified and processed by lawyers acting on behalf of various civil society organisations. To maintain control over its proceedings the Commission insisted that such witnesses coming in had to be processed with the full participation of Counsel Assisting the Commission. This ensured that relevant and credible evidence was presented. Whenever necessary to avoid grandstanding, the

Commission intervened to limit questions from lawyers. The Commission's experience was that allowing the diverse interests seeking representation greatly increased the quality of the inquiry. The lawyers for the various parties brought useful perspectives before the Commission that might have been missed altogether, if they had been excluded. In addition, the participation of these same lawyers enabled the Commission to reach out to witnesses who might not otherwise have come forward. This broadened participation and enriched understanding. Furthermore, a number of the lawyers admitted into our proceedings had sharply opposing points of view. This increased the objectivity and the credibility of the testified received.

Methodological Issues

Public investigative inquiries represent a methodological challenge: they are not courts of law but are influenced by Kenya's common law tradition. In deciding how to proceed, we adopted a mix of chose a half way house that mixed both adversarial and inquisitorial methods. The rules and procedures reflected this choice. The Commission also felt this was the optimal means to uncover the truth concerning post election violence and impunity in Kenya. At the same time, the Commission went to great lengths to ensure that all witnesses were treated fairly and developed rules to protect them from unfair accusations.

The Commission had to address a number of other issues. One was how to utilize the reports and other material received from various organizations, as provided by paragraph 2(a) (ii) of its terms of reference. The Commission treated this information as it did any other: testing and evaluating it independently to complement its own findings.

Although the Commission would have preferred to hold all its hearings in public, paragraph 2(f) of its terms of reference allowed the holding of private hearings when necessary to instil confidence in witnesses and to allay their fears of reprisals. The Commission utilized both methods. Public officials mainly testified openly, unless there were good reasons to do otherwise. A number of victims also

testified in public. However, many others chose to speak in private because they feared reprisals or were too traumatized to come forth in public. The Commission took great care to protect the privacy of witnesses who testified in camera. However, we did not have a reliable witness protection program which might have given greater solace to others who avoided speaking to us. One of the greatest challenges was to find victims and convince them to testify, something the Commission went to great lengths to do in spite of its constraints, including time. The investigation team of the Commission was able to come to towns only two to three days before the Commission. Hence, they had very limited time to find and prepare witnesses, something that elicited disappointment, particularly when the Commission was unable to stay long enough to hear everyone who wanted to testify. Nevertheless, there was a general realization that the Commission provided a unique opportunity and venue for individuals who had suffered horribly to come and tell their stories. The Commission did whatever possible to accommodate witnesses, in some cases holding extended hearings up to 14 hours a day. The Commission appreciates very well that in the final analysis only a miniscule sample of the avoidable suffering inflicted upon innocent Kenyans was heard.

The Commission also faced criticism that it relied heavily on the testimony of public officials in its hearings. The Commission viewed as it duty and within its terms of reference to call upon public officials to account for their actions. It was for this reason that for the first time Kenyans were able to hear and see high ranking officers testify in public and be subjected to questions about their roles. In addition, the political parties at the centre of the political dispute that led to establishment of this Commission criticized the Commission for permitting them only one afternoon to present their side of the story. The Commission had to balance their desire for an open-ended forum, which already exists in Parliament, with ordinary citizens who had far more limited opportunities to be heard.

Public hearings were to be managed to ensure a good representation of individuals and issues, while providing a form of outreach for ordinary citizens to hear from those entrusted with their safety and those who suffered from the post election violence. As a consequence, the hearings elicited an overwhelming response by members of the public who came to listen to the open proceedings. In some cases, the premises in which the Commission held its hearings were packed to capacity and others sometimes ran out of space. Interestingly, it was only after the Commission had held its hearings that members of the public came forward to the investigators seeking to testify.

The Commission's Methodology by Province

Given the time constraints adverted to above the Commission was not able to visit each province and therefore the methodology which the Commission adopted for gathering evidence varied to some extent between the various provinces.

Overall, the Commission relied on background material and reports from government, nongovernmental, and community based organizations (NGOs and CBOs) and individuals; recorded statements of victims taken by our investigators and the sworn testimony, statements and exhibits of witnesses who came before us.

With regard to the Rift Valley province, the Commission heard witness testimony from 30 individuals: 25 in Eldoret and 5 in Nairobi. These included officials from the provincial administration (4), the police (1), the NSIS (1), medical officers of health (5), hospital employees (2), and 15 victims and witnesses, all of whom came before us in camera. In addition our investigators took signed statements in private from 24 individuals, 17 of whom did not testify before the Commission. We also made site visits to roads that were blocked with huge boulders, to the Kiambaa church, where individuals were burned alive by marauding youth and to the Moi Teaching and Referral Hospital.

NGOs, church groups and other local organizations found and prepared witnesses to meet the Commission. They also allowed their premises to be used as safe havens for individuals who wanted to testify in camera. In Eldoret, the Commission faced two main drawbacks. First, as in all places the Commission visited, there were time constraints. Given that some parts of the North Rift were major locus of the violence, the Commission could have benefited from more than the three days it had. Second, and most importantly, there was a pervasive climate of fear facing victims in the Eldoret area. Some witnesses who were worried about their safety were not prepared to testify in Eldoret. A few came to Nairobi to protect their anonymity. It is possible some witnesses who would have liked to have testified to the Commission, did not have the courage to do so and could not afford to travel to meet us elsewhere. It was our expectation that those against whom allegations had been made, especially the so-called "Kalenjin youth" would be available to testify before us or at least record statements. However, none of them came forward and therefore we did not have the opportunity to listen to an account of the violence from the perspective of those in the North Rift against whom allegations are made.

Owing to constraints of time, the Commission did not hold formal sittings in Central Rift, but was able to make a visit to Kuresoi and Njoro areas where informal sessions were held with local administrators, the police and a number of victims. During its sittings in Nakuru, the Commission received sworn testimony from various witnesses who had a good overview of the district, including the Rift Valley Provincial Commissioner (PC).

The former Molo District Commissioner gave evidence in Nakuru Town. In addition, the Commission relied to a large extent on the Minutes of the Molo District Security and Intelligence Committee (DSIC) (also supplemented by DSIC Minutes from the neighbouring Bureti District noting that these 2 committees on occasion held joint meetings, NSIS intelligence reports and the report by the KNCHR, numerous statements taken down by CIPEV investigators but who for reasons of time were never called to testify and used this primary and secondary evidence to reconstruct the story of violence in Molo District. Some degree of

reliance was also placed on reports by NGOs and other civil society and faith based groups and organizations.

The Commission received evidence on violence in Koibatek through district government officials who testified in Eldoret as well as through statements by victims and eye witnesses who talked with Commission investigators. No formal sittings were held in the district though the DC gave sworn testimony in Eldoret while another witness also testified in Naivasha on behalf of IDPs regarding the violence in the district. Further, we received evidence in private from victims of sexual violence and other forms of physical harm. We then used DSIC minutes furnished by the Rift Valley Province PC and NSIS reports to supplement available information. Finally, the Commission relied on statements provided to Commission Investigators but who for constraints of time could not be called to testify.

The Commission also received sworn testimony from a victim of the violence in Narok. In addition, we relied on DSIC minutes for Narok South District, NSIS intelligence reports and the KNCHR report. We also placed a high premium on the Akiwumi Report in describing the historical context of violence in this district.

The Commission did not conduct any hearings in Western Province due to time constraints. In the circumstances, it was arranged that evidence from Western Province would be taken when the Commission was sitting in Kisumu from 11 to 13 August 2008. In Kisumu, the Commission was only able to take the evidence of the following three officials from Western Province: the Provincial Commissioner, the Provincial Criminal Investigations Officer and the Provincial Medical Officer.

Because it did not spend time for hearing in Western Province, the Commission and its investigators did not interact appreciably with the witnesses to a level where it would be satisfied that the evidence presented reflected the full range of information available in Western Province. Further, unlike other parts of the country, the Commission received little or no assistance in the mobilisation of

witnesses and individuals who could testify from organized groups within the region. Correspondence to the local branch of the Law Society of Kenya, for example, remained unanswered.[1] The result is that when the Commission went to Kisumu, there were no witnesses, other than the officials, who came to testify on matters relating to violence in the Province.

The Commission however made a brief visit to Kakamega town on 9th August 2008 and toured the town where it saw properties that had been destroyed and damaged during the PEV. The Commission also visited the Kakamega Police Station IDP camp. In writing this chapter the Commission relied on the testimony of the three officials, its observations during the visit to Kakamega and submissions made on behalf of some residents in Kakamega and other secondary evidence.

The Commission held formal sittings for 3 days in Kisumu though part of this was devoted to Western Province. Senior provincial administration officials and police officers testified to get the perspective of the violence from Government officials. This was then juxtaposed from the sworn testimony of victims that was supplemented by information from the Ministry of Medical Services taking into account that the pattern of violence in Nyanza was typified by shootings attributed to Police. The Commission also relied heavily on professional associations like the Law Society of Kenya, Western Chapter which furnished detailed depositions from victims. Owing to the range of witnesses that were required to provide the Commission with the broad range of issues it had to deal with, focus was directed to the hardest hit regions namely Kisumu Town, Homa Bay District and Migori/Rongo Districts from which most of the Government witnesses were drawn from.

The Commission held no formal hearings to receive evidence and testimony with regard to the violence in Nairobi. Senior officials at the highest levels of various security agencies and also representatives from political parties did testify in

[1] Letter to the dated 19th August 2008 to the Law Society of Kenya, Western Kenya Branch.

Nairobi but with a view to setting the national context and not the violence in Nairobi per se. The Commission was able to make a site visit in Kibera in July 2008 where it spoke to some local leaders, a number of administrators and also the police. Further, sworn testimonies from victims of sexual violence were received in camera. Taking into account this paucity of information, the Commission relied heavily on NSIS Intelligence and situation reports, the KNCHR report and reports by various civil society organizations. In putting forth the background for Nairobi District, the Commission also relied on desk research to explain the genesis of some of slum based violence that took the character of rent disputes with an ethnic angle.

Although the Commission was not able to visit Central province due to constraints of time, it nevertheless was able to solicit accounts of what happened in that Province during the period. The Commission did not have opportunity to interview witnesses and individuals affected by violence. It, therefore, arranged for officials from the Province to provide statements on matters in relation to which it was conducting the inquiry. Submissions were received from the Provincial Commissioner, Central province, the District Commissioners of Kiambu East and Kiambu West.

The Commission also received and considered the Minutes of the Provincial Security and Intelligence Committee and District Security and Intelligence Committee meetings for the period before and after the elections to enable it appreciate the circumstances of post-election violence in Central Province.

The Commission also announced through the media, in its public hearings, and elsewhere that Kenyans were encouraged to submit or send written submissions to the Commission. However, very little information was received from Central Province in pursuance of this.

The account on the post election violence in the Central Province therefore is based on the material received from the officials identified above, and from a consideration of various reports, including the Minutes of the PSIC, the DSIC

and the reports of other organizations that have documented the post election violence in the Province.

Much of the two days of formal hearings held at the Coast was devoted to hearing the provincial administration and the police, and focused on the violence within Mombasa City and its environs. Substantial evidence was also obtained in private from key informants who had a good overview of the conflict and were well placed to speak authoritatively on the violence. In addition, testimony was received from victims and NGOs active in the region to piece together the history of violence as it happened in the Coast Province.

Alleged Perpetrators: To Name or Not To Name?

We realize that Kenyans and the international community have been hoping the Commission's report will identify the individuals behind the 2007 post election violence. After all, the Commission's first term of reference[2] is to investigate the facts relating to the post-election violence. An important part of that investigation is to identify who planned, organised, facilitated, and committed egregious human rights violations.

In carrying out its TOR, the Commission had to make a crucial decision: whether or not to name names. The issue is whether, in narrating the facts and circumstances relating to the post-election violence, the Commission should publicly disclose the names of those persons alleged by various witnesses to have perpetrated violence at some level. It is a choice the Commission found particularly vexing. Therefore, it expended considerable time in researching and discussing this matter before making its judgment.

One possible choice for the Commission was to name the perpetrators publicly given the clear advantage in doing so. Kenya has an extremely troubled past. Its history of ethnic violence has been papered over for years until it exploded

[2] 1(a) of the Terms of Reference.

in horror during and after the 2007 elections. The causes of this sort of violence, which began in 1992 with the first multi party elections, have always been known from official reports of past commissions of inquiry. It isin these Reports that some individuals have been identified publicly as being responsible for the violence. However, there has been no serious effort made by any government to punish perpetrators of violence or to address the plight of their victims. In sum, impunity has become the order of the day in Kenya. One way of addressing impunity is to publicly unmask and shame those who have been behind the chaos. A school of thought is that this should be done even if all that is available as proof is the victim's version of events which seems probable. Where there is more than just the victims' account available, there is even a more compelling reason to name alleged perpetrators. Legal and procedural niceties, the personal safety and reputation of the person named, would in that case be subjugated to by the national imperative of fighting impunity. The named individuals, in any event, would have recourse to the courts to seek redress and the media to express their public rebuttals, if any.

An alternative is to be faithful to certain legal fundamentals prior to the naming of alleged perpetrators in public. This Commission was appointed under the Commissions of Inquiry Act (Cap 102) Laws of Kenya where its Commissioners are required under section 7 (i) to make a "full, faithful and impartial inquiry". The Commission espouses the rule of law and is guided accordingly in the discharge of its mandate. One of the fundamental principles of law is the application of the rules of natural justice in the adjudication of disputes. The other is the presumption of innocence. And one of the rules of natural justice, which the Commission jealously guards, is that no one should be condemned without giving them an opportunity to be heard. Pursuant to this principle, the Commission hoped that it would have an opportunity to serve all individuals adversely mentioned during its inquiry with notices of such mentions and grant them an opportunity to record their evidence with the Commission. For this Commission that opportunity never arose for a large number of adversely mentioned persons except for a few who came before us. Even in these cases, it would still be necessary for the Commission to carry out further investigations

before naming names to verify all the material facts. The main reason why this threshold was not met is that the time allocated to the Commission to complete its task was extremely limited; it was in fact far too short to contact and hear the side of all those who had been adversely mentioned during the Commission's hearings. Also, in some cases, the contacts and addresses of the named persons were unavailable.

The second fundamental issue for the Commission is nevertheless to ensure that the perpetrators of the post election violence are brought to account for their deeds and that the issue of impunity is addressed. For this to be successful, the integrity of the evidence gathered by the Commission would have to be safeguarded. The evidence the Commission has gathered so far is not, in our assessment, sufficient to meet the threshold of proof required for criminal matters in this country: that it be *"beyond reasonable doubt"*. It may even fall short of the proof required for international crimes against humanity. We believe, however, that the Commission's evidence forms a firm basis for further investigations of alleged perpetrators, especially concerning those who bore the greatest responsibility for the post election violence. In the nature of things, the premature disclosure of such evidence and those it relates to exposes it to possible sabotage or other adulteration before investigators have an opportunity to assess it. The Commission has in possession the names of powerful individuals in politics, government, business, the police and elsewhere whose capacity for interference with its evidence can neither be assumed nor dismissed.

Furthermore the recently enacted Witness Protection Act 2008 which became operational on 2nd September, 2008 has not been tested. It is our recommendation that the Act be fully operationalised to apply to the witnesses to ensure their ability to testify against powerful individuals without fear of retribution.

The Commission has carefully weighed the choices available to it and has decided against publishing the names of alleged perpetrators in its report. Instead, these names will be placed in a sealed envelope, together with its supporting evidence. Both will be kept in the custody of the Panel of African Eminent Personalities pending the establishment of a special tribunal to be set up in accordance with our recommendations.

In default of setting up the Tribunal, consideration will be given by the Panel to forwarding the names of alleged perpetrators to the special prosecutor of the International Criminal Court (ICC) in the Hague to conduct further investigations in accordance with the ICC statutes. This is a major recommendation made by the Commission.

Basis for Recommendations

Under its Terms of Reference the Commission was called upon to make specific recommendations on specific measures. Throughout the hearings and in written submissions, the Commission received a wide array of recommendations covering a whole range of issues, within and outside of the Commission's mandate. Some of these recommendations were general and others specific while others related to the normal functions of government. Many expressed scepticism that whatever recommendations the Commission makes would never be implemented and as such this commission was a waste of time and public resources. For those reasons the Commission made a judgment on what was relevant and important for recommendation based on the following factors;

1. The recommendations should be deliberately specific to allow no scope for avoidance of responsibility in implementation.
2. A few recommendations are easier to implement and present a lesser burden, financial or otherwise, on those tasked to implement them.
3. It is important to identify short term and long term recommendations and propose a time frame for implementation.
4. Over the last five years or so there have seen enormous reform initiatives in the legal and public sectors and it is therefore necessary

to reinforce the ongoing reform process and agenda with the aim of empowering Kenyan institutions to effect change.

5. The Commission should also clearly set out accountabilities and responsibilities for effecting recommendations and monitoring the implementation process.

We believe the recommendations of this Commission are capable of implementation and monitoring and that where there is failure to implement, accountability and responsibility can be assigned to a specific person or institution.

Supporting Documentation

The verbatim recording of the Commission's proceedings, statements, submissions and other evidence on the basis of which this report is derived have been compiled and handed over to the President of the Republic of Kenya with the request that it be placed in the National Archives for public reference. As has been explained, material that was received in camera and which tends to show culpability of certain individuals has been forwarded to the Panel of Eminent African Personalities to deal with the same in accordance with our recommendations.

PART II

THE FACTS AND SURROUNDING CIRCUMSTANCES RELATING TO THE POST ELECTION VIOLENCE

CHAPTER TWO

Post-Election Violence, 2007 – How Deep Are the Roots?[3]

Introduction

The main body of this Report examines the post-2007 elections violence in Kenya. This includes:

- the facts and circumstances related to the acts of violence following the 2007 presidential elections;
- the actions or omissions of State security agencies during the course of the violence; and
- sets of recommendations concerning measures to be taken to prevent, control, and eradicate similar violence in the future; bring to justice those

[3] This chapter is drawn from a synthesis of issues discussed by Kenyan experts in a consultative group meeting with the Commission on 26 August 2008 and from the following sources including articles in edited collections: Republic of Kenya – NEPAD, APRM: Country Review Report of the Republic of Kenya (May 2006); Africa Watch, Divide and Rule: State-Sponsored Ethnic Violence in Kenya. New York: Human Rights Watch, 1992; Republic of Kenya, Report of the Judicial Commission Appointed to Inquire Into Tribal Clashes in Kenya (hereafter referred to as the "Akiwumi Report"), Nairobi: Government Printer, 31 July 1999; Republic of Kenya. Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and other Parts of Kenya, Nairobi: Government Printer, September 1992; Susanne D. Mueller, "The Political Economy of Kenya's Crisis," Journal of Eastern African Studies, Vol. 2, No. 2, July 2008, pp. 185-210; M. Katumanga, "A City Under Siege: Banditry and Modes of Accumulation in Nairobi, 1991-2004," Review of African Political Economy, no. 106, 2005, pp. 505-20; Peter M. Kagwanja, "Facing Mount Kenya or Facing Mecca?: The Mungiki Ethnic Violence and the Politics of the Moi Succession," 102, no. 406, January 2003, pp. 25-49; David Anderson, "Vigilantes, Violence, and the Politics of Public Order in Kenya," African Affairs 101, no. 405, 2002, pp. 531-55; Various articles included in the edited works of Godwin Murunga and Shadrack Nasong'o, eds., Kenya: The Struggle for Democracy, London and New York: 2007; of Walter O. Oyugi, P. Wanyande, and C. Odhiambo Mbai, eds., The Politics of Transition in Kenya: From KANU to NARC, Nairobi: Heinrich Boll Foundation, 2003; and of Marcel Rutten, A. Mazrui and F. Grignon, eds., Out for the Count: 1997 General Elections and Prospects for Democracy in Kenya, Kampala: Fountain Publishers, 2001; David Throup, "The Construction and Deconstruction of the Kenyatta State," in The Political Economy of Kenya, edited by Michael Schatzberg. New York: Praeger, 1978, pp. 33-74; Susanne D. Mueller, "Government and Opposition in Kenya, 1919-1969," Journal of Modern African Studies, vol. 22, no. 3, 1984, pp. 399-427; Daniel Branch and Nic Cheeseman, "The Politics of Control in Kenya: Understanding the Bureaucratic Executive State in Kenya, 1952-78," Review of African Political Economy, 107, 2005, pp. 325-36; International Crisis Group, Kenya in Crisis, International Crisis Group, 21 February 2008; Killing the Vote: State Sponsored Violence and Flawed Elections in Kenya, Nairobi: Kenya Human Rights Commission, 1998 (Submitted to the Commission as Exhibit 21B); Behaving Badly: Deception, Chauvinism and Waste During the Referendum Campaign. Nairobi: Kenya Human Rights Commission, n.d. (Submitted to the Commission as Exhibit 21 C); Human Rights Watch, "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance," Vol. 20, No. 1 (A), March 2008 (Submitted to the Commission as exhibit 21M); Kenya Human Rights Commission, "Elections and Human Rights Bulletin No. 1, 2007 (Submitted to the Commission as exhibit 21G); Kenyans for Peace with Truth and Justice, "Post Election Violence in Kenya," 2008 (submitted to Commission as Exhibit 21H).

responsible for criminal acts; eradicate impunity and promote national reconciliation; improve the functioning of security agencies; deal with any other legal, political and administrative matters deemed necessary; and

- make such suggestions to the Truth, Justice, and Reconciliation Commission as the Commission to Investigate Post-Election Violence (CIPEV) deems necessary.

These are the basic terms of reference of the Commission.

This chapter examines the roots of the post-2007 elections violence in Kenya, while the Main Report contains the narrative, findings, and recommendations. This Chapter draws the views expressed at a consultative meeting which the Commission held with a group of Kenyan experts on 26 August 2008 and also from other studies and reports on the subject. Specifically, it attempts to isolate factors that explain the causes of the violence and why it escalated as it did. These factors demonstrate also how and why violence has become a way of life in Kenya, a country once known for peace, prosperity, and its potential for development.

We enumerate these factors below.

The first is the growing politicization and proliferation of violence in Kenya over the years, specifically the institutionalization of violence following the legalization of multi-party democracy in 1991. Over time, this deliberate use of violence by politicians to obtain power since the early 1990s, plus the decision not to punish perpetrators has led to a culture of impunity and a constant escalation of violence. This, in turn, has caused a further diffusion of violence in the country, which now is largely outside of the control of the State and its security agencies. Thus, violence has become a factor not just of elections but in everyday life. What this means in practice is that violence is widespread and can be tapped for a variety of reasons, including but not exclusively to win elections.

Second is the growing power and personalization of power around the Presidency. This has had a twofold impact. First, it has given rise to the view among politicians and the general public that it is essential for the ethnic group from which they come to win the Presidency in order to ensure access to state resources and goods. Second it also has led to a deliberate denudation of the authority and legitimacy of other oversight institutions that could check abuses of power and corruption and provide some accountability, and at the same time be seen by the public as neutral arbiters with respect to contentious issues, such as disputed elections results. As a result, in many respects the state agencies are not seen as legitimate.

Third, is a feeling among certain ethnic groups of historical marginalization, arising from perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services. This feeling has been tapped by politicians to articulate grievances about historical injustices which resonate with certain sections of the public. This has created an underlying climate of tension and hate, and the potential for violence, waiting to be ignited and to explode.

Fourth is the increasing problem of a growing population of poor, unemployed and youth, educated and uneducated, who agree to join militias and organized gangs. These gangs have been alleged to intersect with parts of the Government and the security forces. These groups now have become “shadow governments” in the slums and even in other parts of the country and have been used by politicians to attack their opponents; to secure their own security, and to gain power. Furthermore, these proliferating militias also are said sometimes to dovetail with the State and its security apparatus thereby not only reducing the State’s capacity to control the violence but also increasingly threatening the integrity of the State and the nation. This underlying endemic situation has created a climate where violence is increasingly likely to be used and where its use is increasingly unlikely to be checked.

The Use of Political Violence

Violence was part and parcel of the colonial state, which used it to ensure control. After independence, President Jomo Kenyatta used both the carrot and the stick to maintain power, with the use of violence mainly concentrated in the hands of the State, rather than outside of it. Opposition parties were subjected to political harassment and those individuals who refused to support the status quo experienced various types of repression and even detention without trial. Rallies, by students and others, were dispersed by the GSU using force. The Government is believed even to have been responsible for the murder of three political figures, Pio Gamma Pinto, Tom Mboya, and J.M. Kariuki, the last two of whom were viewed as threats to the then regime and potential contenders for political power. At the same time, individual members of the opposition were weaned back to the fold through appointments to Government positions, and allocations of land as well as provision of other perks.

For a variety of reasons, repression under Kenya's second President, Daniel arap Moi, became more draconian. First he did not start off with the same array of resources (e.g. land, civil service jobs, and a buoyant coffee boom) available to Kenyatta to reward his supporters and the general public. Second, in 1982, he experienced an attempted coup against him. This followed an unsuccessful attempt by parts of the Kiambu Kikuyu elite in 1978 to keep him from becoming the President. For both reasons and perhaps for others, violence, including detentions without trial and the routine torture of perceived and real dissenters, became institutionalized early on under Moi's rule. This in turn generated a groundswell of dissent against his rule by a growing opposition movement, including politicians, lawyers, students, and others from all parts of the country, as well as members of the Kikuyu from Central Province whose economic power he tried and partially succeeded in decimating. President Moi's actions were designed to destroy the economic base of his opponents and to bolster his own

position and that of his supporters, who were mainly drawn from his KAMATUSA[4] allies from the marginal areas.

In the period leading up to independence and through to 1964 when KADU was dissolved and its members joined KANU, KADU had campaigned for a federal system of government known by the Swahili name of "majimbo", in part to protect the members of the smaller tribes from the numerical power of the larger ethnic groups such as the Kikuyu and Luo. To consolidate his base after becoming the President, Moi rewarded his supporters, particularly the Kalenjin, through appointments to political offices and with jobs in the public service and the military. Rightly or wrongly, these individuals given these were viewed by President Moi's opponents as not qualified or competent.

As the opposition to Moi's leadership grew over the years, civil society became increasingly vocal and donors increased pressure on him, including through the use of financial sanctions, to democratize. In the end, President Moi very reluctantly agreed to allow multi-party democracy in 1991 and he presided over two multi-party elections during his rule, one in 1992 and another in 1997. Although he agreed to multi-party democracy, President Moi did not accept the idea that through this he might lose the presidency. Thus, it was in this period in the 1990s that violence became institutionalized during presidential and parliamentary elections. Under the amended Constitution, to win the presidency, President Moi needed to win his parliamentary seat, obtain a majority of the votes cast in the country, and receive 25% of the votes cast in five provinces. In both the presidential and parliamentary elections, the opposition to President Moi and to the then ruling party, KANU, consisted mainly of non-KAMATUSA voters. Various reports covering elections held during this period alleged that high ranking political figures, civil servants, and others close to the heart of the Government organized and used violent gangs to intimidate people in areas of potential opposition support, most of whom were Kikuyu, Luo, Luhya, Kamba,

[4] Acronym for Kalenjin, Maasai, Turkana and Samburu

and other groups. [5] The strategy was to keep opposition supporters from voting and the means used was to hire gangs in the Rift Valley and elsewhere to kill people and displace individuals from their home areas so that KAMATUSA candidates could win and President Moi could be assured of obtaining 25% of the vote in five provinces, the majority of the votes cast for the President, and the majority of elected Members of Parliament. In short, violence became a means of securing political power and winning elections.

Elections related violence occurred not just in 1992 but also in 1997. In spite of the death and destruction that these methods caused and the reports from NGOs such as the Kenya Human Rights Commission, Human Rights Watch, and two Government Inquiries - the Kiliku Parliamentary Committee and Akiwumu Commission - no one was ever punished for this wanton killing and destruction even though names of perpetrators to be investigated and those "adversely mentioned" were contained in the reports of both Commissions. The Akiwumi Report was not made public until 2002, even though it was published in 1999.

This led to a culture of impunity whereby those who maimed and killed for political ends were never brought to justice. This changed Kenya's political landscape with regard to elections, a point noted by Human Rights Watch. Each of these reports implicated politicians as the organizers of the violence and killing for political ends, and noted that the warriors and gangs of youth who took action were both paid and pressed into service. Aside from this youths were sometimes promised land and jobs after evicting up country dwellers. However, from testimony in the Akiwumi Report, it is not clear if they got either. A pattern had been established of forming groups and using extra-state violence to obtain political power and of not being punished for it.

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[5] See NCCK, The Cursed Arrow: Organized Violence Against Democracy in Kenya, April 1992; Republic of Kenya, Report of the Parliamentary Select Committee to investigate the Ethnic Clashes in Western and Other Parts of Kenya (The Kiliku Report), September 1992, See pp. 19, 30-33, 39-40, 52-53,pp.61-62, 74-76; Human Rights Watch, Divide and Rule: State Sponsored Ethnic Violence in Kenya, 1993, pp. 28-32; Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya (The Akiwumi Report), 1999, See pp.286-90 for a list of individuals recommended to be investigated further as well as a discussion of their role in the ethnic clashes of the 1990s in various parts of the report.

Some of the displaced individuals, including youth from Laikipia District, moved to Nairobi and became members of Mungiki, which up through the 1980s had been largely a cultural cum religious cult in the Kikuyu inhabited parts of the Rift Valley. Later it metamorphosed into a Mafioso style gang that grew and eventually became a shadow government in the slums of Nairobi and in parts of Central Province. Initially, the Mungiki were seen as substituting for a lack of public services in the slums. Later it started bullying individuals and businesses, including matatus and owners of real estate, into making payments for services which it would provide, including connecting electricity, providing pit latrines, and meting out justice. Mungiki and other gangs across the country (e.g. Taliban, Chinkororo, Kamjeshi, Baghdad Boys and many others) grew and multiplied within the context of a political culture that both used and tolerated extra state violence.

Gangs and militias continued to proliferate all over the country, thereby increasing the presence of institutionalized extra-state violence both during and after elections, a pattern that continued to increase up through the 2007 elections, even after President Mwai Kibaki took over power in 2002. Up through to the last elections, Mungiki and other political gangs continued to sell their services of violence on a willing buyer willing seller basis. As late as 2007 long after the Government had banned a number of gangs including Mungiki, they continued to operate with their leader Maina Njenga telling his followers to engage in more robberies to compensate for the decrease in revenue from their traditional matatu shakedown operations that had occurred as a result of the crackdown by the Government.

As extra state violent gangs began to proliferate and continued to be used by politicians, the political terrain was transformed. Violence trickled down into daily life and the State no longer commanded the monopoly of force it once had in a previous era. As such diffused extra state violence existed all over the country, where it could be called up and tapped at any time, including being used to arbitrate over elections as it has been doing since the early 1990s. Once

the Government itself used both its own and extra state violence for partisan political ends, it lost its legitimacy, was not seen as dispassionate, and consequently has been unable either to maintain peace and security or to reform itself.

The Personalization of Presidential Power and the Deliberate Weakening of Public Institutions

Power has been personalized around the presidency and this has been increased by changes in the Constitution under each President since independence. Laws are routinely passed to increase executive authority, and those laws seen as being in the way are often changed or even ignored. By 1991, the Constitution had been amended about 32 times. Among the amendments was the insertion of Section 2A, which made Kenya a de jure one party state until that provision was repealed in 1991. Even following the election of Kibaki in 2002 still rules were ignored within Ministries leading to financial scandals such as Anglo Leasing and others underscoring the once again the fact that the personal power of the President and his close associates trumped the law. Hence, as noted in the Akiwumi Report and in a number of articles on Kenya politics, the checks and balances normally associated with democracies are very weak in Kenya and are deliberately so. Individuals in various parts of Government whether in the civil service, the judiciary, and even in Parliament, understand that, irrespective of the laws, the executive arm of government determines what happens. Hence, the State is not seen as neutral but as the preserve of those in power.

The above syndrome has had various consequences.

The first is a sense of lawlessness that has led to Government institutions and officials being seen as lacking in integrity and autonomy. One result of this in the 2007 election was the perception by sections of the public that Government institutions, and officials, including the judiciary, were not independent of the presidency, were not impartial and lacked integrity. Hence, they were perceived as not able to conduct the election fairly. That public sector institutions were

seen as biased and unlikely to follow the rules increased the tendency to violence among members of the public. Furthermore, as the Akiwumi Report and other sources demonstrated, members of the provincial administration and the police also understood that it was sometimes in the interest of their personal survival to follow what they understood to be the directives or inclinations of either the President or MPs in their areas rather than to uphold the law. This led to some officials not following the law themselves, and sections of the provincial administration and security forces even engaging in acts of violence themselves.

The second is the perception on the part of the public that given the power of the President and the political class everything flows not from laws but from the President's power and personal decisions. This also has led the public to believe a person from their own tribe must be in power, both to secure for them benefits and as a defensive strategy to keep other ethnic groups, should these take over power, from taking jobs, land and entitlements. All of this has led to acquisition of presidential power being seen both by politicians and the public as a zero sum game, in which losing is seen as hugely costly and is not accepted. Hence, there is tendency on the part of a variety of political actors to do anything, including engaging in violence to obtain or retain political power, leading to what one specialist has called a race to the bottom because of a fear of being dominated by other ethnic groups and being subjected to the associated consequences of that. This has created a climate of fear and suspicions which politicians easily exploit and use to mobilize violence.

The attempt to reduce the personal power that had been accumulated by former President Moi initially was the reason opposition forces sought to introduce the post of Prime Minister. This culminated in an informal Memorandum of Understanding (MoU) before the 2002 election between the then opposition coalition under which the coalition agreed to introduce the post of Prime Minister after the election. Once elected, however, President Kibaki reneged on the MoU. Discussions continued concerning constitutional change and the devolution of power. The Kibaki Government then came up with a draft Constitution put forward by Attorney General, Amos Wako watering down some

of the provisions in the draft agreed to during the "Bomas" discussions. The Wako draft was put to the public at a referendum in 2005, where voters rejected it. As soon as the MoU was scuttled, a group led by Raila Odinga left the NARC coalition Government. President's Kibaki Government was perceived as being unwilling to abide by its pre-election agreement with its partners and as retreating into an ethnic enclave. This was criticized by the public and was seen as an attempt by the so-called "Mount Kenya Mafia" to keep power to itself rather than share it. Even though the MoU was not a legal agreement, the Kibaki Government's turning away from it and removing from government the group of Ministers associated to Odinga had the effect of increasing the polarization of politics along ethnic lines. Even though the 2005 referendum was peaceful and the results were accepted rather than contested, the parameters were nevertheless drawn. With the ethnic political fault lines clearly drawn after 2005, and the need to win the presidency seen as paramount, tensions began to mount.

The post election violence therefore is, in part, a consequence of the failure of President Kibaki and his first Government to exert political control over the country or to maintain sufficient legitimacy as would have allowed a civilized contest with him at the polls to be possible. Kibaki's regime failed to unite the country, and allowed feelings of marginalization to fester into what became the post election violence. He and his then Government were complacent in the support they considered they would receive in any election from the majority Kikuyu community and failed to heed the views of the legitimate leaders of other communities.

Land and Inequality

Kenya consists of 42 ethnic groups who live in eight provinces. Many areas outside the major cities and towns are relatively homogeneous ethnically. Problems of inequality and marginalization thus are often viewed in ethno geographic terms even though the inequalities between individuals of the same

ethnic group are sometimes more pronounced than those between different ethnic groups and geographic areas. Studies done elsewhere have not found that the presence of a large number of ethnic groups or inequality per se explains large scale violence even though most of the violence in the Rift Valley has occurred mainly in ethnically mixed settlement schemes. Apart from this, citizens everyplace are concerned that resources, including land, and services are distributed equitably and are quick to point out inequities.

Constitutionally, individuals may own land in any place in Kenya and in law no part of the country belongs to an ethnic group. Nevertheless, this phenomenon is de facto a characteristic of many areas, particularly as many of the newly created districts since the nineteen nineties have been ethno-specific, leading to the creation of ethnically homogenous effective "native reserves". This in turn has created the notion of "insiders", who are native to a place and "outsiders" who have migrated there, a notion that has been tapped by aspiring politicians. This raises the question of the balance between group interests and the rights of individuals as entrenched in the Constitution, a problem that also has crept into slums such as Kibera and Mathare which are now informally divided into ethnically homogeneous zones.

Apart from the above, gross corruption in the acquisition, registration, and administration of land matters has been a major problem in Kenya. The Ndungu Report noted that throughout the 1980s and 1990s public land was illegally and irregularly allocated "in total disregard of the public interest and in circumstances that fly in the face of the law"[6]. "Land grabbing" and the allocation of public land as political patronage were part of the gross corruption of this period. Those involved in this allocation were senior public servants, but also local land boards, the courts, and a range of officials including members of the provincial administration, politicians, and others. Land allocations were therefore used to reward "politically correct individuals"[7], and became heavily

[6] Republic of Kenya, Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Pubic Land (The Ndungu Report), Nairobi: Government Printer, June 2004, p. 8.
[7] above, p. 14.

politicized. Given that the recommendations of the Ndungu report were never implemented, this has increased the sense of frustration in attempting to deal with land tenure disputes. The fact that institutions which could have been used to resolve land disputes have not been impartial has encouraged individuals to take matters into their own hands and to use violence to resolve them. Furthermore, as land is an emotive issue, politicians have capitalized on issues surrounding it, including encouraging violence during elections.

In discussions of post-election violence, many Kalenjins argue that it is a product of longstanding anger over land distribution following independence. They argue that land was alienated by the colonial government and then unfairly parcelled out to Kikuyus and other groups whom they view as outsiders. Many Kalenjins believe that issues relating to land were the reason for both the pre-electoral violence in the 1990s and the post election violence after the December 2007 elections[8]. Others, including the Akiwumi Report dismiss this explanation pointing out that individuals from different groups lived side by side for many years until the advent of multi party democracy when violence was used to kill and displace opposition party voters to keep them from voting. Hence, the Report argues that even though the promise of getting land from those who were displaced was used to entice youth into violence, the desire for political power and not land hunger was the causal factor.

Notwithstanding these views, the Ndungu Report noted that there has been corruption in the misallocation of land both in settlement schemes in the countryside and in the urban areas. Hence there is a land issue which needs to be addressed, particularly in parts of the country which are not ethnically homogeneous. Even now, this mentality and the fear that accompanies it has led to a type of quasi residential apartheid as Kenyans move into more ethnically homogeneous areas even within urban centers and towns.

[8] See the statements of two CW no. 78 and 79 and Exhibit No. 78 prepared by the EMO Foundation.

Beyond the above, another issue that looms on the horizon is that some communities have done better than others which are poorer, less well developed, and more marginalized from the mainstream. This in turn has generated feelings of resentment and powerlessness, sentiments that can and have been mobilized violently. Furthermore, there is a large and growing underclass of urban poor who are not landowners and are unlikely ever to be landowners. The tendency has been to think of Kenya almost exclusively as agrarian and of land issues as paramount even though the number of Kenyans living in urban areas is increasing, a tendency likely to continue.

Unemployed Youth

Although Kenya's population growth rate has been reduced and is now reportedly down to 3%, it still has an estimated two million youth who are unemployed. Furthermore, between 1992 and 1996, the number of street children increased 300% in just four years. Many of these initially rootless children who are now adults are the product of displacement by ethnic violence. They have grown up on the streets and are inured to violence, something that is clearly very dangerous. In addition, although many youth speak English, something that has raised their expectations, they have no hope of formal sector employment. The combination of being rootless, having survived amidst violence, plus their need for an identity and a livelihood makes them ready recruits for violent gangs, which exist all over Kenya and are tapped by politicians, particularly but not exclusively during elections.

The gangs are devoid of ideology and operate on a willing buyer willing seller basis. Given the hierarchical nature of gangs and the upwardly mobile hopes of their members to become as well off as their leaders, youth can be mobilized for a variety of reasons, not just to meet their daily needs. This, in itself is a very dangerous situation, helping to explain why since the 1990s violent gangs have proliferated all over Kenya.

Additionally, there is also a growing problem of unemployment among youth who are university educated, estimated to be around 40,000 a year, given that only 150,000 formal sector jobs have been created since 2003, raising the spectre of whether these individuals will also be ready to engage in violence as well if they are unable to find work[9].

Violent gangs, consisting mainly of unemployed youth have been mobilized into gangs along ethnic lines. Their power, to the point of having become shadow governments in many areas, stems from two sources. First as the main aim of Government in the 1990s was to mobilize political support to gain and maintain political power, a good deal of revenue was spent on patronage rather than on maintaining infrastructure and providing social services. This meant that the country started to crumble, visually evident in the decay of roads and the proliferation of uncollected garbage, even in the capital city of Nairobi, which once had been called the "city in the sun". This crumbling as well as a decline in social services and security also paved the way for violent gangs which provided them. This gave unemployed youth work, albeit within gangs, and made the latter extremely powerful. Over time these gangs operated as Mafioso shakedown gangs, with violence and impunity, as they continue to do. Increasingly, citizens began to ask who was in charge of Kenya, gangs or the Government.

While one might have expected that the police could have dealt with the increase in violent gangs operating as virtual shadow states in so many parts of the country, the Government has been ineffective in dealing with them for several reasons. First, many politicians themselves have used these violent gangs to decimate their opponents, to protect themselves from a dictatorial state in the 1990s, and to gain power then and now. This has itself given gangs such as Mungiki, the Taliban, Chinkororo and others a life and the ability to operate without fear of being caught. Second, by the time government was serious about banning the groups, they were large, controlled a number of areas, and

[9] The numbers come from an expert's discussion in the consultative meetings with the Commission on 26 August 2008. For other discussions of youth see Who is Guilty: Youth Perspectives on the 2007 Pre-Polls Electoral Violence in Kenya. Nairobi: The Youth Agenda, n.d.; Peter M. Kagwanja, "'Power to Uhuru': Youth, Identity, and Generational Violence in Kenya's 2002 Elections," African Affairs, 105, no. 418, January 2003, pp. 25-49.

continued to operate in spite of the bans. Third, security forces including police often were victims of these gangs themselves and used draconian but ineffective force against them.

Furthermore, the fact that both the police and military are perceived historically to have been recruited along ethnic lines to protect the particular government of the day has increased the likelihood of their breaking down along ethnic lines in a crisis and being either unable or unwilling to maintain law and order impartially. This meant that post election violence proliferated and intensified for a number of months and that politicians and businessmen allegedly chose to hire gangs of youth to fight their attackers rather than call in forces whose loyalties could not necessarily be counted on.

The post election period infused gangs of unemployed youth with more power than before and has given them an added currency. While clearly there is a problem of youth who grow up in slums and make their living by joining gangs because of a lack of good alternatives and the prospects of upward mobility, the issue is not one of poverty alone. Instead this situation intersects with other phenomena, including that of weak institutions, ethnic polarization, and the willingness of the political class to hire gangs to engage in violence to obtain political power. Furthermore, the power of these gangs should not be underrated, including their ability to force other poor unwilling youth to join them as they remain unchecked, grow, and along with other forces threaten the integrity of state and nation. In this sense, youth are both being exploited and have become exploiters themselves.

Conclusion

All of the above factors have dovetailed to make violence the method of choice to resolve a range of political differences and to obtain political power. Furthermore, because the violence surrounding elections has been ethnically directed, this has increased distrust among different groups and vastly eroded any sense of national identity. Hence, ethnicity has now taken on a dangerous

and negative connotation. The basic issue facing the nation is how to deal with these issues. Attempts have been made to crack down on gangs and half heartedly to reform institutions. Neither has been successful, in part because the Government has not been serious, has not been willing to address generic issues or underlying causes of violence.

Furthermore, the main perpetrators of systemic violence have never been prosecuted. Currently Kenya is at a critical juncture. Violence is endemic, out of control, is used routinely to resolve political differences, and threatens the future of the nation. Because of the ethnic nature of the post-election violence, ethnic fears and hatred have been elevated in importance and could turn violent again even more easily than has happened in the past. What is required to address the points discussed above is political will and some basic decisions to change the way politics is conducted, as well as to address its intersection with other issues related to land, marginalization and inequality, and youth. Short of that, violence including that related to elections will continue to appear and will be ignited ever more readily. Kenya needs to decide if it wishes to let violence, corruption, and powerless institutions prevail or to introduce fundamental change. Simply put, the individuals and institutions who have benefited in the short term from the chaos and violence need to give up the methods they have used or Kenya could become a failed state. The report which follows is dedicated to discussing the Commission's findings on the post 2007 elections violence and making recommendations on transforming the current situation.

CHAPTER THREE

Violence in Rift Valley Province

The North Rift Region

Introduction

The North Rift region comprises the districts of Uasin Gishu, Trans Nzoia West, Trans Nzoia East, Nandi North, Nandi South, Marakwet, Keiyo, Baringo North and Baringo South. The evidence made available to the Commission in relation to those districts is examined below, but more so, in relation to Uasin Gishu and Trans Nzoia which experienced the epicentre of the post election violence in that region.

The Uasin Gishu District covers an area of 3218 square kilometres. It borders Lugari district of Western Province to the west. To the east, it borders Keiyo, Marakwet and Koibatek. On the southern side, it borders Nandi North and Nandi South districts. The Trans Nzoia districts of East and West are in the north. It shares a small boundary with Kipkelion at its south easterly tip. The district is divided into six administrative divisions namely Turbo, Soy, Moiben, Ainabkoi, Kesses and Kapsaret. Politically, it has 3 constituencies namely Eldoret North, Eldoret East and Eldoret South. It has three local authorities namely: the Municipal Council of Eldoret, the County Council of Wareng and the Town Council of Burnt Forest.

At an annual growth rate of about 4%, the population of Uasin Gishu, estimated at 744,083 in 1999, is currently close to one million people and a fair mix of all Kenyan communities. The district's economy is agricultural based. There are a few industries in Eldoret, which is the district headquarters. Eldoret town is the commercial hub of the North Rift region. It is well linked to the rest of the

country by rail, air and road networks. It has many institutions of higher learning, a referral hospital and other vital installation such as the Kenya Pipeline Oil Depot which serves some of the neighbouring countries.

More than in any other part of the country, with the exception of the Molo district in Central Rift, violence in North Rift bore resemblance to previous cycles of election related ethnic violence. It is worth noting that the Akiwumi Report and the question related to acting upon its recommendation were most discussed in our hearings on the North Rift. The Commission therefore felt necessary to examine the pattern, actors and consequences of the 2007 post election violence in this region in the general context of the legacy of ethnic clashes experienced during previous election periods.

Pre-Election Period and the Legacy of the 1990s State Sponsored Violence

Previously, the North Rift had experienced serious violence before the presidential and parliamentary elections of 1992 and 1997. In 2007, the main difference was that the violence was more intense, more widespread, was urban as well as rural, lasted longer, and occurred after rather than before the elections.

The North Rift is one of the regions which was investigated and extensively covered in the Akiwumi Report.[10] According to that Report, the clashes broke out in Tinderet Division, in Nandi District, on 29 October 1991 before spreading out to other parts of the Rift Valley. Paragraphs 90 and 91 of the Report summarize the general nature of the violence and are reproduced below:

> *"90. In each clash area, non-Kalenjin or non-Maasai, as the case may be, were suddenly attacked, their houses set on fire, their properties looted and in certain instances, some of them were either killed or severely injured with traditional weapons like bows and arrows, spears, pangas, swords and clubs. The raiders were well organized*

[10] Exhibit 134 (a) Pg. 59 – 189.

and co-ordinated. Their attacks were generally under the cover of darkness, and where the attackers were in broad daylight, the raiders would smear their faces with clay to conceal their identities. The attackers targeted mainly the Kikuyu, but also the Kisii, the Luhya, and the Luo, other non-Kalenjin and non-Maasai communities were not spared. The attacks were barbaric, callous and calculated to drive out the targeted groups from their farms, to cripple them economically and to psychologically traumatize them. Many of the victims were forced to camp in schools, church compounds and shopping centres. There they lived in makeshift structures of polythene sheets, cardboard and similar materials. They had little food and belongings with them and lived in poor sanitary conditions with their children who could no longer go to school. There was also a general lack of concern by the Provincial administration and the Police Force for their security and general welfare.

91. In general, the clashes started and ended suddenly, and left a trail of destruction suffering and disruption of life hitherto unknown in this country. The causes of the clashes have been given as conflict over land, cattle rustling, political differences and ecological reasons among others. As stated elsewhere in this Report, these reasons were proffered to conceal the real motive or reason for the clashes."

The Akiwumi Commission came to the conclusion that there were three underlying reasons for the clashes:

1) *"Ambitions by Kalenjins of recovering what they think they lost when the Europeans forcibly acquired their ancestral land.*
2) *The desire to remove "foreigners", derogatorily referred to as "madoadoa" or "spots" from their midst. The reference was mainly towards the Kikuyu, Kisii, Luo and other communities who had found permanent residence in the Rift Valley.*
3) *Political and ethnic loyalty."*

The Akiwumi Commission also came to the conclusion that the security forces and the Provincial Administration were negligent and unwilling to take firm and drastic action to prevent the clashes from erupting or once these erupted, to

bring a quick end to them. Tribal leaders and politicians were also found to have instigated the clashes.[11]

Recommendations were made to prevent the future recurrence of violence including recommendations for the investigations of named individuals suspected to have had a hand in the violence. But the findings and recommendations of that Commission, as related to the Rift Valley, were rejected by sections of the Government of the day and there followed no further visible action on the Report[12].

Build up of Tension

Although several Government officials testified that the lead up to the elections was peaceful and did not experience any violence, there was also evidence that in the lead up to the elections all was not well. For example, the DC for Uasin Gishu Bernard Kinyua, started by saying that in his district "polling was smooth, very smooth, indeed the smoothest I have ever seen". However, when specific incidents were put to him, he acknowledged that there were violent skirmishes before the elections and these contributed to an atmosphere of ever-escalating tension.

These incidents included the burning in Eldoret of a vehicle belonging to the Brookside Factory on 26th December, on suspicions, later disproved, that stuffed ballots were stored in the premises of the Company, the attempts to burn another vehicle belonging to a bus company, Mololine, on the same day and for the same reason and the suspension, two days earlier, of the transportation of people to and from Eldoret, by bus operators who feared for the safety of their vehicles. Witnesses testified that electioneering continued throughout the period after the conclusion of the referendum exercise on the proposed new

[11] Exhibit 134 paragraph 524

[12] Exhibit 134 (b)

Constitution in 2005, and that, on all sides of the political divide, inciteful utterances were made by politicians and their cronies as part of the campaigns. According Stephen Ikua, the Koibatek DC, the Kalenjin people were made to believe that they had been marginalized by the Government and that their people had been removed from Government positions unfairly. The NSIS district co-ordinator for Uasin Gishu informed the Commission that during the 2005 referendum, the Kalenjin viewed the Kikuyu as arrogant and also felt that the Kikuyu looked down upon them, notwithstanding the fact that the Kalenjin were host to a large number of Kikuyu people. The DC for Koibatek, confirmed the extension of campaigns beyond the referendum period and also that there was a build up of tension resulting from the messages that were delivered as part of the campaigning. Although he was not able to furnish the Commission with a single example to verify his claims, he added that during the campaigns, vernacular radio stations were involved in the incitement of people along ethnic lines. The *"majimbo"* debate was particularly divisive as it brought back the issues of recovery of ancestral land by the Kalenjins and removal of "foreigners" (*madoadoa*) from the land, all underlying reasons for the 1990s clashes. According to the Uasin Gishu DC, Bernard Kinyua, references to madoadoa "were used frequently even in normal discourse within the district". As the political temperature rose, so did incidents of violent confrontations between the political actors before election day. As discussed later, in all those pre-election incidents of violence, no one was arrested and those who were, were released without any charges or prosecution.

Although it was the impression of many witnesses that violence in the North Rift began on 30 December 2007 immediately after the Electoral Commission of Kenya (ECK) announced the presidential results of the 27 December polls, there was evidence that violence had began even before the election results were announced. For example the DC for Nandi South, Mabeya Mogaka, testified that violence in his district had begun on 29th December. The delay in the announcement of the results of the presidential elections, allegations of problems in the conduct of the election by both local and foreign observers, the view that any ODM loss would be the result of rigging and hence illegitimate, as

well as incendiary remarks and hate speech by politicians, FM local media stations, and the public had built up noticeable tensions in many parts of the country.

The Commission established that this was so also in Uasin Gishu District, which was the epicenter of the violence.

Nature and extent of violence

Various administrative officials and senior police officers in the North Rift who testified before us reported that massive violence all across Uasin Gishu District in particular, as well as in various parts of Nandi, and elsewhere erupted suddenly immediately after the ECK announced the presidential results on 30 December. In Uasin Gishu, the violence entailed large marauding gangs of 1,000-2,000 Kalenjin youth, brandishing machetes, bows and poisonous arrows, occasional firearms, matches and projectiles filled with petrol. These menacing gangs blocked and manned a variety of roads with trees trunks and huge rocks, some of which were transported by tractors, throughout the district. They also burned vehicles and tyres while refusing to allow anyone to pass as well as engaging in killing, rioting, and looting.[13] This included numerous simultaneous attacks and cutting off all five entrances to Eldoret town, other roads and highways, as well as the main artery to Kisumu and Uganda, and beyond from Timboroa to Turbo.

The Director of Moi Teaching and Referral Hospital, Prof. Harun Mengech, mentioned that some road blocks were established as early as 29 December. The violence was so overwhelming that for some time, long term trade was at a standstill with no supplies going in or out of Uganda and Eastern Congo. The Provincial Security and Intelligence Committee (PSIC) finally decided to call in the military to clear the blocked highways and other feeder roads, including

[13] From testimonies of CW 59, 60, 67, 74, 81, 82, 83, 84, 85, 86; also exhibit 125, pp61-69; testimony from numerous other eye witnesses interviewed by Commission investigators.

escorting public service vehicles (PSVs) and tankers from the Eldoret Pipeline to the Kenya Uganda border. Security personnel deployed by the OCPD also assisted in protecting life and property, guarding IDP camps, and transferring them from the interior to safer locations in the centre.

The barricades in town were so severe that, according to Prof. Mengech he tried unsuccessfully twice to get to his hospital on 30 December, first through the Moi's Bridge/Matunda route and then through the Ziwa route. In each case he encountered youths, estimated to be between 15-20 years old, who were blocking the roads and who warned him he might not make it to the hospital. It took until 2 January 2008 for Prof. Mengech to reach the hospital and then only when the DC and the police gave him an armed escort.

Within Eldoret town, the less well off areas of Munyaka, Silas, and Langas estates experienced heavy violence with a former international athlete, Lucas Sang killed. According to evidence presented by the KNCHR, Yamumbi, a farm area near to Eldoret was also seriously affected. Kalenjin raiders torched houses owned by Kikuyus there. Two deaths ensued, with one person dying in the presence of two police officers who had invaded the victim's home. According to the evidence, the Kalenjin gangs reportedly came from the rural areas to attack Kikuyu residents in Eldoret town.[14]

The former OCPD for Eldoret Division, Angelus Karuru, told the Commission that on 30 December, his office began receiving reports from all over the district of arson, theft, the destruction and looting of property, and the taking of livestock. Outside of town, gangs with crude weapons also barricaded access to various sites, including farming communities in the largely Kikuyu inhabited settlement schemes. Here, mostly unsuspecting and terrified victims were suddenly overwhelmed by large numbers of Kalenjin youth who set fire to their compounds, burned and stole their possessions, as well as maiming, gang raping, and hacking to death large numbers of defenseless families, most of whom were Kikuyu. The DC said that the main areas affected were Kiambaa,

[14] Exhibit 125

Rurigi, Rukuini, Kiamumbi, Moiben Division, Matunda in Soi Division, and the area around Turbo.

The nature of violence was best rendered in personal stories the victims and eye witnesses told the Commission. As one informant told Commission investigators,

> "*At about midnight on December 30…I was awoken by screams. When I went out of the house I saw that neighbor's homes belonging to Kikuyu were on fire. I remained out up to morning. I went to check what was happening. I saw houses burning at the boundary of Langas and Kapseret".*

Another witness rendered yet another heart wrenching tale as follows:

> *"Some Nandi were running after people on the road. I ran away with my children. I saw a man being killed by cutting with a panga and hit by clubs when I was running. I fell near a seasonal river in Kipkendui primary school while running away. My last born child fell a distance away from my arm, was hurt, and was crying. Some people were running after me and when I fell, two men caught me. They tore my panties and they both raped me in turn."*[15]

In some cases, victims were attacked and killed by unknown assailants, in others the perpetrators were people they knew, including neighbors. One farmer from Chegaiya sub-location in Kesses Location testified to the Commission about having watched seven members of his immediate family being hacked to death, including his wife, who was hit on her head with a rungu and had her throat "slit with a panga". He knew many of the attackers, some of whom were his neighbors and identified them by name to the Commission, as well as the numbers and owners of the vehicles which "were used to transport the armed youth from Meteitei". A summary of his testimony is in the below.

15 IDP witness living in Eldoret showground interviewed by CIPEV investigators

An Elder Watches as His Family is Attacked

70 year old Mzee Joseph Mwangi Macharia (Karobe) watched as seven members of his family were hacked to death – his wife, three sons (aged 36, 33 and 23), one daughter (aged 25), a grandson (aged 6) and a granddaughter (aged 6). He narrated his ordeal as follows:

On 31st December, 2007 at about 5 p.m., he had a family get-together in his house at Chagaiya village in Kesses location, when a group of about forty young people, among them his neighbours, struck. They said they wanted five heads from that house – his and his four sons'.

As he pleaded for mercy one of them struck his son on the chest with a club and another shot him with an arrow as he tried to escape. Another son was pierced with a spear and his throat was cut. The rest of the family tried to hide inside the house but it was broken down and they were pulled out. His daughter and her child were pulled out and their throats were slit. So was his wife's throat. That is when Mzee Macharia escaped into a nearby bush and watched as his house was set on fire. He stayed in the bush until the following morning.

In the morning he went to a nearby AP camp where he collapsed and became unconscious. Three days later he was assisted by the APs and neighbours to dig a shallow grave where he buried his family before moving to an IDP camp in Limuru. They were only exhumed on 28th April, 2008 and given a decent burial.

Mzee Macharia knew at least 14 of the assailants and recognized them during the attack.

In a few cases members of the Kikuyu community were able to resist the attacks and even hit back at their attackers. In Matunda Centre, for example, some 14 – 25 young Kalenjin men were hacked to death after they invaded the area in January 2008 to raid businesses at the centre. They were overpowered by the local residents who killed all of them. In another incident, an eyewitness told Commission investigators the following:

> *"On the 31st December I saw Kalenjin warriors being ferried by lorries from the Ziwa area. They were armed with arrows and bows. Immediately after alighting from the lorries they met with a rival group of Kikuyu youth from Munyaka. We had been told that a group of Kikuyu youth were coming from there to defend us against the Kalenjin attackers. They were armed with pangas (machetes) and rungus (clubs). Then a confrontation ensued between the Kikuyu youth and the Kalenjin youth. The Kalenjin would shout at the Kikuyus who would in turn respond by charging at them with the*

clubs and machetes. Shortly thereafter, police arrived on the scene and dispersed the combatants. The Kalenjins retreated towards the bushes in the Junction area and the Kikuyu retreated to Beta Farm. The Kalenjins set houses on fire as they retreated."

Overall, though, both the police and members of communities perceived to be both foreigners and PNU sympathizers (Kikuyu and Kisii in particular) were overwhelmed by the magnitude of the violence and the number of the attackers. Those who escaped death ran to seek refuge in places they thought would be safe including churches, police stations, schools, and mosques. Among these many tragic stories, the incident which captured the attention of both Kenyans and the world was the deliberate burning alive of mostly Kikuyu women and children huddled together in a church in Kiambaa on 1 January 2008. They had sought refuge in the church following a 30 December attack on their village of Kimuri, bordering Kiambaa. According to reports, including witness testimony, mattresses and blankets were set ablaze with petrol and thrown into the building while mothers and babies who were trying to flee the inferno were pushed back into the church. Kikuyu men attempting to defend their church and loved ones were hacked to death with machetes, shot with arrows, or pursued and killed. The death toll for this horrific incident was 17 burned alive in the church, 11 dying in or on the way to the Moi Teaching and Referral Hospital, and 54 others injured who were treated and discharged. One woman who lost her mother in the inferno captured the horror of what happened when she told our investigators that:

"*On the 1st of January 2008 at around 10 a.m., I heard people yelling that some raiders were coming. I saw smoke coming from some houses in our village and the houses were burning. Everyone in the village started running away to the church (KAG). My mother who was 90 years old was with me at the time. I decided to take my mother into the church for safety. After a few minutes, I saw more raiders coming towards the church....We thought the raiders would not attack the church. Many people were being pushed into the church*

by the raiders. The raiders threw some mattress into the roof of the church and threw more into the church. They were also pouring fuel (petrol) onto the mattresses. All of a sudden I saw fire break out. I took my mother toward to [the] main door to get her outside, but there were many others scrambling toward the door as well. We both fell onto the floor. I wanted to save my mother from the burning church, but one of the raiders prevented me. I saw the fire had reached where my mother was. I heard her cry for help as the fire burnt her, but I could not help."

An official of the Kiambaa Cooperative Farm, who testified in camera, also confirmed the above account, noting that those who had taken refuge in the church were surrounded on all sides and adding that when the "raiders" reached the church:

"*they started throwing stones, arrows and forcing children, women, and old ones in the church. They took all mattresses pouring petrol on and laying some at the roof…, against the wall and at the doors and set ablaze so all men trying to come outside was killed. Others escaped [and] survived with major cuts and inside were so many dead and others burned beyond recognition and some escaped severely burned….I saw many that I know them for many years but the constitution of this country was made for Kalenjin because they are able to kill, burn houses and also to loot livestock and there is no law to prosecute them".*[16]

Although many attempts were made to quell the violence in Uasin Gishu District, the testimony of Government officials to the Commission is that it continued

16 The Commission was informed that this particular incident is now the subject of a court trial (Nakuru High Court Criminal Case No. 34 of 2008 [Republic v. Stephen Leting and 3 others]) and 4 persons have been charged with 8 counts of murder.

almost unremittingly, with increasing numbers of IDPs pouring into camps. According to officials, violence did not abate until the peace accord between the two political aspirants for the presidency, Mwai Kibaki and Raila Odinga, was signed in Nairobi, but even after this, according to the DC Bernard Kinyua, they still continued to experience all sorts of incidents.

The Commission also received evidence on the nature and extent of violence in the areas contiguous to Uasin Gishu, including Nandi North and Nandi South Districts. In his sworn testimony, the former D.C. for Nandi North, Mabeya Mogaka, told the Commission that there had been tension in the district for some time in part the result of Luhyas having bought land in Kapkangani, Kipkaren, and Chepkumia, as well as two Luhya candidates having been cleared to contest a parliamentary seat, something that was not accepted by prominent Nandi personalities in the district. He also noted that the administration had expected trouble including violence if either Luhya candidate won the election.

According to the D.C., violence erupted immediately after the presidential results were announced on 30 December, but had already started before then on 29 December. Overall the violence led to 1,475 homes being burned and destroyed and 7,800 people being displaced. Even though one person died in the end only 12 individuals were arrested despite all the violence and destruction. Violence was directed at PNU supporters, government departments and houses, and the ethnically mixed Baraton University, with the worst destruction occurring after the newly elected MP for Ainamoi was shot dead on 31 January 2008.

The Commission was also told that at the height of the violence, the provincial administration allowed a demonstration of 70,000 individuals from Nandi North and South to take place in Kapsabet, after having engaged with 12 Nandi elders to ensure that it was peaceful. The mere idea of a large demonstration was threatening enough to the displaced to make many of them move to the police station for safety, while numerous Kikuyu and Kisii asked for assistance to leave, something we were told the district administration helped them do. 8,000

IDPs who had taken refuge in the Kapsabet police station and other in the Kabiyet police station were also being threatened and therefore were moved.[17]

Impact of the Violence

According to District Commissioner Kinyua and SSP Karuru, 205 people died in the post-election violence in the Uasin Gishu district. 167 of them have been identified while 38 remain unidentified in the mortuary. Among those who died were an Administration Police Officer, Ewafula Wakhungu and a District Officer (DO). Both were killed in Cheptiret near the Chebii Primary School as they were attempting to quell violence at an illegal road block on 1 January 2008.

From other witness testimony, mortuary records and other sources, including the evidence of the Director of Moi Teaching and Referral Hospital Prof. Harun Mengech, the Commission was however able to determine that 272 persons died in the post election violence in Uasin Gishu District. The Casualty Section of the hospital recorded 521 victims of post-election violence. 50% were Kikuyu, 22% Kalenjin, 4% Luo, 9% Kisii and Luhya and 10% other tribes. The majority of these were young people. 161 of these were admitted while the rest were treated and discharged. Of those admitted 36 died from their injuries. The police brought another 107 bodies into the hospital's mortuary, while the Kenya Red Cross brought 20. The total number of deaths recorded at the hospital was therefore 163.

Out of the 127 bodies received from outside the hospital, Langas had the highest number of deaths followed by Kiambaa. The distribution was as follows: - Langas 30, Kiambaa 20, Huruma 14, Hawaya 10, Malime 8, Tarakwa 7, Munyaka 7, Kimumu 6, Cheptiret 5, Kapsoya 4 and others 16 totalling to 127. Thirty three (33) bodies remain unidentified in the Hospital mortuary.

[17] CW 67

The causes of death according to the post mortems carried out showed that the majority of the deaths were due to sharp/pointed objects (33%), followed by burns (22%), blunt objects (14%), gun shots (14%), arrow wounds 6% and broken bones, 3% and others in that order.

Of the 163 deceased, the majority were between the ages of 21 and 30 (27%), the ages 41 – 50 (18%), ages 31 – 40 (15%). The possibility that there were dead people who were not brought to the hospital was not ruled out. The period covered in the statistics was between 30th December, 2007 up to 6th February, 2008.

Property was also destroyed during the attacks. According to police records, 52,611 houses were burnt; 58 motor vehicles belonging to civilians and 2 government vehicles were also burnt.

A total of 21,749 people were displaced from their homes, other places of residence and businesses and they were accommodated in IDP Camps. 13,417 have since been reportedly resettled leaving 592 still in IDP Camps.

From 30 December 2007 to 6 February 2008, the Moi Teaching and Referral Hospital in Eldoret received 521 patients. It was assisted with cold storage facilities and supplies by the International Committee of the Red Cross (ICRC) given that its own mortuary could take only 48 bodies. According to the hospital's Director, about half of the victims received at the hospital were Kikuyu, about a fifth Kalenjin with others being Luhya, Kisii, Turkana, and Muslim. Most of the deceased were under forty with a concentration of individuals with almost 30% being between 21 and 30. The range in age of those who were injured and died was between 3 to 85. The numbers include those from hospitals outside the district as the Moi Teaching and Referral Hospital is the only one with a mortuary and hence when bodies were found they were brought there. Even then, some victims of the violence never made it to any hospital, which accounts for the higher numbers of 205 dead in District in the police registry mentioned by the DC for Uasin Gishu.

The Commission also heard testimony about the impact of the post election violence in other parts of the North Rift, mostly from districts bordering Uasin Gishu District. This, and other information received demonstrates the extent of the post-election violence and the dislocations throughout the region, some of which had spilled over from Uasin Gishu, and some from the Mount Elgon region in Western Province.

Dr. Sammy Osore, witness no. 61 and currently the District Medical Officer for West Pokot, was previously the District Medical Officer for Marakwet District, which borders on Uasin Gishu District. He confirmed that his hospital did not received patients with injuries from post-election violence. However, he noted that they provided drugs and medical supplies to an IDP camp at Kapchorop Division, bordering Trans Nzoia, where there had been a lot of violence. The camp contained 140 adults and 70 children who took refuge there because their lives were endangered. It was dismantled and consolidated with one in Kachibora in Trans Nzoia. He also mentioned that four of his staff, including two who lived in Chebyemit Market in Marakwet District had their houses broken into while they were voting and two others were displaced but neither was harmed or injured.

Dr. Stephen Kaiya, the District Medical Officer for Nandi South testified that his District Hospital in Nandi Hills received 160 patients: 124 outpatients and 36 in patients, due to the post election violence. The majority of the outpatient cases had soft tissue injuries (48) and cut wounds (39), along with three rapes and other problems. Of those admitted, there were 11 with gunshot wounds, 6 with burns, 8 with cuts, and other injuries, with no recorded deaths. Most of those who came to his facility were from within the district, but he also had some patients who came from Nyando District which borders Nandi South and others from as far away as Burnt Forest.

The District Medical Officer for Nandi North, Dr. Shadrack Keimi, testified that the District hospital in Kapsabet Municipality is between Uasin Gishu and Nandi

North, while the sub- district hospital is in Chepcherut. Although there were no fatalities there, the district as a whole recorded seven casualties. He also testified that 35 of his health care workers in various facilities in the District were threatened, with some having had their property destroyed and becoming IDPs, while another had to leave for "tribal reasons" resulting in the closure of the Kaptenyaloi Dispensary. The District Hospital received 228 patients: 151 with wounds from cuts (over half of which were women), 60 from blunt objects, 9 with fractures, and 2 from gunshots, as well as well as some with other injuries. The Mosoriot health center in the northern part of Nandi North, bordering Uasin Gishu, received 120 victims of post election violence. 103 had cut wounds with over half also suffering from blunt object injuries, and seven from gunshots, while the Kapkangani center bordering Nandi North and Western Province saw 23 patients , 22 of whom had cut wounds as well as one from an arrow shot.[18]
The District Medical Officer from Trans Nzoia District, Dr. Philomen Too, witness no. 64, is based in the Kitale Hospital which covers both the eastern and western parts of the District. In Trans Nzoia West the most severely affected areas were in Gituamba, Timbora Location in Saboti Division and Waumini near Kitale town, while in Trans Nzoia East, Geta Farm Salama, Kalaa area, and Makutano were the hardest hit. Five hundred and eight patients received treatment at the Kitale District Hospital from injuries stemming from post-election violence, including 119 gender based cases from rape or defilement, while the police recovered 105 bodies, not all of which were retrieved from the conflict areas. The injuries received included 137 from sharp or pointed objects, 329 due to blunt objects, 36 from burns, and 9 from gunshots. One hundred and five patients died, including 17 from gunshot wounds. The dislocation from the violence was so extensive that 5 IDP camps were set up in Trans Nzoia West and 4 in Trans Nzoia East.

Both DCs for Trans Nzoia West and East, Francis Mutie and Seif Matata said the violence in their districts, including the torching of Gituamba town and the

[18] Commission Witness 63

violence in Endebbes, which was involved in the ethnic clashes in 1992 and 1997, stemmed from a spillover from the conflict in Mount Elgon and consequent attacks by SDLF militia.

Response by Police and Provincial Administration

In accordance with our Terms of Reference, one of the main areas of our inquiry was to find out whether and to what extent the local administration and police were prepared for the violence that erupted, and how they ultimately responded to it. We shall now discuss the evidence presented before us in this area, which indicates that the police and the local administration were caught totally unprepared by the violence. We shall examine the police response in light of the availability of intelligence information indicating the high likelihood of violence. We shall conclude this section by discussing whether violence in North Rift was planned or spontaneous with no prior planning, as was the testimony of local administration officials.

The Provincial Administration and Security Forces

This issue is discussed in more detail elsewhere in this Report. We shall limit ourselves to aspects particular to acts and omissions attributed to the police and the administration in the North Rift.

According to Bernard Kinyua, Uasin Gishu's District Commissioner and the OCPD of Keiyo Division (previously OCPD of Eldoret Division) Angelus Karuru's testimonies before us, the DSIC was prepared for the possibility of pre-election violence, including the likelihood of some celebratory violence after the election in Uasin Gishu. However, they did not anticipate widespread post-election violence, had not developed contingency plans for it, and had not beefed up their existing force of 600 police officers.[19] Their testimony to the Commission was nevertheless that they were ready even though when the violence erupted they

[19] The DC admitted in his testimony that the ratio of the district's police to population was not up to international standards.

were forced to call in reinforcements from Baringo, West Pokot and Nairobi for contingents of GSU, the Anti-Stock Unit, the Administrative Police (AP), and some military personnel.

A resident of Langas estate in Eldoret told Commission investigators that the police there were generally ineffective and unable to control roving gangs which surrounded the estate until the Police Commissioner arrived by helicopter with GSU reinforcements.[20] That view has the support of a local religious leader who asserted that the security forces were powerless against the violence and furthermore there were ethnic divisions amongst them.[21] Once reinforced, the district used its forces to unblock the main arteries and to disperse the gangs of young Kalenjin attackers in town and elsewhere. In conjunction with the DC's office they also assisted victims by bringing them to IDP camps which initially were established in the area at the ASK Showground in Eldoret, at 8 camps in the Mau Forest, and in Mathare. Later they took the initiative to move them out of hostile rural areas when they received intelligence that Kalenjin warriors were planning to attack and evict IDPs from the camps themselves.

The Commission was given evidence that the police were obviously overwhelmed by criminal gangs who proceeded in large numbers and appeared to plan their attacks. Roadblocks were manned and security forces and health care providers denied free movement. This hampered the police ability to rescue distressed victims of the attacks. The first time district officials heard of plans by Kalenjin youth to attack the Kiambaa farm, for instance, was during a DSIC meeting on 31 December 2007. According to the OCPD, his office immediately dispatched officers to the area. However, because the access road was heavily blocked with rocks and old tractors at the turnoff to Kiambaa on the Nakuru Eldoret Road, they could not proceed. By the time they arrived the church at Kiambaa had been burned to the ground with the charred remains of the victims still inside.

[20] Commission investigation job sheet

[21] CW 74, in camera.

In some cases, police on rescue missions faced not just road blocks but also attacks by hostile gangs of Kalenjin youths. The Commission heard about an incident in which five policemen in a land rover on a mission to assist an old Kikuyu man at Soi, encountered heavy road blocks from Huruma to Turbo and from Huruma up to Kitale. They were repelled by gangs of youth armed with bows and arrows, and had to return later to rescue him. A similar situation ensued at Mailu Nne on 31 December 2007. In still other cases, the police themselves were overwhelmed, attacked, and even killed.

Beyond this the police took two pre-emptive measures which may have helped to minimize the violence. First, the OPCD for Uasin Gishu, Angelus Karuru, asked all five petrol stations in town to stop selling small amounts of petrol to individuals as opposed to legitimate motorists. He was acting on intelligence that petrol might have been used to set Kikuyu and Kisii houses on fire. Second, upon receiving intelligence of possible attacks on IDP camps that had been set up in areas where there had been violence, also mentioned in NSIS's intelligence reports, he immediately deployed forces and vehicles to have them moved to safety in town as did some officials in the provincial administration in other parts of the North Rift. As witness number 86 from Chegaiya sub location who had lost all his family members and who testified before the Commission noted:

> "*We remained in the Administration Police camp for four days. The attackers continued to attack us even in the camp. The Kalenjin officers in the camp joined their kinsmen in the attacks and the Kikuyu Administration Police officer had to take rifles from them."*

On the other hand, there were numerous reports of the police and other security forces being heavy handed and even worse. During the violence they chased a group of demonstrators near the Moi Referral Hospital in Eldoret and in the process lobbed both tear gas and fired bullets into the hospital. The D.C. for Uasin Gishu testifying before the Commission denied that this had happened saying that the tear gas must have been a by-product of what was used outside the hospital. However both the head of the Hospital and its guards told the

Commission that the police tried to enter the Hospital by force. Cross examination revealed that both canisters and bullet casings were found inside the Hospital, the OPCD admitting in his testimony that it was possible that in fact tear gas and bullets were fired into the hospital.

The Commission also received evidence of numerous other instances of police brutality. Witnesses spoke under oath of horrifying tales of police brutality and indifference. This included police standing by, doing nothing and not coming to the assistance of individuals and communities under attack, joining in the attacks, including raping already vulnerable victims, and taunting Kikuyu victims with one of Kibaki's campaign slogans, "*kazi iendelee"* (let the work continue) as they stood by watching helpless victims being attacked. In other cases there were reports of victims under attack seeking police help and being turned away. Among many cases, the Commission was able to determine that a senior police officer in Eldoret was responsible for personally shooting a number of individuals. The Commission visited one such victim at a hospital where he had been admitted with wounds sustained from gun fire. Similar allegations were made in the evidence produced by the KNCHR.

The Commission was told that some chiefs either passively or actively collaborated with the attackers. At least thirteen of them were later interdicted after reports against them were made. In his sworn testimony, the District Commissioner of Uasin Gishu, Bernard Kinyua, admitted to having "received some information that the chiefs were not helpful" and "were not there for the people", although he claimed that he had no information that chiefs were involved in the violence, nor were any names given in the intelligence reports he received.[22]

However, evidence received by the Commission tells disturbing stories of chiefs either standing by while violence was being committed, or even actively taking

[22] C W 60

part in the commission of violent acts. A Kikuyu pastor from Burnt Forest had this to say:

> "*The young Kalenjin men started attacking and shouting that non-Kalenjin had to go. We tried telephoning the OCS Burnt Forest station and the Chief countless times. Nothing happened. Kikuyu young men started trying to defend themselves. There was no response. The Chief arrived with his two police officers who were both Kalenjin. The AP officers started pushing the Kikuyu men back as the Kalenjin men burnt houses behind them. Everyone was pushed to the centre of the Kikuyu farm".*[23]

Moreover, a resident of Kiambaa who testified to the Commission in private submitted as an exhibit a memorandum from "residents of Uasin Gishu", identifying by name eight chiefs from "one ethnic group", whom they claim had fuelled tribal clashes in 1992 and 1997, who had been threatening "people from other communities with eviction during the referendum in 2005", and were "frustrating" the return of those who were evicted from Burnt Forest and Ainabkoi.

In short, while not denying many instances where police mobilized quickly to assist victims to quell the violence or where they were overwhelmed, the Commission also has evidence that in some other cases victims of post election violence found the very people they thought would help and defend them as they were under attack participating in the violence themselves or indifferent to their plight.

Under these circumstances, it is not so surprising that many victims of post election violence chose not to make reports to the police. This in itself was another part of the tragic breakdown of law and order and indicative of the lack of integrity of key government institutions including the security forces and parts

[23] Statement recorded by Commission investigators

of the provincial administration. It is also a pattern that supports previous findings from the Akiwumi Report.

Intelligence Concerning Post-Election Violence and Its Use

The National Security Intelligence Service (NSIS), the Provincial Security and Intelligence Committee (PSIC), and the District Security and Intelligence Committee (DSIC) each contributed intelligence information concerning security in Kenya before, during, and after the election. Before the election, the NSIS correctly analyzed the forces at work in the country and said that in the case of either a Kibaki or Odinga loss there was a strong possibility of post election violence, the worst case scenario being if the ODM candidate lost.[24] Some of the pre-election intelligence received by the Commission from the three agencies predicted the post-election violence which engulfed the North Rift, particularly in Uasin Gishu District.

The NSIS's Situation and Hot Spot analysis from June 2007 until February 2008, given to the Commission,[25] mostly concentrates on traditional conflict areas such as Trans Nzoia, Molo, and other parts of the Rift and on gangs such as Mungiki operating there and elsewhere. As early as three months before the elections, the NSIS warned in its Situation Report of 25 September 2007, that "in parts of Uasin Gishu, tension is brewing between the Kalenjin, the Kikuyu and the Kisii following the Mugirango skirmishes with some Kalenjin tribesmen terming the two communities their political enemies and threatening to evict them. It added however with some premonition that "violence could engulf different parts of the country if cases of incitement are not legally addressed as they emerge."

[24] Exhibit 19A, submitted to the Commission by the NSIS.

[25] Of which are missing "situation analysis reports" from 25 December 2007 to 2 January 2008 and "flashpoints/hotspots analysis" from 24 December 2007 to 11 February 2008

In its "Hot Spot/Flash Point" Report of 19 October 2007, the NSIS noted that the debate around *Majimbo* was already being used by some politicians in Nairobi, Rift Valley and Coast provinces scheming and organizing local youth to attack perceived outsiders in order to disenfranchise them and finally have the incident blamed on Majimbo campaigns. NSIS added that "generally, the debate has elicited a strong anti-Kikuyu sentiment due to the fact that the community is also robustly opposed to the system." The same briefing under the heading "Use of Criminal Gangs" noted that as the campaigns intensify, the possibility of various leaders/politicians resorting to reactivation and use of such gangs was likely in Nairobi, Nakuru, Uasin Gishu, Trans Nzoia, Gusiiland, Kuria and parts of Central Province.

On 23 November 2007, NSIS noted that in Uasin Gishu District, "tension is looming between the Kalenjin and the Kikuyu within Timboroa Area following the arrest of two members of the Kikuyu community for circulating anti ODM leaflets." And on 7 December 2007, NSIS warned that in Nandi North, the Nandi and Luhya could clash at Os-Rongai area in Turbo Division where Nandi tribesmen torched houses belonging to Luhya to avenge the killing of a Nandi over alleged theft of property.

It is unclear from what the Commission has received and from its examination of the intelligence reports from Uasin Gishu District whether the NSIS's analysis, and in particular its two case scenario was communicated downward to the provinces and the districts or not, and why if the violence was planned and organized, the NSIS either did not have this information or did not transmit it to the field. Both the D.C. and the OCPD for Uasin Gishu testified to the Commission that they did not receive any information about NSIS's two scenarios or potential problems if ODM did not win.

However, the NSIS Uasin Gishu District Co-ordinator who testified in camera passed on some intelligence information to the DSIC about the possibility of pre-election violence in Kesses as early as 30 October 2007. Furthermore, he also

generated a security brief on 29 December 2007 which went to the DSIC stating that "tension was high within Uasin Gishu district and that there was a likelihood of violence targeting the Kikuyu community in a number of specifically designated spots in the following divisions: Soy, Kesses, Turbo, Kapsaret, Eldoret Town, and Ainabkoi."[26]

Nevertheless, most officials from the North Rift, including the D.C. for Uasin Gishu who chaired the above 29 December DSIC meeting as well as the OCPD for Eldoret, and other officials testifying before the Commission said they did not anticipate post-election violence. The Commission finds it surprising that provincial administration officials would not anticipate some level of post-election violence while they were are that the pre-election period had been extremely tense, filled with incendiary language, hate speech, innuendoes concerning majimboism and the possibility of evicting outsiders, pamphlets threatening war, and scattered references to politicians encouraging their supporters to "violate the law."

Having survived the 2005 referendum on the constitution without incident and having completed what turned out to be a peaceful December 2007 election, including the announcement of the parliamentary results on 27 and 28 December, officials did not think there would be serious problems after the election, leave alone anticipate the debacle that engulfed the country. As Bernard Kinyua, Uasin Gishu District Commissioner noted, he had been extremely vigilant and had intensified patrols before the election in areas that had experienced pre-election violence in the past such as Yamumbi, Turbo, and Burnt Forest, but he did not anticipate that violence could be on the scale on which it happened. He explained in his testimony to the Commission that previously nothing like this ever happened, adding that in the past, immediately after elections were over, people would settle down to [their] daily business, but this time it was the reverse. He said he had covered the district properly and

[26] This information is contained in exhibits 66A and 66B.

thought he could handle any situation, adding, however, that in this case it was "enormous", "nothing like what we expected," and "spontaneous."

Nevertheless, he admitted that because of the utterances of some politicians, he was aware that there was an expectation of an ODM win and that there might be a refusal to accept anything else. However, he said he did not receive any information from the NSIS or other agencies of unprecedented upheavals if ODM did not win. This partly contradicts the intelligence information said to have been relayed to the DSIC on 29 December 2007.

Notwithstanding this reality and similar sentiments conveyed from other officials both in Uasin Gishu District and in other parts of the North Rift there were reports of violence in the run up to the election indicative of heightened tensions, as well as isolated attacks on businesses and burning of houses on farms even before the ECK announced the presidential results on 30 December. This included three houses allegedly having been burned in Lelmorok farm in Kesses on 29 December, an incident about which the OCPD said he was not aware, but which a resident who had been evicted four times previously, confirmed when he testified to the Commission in camera, also naming some of those he alleged to be the attackers.[27]

Furthermore, a former resident of Outspan Estate in Eldoret, said that the chaos there began as early as 27th December, causing her to take refuge in a church during the evening. In her statement to the Commission she said that "Kalenjins started burning houses belonging to the Kikuyus on 28 December." On 29 December, while checking on her property, she was then accosted and raped by three men.[28] Evidence submitted to the Commission by KNHCR also maintained that some Kikuyu buried their possessions before the election in anticipation of attacks[29] while cross examination of officials from Eldoret suggested that some

[27] CW. 85
[28] CW 82
[29] Exhibit 125.

Kikuyus had already left the area between 27th and 29th December to ensure their safety. In addition, the D.C. of Uasin Gishu and the OCPD of Eldoret Division noted that some public service vehicles stopped coming to town as early as 24th December because of allegations that they were ferrying marked ballots. There were also widespread allegations of rigging.

In spite of these incidents, it is not apparent that either administrative officials or police refined their intelligence as a result, nor apparently was there any sense of the unexpected impending disaster to follow. Furthermore, a witness from Nandi Hills told the Commission that "[t]here were already tyres being burned on the road from Nandi Hills to Kisumu" as of 26th December.[30]

Angelus Karuru, OPCD for Eldoret Division during the election told the Commission there were four incidents before the election which he had effectively contained, something that gave him confidence about handling whatever might come up during and after the election. There was a shooting incident on 17th November 2007 at Cheptiret Secondary School during the ODM's parliamentary and civic nominations when 200 of the party's supporters blocked the highway to the tallying centre, using logs, big stones, and their own motor vehicles. The second was at Ziwa Sirikwa Trading Center on 27th November 2007 when 100 ODM youth disrupted a PNU political rally. The third was on 26th December 2007 when local politicians and foreign press stormed the divisional headquarters to inspect a Molo Line Company minibus which was alleged falsely, it turned out, to have brought administration police and ballot boxes to be used to rig the election. Finally, on the same day in the early evening at Keiyo Petrol Station, youths burned a pickup truck transferring ballots from Keiyo Division to Kaptubei polling center, but the police moved in swiftly to rescue the ballots. They also contained the other incidents, but no one was

[30] CW no. 84 in camera.

arrested, a point that was criticized under cross examination as having contributed to a culture of impunity.[31]

Apart from the lack of anticipation of what might follow, the testimony by the D.C. for Uasin Gishu and the OCPD for Eldoret suggests that neither followed up on local intelligence and information they knew about. Had they taken the initiative to do so, they might have pre-empted some of the post-election violence which was experienced. It is not clear to the Commission if this was because of the lack of capacity or the result of not wanting to tread on the toes of powerful political personalities in the district for fear of retribution, something which had been noted in the Akiwumi Report.

Neither the provincial administration nor the police investigated claims of incitement by politicians or media stations. They claimed they did not know the names of the two prominent athletes who were killed during the post election violence. They appeared unwilling to discuss the ethnicity of their staff. They said they did not know or follow up on reports concerning politicians engaged in hostile acts or speech. They claimed they did not have any information on any chiefs or police as having been involved in the violence. They did not look into the source of hostile leaflets being distributed. They said they did not have reports about which politicians were using the terms "*madoadoa*" and "*makwekwe*" even though they had "heard about this generally". They had no information that youths were being trained to engage in violence.

In contrast, a witness told the Commission that the following "threatening terms" were routinely used against Kikuyu: *madoadoa* (spots), *maharagwe* (bean), *bunyot* (enemy), *sangara* (wild grass) with the additional notation that they should be "uprooted".[32]
When asked if he had followed up on some specific information the OCPD said he had not. He argued that it was not the function of the police to follow up on

[31] Testimony of Angelus Karuru, CW 75
[32] See for example, testimony of CW 85

general information as opposed to formal reports. The OCPD said that he "could not rule out that the violence was planned," but did not have any information to this effect. Concerning incitement and hate speech he told the Commission that he did not investigate "rumours" and that "you only investigate what has been reported", noting that "no one came forward to report and say ABCD said XYZ". When asked what he did about allegations that some athletes participated in the post election violence, he said he had heard about it but "no one said so and so was doing ABCD", a phrase that was repeated several times following questions directed at him when he testified to the Commission. He also did not formally investigate the incident where the Moi Teaching and Referral Hospital was invaded and tear gassed by police, an incident confirmed to the Commission by Jonathon K. Barno, head of the Security Department of the Hospital and Julius K. Chelimo, the Security Supervisor at the hospital, who had tried to dissuade the GSU officer in charge and who described the behavior of police officers at the hospital as "merciless."

This attitude of the OCPD is particularly troubling, but may not be so unusual given the testimony of a senior provincial security officer that investigating the post-election violence was extremely difficult given that witnesses were very reluctant to come forward to give evidence for fear of reprisals,[33] something also reiterated by a resident of Nandi Hills.[34]

It is also possible that officials themselves did not want to delve too deeply into matters that might come with the names of prominent, given that, as an Eldoret resident noted: "[I]n the skirmishes in [the] Rift Valley no leaders from the area condemned the violence". As a Kikuyu from Lerumoruk farm in Nandi Hills explained in trying to get the Commission to understand why even the multi-ethnic composition of the district administration was not a source of comfort to him and others:

[33] CW 80, in camera.
[34] CW 84, in camera

> "*the DO is just two kilometres from the farm but anything can be said, anything can be done with or without him there. We have very powerful people in this District. The politicians here* [in Uasin Gishu District] *decide what is to be done. It doesn't matter what you say…".*

Furthermore, according to the provincial criminal investigation officer (PCIO), even people like him have difficulty dealing with the "big fish". As he noted in testimony to the Commission:

> "*My Lord…when you arrest the so-called politicians, people don't look into the crime. They say the police have arrest*ed *one of our own. We arrested some councillors in Buret and the council was so rowdy. They stormed the whole Buret Police Station so much so that we were compelled to release those councillors."*[35]

In the Commission's view the lack of robust action by the administration officers and the police to pre-empt the possibility of post-election violence can be put down to several factors: complacency after peaceful polling given past history of pre- rather than post-election violence; fatigue because so many officials from both the provincial administration had been up for days either manning polls or counting votes; lack of communication from the NSIS to the field; an unwillingness to act on the of intelligence received, admittedly belatedly, by the DSIC on 29th December; and a "play it safe" attitude on the part of district officials who did not want to rock the boat, particularly given the tendency of powerful politicians to call the shots at the local level and exact retribution, problems tendencies reported earlier in the Akiwumi Report.

[35] Rift Valley PCIO Mohamed Aman CW 80. The Commission was informed that in fact the Councillors were protesting the shooting of two civilians by the police when they were arrested.

Was the violence planned or spontaneous?

The question whether violence in North Rift was planned or spontaneous has as many answers as there are respondents depending on the respondent's ethnic or political inclinations. There was also the view of the provincial administration, that the post election violence in Uasin Gishu, indeed in the North Rift in general, was spontaneous, was not planned. Thus the Commission heard testimony in favour of both the view that the violence was planned and organized as well as the view that it was spontaneous.

Those who hold the view that the violence was planned believe that it was a contingency plan on the part of ODM politicians and supporters should the election results go in favour of the PNU.

Those holding the view that the violence was planned and organized cite four factors in support of their view: (i) testimony that information had spread within communities prior to the violence that the Kalenjin would attempt attacks; (ii) the testimony of witnesses who say they attended meetings or knew of individuals who were organizing violence both before and after the announcement of the presidential results; (iii) information from NSIS intelligence reports which have named key individuals and politicians as having been involved; and (iv) circumstantial evidence pointing in the same direction. We shall now examine these four sources in light of evidence we received.

Advance Warning of Violence Conveyed to Communities

The Commission heard numerous testimonies indicating that advance warnings were given to people in anticipation of the violence. In most cases, advance warnings are said to have been given to members of the Kikuyu community by their Kalenjin friends, tenants, business partners, or relatives in inter-ethnic marriages. In other cases, Kalenjin elders or church leaders who disapproved of plans to attack Kikuyu are said to have sent advance warnings to their Kikuyu

neighbors, congregation colleagues and friends. Statements collected by the Commission investigators are illustrative of some of the warnings have been given to individuals in advance of 30th December, including the following:

> -*"I wish to state that after the general election, I received information from Kalenjin friends that there were some Kalenjin people who were holding a meeting and preparing to burn my business. On 29 December 2007, I was warned to be careful by my tenants. Another friend of mine called me on the phone and he informed me that there were some people who had been sent with petrol to come and burn the building down."* (Businessman from Tambach Trading Center in Keiyo North interviewed by CIPEV investigators).
>
> "*On December 29th, I received a telephone call from the wife of the Pastor at the AIC Church and she told me that young Kalenjin were planning to attack the Kamuyu farm. On December 30, 2008 immediately after the announcement of the election result, homes began burning around Kamuyu. The young Kalenjin men started attacking and shouting that non-Kalenjin had to go. It all happened at the same time in all the areas in Kamuyu*". (Pastor from Burnt Forest interviewed by CIPEV investigators).
>
> "*A few days (before) the election KASS FM announced that there would be rigging and in some of their open forums they encouraged people to use the radio to incite people who gave their views. Most people used the radio to say that whether PNU or ODM [won], Kikuyu would be expelled from Rift Valley. So there was very high tension.*" (NARC activist from Kapseret Location, Uasin Gishu District, interviewed by CIPEV investigators).

Furthermore, a resident of Eldoret town who testified in camera to the Commission in Nairobi noted that "[f]rom 27 December all my friends from the local community disappeared from town with their families, something that has

never happened. On the eve of [the] announcement of Presidential Election Results, the killings had already begun in such outlying areas such as Moiben".

Incitement to and the Organization of Violence

The Commission heard from a number of witnesses who claimed to have first hand information concerning the incitement to and the organization of the violence in North Rift. Some of the witnesses were Kalenjin and had participated in meetings they claimed were called with the view to organize the violence. Others were insiders with information on planning of the attacks. Many were Kalenjins who said they were threatened themselves or even attacked for not joining or opposing the attacks on Kikuyu. Yet others were Kalenjins working as campaign organizers for PNU and thus perceived as traitors to the cause of the Kalenjin community. The Commission also heard from witnesses inferring evidence of planning or organization from their own observation or personal experience of the post-election violence.

A resident of Eldoret town[36] maintained that the attacks on residents of the outlying residential areas of Eldoret such as Ilula, Chepkoilel, Munyaka, Kiambaa, Kambi ya Mumbi, and Turbo were part of "a coordinated attack". In defense of this view he notes that the road blocks were erected by young people under the command of some senior and older people. He said that road blocks were erected within five minutes of the announcement of the presidential election results, making it impossible for his family and others to flee to safer places like police stations and the Catholic Church. On the basis of his own observations, he felt there had to be "lots of serious coordination and logistics put in place for the warriors to approach Eldoret town from all directions at the same time", noting that in his area he observed over 5,000 in one go and that they smeared themselves with the blood of the victims they had killed. He said that friends who were under attack and called him from other areas observed large bands of between 5,000- 7,000 youths approaching from Burnt Forest,

[36] CW 130.

Kaptarakwa, Kesses, Nandi Hills, Kapsabet and Turbo, wondering to himself how they could have *"travelled … hundreds of miles in five minutes"*. He also thought that the majority of those involved were from the "Kimnyengei age group" who had been part of a massive oathing ceremony in August 2007 which took place secretly in Kipkulei forest. This however had been disputed earlier by representatives of the Kalenjin Community, including an EMO official, Bill Ruto, and a Kalenjin elder, John Kiplagat Arap Koech, both of whom insisted this was nothing more than a normal circumcision ceremony. This view was disputed by the witness who claimed to have been told by some of his friends who refused to take the oath that its purpose was to *"conduct a cleanup operation"* to *"evict foreign communities within their areas"*.

Another witness, a Kalenjin resident of Nandi North and grassroots community activist,[37] testified before the Commission and said that the violence was not spontaneous, a view which contrasted with the views of most government officials interviewed by the Commission. He felt the violence was both well coordinated and the actions well organized. He submitted videos of a campaign rally on 5 December 2007 to the Commission to illustrate what he described as a "systematic and deliberate effort by both the politicians and the media to whip emotions both before the election and after[wards]", also citing KASS FM as a perpetrator. He also maintained that the incitement by politicians against the Kikuyu explained the intensity of the post-election violence. He argued that the politicians had prepared the masses to retaliate if elections did not go their way, mentioning by name two sitting MPs, former and sitting councillors and political activists. He also noted that as a result of these individuals' behavior, it was "not surprising… that the explosions in the Rift Valley and particular within the Kalenjin Community happened almost concurrently and in the same manner'. He claimed that "[t]hese activities were coordinated using cell phones, matatu drivers and touts" and that [y]ouths who are considered to be idle were also largely used."

[37] CW 83

Another witness, a Kalenjin resident of Soy Division in Eldoret North Division in Uasin Gishu[38] told the Commission that even prior to the election there was a concerted campaign to evict the Kikuyu from the Rift Valley starting as early as 1st December 2007. He mentioned a meeting held on 1st December in Eldoret led by a lawyer, which strategized on how to deal with the Kikuyu; a meeting held by a prominent politician whose name he mentioned on 3rd August 2007 describing anyone who voted for PNU as mad; and the destruction of eight houses belonging to PNU supporters which were burnt after he had visited the area on 17th December 2007. He also claimed that on 23rd December a meeting between some athletes and a prominent politician, whose name he mentioned was held "to prepare the youth for war" once they knew President Kibaki was winning. He said that after this meeting an elder informed them he was going to get guns from a friend in Mt. Elgon and that a retired policeman would assist with using the guns and that somebody from Marakwet district was sent to purchase bows and arrows from there. He also alleged that on 28th December 2007 after the election an elder who was a point man for a prominent politician "…went around Eldoret North with some athletes and other prominent people calling on youths telling them to be ready for war, promising them support from the M.P…" The witness also testified that on 27th January 2008, the MP held closed door meetings at his house, promising to go on with the violence, after which the road to Eldoret town was blocked and the violence went on. He said he was willing to mention the names of persons he was referring to and information concerning the vehicles that were used to transport the youth.

Furthermore, in a statement taken by Commission investigators, a businessman at the Tambach Trading Center in Keiyo North alleged that two individuals, whom he named, funded the violence in this area. Another witness interviewed by CIPEV's investigators claimed that "militias were ferried in lorries owned by a local politician prominent, the attacks on the Kiambaa church was caused by

[38] CW 128

some councillors who spread propaganda that the church held Mungiki adherents from Central Province who were ready to attack the local Nandi community.

Information Contained in NSIS Intelligence Reports

An NSIS official gave a statement to the Commission and also submitted several NSIS "Security Briefs" which also had been received by the DSIC at the time.[39] As early as 30 October 2007, there was a brief to the effect that a week earlier a former Member for Parliament for Eldoret South, whose constituents were threatening to unseat him, toured the Kesses area and told them they should get rid of "madoadoa". It was the assessment of the NSIS that the former MP likely to use the Taliban thugs to intimidate his opponents during the campaign. Further, on 29 December 2007, the NSIS identified the areas likely to be affected by post-election violence in Uasin Gishu District if Kibaki was declared the winner.

On 2nd January 2008 the NSIS said that the violence threatened to degenerate into anarchy. From then through February they had intelligence concerning the presence of gangs of Kalenjin and Nandi youth planning to attack Kikuyus and Kisiis seeking refuge in Uasin Gishu District and of youth planning to burn houses in Eldoret town belonging to ex MPs and others. They also noted early in January that some ODM supporters intended to raid the Ngano factory in Eldoret to steal munitions and were planning to seek the assistance of military personnel guarding the factory who were sympathetic to ODM. Later on 4 January they identified an employee of the bullet factory in Eldoret as the leader of youth groups involved in the violence there, further claiming that they shared a password to be used to mobilize them for attack. On 8 January 2008, the NSIS situation report identified an employee of the Eldoret Bullet Factory as a trainer of the youth in the handling of firearms, use of grenades, and the destruction of buildings, naming some of the training sites as being in the Sigowet Forest and Kerio Valley. The Report also said that ODM leaders allegedly gave money to

[39] CW 66, in camera.

Kalenjin youth in Eldoret on 2nd January 2008 to attack Kikuyu at the Kipkaren area in Eldoret town.

In a report of 8th January 2008, the NISIS said that "some senior Kalenjin personalities were reported to be funding ODM activists to organize youth for violence". The NSIS say further that on 11th January, they received information that prominent unnamed businessmen and professionals were financing the acquisition of firearms and that Kalenjin youth from some divisions in Nandi North District and that they had already had acquired some from Mt. Elgon and Marakwet Districts which they planned to use to evict Kikuyu from the Rift Valley. NSIS Situation Reports of 25 January maintain that "Kalenjin warriors" were reportedly being trained on how to handle firearms within the Segoit area in Moiben Divisions of Uasin Gishu District. The warriors were allegedly going to be used to prevent internally displaced individuals from returning to their farms and to raise funds to purchase land at "throwaway prices." The NSIS reports throughout January also warned of Kalenjin youth from Sima Division in Nandi North regrouping to attack IDPs in Eldoret, in Burnt Forest, and elsewhere.

In addition to the above, the NSIS's report of 8 February 2008, contained in exhibit no. 19A to the Commission stated that certain unnamed Kalenjin tribesmen were cautioning members of the community against disclosing or volunteering information on the post election political violence to any group investigating the clashes.[40]

It can be argued that these NSIS reports point to the possibility that the post election violence was concerted and a product of organization and planning, although this does not preclude the possibility that some of the violence was spontaneous as well.

[40] The Commission listened to recorded tapes of Kass FM programs and was able to confirm that such messages were indeed broadcast on Kass FM on 18 February 2008.

Circumstantial Evidence

Most reports from witnesses and others describe large groups of Kalenjin youth blocking roads with felled trees, large boulders, tractors, and the use of petrol to burn dwellings and farms in numerous non-contiguous areas. For this to have occurred, the invaders needed to have cut down trees, moved heavy rocks, and obtained petrol, all factors which can be argued to point to some level of organization and planning. The extent of this depends in part on the amount of petrol used, where and how it was obtained, whether or not chainsaws were necessary to fell trees, and what sort of equipment was used to move boulders to create barricades in various parts of the North Rift.

In some other cases, reports describe what appear to have been simultaneously coordinated attacks from different points and the need for transport to have brought attackers from miles away to gathering points. Although the Kalenjin youth engaging in these acts had a good deal of history to draw on given the violence of the 1990s, the accounts of the violence do not suggest a breakdown of law and order arising solely from spontaneous rioting.

Was the violence spontaneous?

A number of government officials testifying to the Commission described the violence as spontaneous. A senior provincial government security officer who testified in camera, told the Commission that "[t]his was not organized crime…[i]t was a spontaneous reaction". In response to suggestions that officials were reluctant to investigate "the big guys" the same officer said they had followed up, but found there was no concrete evidence. He nevertheless added that "recently we got information …and my officers opened up investigations" into three major political figures whom witnesses named as having been involved in the organization and training of youth.[41]

Another senior police officer, the former Rift Valley PPO Everett Wasike, after suggesting that Kalenjin don't need preparation, mentioned that from the

[41] Rift Valley PCIO, CW 80.

pattern of attacks there must have been organized support for attackers in form of transportation, provision of food, etc. Evidence of such organization and support appeared clear to him when he explained that "[…]of course to run from one District to another burning and looting, there [must be] supervisors," and it would be difficult to go around "burning houses, killing people without eating something, without the support…" He also told us about a meeting at the Nairobi police headquarters in which politicians and other Kalenjin leaders were called and told "we have information that you people are inciting your members against other people."[42] The witness did not tell us whether there was any response from the politicians.

Some of those who hold the view that the violence was spontaneous have sought to explain its scale on the basis of what can be described as Kalenjin cultural disposition towards war. In testimonies presented to the Commission, a number of Kalenjin witnesses and experts used the idea of the so-called Kalenjin culture to argue the violence could attain the level of magnitude it did in North Rift and still be spontaneous; not planned or organized. Variances of the "Kalenjin culture" theory aimed to explaining some cultural predilection of Kalenjins to engage in warfare were offered by a former Rift Valley PPO when, answering the question whether violence in North Rift was spontaneous or planned. He told the Commission that the violence was probably spontaneous because "the Kalenjins require just a … They don't need to plan. You injure

John Kiplangat Arap Koech, a Kalenjin from Tinderet, Nandi South District, who introduced himself as a "Cultural Practitioner and Land Dispute Tribunal elder" and "currently involved in carrying out research on the origin and customs of the Kalenjin", also resorted to elements of the Kalenjin culture to explain the violence in North Rift. He emphatically stated that violence was spontaneous and strongly challenged and dismissed as "false and malicious…the notion that the violence was planned, funded and organized." He explained that "given the

[42] Rift Valley PPO, CW 57.

nature of the Kalenjin set up and cultural inculcation, when violence develops into a situation akin to war then the entire community rises to defend itself."[43] Bill Ruto, a writer by profession, said: "The Kalenjins just like many other pastoralist communities tend to be militarily organized and can respond to perceived threats in an organized manner. This rapid and organized reaction is what most people have confused for pre-planning of violence."

But the "Kalenjin culture" theory as an explanation for the violence in North Rift was strongly challenged by a number of Kalenjin lay members and community leaders. A Kalenjin religious leader dismissed the theory and instead accused political leaders who come up and use the ethnic background and the unity they found to instil violence, and suggested that to end the cycles of violence we have to break that. He added that "the same applies to the Maasai because they are all the Nilotic group. So it is the myths that can be changed but it is this unity the politicians are exploiting..."[44]

In his testimony to the Commission, Hon. William Ruto also dismissed the Kalenjin culture theory, remarking "there is no DNA for people to fight." Instead, he blamed the Kalenjin attacks on Kikuyu during the post-election violence on "a combination of factors", including the history of violence since 1992 with "friction [having been] higher in Uasin Gishu than any other area" because of the cosmopolitan makeup of the district. He dismissed the land issue as a factor in the 2007 violence. He told the Commission, "The issue of the PEV is not land, let nobody cheat you. Kikuyus always sit on the land and the only problem is at the end of 5 years. It is all politics. Land is just an excuse." He also noted that "our politics acquires ethnic dimensions" and communities support parties where "their leaders ae at the front and that is one thing we have to change." He finally remarked that the 2007 election was very polarized and "the people in the Rift Valley believed that Kibaki oppressed them in the last 5 years. They voted more against Kibaki's presidency than for Raila's presidency."

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[43] Everett Wasike, former Rift Valley PPO.
[44] Exhibit 79, Evidence submitted by John Kiplangat arap Koech.

A Kalenjin businessman concurred with the religious leader, noting: "The issue of Kalenjin warriors does not arise here. To me, those are Kalenjin young men who idle around and anyone can take advantage of them to be warriors. The word "warriors" in the Kalenjin tradition is a respectable term. But nowadays there are no warriors. They have just classified these young men as warriors. They are not warriors." He also added, "People hide behind culture….This [the post election violence] is nothing to do with culture," insisting as well that "land wasn't an issue either", adding that it was just used to "cover what happened".[45] As to the real cause of violence, a Kalenjin resident of Eldoret offered that "the violence was motivated by jealousy" against Kikuyu who had "succeeded in business" as opposed to Luhya and Gusii who also owned land, with the post-election violence being "purely politically motivated.

Findings

In 2007, in contrast to the 1990s the bulk of the violence in the North Rift followed rather than preceded the elections. Explanations offered for the timing and scale of the 2007 post-election violence include: general spontaneous anger by ODM's Kalenjin candidates and voters at the announcement of a Kibaki win amidst allegations of rigging; land hunger and a desire to evict so-called outsiders whatever the outcome of the elections; and a desire by Kalenjin ODM candidates to overturn the presidential election and assume power.

It is our finding that violence in North Rift caught the police and local administration officials totally unprepared. We found this particularly disturbing given the fact that intelligence was made (or should have been made) available to local administration and police indicating the high likelihood of violence in either case of the electoral outcome – but higher in the case of a Kibaki win.

[45] CW 74

As a consequence, police reaction to the violence was chaotic, to say the least. Some police officers joined the attackers and participated in the violence. Others were able to display acts of personal courage that saved lives. In many cases the default line was ethnic, along which the police force was divided. In general, though, the police were overwhelmed by the massive numbers of attackers and what appeared to be a fairly high level of organization of the attacks.

Central Rift Region

Central Rift Valley is to a large extent dominated by the larger Nakuru District whose Kikuyu majority raised a feeling of unease and suspicion among Kalenjin politicians following the end of the one party system in 1992. They felt that the position of Daniel Arap Moi as President was under threat by the Kikuyu who were at the forefront of the clamour for multi-party democracy.[46] Thus in this period, the Central Rift experienced a pattern of clashes where the non Kalenjin and non-Maasai tribes were attacked, their houses set on fire and many killed with a view to driving them out of the region since they were perceived not to support the then ruling party KANU. Narok was one of the three places in the Rift Valley where the pro-one party rallies were held in 1991 and the key message emanating from these political meetings was that violence would be used to resist multi party politics. A key architect of this school of thought was William Ole Ntimama, the MP for Narok North who stated that KANU leaders had resolved to fight together and follow President Moi in the clamour to end the debate for multi party politics by use of majimbo as the antidote against the re-introduction of plural politics[47].

The larger Nakuru district due to its high Kikuyu population was the hardest hit by the tribal clashes that came to be associated with the region from 1991 to 1998. Of note is that the larger Nakuru District was later split to create Molo, Naivasha, Rongai and Subukia Districts.

For purposes of this Report, the Central Rift Valley covers the following districts; Narok, Molo, Koibatek, Nakuru, Rongai and Naivasha districts. While Nakuru, Molo and Naivasha Districts have a clear Kikuyu majority, Narok is predominantly Maasai, while Koibatek has a clear Kalenjin majority. In Rongai, the population between Kalenjin and Kikuyu is almost even with a slight margin in favour of the Kalenjin. The rationale for dealing with the region separately was

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[46] Akiwumi Report at paragraph 212 on page 118

[47] Above, page 117

informed by the fact that it has been a theatre of internecine ethnic conflict that first erupted in 1991 after the re-introduction of multi party politics. Further, it is a cosmopolitan and strategic region which has attracted heavy focus from different political parties seeking to hold sway. Nakuru Town, a highly multi-ethnic town is Kenya's fourth largest town and the administrative capital of the entire Rift Valley Province.

The politics of the region have been extremely competitive and volatile, no doubt informed by the fact that this zone having once formed part of the former white highlands saw different ethnic communities purchase land under various settlement schemes some of which were set up prior to Independence. As noted in the Akiwumi Report, *"*the different tribes in this area only tolerated each other as there were deep seated ethnic ambitions and prejudices which were activated by political events preceding the 1992 General Elections*"*. While political re-alignments had shifted in 2007-the Kalenjin and Maasai expressing support this time round for the ODM and not KANU, nevertheless the patterns of violence in 2007 closely echoed what had transpired previously with slight differences i.e. the use of criminal gangs suspected to be Mungiki by the Kikuyu in Nakuru and Naivasha ostensibly to protect the Kikuyu community and largely Kalenjin gangs in turn preparing to attack the Kikuyu in Nakuru, but this time without the tacit support of the state security machinery that had hitherto aided their cause in the 1990s.

Molo District

We received evidence on violence in Molo District during our hearings in Nakuru and Eldoret. We also made site visits to Njoro and Kuresoi and interacted with a number of officials from the local police, provincial administration and citizens. The visit provided a unique opportunity for the Commission to witness first hand some of the scenes affected by violence and hear additional explanation from eye witnesses. Commission investigators also recorded statements and depositions from displaced persons from Molo and Kuresoi and these accounts have been in turn amply supported by District Security Intelligence Committee minutes and

also published reports by other entities including public bodies. The totality of such information pieces together the story of Molo and Kuresoi.

Background: A History of Ethnic Conflict

Molo District borders the Mau Forest which is one of Kenya's largest forest areas comprising about 36% of the total forest cover in the country. The region is situated along the Mau Escarpment and is one of the most fertile farmlands in the country famous for growing pyrethrum, potatoes and other agricultural crops due to its cool climate.

The District, on the other hand, has also been a theatre of ethnic based conflict since the return of multi party politics in 1991. The Akiwumi Commission noted that in the then Nakuru District, Molo and Olenguruone Divisions (parts of the current Molo District) were the most affected by 1992-1993 clashes and that the Molo Division was among the few areas declared security operation zones under the Preservation of Public Security Act.[48] The district has two constituencies- Kuresoi (with a Kalenjin majority, a sizeable number of Kikuyu and a Kisii minority) and Molo (with a largely Kikuyu majority and Kalenjin and Kisii minority). Both constituencies also host a number of other communities mainly the Ogiek (an indigenous hunter/gatherer community), Luhya and Luo communities. The Akiwumi reportfurther noted in its findings that this ethnic diversity had been a source of tension and ethnic conflict pitting the Kalenjin on the one hand and the Kikuyu and Kisii on the other. Evidence tendered by the KNCHR also notes that the area experienced ethnic violence in 1992 and 1997 where the pattern of attacks was Kalenjin raiders attacking and killing members of the Kikuyu community and burning their houses and in turn the Kikuyu community organizing themselves to launch counter attacks in which they killed the Kalenjin and also burnt their homes.

[48] Akiwumi Report, para 242.

A witness testified that Kuresoi Constituency was carved out of the old Molo constituency in such a way that the majority of the people in Kuresoi were Kalenjin. The witness claimed that this was influenced by retired President Daniel Arap Moi to ensure that the Kalenjin in that constituency could get a representative in Parliament because a Kalenjin candidate could not win in the bigger Molo due to the large Kikuyu majority.[49]

This history of ethnic tensions in Molo District was confirmed by the Rift Valley PC Hassan Noor Hassan who stated that since 1992, elections had been the excuse rather than the cause for the violence over land. Other witnesses however, provided a broader perspective of the reasons for ethnic infighting notably Gordon Ogolla Chairman of the Rift Valley Chapter of the Law Society who gave a number of causes; firstly that violence was not over land as such, but rather due to a feeling among the Kalenjin that during elections, the Kikuyu and other communities opted not to vote according to the wishes of the Kalenjin and instead followed the voting patterns of their kinsmen elsewhere which general feeling led to animosity between the communities and secondly in the areas of Nesuit, Mauche and some places around Njoro, the biggest problem appeared to be centered, not on politics, but on allocation of the Mau Forest in the 1990s to senior Government officials and well connected individuals which enraged the Ogiek community who consider the Western Mau Forest to be their ancestral home.

During cross examination of Mr. Ogolla on the issue of the democratic rights of citizens to vote as they wished, he stated that the issue of voting patterns in the Rift Valley where there were mixed communities-Kikuyus, Kisiis, Luhyas, Luos and the Kalenjin-elicited feelings among Kalenjin that non-Kalenjin communities tended to follow the political trends from their ancestral areas of Nyanza, Western and Central Provinces which had antagonized the Kalenjin since the return of multi party politics hence a feeling that if non-Kalenjins wished to live harmoniously among the Kalenjin, then the Kalenjin expected them to vote

[49] CW 133.

together with them and not with the regions where they were deemed to have come from. He did however concede that while such a proposition was patently undemocratic, it nevertheless had the potential to realize inter- ethnic coexistence in the province. Not surprisingly, Mr. Ogolla was of the view that failure to heed the recommendations from the Akiwumi, Kiliku and Ndung'u Reports had contributed to the violence since the underlying grievances remained unresolved.

The Pre-Election Violence

The Commission established that before the 2007 Elections, Kuresoi and Molo constituencies were experiencing violence between the Kalenjin on one side and Kikuyu and Kisii on the other. The Commission was told that the problem in Molo District in general and Kuresoi in particular was perennial in nature having started in 1992 when the Kikuyu were forcibly evicted from Chepakundi in Olenguruone division. The witness claimed that this was viewed by the Kalenjin as a success because the Government resettled the displaced Kikuyu at Kapsita near Molo town. Thus, according to the witness, there was a feeling among the Kalenjin starting from the aftermath of the 2005 Referendum that the Olenguruone precedent should be replicated elsewhere in the District since Olenguruone was the only division that had managed to bring about the complete removal of *madoadoas* through violence and that if this was repeated elsewhere in the District, the Government would similarly resettle the displaced Kikuyu as had happened with those from Chepakundi. The witness was therefore of the view that the pre-election violence of 2007 had some connectivity in one way or another to the violence in 1992.

During hearings in Eldoret, the Commission was told by the Kipkelion DC that Kipkelion District had experienced the spill over effects of the violence in Molo and Kuresoi prior to elections as a result of which ethnic animosity built up on account of displaced persons fleeing to Kipkelion from Kuresoi. This was corroborated by the NSIS security briefing for the week ending 3rd December

2007 which noted that the animosity in Molo had spilled over to Belgut and Ainamoi Divisions where Kipsigis youths torched kiosks belonging to Kikuyu businessmen.

Mr. Mohamed Salim the DC for Molo informed the Commission that hostilities began on September 25th 2007, though as we shall see later, violence had already been reported as early as 2006. In fact, evidence produced by the (KNCHR) noted that clashes broke out in Kuresoi after the referendum held in November 2005 pitting the Kikuyus who were largely in support of the proposed draft Constitution and the Kalenjins who had supported the Orange Movement that opposed the draft Constitution and that these clashes involved the expulsion of Kikuyu and Kisii from Kuresoi. Throughout 2006 and 2007, there were attacks on a low scale in Kuresoi by the Kalenjin against those they deemed not to have supported the Orange Movement which attacks intensified towards November 2007 and rose to their peak on 30th December 2007. The DSIC Minutes for Molo District dated 20th December 2007 corroborate this chronology in noting that between 22nd November and 4th December 2007, ethnic hostilities reached fever pitch and that as a result, deaths, injuries, displacement and destruction of property through arson had occurred prompting the PC to visit the area on 4th December 2007.

The Commission was told that violence in Kuresoi had erupted in May 2007 at a place called Chepkinoyo where two children were burnt and several houses destroyed through arson. This subsided up till September 2007 when Kalenjin attackers from Ndoinet Forest raided Kamwaura and killed 2 people. There were subsequent attacks in Gathiriga Settlement Scheme, and then Tetagik Scheme where members of the Kikuyu burnt Kalenjin houses prompting the Kalenjin to attack Karirikania, a farm occupied by former freedom fighters where the Kikuyu put up stiff resistance, killing 2 Kalenjin raiders [50]. By the time of going to elections, the Commission heard, there were already IDP camps in a number of churches in Kuresoi.

[50] CW 133

The Molo DSIC noted that on 20th October 2007 in Cheptagum Farm in Keringet, a house owned by one Wambui John was torched by unknown arsonists in an incident whose motive the DSIC believed to be revenge for a Kalenjin man who had been killed in mid August 2007 during a suspected robbery at Tebere area. Further, on 26th October 2007, the DSIC reported that an unknown number of raiders believed to be Kalenjin had killed one Benson Njuguna, a Kikuyu, injured four people and stolen livestock at Gathiriga Trading Center in Chemaner Location of Keringet. During this period, incidents of widespread looting and vandalism of deserted homesteads were reported by the DSIC in Kuresoi. It was observed that criminals took advantage of the wanton lawlessness to loot household goods, and stole food crops from abandoned farms, raising fears of food shortages in 2008. Between 25th October and 4th December 2007, the Molo DC stated that 16 people were killed, 67 houses torched and 300 families left homeless after their houses were torched[51].

Indeed, similar accounts were provided in detail to Commission investigators by a number of witnesses who narrated how the pre-election campaigns were characterized by tension with the Kalenjin saying that on election day, they did not want to see *"madoadoa"*. This information was corroborated by the testimony of the Chief for Sachangwany Location which we shall revert to shortly.

The Commission further perused reports from the NSIS stating that in October 2007 a number of ODM leaders from the Kalenjin community were planning to instigate killings in Kuresoi, Olenguruone and Molo targeting the Kikuyu community domiciled in the area for showing support for President Kibaki.

Meanwhile in Kuresoi, Commission investigators received a number of statements stating that leaflets warning non-Kalenjins to leave the area had been circulated as early as 2006. The deponents alleged that a former

[51] Statement of then Molo DC Mr. Mohamed Salim, Exhibit 56.

politician[52] had been behind the violence of the previous years and that once current MP Zakayo Cheruiyot[53] came to the scene promising to end the violence if the Kikuyu voted for him, the supporters of the politician went ahead to beat and evict the Kikuyu. The Commission found this information credible since it was corroborated by the Minutes of the DSIC meeting for Molo District held on 22nd November 2007 which noted that intelligence had been received that supporters of the fpolitician were "poised to cause clashes to scare non-Kalenjins away from Kuresoi for support for Zakayo Cheruiyot". NSIS also stated that the politician and a civic candidate were responsible for organizing and financing Kalenjin youth who were reportedly paid Kshs 1,000/- for every house razed down belonging to the Kisii and Kikuyu in Kuresoi.

From records made available to the Commission, it is clear that the district was tense. For instance, on 1st December 2007, the DSIC reported that a parliamentary candidate for Molo constituency had led a demonstration of about 3,000 youths in Molo Town to press for the release of 59 Kikuyu and Kisii youth arrested on 30th November 2007 for erecting an illegal road block at Muchorwe with a view to attacking Kalenjin motorists and passengers. During this demonstration, looting of businesses by the demonstrators was reported in Molo Town. For the above reasons, the evidence of Mr. Hassan Noor Hassan, Rift Valley Provincial Commissioner, that the provincial administration did not anticipate the violence in Molo District suggests that the administration was not prudent to ignore clear warning signs.

The Post Election Violence

Just as in other parts of the Rift Valley, the Commission heard from Hassan Noor Hassan the PC for Rift Valley that violence erupted in Molo and Kuresoi immediately after the election results were announced on 30th December 2007

[52] The NSIS furnished information which contains the names of several persons.
[53] Equally, NSIS had intelligence that supporters of a parliamentary aspirant were targeting for destruction the Kiptagich Tea Factory.

involving attacks on mainly Kikuyu and Kisii many of whom were killed and injured, their homes were burnt, animals stolen while roads were barricaded. As we discuss elsewhere in this report,[54] the PC testified that the Provincial Administration had no prior notice of the attacks and did not expect attacks of that magnitude in Molo and Kuresoi.

Evidence received from the NSIS however seems to indicate the contrary. For example, an NSIS Security briefing for the week ending 23 November 2007 indicated that Kalenjin youth were already harbouring plans to attack the Kikuyu and Kisii in Murinduko, Bochege, Kaplelach, Muchorwe, Kuresoi Trading Center, Githima, Mwaragania, Mwahe Farm, Sondu River, Temuyota and Kwawira Farms to disenfranchise the two communities for supporting certain politicians. The NSIS security briefing for the week ending 3rd December 2007 had noted that parliamentary aspirants and their supporters were suspected of fanning the hostilities for political expediency. One of the aspirants was alleged to be behind the harassment of Kikuyu and Kisii and to have been rewarding youth "according to the houses they burn". The Commission was told that NSIS Security briefing reports were provided to the Minister for Internal Security and Provincial Administration.

Even without the benefit of such NSIS reports, it is the Commission's view that the Molo DSIC was in possession of enough intelligence from the ground to act more swiftly and more decisively than they did. For example, a Molo District Security Intelligence Committee meeting held on 20 December 2007 had indicated that there was a likelihood of disruption of voting and that the morale of police officers was noted to be low due to disaffection with a paltry pay rise of 10%. This was a clear early warning signal of a potential security breach. During the same DSIC meeting it was highlighted that due to the ongoing insecurity and pre-election violence, mobile polling stations had been set up by the electoral Commission of Kenya in various places, including Molo Primary School in Molo

[54] See chapter on violence in Nakuru District and refer to the testimony of Rift Valley PC, Mr. Hassan Noor Hassan, CW 43.

Town, Chesengere Primary School in Muchorwe, Kamwaura Health Center, Kenjogetty in Mungetho Trading Center, Full Gospel Church Muchorwe, Kimkasia Primary School in Nyota and Kuresoi Health Center.

According to the Chief of Sachangwany Location Evans Mageto Kebira, violence in Sachangwany erupted immediately results of the presidential elections were announced on 30th December 2007 where Kalenjin youths burned houses owned by Kisii and Kikuyu prompting him to call a meeting at Mukinyai on 31st December. The witness stated that during this meeting, community leaders accused a local politician, who was present, of having been behind the violence.[55] Following this meeting, there was a period of calm but violence erupted after the killing of Josephat Kinyanjui, an elder in the area, allegedly by the Kalenjin according to statements provided to Commission investigators by several witnesses.

There is consensus from Commission witnesses that a new wave of violence erupted in Molo on 30 December 2007. Commission Investigators received a number of statements confirming that Kalenjin raiders started attacking and burning Kikuyu homes on the night of 30th December 2007 and that the attackers received support from some prominent Kalenjins in the area. Evidence produced by KNCHR corroborates this information in stating that there were reports of Kalenjin youth having been transported from outside the district and housed and fed in the homes of well known Kalenjin personalities. KNCHR also stated that the Kikuyu and Kisii organized counter attacks in Molo where they were a majority and in response, Kalenjin politicians and wealthy Kalenjin businessmen provided transport to bring in attackers from outside the district to buttress the local Kalenjin population. This information was corroborated by evidence received by Commission investigators, including from Kalenjins and other sources, that gangs of Kalenjin were transported to Molo from Kericho and Ndoinet areas.

[55] Testimony was received and also statements recorded by Commission investigators in which the local politician is repeatedly named as having planned the violence an allegation which he is reported to have denied during a public baraza held at Sachangwany Dispensary Grounds on 14th December 2007.

On 23 January 2008, the Commission heard that Jogoo Center in Mau Summit was razed to the ground in an incident where police shot dead 2 people said to be behind the attack. The Commission heard that members of the Kalenjin community held Mr. Evans Mageto Kebira, Chief of Sachangwany Location, responsible for having called the police who shot dead the 2 people, which prompted about 200 Kalenjin youth to attack his homestead at Kimanyi Farm on 24 January 2008, burn down all his houses and escape with his 10 cattle and 30 sheep which they took to the neighbouring Chesoin Farm. At the time of his testimony, Mr. Kebira stated that he was discharging his duties as area Chief of Sachangwany Location from Mukinyai Farm since he had been declared "*persona non grata"* by the Kalenjin in his location.

The Commission received evidence from Mohamed Aman[56], Rift Valley PCIO, indicating that on 24 January 2008, about 400 Kikuyu youths from Molo Town, incensed by the frequent killings meted against their tribesmen by members of the Kalenjin community, ganged up and proceeded to Sirikwa farm within Kalenjin populated Kuresoi constituency on a revenge attack mission, armed with pangas and other crude weapons. However, the Kalenjin got wind of the impending attack and ambushed them just before Sirikwa farm. As a result, 13 Kikuyu were killed and several others escaped with arrows lodged in their bodies.

Evidence was tendered by a witness who said he had attended a meeting of Kalenjins held in the area on 28th February 2008 during which local Kalenjin leaders discussed how to purchase Kikuyu farms cheaply from the Kikuyu who had left.

The Commission also received video coverage of a demonstration on 16th January 2008 in Kimalang village, Keringet Division of Kuresoi where some Kalenjin youths armed with bows and arrows were secretly filmed while they

[56] CW 80.

smeared mud on their faces to camouflage themselves as they prepared for attacks. When the witness was spotted by the youths he almost lost his life but for the intervention of a Member of Parliament.

A total of 150 people were killed in the District, another 170 injured, 1,564 houses burnt and 66,000 people displaced by the conflict[57]

Response by Police and Provincial Administration

Allegations of partisanship among the police and provincial administration in responding to the violence were made before the Commission. In Sachangwany, for example, police shot in the air on 6th January 2008 to disperse a group of Kikuyu who tried to put out a fire that was consuming Janet Mulinga's Nursery School which had been set ablaze by Kalenjin youth.[58]

In other instances, the Commission established that police were simply overwhelmed by the numbers of Kalenjin attackers. In one such instance, there were only 5 police officers confronting a mob of Kalenjin attackers estimated at over 2,000. In Kuresoi, allegations were made against the local OCS that he refused to intervene to stop Kalenjin raiders dubbing himself "ODM damu" (an ODM follower) and that he in fact watched as houses were burnt down at Mwaragania next to his police station.[59]

There is support for this allegation from the report produced by KNCHR which accused the police of complacency and at times complicity in the violence and that some police officers were not only seen in the company of Kalenjin raiders but that some officers derided Kisii and Kikuyu victims "that they were paying the price for voting *"kazi iendelee"* (let the work continue)" which was the PNU slogan.[60]

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[57] Exhibit 56
[58] Statement taken by Commission investigators from local traders.
[59] Exhibit 125, paragraph 353
[60] Exhibit 125. the Commission had access to the raw data which informed the KNCHR report.

Further, allegations of laxity and failure to apprehend attackers caught in the act were made which suggested to KNCHR that police were "overwhelmed, did not want to stop the violence or were under orders not to do so." The KNCHR Report opines that the raiding gangs must also have had prior reassurance in this regard or having observed that the police were simply shooting in the air, carried on their attacks undeterred."

We find these assertions credible on their own but they find further support from evidence produced by Government officials from the area. The Molo District Security and Intelligence Committee meeting of 4th February 2008 noted that "discipline of uniformed forces had deteriorated a lot" and cases of police officers drinking and fighting had been reported which prompted the DSIC to direct the area OCPD to ensure strict supervision so that all officers worked as required. All the above supports the conclusion that police force was so suborned by external factors, including lack of sufficient resources, that it was incapable of enforcing the law effectively.

One recurring feature in the DSIC Minutes was the lamentation that police boundaries in Molo did not match the administrative boundaries which in turn affected service delivery. This had been noted as early as 22nd November 2007 when the DSIC recommended the harmonization of Molo Police Division's boundaries to coincide with the administrative boundaries in order to centralize operations. The same observation was repeated in the DSIC meeting of 20th December 2007 which was of the view that harmonization of the police boundaries was a matter of high priority. There had been no response to this plea by the time intense violence broke out ten days later. It begs the question whether the failure to implement the recommendation affected police response and service delivery to prevent the loss of life and property that occurred.

The violence seriously affected Government service delivery in the District Headquarters of Molo. The post office was completely closed after five Kalenjin members of staff ran away leaving only the Kikuyu post master, while in Molo District Hospital, operations in some departments were stopped all together after 20 Kalenjin members of staff fled. Similarly, the Molo Law Courts and the

District Commissioner's office were also affected. With the Olenguruone-Molo-Njoro Road blocked, Kalenjin from Olenguruone could not access vital services like medication, access to markets and shops especially in Molo, and Elburgon, and conversely the Kikuyu could not access their farms in Muchorwe, Store Mbili, Kibunja, Matumaini, Kuresoi, Baraka Farm, Sirikwa, Tombo, Ngenia, Kiambiriria and Gacharage[61]. Further, the Molo DSIC meeting on 11th February 2008 alluded to the fact that intelligence had been received of some Chiefs having been responsible for incitement and recommended their investigation. The same Minutes also indicate that the DSIC would seek the help of the Army in restoring law and order, a further confirmation that the police were incapable of doing so on their own.

Koibatek District: Attempted Ethnic Cleansing

Koibatek District was carved out from Baringo District and comprises of two electoral constituencies, Eldama Ravine and Mogotio. We received evidence on violence in Koibatek through district government officials who testified in Eldoret as well as through statements by victims and eye witnesses who talked with Commission investigators. The pattern if violence in Koibatek is distinguishable from that in other parts of the Central Rift Valley Province in that it is the only district in which violence was committed mostly by members of the Kalenjin community against members of the Kikuyu and Kisii communities, without much retaliation.

The DC for Koibatek Mr. Stephen Ikua stated that the post election violence in the District claimed the lives of 31 people, left 1,215 houses burnt and around 45,000 people displaced from their homes. He traced the causes to the 2005 referendum that widened the political gulf between the majority Kalenjin and minority Kikuyu communities living in the area. In his view, the divisions were exacerbated during the political campaign period by the debate on Majimbo with

[61] The Molo DSIC in its meeting of 25th January 2008 observed the need to protect Salgaa market along the Nakuru-Molo highway and was apprehensive that the calm in Kamara and Keringet areas could have been an indication that something was being planned.

some politicians not only declaring the area an ODM zone but also asking residents to vote as a block for ODM. A statement recorded by Commission investigators from Joseph Macharia Nyaga, PNU organizing secretary for Koibatek district, alleged that on 6th August 2007, ODM held a meeting which the witness attended in Eldama Ravine Town during which Raila Odinga, William Ruto, Otieno Kajwang, Martin Shikuku and Najib Balala spoke in favour of majimbo. He claimed that one of the speakers asked the Tugen community to remove all "*madoadoa*" from Rift Valley and "to be committed in voting so as to remove Kibaki from power and Kikuyus from Rift Valley."

The same witness claimed that chiefs from the area had organized meetings after the referendum during which sentiments were expressed to the effect that Kikuyus would have to leave and go back to Central Province. This statement suggests that local administration in Koibatek was not able to maintain a level of political neutrality during the campaign period, a proposition similarly observed by district administration and recorded in the Minutes of the DSIC on 19 February 2008 which noted that some chiefs were partisan.

Mr. Nyaga's statement further alleged that as early as 6th August 2007, there was already talk by politicians on the campaign trail of bloodshed and dispossession of land from Kikuyu which would be given to the young Kalenjin men if the election was rigged. Credence to such allegation appeared to be given in the DSIC Minutes of 13th February 2008 stating that Kalenjin in Eldama Ravine had allegedly vowed not to allow displaced Kikuyu back but would instead buy their land at a ceiling price of Kshs 10,000/- per acre and warned that if any Kalenjin paid a price beyond this sum, their houses would be burnt.

The pattern of violence in the district mirrored that experienced in other areas of the Rift Valley populated by the Kalenjin, where immediately after announcement of the election results on 30th December 2007, Kalenjin youth especially within the market centers started burning properties owned by Kikuyu

and Kisii, blocked roads and issued threats to any Kalenjin deemed to have supported PNU[62].

The Commission was told during its public hearings in Eldoret that the fact that former President Moi declared support for incumbent President Mwai Kibaki did not go down well with the Kalenjin and Moi paid the price for this stand as his property was one of those that were burned during the violence. We were provided with evidence that Kalenjins in Koibatek were forced by their kinsmen to join in the attacks against Kikuyu and that those who did not, or were perceived to be sympathetic to PNU or to Kikuyu were attacked by their fellow Kalenjins. Moreover, the Koibatek District Commissioner told us that Government officials were similarly not spared: a son of a Chief from Maji Mazuri who was viewed as a PNU sympathizer was killed and in another incident, a police officer was seriously injured when responding to a distress call.

One incident in the district involved the killing of a police officer on escort duty. The Commission heard that the officer, who was Kalenjin, was among security officers who were taking charge of the equipment of the China Road and Bridges Construction Company Ltd which was re-constructing the Eldoret/Nakuru Road. On the material day while escorting a lorry to the site, they met some Kalenjin youths who were about to burn a lorry. The officer alighted from the vehicle and tried to dissuade them in Kalenjin language but they would not listen to him. Instead, the youth beat him up, cut him up with machetes and took his gun which they broke. They also took the magazine from his gun with 20 rounds of ammunition. The officer, according to the evidence, never even shot in the air. The incident, in our view, highlights the helplessness of ordinary civilians facing marauding gangs when armed security forces themselves were defenseless.

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[62] Minutes of the Rift Valley PSIC meeting held on 3rd January 2008 record threats to evict Kikuyu from Timboroa and Makutano

Most of the violence in Koibatek was concentrated on the border with Uasin Gishu, Kericho, Kipkelion and Molo where non Kalenjins were attacked and killed, their properties burned and/ or they were forcefully evicted. On 26th January 2008, a catholic priest Father Peter Kamau, a Kikluyu, who was coming from Nandi going to Nakuru was stopped at Museretchi Trading centre where a gang of youth killed him, in an incident that was widely reported by the mainstream media.

She Is Raped While Husband Is Being Killed

On 1 January 2008, 36 years old Elizabeth W. and her husband were attacked in their house in Eldama Ravine by a group of Kalenjin, some of whom she knew. She was gang raped while her husband was being hacked to death and her shop looted. Following is an extract of her testimony:

On 1 January 2008 we were still fearful. We didn't open our business. I worked at the Eldama Ravine shopping centre at Mama Faith's Shop. We owned the shop. It was just next to my house – they are joined together. But I stayed at home that day because I was scared. We left the shop locked up.

At about 3pm that day, people came to my home. At the time there was only my husband and me at home. My children had gone to visit their grandparents in Nyandarua. There were more than ten people who came. They were all men. They were dressed in coats and they had smeared mud on their faces so you could not recognize them. The mud was different colors on their faces – white back and red in spots -- patches all over their faces. They were armed. They had arrows, pangas and rungus.

The first I knew they were there was when I heard talking and noises outside. They were speaking in Kalenjin. They said "we have come to finish you". The door was not locked so they just came inside. My husband and I were in the sitting room. We were sitting down but stood up when the men came in.

When they came in I started pleading with them because of what I had heard them saying outside. I told them why were they doing this when we had lived with them. They ordered me to shut up and said that the Kikuyu had migrated to the area and taken up their (the Kalenjin's) property. They said I should keep quiet or they were going to kill me. So I just kept quiet then.

That is when they started attacking my husband. They were cutting him with pangas and piercing him with arrows. They were struggling with my husband and trying to get him to the ground. The men were crowding on him – it might have been most of them attacking my husband. I was scared. They cut my husband on the neck with a panga and that made him fall to the ground. It was a serious blow. After that they were cutting every part of his body.

After my husband was cut, but before he died, one of the men came towards me and asked me what I wanted to be done to me. I asked them not to kill me. One said we need to know what she is like, now that she never talks to us.

There was another group of men who were looting my shop. I could see them from the door – it was still open. They were going past carrying property from my shop, such as sugar, cooking fat and other goods.

I was wearing trousers with buttons at the waist. The men tore at my trousers trying to get them open and the buttons came off. There were about four of them there doing this to me at that time. They lifted me up and put me on the ground. They were arguing among themselves who was going to be first. Then one said that if I escaped from the knife and arrows, I would die of AIDS. Some of them held my legs and some held my hands while they raped me. When this was happening my husband and I were both still in the sitting room, but by now I was not watching my husband but pleading my own case. The last time I had looked, it was like he was dead. He wasn't moving.

One man raped me and then the second one and the third. They put their penises in my vagina. It was either the second or the third man who said they were not able to get in me properly so they cut me. I think it was the panga they were carrying that they used. They cut my vagina. When I had my children, the Doctor told me I had a narrow opening. Both my children were born by caesarean.

They continued raping me. It was when the fourth man was raping me that I went unconscious…I next remember – and it is vague – that a Kalenjin friend of ours called Joseph was there and he was pleading with the men. He was asking them for him to be allowed to take the body of my husband and take me to hospital. The men started quarrelling with him and told him that he was in partnership with us. They threatened to kill him.[…]

Response by Police and Provincial Administration

The NSIS had in their election Security Situation paper noted that the ratio of the police officers to the population which was already inadequate nationally

would pose potential problems since the police would be over-stretched by election related duties such as escort and guarding of polling stations. With such demands being exerted on the police, NSIS was of the view that if there were to be an outbreak of violence such as had been witnessed in 1992 and 1997, the police would be unable to cope in responding to such emergencies.[63]

It is therefore not surprising that violence continued in the district until around 15th February 2008 before the provincial administration was able to assemble some of the area leaders to discuss with them the need for the violence to stop. This finding is supported by the DSIC Minutes dated 9th February 2008 which noted that violence was far from ending and that 2 people were killed with arrows at Makutano. The DSIC observed that the Kalenjin appeared determined to displace the Kikuyu from their farms and that both communities reportedly were arming quietly.

Notwithstanding that the PSIC had mobilized all serviceable public vehicles which were handed over to the OCPD to facilitate deployment of security officers to the affected areas and also along the highway to ensure the smooth flow of traffic, we found the acknowledgement by the DSIC that some chiefs, security personnel and other public servants were biased to be a matter of serious concern. A Kikuyu lady recorded a statement with the Commission stating that she was assaulted by two Kalenjin attackers on 31st December 2007 in Timboroa Trading Center sustaining serious head injuries from which she fell unconscious and was taken by good Samaritans to Timboroa Dispensary. She was then referred to Eldama Ravine Hospital on account of the seriousness of those injuries but, she says, the Kalenjin staff at Ravine Hospital refused to attend to her because she was Kikuyu and she had to be taken to the Nakuru Provincial General Hospital in critical condition where she was operated on and remained in hospital for 3 months.

[63] Exhibit 19A

Similarly a statement by Mr. Nyaga stated that he reported the theft of goods from his house to Eldama Ravine Police Station but the officers refused to help him in tracing his property. He further stated without providing the source of his information that out of 126 Administration Police Officers, only 3 were Kikuyu. Further evidence of partisanship and criminal conduct by the police was provided by John Mwangi who testified in Naivasha stating that he and his family had been displaced from Timboroa after being attacked by a group of about 600 Kalenjin warriors-who had smeared their faces with mud and were armed with bows, arrows, spears and pangas. The attackers appeared coordinated and communicated through signals sent by blowing a horn and carried petrol in small bottles which they used to torch houses belonging to Kikuyu families. He alleged that they were assisted by a police officer who was in charge of Timboroa Police Station whose name the witness was unable to provide.

Thus it would appear that partisanship on the part of public service and law enforcement agencies strained coordination efforts.[64] Indeed, the provincial administration recommended an effort to balance the ethnic composition of security personnel.

Nakuru District: Organized Attacks and Counter-Attacks

Introduction

Nakuru District is an agricultural region best known for Lake Nakuru, famous for millions of flamingoes that nest along its shores. Before the larger Nakuru District was split, it was one of the biggest districts in Kenya with six constituencies-Nakuru Town, Naivasha, Molo, Kuresoi, Rongai and Subukia. Nakuru District has been synonymous with ethnic and political conflict and was affected in 1992 and 1997 prior to the General Elections held in those years.

[64] Koibatek DSIC Minutes dated 19th February 2008.

The Akiwumi Report noted that the genesis of the ethnic violence revolved around the re-introduction of multi party politics in 1991. Non-Kalenjin communities especially the Kikuyu, Kisii, Luhya and Luo supported the return of plural politics but the Kalenjin and Maasai communities, then supporters of the ruling Kenya African National Union (KANU) were opposed to any challenge on KANU's monopoly of Kenya politics.

The purpose of the clashes in 1992 and 1997 was to evict the so called non-indigenous communities who were perceived to be unsupportive of KANU. The district however still remains one of Kenya's most cosmopolitan where most of Kenya's ethnic communities are found though the dominant ones are the Kikuyu and Kalenjin with substantial numbers of Kisii, Luo and Luhya.

Election Related Violence

As was the case in other sites of violence visited by the Commission, the prevailing atmosphere in Nakuru district prior to the eruption of violence was described differently by different witnesses who appeared before us. Even Government officers who testified gave different versions on almost every aspect of the violence, including the date the violence actually erupted in Nakuru district, the prevailing atmosphere in the preceding weeks, and the causes of violence.

According to Rift Valley Provincial Commissioner, Hassan Noor Hassan, who testified before us, violence in Nakuru did not erupt until Thursday, 24 January 2008 and was caused by "the arrival of thousands of IDPs in Nakuru" which "elicited strong emotions and heightened tension in an otherwise peaceful and cosmopolitan town", and by "tensions, suspicions and acts of self preservations" fuelled by "rumours of planned and impending attacks and evictions of members of some communities [...]" On the other hand, Wilson Wanyanga, the Nakuru District Commissioner, told us that it was the release of the Presidential election results on 30th December 2007 that "marked a turning point in terms of security in parts of the District" and that clashes erupted on the evening of 30th

December 2007 in areas of Nakuru bordering Koibatek district. He further testified that the clashes could be attributed to existing ethnic tensions and repeated allegations of rigging by politicians as well as coverage by the media.

The Commission established that violence in Nakuru district occurred in two phases. The first wave of violence started on 30 December 2007, following the announcement of the results of the presidential election, and was largely triggered by spontaneous, election related incidents. The second wave of violence started on 24 January 2008 and took a more planned and systematic nature, pitting well organized ethnic based criminal gangs against each other.

The Commission was able to establish that much of the violence in Nakuru in late December 2007 and early January 2008 was the culmination of ethnic tensions built up during the electoral campaign and a reaction to perceived attempts to rig elections. Commission witnesses were unanimous in acknowledging that tension started building up in Nakuru town well before the elections, and that the announcement of the results for the presidential elections was preceded by a lot of anxiety among members of the public. A succession of isolated criminal incidences before and after the elections, and the inadequate police response to these incidents contributed to the increasing tension within the district. In one such incident, on 28th November 2007 provincial security agencies were alerted by members of the public that two individuals suspected to be Administration Police officers were on board a vehicle heading towards Eldoret from Kabarnet, carrying and distributing anti-ODM leaflets. The vehicle was followed by anxious members of the public and was intercepted in Keiyo where the two officers were confronted by a mob who were about to burn the vehicle when the Keiyo District Criminal Investigation Officer (DCIO) appeared and saved their lives from the mob. The two officers were later brought to the provincial police headquarters in Nakuru where they were released in mysterious circumstances without being charged.[65]

[65] Everett Wasike, PPO (now retired) of Rift Valley CW47; LSK Chairman of Rift Valley Chapter Gordon Ogola, CW 57

As a consequence of these incidents and the perceived unwillingness of the police properly to respond to them, tension was heightened in Nakuru district, among ODM supporters, largely consisting of members of the Kalenjin, Luo and Luhya communities, as well as among members of the Kikuyu community, believed to be largely sympathetic to PNU. ODM supporters and members of ethnic groups sympathetic to ODM felt that elections were being rigged in favour of the incumbent President Kibaki.[66] Within the Kikuyu community, rumours started circulating that armed Pokot warriors and trained Kalenjin youth planned to flush out the IDPs from Nakuru and push them beyond Naivasha since Nakuru was deemed to be a Kalenjin territory. All tribes who had not supported ODM would also be pushed towards Naivasha. Fears of a Kalenjin attack on Kikuyus intensified on 31 December 2007 when Kikuyu IDPs started arriving in large numbers in Nakuru from Eldoret, Burnt Forest, Kericho, Western Kenya and Nyanza.[67] At the same time, rumours were rife that Kikuyus were recruiting youths in Naivasha, Laikipia and Dandora to come and protect Nakuru town.

It is worth noting that, to contrary to previous election related ethnic clashes which were mainly confined rural areas, the December 2007 violence affected urban as well as rural areas of Nakuru district. The DC, Wilson Wanyanga, told the Commission that on 28 December 2007, a day after the elections, incidents of violence involving eviction of Kikuyu and Kisii farmers were reported from the Rongai division, particularly in the areas of Kambi ya Moto and Rongai location, prompting the DSIC to call an emergency meeting on 29 December 2007. On the evening of 29 December 2007, Kalenjins started burning houses belonging to

[66] CW 47.

[67] The Commission heard from a representative of the IDPs in Nakuru Mr. Peter Kariuki who was displaced from Chepsion in Kipkelion District that the IDP Camp at the Nakuru show ground had processed over 100,000 IDPs who passed through the camp on their way to other camps or other places to stay with relatives in other parts of the country. At the time the Commission visited the Camp on 30th July 2008, there were 10,200 IDPs.

Kikuyus and Kisiis and chasing away members of the two communities. Some Kikuyus and Kisiis left their houses out of fear before they were burnt. [68]

In urban areas, meanwhile, the Commission was told that ODM supporters stormed the Nakuru Town Hall on 28th December 2007 demanding the release of Presidential results and on 29th December, Luo youths took to the streets of Pondamali Estate where they were joined by a losing Parliamentary candidate who lent his support to the protests. Businesses and vehicles owned by Kikuyu were attacked prompting a violent response by the Kikuyu from Langa Langa estate.

The police had to intervene and create a buffer zone between the two estates. On 30th December, violence erupted again in the town resulting in the deaths of 7 persons. Club Lule's, a restaurant along KANU Street owned by Nahashon Lule, a Luo and former professional football player, was burnt by some Kikuyu arsonists and the fire spread to the adjoining Summerland Club, another restaurant. This precipitated the Kalenjin to burn houses and businesses owned by the Kikuyu in Kaptembwa.[69]

On January 4th 2008, a member of the Kalenjin community who had brought some charcoal to Nakuru for sale was killed by members of the Kikuyu community at the Nakuru Bus Park near Ogilgley bar. The following day, members of the Kikuyu community removed people from motor vehicles and insisted that they identify their ethnicity. This prompted non-Kikuyus to start leaving the town and there was open tension between Kikuyus on the one hand and the Kalenjins, Luo, Luhya and Maasai on the other.

[68] Sworn evidence of CW 44.
[69] Exhibit 125; minutes of Rift Valley PSIC meeting on 31 December 2007.

Organized attacks

The Commission was told that a level of calm returned to Nakuru town until the end of January 2008 when the district and town experienced the worst acts of violence. Members of the Kikuyu community were enraged by stories of fleeing Kikuyu IDPs and influential Kikuyu business people allegedly held meetings to raise funds for attacks against the Luo, Luhya and Kalenjin communities. During this period of a tense and uneasy calm, a member of the Kalenjin community was killed and to avenge his death, Kalenjin youths from Kaptembwa and Kwa Ronda areas attacked Githima Estate-mainly inhabited by Kikuyu on 24th January 2008, torched their houses and stole property.

Kikuyu militias supported by members of the outlawed Mungiki sect and angry displaced Kikuyu youth armed with new pangas, knives and petrol bombs were assembled and deployed to various estates-Kaptembwa, Kwarhoda, Mwariki, Free Area and Kiti to flush out 'enemy' communities. They rounded up Luo men who were forcefully circumcised using pangas and broken bottles and those who resisted were beheaded. The Provincial Medical Officer of Health for Rift Valley confirmed that the Nakuru Provincial General Hospital attended to 4 cases of Luo men who had been forcefully circumcised while another Luo man had his penis amputated by his attackers on 25 January 2008. The Kalenjin community living around Nakuru, who had already been mobilized and reportedly paid to fight the Kikuyu[70], retaliated immediately by attacking the Kikuyu dominated areas of Kaptembwa, Mwariki and Githima where they burnt houses, business premises and also killed a number of people. According to Commission witnesses, the estates of Kaptembwa, Free Area, Kiti and Githima were the hardest hit by this violence which lasted from the 24th to 27th January 2008 while Kiamunyi a middle and upper income neighbourhood was unaffected. The Commission heard that in one night alone, the 26 January 2008, 48 people were killed in the aforementioned estates of Nakuru.

[70] Exhibit 125

Planning of the violence in Nakuru

According to provincial and district government officials, the January attacks in Nakuru were neither organized nor planned. The Rift Valley Provincial Commissioner Hassan Noor Hassan was of the view that since 1992, elections were the excuse rather than the cause of ethnic fighting and that a simple incident such as a fight in a bar between members of different communities could spark serious violence. The retired Rift Valley PPO was of the opinion that the violence was not entirely unforeseeable. Emotions had been raised by the high numbers of fleeing IDPs arriving in the town and this made it logical that retaliatory violence was bound to occur. However, the Commission was able to determine from compelling testimonies and evidence that the January 2008 violence in Nakuru was well planned and organized by both Kikuyu gangs believed to be Mungiki members and Kalenjin and Luo gangs, and that security agencies knew in advance about the planning and organizers of the attacks. The Commission established that planning for and anticipation of violence in Nakuru by both sides of the ethnic and political divide began in the weeks leading to the elections and intensified immediately after elections, in the first week of January 2008. This view has ample support from evidence produced by NSIS and by other witnesses who testified before the Commission.

NSIS Evidence

Evidence presented to the Commission by NSIS indicated that days and weeks prior to these attacks, this security agency had been closely monitoring details of planning for and organization of attacks in Nakuru by gangs affiliated to both sides of the ethnic and political divide. With regard to the Mungiki/Kikuyu side, an NSIS report dated 18 December 2007 noted that two Mungiki leaders of the Nakuru chapter were engaging in a recruitment drive aiming at recruiting 300 new members from the Nakuru area.[71] It was further NSIS evidence that in

[71] The two leaders were cited by NSIS .

Sachangwan trading center along the stretch of highway between Nakuru and Molo, Kikuyu and Kalenjin communities were planning to attack each other. On 9 January 2008, NSIS noted heightening of tension among the Kalenjin, Luhya and Luo communities residing in Shabab and Langalanga estates in Nakuru following speculations that Mungiki members would attack them between the 9th and the 11th January 2008.

On 15 January 2008, a week before the most brutal attacks erupted in Nakuru, NSIS was able to establish that some Mungiki members were planning to discredit the government by instigating chaos in Nakuru, among other places. After noting the heightening of tension in the Bahati division of Nakuru between the Luo and Kalenjin on one side and the Kikuyu on the other following the eviction of 50 Luos from rental houses belonging to the Kikuyu, NSIS concluded on 18 January 2008 that "confrontations are likely." Finally, on 23 January 2008, NSIS had information that a former Nakuru MP was organizing Mungiki members to attack non-Kikuyu people residing within Nakuru town and that the intended targets of the Mungiki included former Nakuru parliamentary candidate and other ODM provincial and district leaders. Finally, NSIS received information on 25 January 2008 that the Mungiki co-ordinator for Nakuru had advised Kikuyu businessmen in Nakuru Town to close down their businesses and join the sect members in attacking non-Kikuyu to revenge attacks on Kikuyus in North Rift.[72]

On the Kalenjin and Luo side, NSIS was informed on 2nd January 2008 of a plan by a group of Luo and Kalenjin youth from the Kaptembwa area of Nakuru to attack the Kikuyu and government supporters and to set ablaze their business premises. According to NSIS, Mungiki was informed of this plan and was able to deploy its members in the affected areas with a view to counter the intended attack. NSIS information on 7 January 2008 was that a Kalenjin chief was leading a group of local elders in mobilizing youths from the Kalenjin community to evict the Kikuyus living in the area, with the aim of selling the Kikuyu

[72] Exhibit 19A (NSIS situation reports)

abandoned farms to Kalenjins. The same day NSIS learned that several Kalenjin youths were receiving combat training within the farm of a politician within Olenguruone for the purpose of being deployed to attack the Kikuyu and Kisii residing in neighboring Molo District. On 24 January 2008, NSIS learned that following an attempt by the Kikuyu to set ablaze a house of a former Councillor at Muchorwe area, a former councillor in Nakuru was mobilizing Kalenjin youth to attack the Kikuyu residing at Muchorwe and Nyakinyua within the Sirikwa location of Nakuru district. In addition, NSIS was informed that on 25 January 2008 about 200 Kalenjin youth from the greater Kericho District arrived in Nakuru where they were regrouping at Sewale in Mwariki B and at the residence of a former Member of Parliament.[73]

Other Commission Witness testimony

The Commission was given evidence and testimony that corroborated NSIS information on planning of violence in Nakuru. The Chairman of the Law Society of Kenya, Rift Valley Chapter, told the Commission that sometime before the 24th January 2008 had received a call from an MP informing him that attacks were planned in Nakuru for the 25th and 26th January 2008 and that, through a third person, he passed this information on to the Provincial Police Officer (PPO).[74] The then PPO, Everett Wasike, confirmed having received this information and passed it on to Naivasha and Nakuru OCPDs.[75] It is not clear what use was made of that information before the attacks on 25 January. A special PSIC meeting held on 6 February 2008 directed the Nakuru and the Naivasha DSICs "to summon those believed to be funding the illegal sects (Mungiki) activities to their respective DSICs for discussion/warning on the same." Commission witnesses, including district and provincial government officials, told the Commission that some of the people who funded and organized the attacks in Nakuru town included several Nakuru businessmen.

[73] Exhibit 19B
[74] CW 47.
[75] CW 5.7

Evidence presented by the KNCHR was that local leaders in Nakuru and influential Kikuyu business people had held meetings to raise funds for revenge attacks against the Luo, Luhya and Kalenjin. The retired PPO gave the names he received as being behind the retaliatory attacks in Naivasha and Nakuru.[76]

The involvement of Mungiki gang members in the violence in Nakuru led to the continuing monitoring of this gang's activities in Nakuru by both the Rift Valley PSIC and the Nakuru DSIC members from November 2007 through March 2008. A DSIC meeting held on 20th November 2007 noted "with concern the presence of Mungiki adherents within Nakuru town" and recommended that intelligence reports on Mungiki "be availed to DSIC promptly for immediate action instead of having it sent to Nairobi, back to the PSIC and then to them." At the provincial level, the Mungiki menace in Nakuru and Naivasha continued to be discussed in PSIC meetings, including meetings on 5th, 7th and 8th February 2008. On February 1st, 2008 the PSIC received information of another imminent Mungiki attack on the Kwa Rhonda area and asked the Nakuru DSIC to arrange for pre-emptive raids in the area.[77]

Nature and extent of the violence

The violence in Nakuru District took the form of ethnically targeted killings, maiming, forced eviction, burning of houses and business premises. Records from health institutions and the Nakuru mortuary produced before the Commission indicate that between 31 December 2007 and 3rd March 2008, 214 persons died as a result of post election violence, including 205 males and 9 females. According to post-mortems done on the bodies, 148 of the 214 died of injuries resulting from sharp/pointed objects; 45 died of injuries resulting from blunt objects; 23 died of gun shot wounds; 10 died of burns; and 1 died of suffocation. From the records made available to the Commission at least 74 of

[76] Exhibit 125

[77] Minutes of Rift Valley PSIC and Nakuru DSIC meetings produced before the Commission

these people died before 23rd January 2008 during the first wave of violence while another 112 were killed after 23rd Jan during the second wave. We were however unable to determine from the records available the dates when the other 28 recorded deaths could have occurred.

Traumatic (or forced) circumcision, a particularly barbaric form of violence, was inflicted on mainly male victims who were Luo. 7 persons were admitted at the Provincial General Hospital, Nakuru, where they were treated for traumatic circumcision and penile amputation. 5 out of the 7 traumatic circumcisions occurred on 25 January 2008.[78] 29 rape cases were managed at the Provincial General Hospital, Nakuru. The Commission was given a complete tabulation of post election related deaths and hospital admission cases, as well as post-mortem references and details.[79]

The majority of the deaths were either as a result of arrow and machete wounds (sharp/pointed objects) or inflicted by blunt objects, which is a pointer to the savagery of the violence and barbarity of the warring gangs. In spite of a National Coordinating Committee established by the Ministry of Health to respond to the emergency, such a high number of casualties in a district such as Nakuru stretched medical facilities and especially the Rift Valley Provincial and General Hospital to the limit.[80]

We salute the commendable efforts of Nakuru medical personnel who, while facing great odds, managed to maintain an acceptable standard of health within the IDP camps in Nakuru including the deployment of clinical officers to these camps and establishment of mobile clinics to serve the IDP camps where those displaced were unable to reach available health care facilities. We further commend the sterling efforts of armed forces health personnel who had to come in to help in managing the victims since health workers were overwhelmed despite working overtime. As with other hospitals in conflict zones, the Rift Valley Provincial & General Hospital was faced with an overwhelming number of

[78] Nakuru MOH, exhibit 46
[79] Nakuru MOH, Exhibits 46, 46A, 46B
80 Dr. Hezron Nyangito, Permanent Secretary Ministry of Medical Services

survivors which was further exacerbated by displacement of staff members and requests for transfers by staff who had received threats on the basis of their tribe leading to shortage of staff. The Commission further heard that the blockage of roads in many places in the interior hindered survivors from accessing the facility after being referred from the health centers of first call. Finally, a problem that was not unique to the Rift Valley Provincial General Hospital was the inadequate mortuary capacity which made it difficult to preserve bodies. In some areas, the Kenya Red Cross came in handy and provided refrigerated containers, but in Nakuru the unclaimed bodies were disposed of.

Response by Police and Provincial Administration

The Commission established that police and government authorities at provincial and district levels were informed of the planned attacks in Nakuru sufficiently in advance to be able to plan for adequate response. The Rift Valley Provincial Police Officer, Everett Wasike, admitted having received information of planned attacks by Kikuyu gangs before they were committed and, as discussed earlier, NSIS had similar information which would ordinarily be passed on to police and the district authorities. The Commission therefore found testimonies by police officials and district authorities to the effect that the violence in Nakuru in January took them by surprise unconvincing.

The Commission was given evidence that the police were very slow to respond and some simply refused to enforce the law. Although tension had accumulated and intelligence reports were clearly indicating a build up to attacks by both sides, it was not until violence broke out and needlessly led to the deaths of 48 innocent people on 26th of January 2008 that the Provincial Security and Intelligence Committee through the Rift Valley PC imposed a restriction of movement (curfew) in Nakuru and Gilgil the following day, 27th January. It was clear to the Commission that by this time the situation had gone completely out of control and perhaps if the so-called "curfew" had been imposed before the volatile state of affairs unravelled, more lives would have been saved. There were

complaints from members of the Nakuru business community that the restriction of movement had severely affected businesses within the town leading to huge losses. But preserving life was certainly a much higher priority, and from uncontroverted Commission testimonies, the curfew seems to have saved lives in Nakuru.[81] Yet, even before the curfew imposition, the authorities were already aware that tribal gangs had been mobilized to attack certain farms; residents and travellers were already being killed by rival gangs on an ethnic basis. We were also told that in many cases police officers were deliberately refusing to intervene and their enforcement of the law was unbalanced and ethnically biased.[82]

Failure to plan for adequate deployment of personnel resulted in poor police response to the violence in Nakuru district. Immediately following the announcement of the presidential elections results, it was obvious to Rift Valley provincial security agents that police officers on the ground were overwhelmed by the violence that erupted across the province. A PSIC meeting held on 31 December 2007 decided to call for support from the military. In Nakuru District, according to then PPO Wasike, the sheer numbers of the marauding gangs heavily outnumbered the police and the Army was called in to assist in policing. The Commission heard that there were very few police officers in the troubled areas of Kambarari, Kaptembwa, Milima and Kiti, and that those who sought help from police stations were told to resort to self help. The Commission was further told that there were more than 100 idle police officers in their residential houses within the town at Kasarani and thereafter they would be hired privately at a going rate of between Ksh. 1,000 to Ksh. 2,000 per officer to assist with the rescue of besieged people to safer areas. The inadequate number of police officers resulted in individuals engaged in criminal activities not fearing to be caught by police or even disobeying police orders to stop those criminal activities. In Salgaa area, 10 armed thugs set a house on fire and refused to stop

81 Asked to discuss the legality and effect of the curfew, Mr. Ogolla, chairman of the Law Society Rift Valley Chapter, stated, "[h]ad that curfew not been imposed, I think Nakuru would be no more".
82 CIPEV Investigators Job Sheet

when confronted by security personnel who opened fire resulting in 5 of the thugs being arrested and the rest escaping with bullet wounds.[83]

We were told that in view of the failure of police, a number of private institutions, including the Law Society of Kenya Rift Valley Chapter, were able to mount commendable and risky operations to rescue individuals and families who were at risk of being attacked. Between the 25th, 26th and 27th January, the Law Society Rift Valley Chapter rescued approximately 300 to 400 people from Ponda Mali, Kaptembwa, Githima and Mwariki areas who were taken to Afraha Stadium and to the Nakuru ASK Show Ground. The Chairman of the Law Society Rift Valley Chapter, Mr. Ogolla, who extensively interacted with the police during the attacks in Nakuru, testified that the police were divided along ethnic lines with each group helping their own and at that these divisions escalated to the point where the officers were on the verge of turning against one another. He further stated that he had learnt that a senior officer who was in charge of operations at the Kenya Police Provincial headquarters was only deploying Kikuyu officers which left a huge number of police officers idle within their residential dwelling place of Kasarani.

In many instances the police and provincial and district authorities let criminal or potential criminal activities go unpunished, thinking that dealing promptly with them would worsen the volatile situation. The Commission heard that on 24th or 25th January 2008, a motor vehicle carrying four civilians armed with AK47 rifles was cited in KANU Street and the police were alerted. The Police gave chase and managed to stop this vehicle in Langa Langa Estate upon which it was impounded but released after two days on instructions of the same high ranking police officer. Further, the Commission heard from the PCIO Mohamed Amin, that while on patrol within Mahiga area on 28 January 2008, Administration Police officers spotted some people burning houses and managed to arrest one arsonist whom they were escorting to Kampi ya Moto Chief's camp when they met eight men, among them the area chief. The Chief ordered the

[83] Special PSIC meeting, 4 Feb 2008

officers to release the suspects otherwise he would incite his people to attack them with bows and arrows as they were harassing his community members. The officers arrested the chief and his men and escorted them to Nakuru police station where they were placed in cells for interrogation. The Commission heard that the following day, the chief was released under instruction of the then OCS Nakuru Mohamed Bakuli, with no consideration, to the nature and gravity of the offence committed by the suspect. The OCS was himself later placed in cells for interrogation, only to be released the following day, 30 January 2008 with no further explanation.[84]

It is the Commission's view that the poor handling of these criminal activities by the police contributed to reinforcing the atmosphere of lawlessness in Nakuru district. Failure to properly investigate and prosecute police officers and political leaders involved in these incidents widened the gap between law enforcement agencies and members of the public and promoted impunity. Those who espoused ODM's assertion that elections were rigged with the help of Kenyan security agencies and local administration authorities were quick to identify the mishandling of enforcement of justice as evidence of a politically biased state security machinery. On the other hand, the state inability or unwillingness to promptly deal with post election criminal activities resonated with the appeals for revenge attacks from Kikuyus and other PNU affiliated sections of the public. As incidents of mishandling of post election offences accumulated, the consequent widening gap between law enforcement agencies and members of the public became an increasing security concern, prompting a PSIC meeting on 4 February 2008 to issue a strong disapproval "of the way the Nakuru DSIO office handled the case of the suspect in the shooting of the late MP for Ainamoi." In the PSIC words, "[t]he fact that the Attorney General's Office Nakuru delayed the case from being taken to court under flimsy reasons leaves a lot to be desired."[85]

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84 Exhibit 80, page 59. Mr. Wasike stated that the arrested Mr. Bakuli had called him informing he had been placed under arrest and was seeking Wasike's intervention on his behalf.

[85] Minutes of Special PSIC Meeting Held on 4th February, 2008

In addition, the Commission received evidence that police and other security personnel were involved with the very criminal gangs who were the authors of violence in Nakuru. Some police officers actively sided with Kikuyu/Mungiki gangs while other officers were aiding and abetting Kalenjin attackers. Evidence presented to the Commission by NSIS was that during the attacks, armed Mungiki sect members wearing Administration Police uniforms were moving from house to house in Nakuru posing as police officers in search of members of non-Kikuyu communities to attack and kill them.[86] Allegations were also made to the Commission that an officer in charge of special operations at Police Provincial headquarters was in fact the secretary of Mungiki in Nakuru.[87] NSIS also learned that security personnel deployed within Rongai "[were] supporting Kalenjin raiders and that weapons used by the raiders [were] being kept at a local Councillor's homestead with their [security personnel's] knowledge."[88]

Findings and Recommendations

From the available evidence placed before us, we are convinced that information on the impending wave of violence was available to the relevant authorities early enough to prevent the fighting that followed. Furthermore, the fact that the violence erupted in the manner predicted, especially by the NSIS, discloses a failure on the part of the police and provincial administration who showed no signs of being pro-active. Instead they chose to fire fight when the prudent action dictated pre-emptive measures against the organizers, planners and instigators who, as we have seen, were implicated and sufficiently identified.

[86] Exhibit 19B
[87] CW 47
[88] Exhibit 19B

Naivasha District: Planned Criminal Attacks by Mungiki and Kikuyu politicians

Introduction

Naivasha is a sprawling town in Rift Valley Province located on the shores of Lake Naivasha that is home to a variety of wildlife and a sizeable population of hippos. The lake's name derives from the Maasai name *Nai'posha* (rough water) because of the sudden storms which can arise over the lake. Between 1937 and 1950 the lake was used as a landing place for flying boats on the Imperial Airways passenger and mail route from Southampton in Britain to South Africa.

The area is well known for its population of European immigrants and settlers and is a popular tourist resort and also a weekend haunt for Nairobi residents due to its proximity to Hell's Gate National Park, Longonot National Park and the nearby Mount Longonot. The main industry is agriculture, especially floriculture around the lake providing a source of employment and income for the local population and CW 33 told us that there were about fifty two flower farms in Naivasha area which accounted for almost 74% of all the flower farms in the country.

Naivasha District further hosts Kenya's geothermal plant at nearby Ol-Karia and is therefore of strategic national importance since a significant component of Kenya's electricity generation is located here and the area thus represents the future of the geothermal industry in Kenya. The majority of the population is Kikuyu with substantial immigrant workers on the flower farms who are mainly Luo and Luhya. Formerly a part of Nakuru District before it was hived off as a separate district, the area experienced some ethnic violence in 1992 pitting the Kikuyu on one hand and Maasai on the other as explained in page 127 of the Akiwumi Report.

The Commission heard from several witnesses that there was no major violence in Naivasha before and immediately after the 2007 general elections. According to the District Commissioner Katee Lucas Mwanza, the district has no history of

ethnic violence, with the exception of the Mahi Mahiu area bordering Narok District, where there had been ethnic and land related conflicts between members of the Maasai and Kikuyu communities.[89] A Naivasha District Security and Intelligence Committee (DSIC) meeting held on 6 December 2007 to review security plan ahead of the general elections noted that in the past, parts of the district that had experienced clashes during general elections included the areas of Maella, Mai Mahiu, Oljarai, Longonot and Moi Ndabi. Naivasha town was not mentioned. Indeed, several witnesses who appeared before the Commission highlighted the history of peaceful co-existence between ethnic groups living in Naivasha Town. Peter Otieno, a resident of Naivasha for 18 years and leader of the Kenya Plantation and Agricultural Workers Union representing flower plantation workers, told us that,

> *"Naivasha had been peaceful until the 2007 general elections. With the many tribes in Naivasha, they had been co-existing and doing business together and they had been co-existing without any problem."*[90]

Another witness who gave her testimony in private described her relations with her Luo, Luhya and Kikuyu neighbors as follows:

> *"**Q:** How were you living with your neighbours before you voted?*
>
> ***Witness:** We used to live very well with my neighbours. We even used to borrow (sic) and help each other."*[91]

The Commission was told that incidents of violence registered before the elections were of political, rather than ethnic nature, and they occurred in the context of a highly charged political rivalry during the campaign period. Appearing before us in private, a former Naivasha Councillor who worked as

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[89] CW 33

[90] Sworn testimony of Peter Otieno Ombunde, CW 40

[91] CW 36

election monitor for the 2007 elections answered as follows to a question about political tension during the electoral campaign:

> ***"Q:*** *I asked you what your assessment was overall in terms of, were there political tensions there or was there an environment which was suitable for such tensions?*
>
> ***Witness:*** *Yes, there was a clear difference between ODM supporters and also PNU supporters, but there was no actual violence. But on 22nd of December ODM people were attacked on their way to Suswa, they were attacked in Mai Mahiu and some of the people in the team were badly beaten up; and one eventually succumbed to the injuries […]"*[92]

As was the case in the rest of the country, however, the political rivalry during the campaign soon took a clear ethnic dimension and tension started to build up in Naivasha between members of the majority Kikuyu community and those from the Luo, Kalenjin and Luhya communities, most of whom worked as wage earners in the local flower farms. According to a witness, "We were divided, the Kikuyus were in PNU and me with my other Luo colleagues were in ODM."[93]

This politico-ethnic tension heightened immediately after the results of the presidential election were announced on 30 December 2007. As members of the public, mostly from the Kikuyu community, were celebrating the Kibaki win they were also threatening members of other communities. The Luos in particular were threatened with eviction, following stories about the pre-election expectation of Luo tenants not to pay anymore rent if Raila Odinga had won the elections. According to union leader Peter Otieno,

> *"On 30th when the results were announced many people poured on the streets celebrating the results and the celebration continued up to late in the night. […] as people were celebrating among them they*

[92] CW 39

[93] CW 36

were uttering words against other tribes which was scaring other tribes away from celebrating. […] Some were uttering that the Luos should be circumcised, my Lords. Those were the words coming from the crowd."

Other sworn evidence from a Luo resident was as follows:

"After Kibaki was declared winner, people in my area started cheering and saying that those Luos who thought they would not pay house rent once Raila was declared winner should be prepared to leave – 'wajaluo wajipange*'. There was tension soon after the announcement. Our landlord used agents in the house where we used to live to collect rent. She ordered the agents to evict all Luos from her property because there were rumours that houses hosting Luos would be burnt down."*[94]

Kabati estate in Naivasha town was most affected by the eviction of Luo tenants, some of whom started seeking refuge in the compound of the Naivasha Maximum Security Prison. Duncan Ogore, then officer in charge of the prison, told the Commission that the first group of mostly women and children from the nearby Kabati estate arrived to the prison in the evening of 30 December 2007 and by 3 January 2008, the number of displaced persons in the Naivasha prison had reached 112, including 68 children and 44 adults.[95]

The Eruption of Violence

By early January 2008 the majority of districts in the Rift Valley province were theatres of large scale violence. Naivasha District, however, did not experience violence of similar magnitude until the end of January 2008. The Commission was told that the violence that broke out on 27 January 2008 in Naivasha was as a result of a growing bitterness caused by the massive influx of IDPs from other districts of the North Rift Province. The District Commissioner informed

[94] Exhibit 36

95 Exhibits 32A and 32B

the Commission that Naivasha Town had started receiving Kikuyu IDPs from other parts of the Rift Valley after announcement of the election results and that at its peakthe town accommodated upwards of 22,000 IDPs displaced from Eldoret, Kisumu, Kericho, Kipkelion, Kitale, Trans Nzoia District, Narok and Molo District. The IDPs, who were mainly Kikuyus, brought painful personal stories of ordeals experienced in places from where they had fled and pointed accusing finger at members of such communities as the Kalenjin, Luo and Luhya. This, combined with the accumulation of minor incidents throughout December 2007 and the first half of January 2008, led to an extremely volatile situation and laid the ground for the revenge attacks on non-Kikuyus in Naivasha between 27 and 30 January 2008.

Consistent witness testimony and evidence tendered to the Commission suggest that the attacks on members of the Luo, Kalenjin and Luhya communities that started on 27 January 2008 were executed in an orderly and well planned manner by a coordinated group. The Commission was able to reconstruct the events of 27 January 2008 as follows:[96]

In the morning of Sunday 27 January 2008, large groups of demonstrators started congregating in different places in Naivasha, ostensibly to protest the killing of Kikuyus in other parts of the province, demonstrate against the restriction of movement ("curfew") earlier imposed by the DSIC, and demand that prison warders be withdrawn from the joint security patrols in the streets of Naivasha. The District Commissioner acceded to the demand for withdrawal of prison officers and a group of prison warders who were proceeding towards the OCPD's office to commence security patrols was called back to the prison. He told another group of cheering protestors that the curfew would be lifted and asked them to disband.

[96] This is a summary of sworn evidence and other testimony, from individuals and government officials. Most of it was taken '*in camera*' in Naivasha.

Main roads within and through Naivasha were barricaded by the demonstrators, including the Nakuru-Nairobi and the Gilgil-Mai Mahiu highways. The demonstrations attracted big crowds and happened simultaneously in different places of the town, which resulted in security forces and local administration authorities spreading all over in attempts to respond to the situation by addressing the demonstrators, dispersing the crowds and clearing roadblocks.[97] The same morning, at around 10:00am, the Kikuyu gangs attacked Luo and other non-Kikuyu families and burnt their houses in different estates of Naivasha. The hardest hit areas were the estates of Kihoto, Kabati, Site, Council (*Kanjo*) Estate and Karagita.

It later became clear that the attackers were organized so that groups of "demonstrators" would keep police and administration authorities busy on the streets while other groups were chasing Luos and other non-Kikuyus in the estates, killing them and burning their houses. As the DC told us:

> *"…the time where we were trying to quell these clashes we thought of using our normal method of addressing people in public* barazas *and meeting and when we realized that there appeared to have been an organized gang as we addressed people here another gang was somewhere committing a more serious offence…"*[98]

In at least one case, the same crowd that the DC was addressing at Kariuki Chotara Road went on a looting and burning rampage targeting Luo and Kalenjin shops as soon as the DC and the police left to go and address another group.

The Commission heard that in the ensuing violence the Kikuyu gangs killed forty people in one day. This included nineteen members of one Luo family who died

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[97] On that day, the D.C. Mr. Katee Mwanza stated tht he addressed four riotous mobs in different parts of the town; 3 of the groups were comprised of mainly Kikuyu complaining that their people were being killed and displaced from elsewhere in the country while a fourth group, made up of mainly Luo, Luhya and a few Kisii workers in the flower farms that dot the area; complained that they were being attacked and were thus demanding safe passage from Naivasha.

[98] CW 32, Naivasha 29 July 2008

on the afternoon of the 27th when their Kabati house was set on fire while they were locked inside. Gangs of young Kikuyu men armed with machetes went round the town, forcing other Kikuyu to join them, in search of Luos, Luhyas and Kalenjins. The gangs blocked roads and public transport and searched vehicles forcing passengers forced to identify their ethnic groups. A Catholic social volunteer who involved herself into rescue operations in the morning of 27 January said she saw "young men…flagging down the vehicles and shouting: "kuna mjaluo kwa hii gari!! *Tunataka wajaluo*!"[99] In the evening of 27 January one Luo woman was nearly caught at one such road block while on her way back from the flower farm where she worked. She told us:

> *"I worked till 4:00pm when it was time to go home. At the stage inside our place of work, the company drivers informed us that they had just left town and there was chaos, that road blocks were being mounted. The drivers advised Luos against boarding the vehicles. I decided to board. I requested my friends to board with me so that in case we are killed we could all die together. On reaching 'sanctuary' we found a convoy of vehicles lined up. The vehicles were not being allowed to pass. We found armed Kikuyus armed (sic) with pangas. The company vehicles did not take us to the stage. It dropped us at the field called kiwanja ndogo. The Kikuyus were waiting for Luos to alight from the company vehicles so that they could run after them and kill them."*[100]

A Kikuyu woman who interacted with the attackers while rescuing her Luo friends described the unfolding of violence as follows:

> *"Young men were walking in groups. Not only young men because it was everybody in the society. They were all walking in groups, shoving people up and down. In fact, they were chasing the non-Kikuyus like rabbits and then when one is captured just hacked to death. They were burning properties and the local women were following them, looting."*[101]

The attacks were targeted against mainly members of the Luo community, though Luhyas and Kalenjins were also targeted and among the forms of violence perpetrated by the mobs was forced circumcision on four members of the Luo community.

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[99] "Is there a Luo in this car? We want the Luos!", Exhibit 38A, p.2
[100] Exhibit 36, p5
[101] CW 39.

The Ministry of Medical Services through the District Medical Officer of Health gave a figure of 48 deaths were recorded between 27th January and 31st January. Post-mortems carried out at the Naivasha District Hospital showed the causes of PEV deaths to be burns (22), sharp object injuries (19) and gunshot injuries (6). In addition, in 2 cases the cause of death was "unknown" while one person died of injuries from arrow shot. Of the 50 deaths, 11 were female and 32 were Luos, an indication that members of the Luo community were particularly targeted.

The attacks resulted in a serious humanitarian crisis when Luo, Luhya and Kalenjin residents of the town took refuge at the Central Police Station-Naivasha which was not equipped with sanitation facilities to handle such huge numbers, estimated at 8,000 IDPs. Further, the number of non-Kikuyu IDPs seeking refuge at the Naivasha Prison eventually rose to 10,000 by 3rd of February 2008 and by default the Naivasha Prison turned into a camp for IDPs.

The Killing of Eric Ouma Oyieko: An Account by His Sister

[…] On Monday [28 January 2008], I woke up and started thinking of my business that I set up after obtaining a loan at my place of work. Even before I went to work, a workmate of mine, a Luhya, came to me… He told me that my brother had been killed while taking tea. My brother's name was Eric Ouma Oyieko. I told the workmate that it could not have been my brother because when we were fleeing I passed by my brother's house and I found a padlock. I knew he had also fled. My brother used to live near me in the next building known as 'makao ya amani.'

At about 10:00am something told me that I should go and check on him. I boarded a Securicor car and paid Shs. 50. They were the only vehicles operating. I left to see my brother. On arriving there I found a crowd of people including policemen who were standing nearby but at a distance from the other people. They did not look bothered. I found that his (my brother's) penis had been cut and placed in his mouth; his testis were chopped off and placed in his hand. I found blood was still pouring out of his body and he was kicking as he was dying. I talked to the policemen around and requested them to take my brother to the hospital so that even if he died, he would die at the hospital. The police told me to get away from them, that I should not disturb them, that if I insisted I would end up like my brother and that it was not their work.

I didn't have anything to do. I decided to go back to Sher where we were seeking refuge. I walked to Sher because I did not have bus fare with me. I left karakta at about 11:00am but got to Sher at 4:00pm. I took a lot of time walking and sitting down. I had

a lot of thought on my mind. By that time my brother had died. I touched him and he was no longer moving. He was dead. I informed my husband that my brother was dead. He asked me if I had taken my brother to the mortuary and I told him I hadn't since I did not get any assistance from the police. The following day, another workmate of mine informed me that my brother had not been moved to the mortuary and was still lying on the road, that his head had been chopped off and that dogs were eating his private parts. My brother was clobbered to death before he was mutilated. The people who did that to him were using spiked clubs. They had fixed nails on the club and as they hit his face the nails would pluck flesh from his body.

I was not able to go to work that day. I just sat on the road. It was then that I saw a land rover full of police men. The driver was a Kalenjin because he was speaking in Kalenjin. I talked to him and informed him that my brother had been killed in Karakta and that his body was not collected. I boarded their vehicle and we went with them to where my brother's body was. I found that the dogs had eaten him just as I had been informed. We picked him and took him to the mortuary. By then he was smelling badly and he had started rotting because his body had spent two days on the sun before being collected. His body had insects that had started to eat him due to rotting…

I learned that on that Monday my brother was taking tea from his house when some Kikuyu told him that I and my husband had been killed. He left the tea and came to our shop to look for us. He peeped through the glass window when some people said, 'there he is'. They were actually looking for my husband and when they could not find him they killed my brother.

My late brother was married to Mildred Achieng. They had three children, Ochieng (5 years), Amam (1½ years) and Linet (4 years). Ochieng was present when his father was being clobbered and mutilated. He has since gone mad. He keeps on saying, *"baba wanakata kichwa yako, wana kata kitu chako…Dad they are chopping off your head, they are chopping off your thing (penis)."*[…]

Extracts from Exhibit 36, statement by Judith A. O., 29 years old, taken by Commission investigators on 25 July 2008, Naivasha, and submitted in evidence.

Planning of Violence in Naivasha: Political Leaders and Mungiki

The Commission received credible evidence to the effect that the violence in Naivasha between the 27th and the 30th January 2008 was pre-planned and executed by Mungiki members who received the support of Naivasha political and business leaders. The Commission has also evidence that government and political leaders in Nairobi, including key office holders at the highest level of government may have directly participated in the preparation of the attacks. Central to that planning were two meetings held in State House and Nairobi

Safari Club in the run up to the election with the involvement senior members of the Government and other prominent Kikuyu personalities.

Evidence produced by NSIS suggests that this agency was collecting information on the planning of violence in Naivasha by Mungiki members and politicians, at both local and national level.[102] As early as 3 January 2008, NSIS had information that two former MPs of the Kikuyu community were "said to be negotiating with the outlawed Mungiki with a view to have sect members assist the community to counter their attackers" and that Mungiki members were meeting "in an undisclosed location in Nairobi with a view to carrying revenge attacks on Luos/Kalenjins travelling along Nairobi-Naivasha highway on undisclosed date."

On 15 January, NSIS was informed that Mungiki members were planning to discredit the Government by instigating chaos in Nairobi and Nakuru "while others would raid Kamiti and Naivasha Prisons to rescue their colleagues held there among them [Maina] Njenga." This supported information presented to us in camera by a senior police officer in Naivasha who had learned on 9 January that "there was a likelihood of the so-called *mungiki* making a way into prison with the intention of whisking away the chairman [Mr. Maina Njenga] who is currently held in that particular prison."[103]

Following up on this information, the Naivasha District Security and Intelligence Committee (DSIC) chaired by the District Commissioner decided on 9th January 2008 to increase patrols within the town and additional officers were sought from the Naivasha Prisons to assist the police. The Naivasha Prisons Commandant, Duncan Ogore, confirmed having received such request for

[102] All NSIS evidence discussed here was produced as Exhibits 19 and 19A

[103] Testimony produced in camera, Naivasha 29 July 2008

assistance and having furnished some prison warders to the OCPD Naivasha to help in patrolling the town up to 27th January 2008.[104]

On 21 January NSIS received precise information on part of the planned operation of violence in Naivasha, to the effect that Kikuyu youth in Naivasha "plan to block Nakuru-Naivasha and Gilgil-Mai Mahiu roads, to block/intercept vehicles from Western and Nyanza regions to fish out the targeted communities," which is exactly what happened on 27 January.

According to evidence presented by the KNCHR, local politicians received support from Kikuyu elite from outside Naivasha to mobilize local jobless youth who were bolstered by Mungiki followers from Nairobi and Central Province. KNCHR had evidence of two planning meetings held on 23rd and 26th January at a local hotel where influential Naivasha business people plotted the violence and paid between Kshs 100-200 to the youth who would participate in the attacks targeting mainly members of the Luo community.[105] Information of these planning meetings and participants was corroborated by individual witnesses, including two Naivasha social workers and activists.

According to witnesses, evidence that Mungiki were involved in violence in Naivasha includes a high level of coordination of the attackers, many of whom were not Naivasha residents, as well as inside intelligence obtained from Mungiki members involved in the violence. A Kikuyu political activist who testified in camera told us that she learned from an aide to Ndura Waruinge, Mungiki national Coordinator, that Mungiki was not responsible for all the violence in Naivasha, and that one "could differentiate the Mungiki from the locals, because where Mungiki went they were not looting they were just destroying properties. But with the locals they were looting." She further testified that the attacks happened at the same time, around 9:00am, in the estates of Kayole, Kabati,

[104] CW 32.

[105] Exhibit 125

Kihooto and Karagita, and so she thought the attackers "were dropped at those areas and they had orders [to] start at 9:00am", which she characterized "as having the Mungiki type of organization."

Acting either on NSIS or on its own intelligence, the Naivasha DSIC gathered similar information with regard to a number of politicians and businessmen whom it suspected of financing and organizing the gangs they believed to be Mungiki, which were responsible for the Naivasha violence. Those who the DSIC recommended for arrest for financing and organizing the violence included a former MP of the Kikuyu community and other prominent Kikuyu personalities, whose names were provided to the Commission. Further information in possession of the DSIC was that prior to the attacks, a number of meetings were held at a hotel in, Naivasha whose owner was allegedly also involved in the planning and that a former MP from the area the master mind. The names of the individuals who not only purchased the pangas from a local supermarket for use by the attackers who had been transported from outside Naivasha but also directed the attacks on the ground were also made available to the Commission.

Response by Police and Provincial Administration

The Commission established that response to the PEV in Naivasha by security agencies and district administration reflected the same poor planning and lack of professionalism and independence as was evident in other parts of the Rift Valley Province. The police were obviously overwhelmed by the magnitude of the violence, but breaks in the chain of command and parallel ethnic command structures within the police meant that even with the best of planning the police were too weak as an institution adequately to respond to the violence in Naivasha.

The Commission also received ample evidence to the effect that police and administration authorities were overwhelmed by the magnitude of the violence. The Naivasha DC and OCPD testified that in the morning of 27 January they had to deal with 2 to 3 groups of demonstrators each and that they spent too

much time and energy in addressing each group at a time while trying to disperse the crowds and clear road blocs, before moving to the next group of demonstrators. A community leader who appeared before us in camera and had been personally involved with the police in helping rescue persons in danger, testified as follows:

> *"**Q.:** Now, may be you need to go back to the date of 27th. What can you recall about that date that is significant for Commissioners?*
>
> ***Witness:** There was a lot of violence and I can say, it is like the Police were overwhelmed and there was no law in Naivasha on that day and also on 29th. The Police were just overwhelmed. Like when I went to the Police Station trying to get any Police Officer even to talk, when I got there I talked to the OCPD and then he started getting calls. I tried to organize the people somehow and we tried to call others. I told them to call their friends to know if they were all safe. So we started making calls and we found people who were trapped in their houses. They couldn't come to the Police Station or go to the GK Prison. I started coordinating with the Police on how to go and evacuate those people who were trapped and sometimes it was just difficult because the Police vehicles were not enough. It was just chaotic. Sometimes we were getting very desperate."*

Among the causes of police failure to adequately respond to the violence was the breach in the chain of command within the force. The Commission was provided with abundant examples of junior officers refusing to take orders from their superiors and placing ethnic loyalty before professional ethical conduct. The community leader involved in the police operations at the time testified as follows:

> *"**Q.:** Did you get the sense the police who were doing the best they could but were overwhelmed or was there incompetence amongst the police officers or other security agencies?*
>
> ***Witness:** On the first day, that was on 27th, I thought that the police were being overwhelmed. But during that week when we stayed at the*

Police Station camp, because the last person we evacuated was on Thursday and I could tell that there was some defiance. The junior officers particularly from the Kikuyu tribe were not ready to take instructions from their superiors; and I can say, for example there is a time we went to evacuate a terminally ill lady who was trapped inside an estate and getting the officers to come, they were just defiant, they were just running and saying that it is the Deputy OCPD, because it was the Deputy OCPD, Grace Kakai who was giving them those instructions. They were saying that she is just being bossy."

We were presented with ample evidence suggesting that the same ethnic fault line that divided the community in Naivasha also affected security agencies. Whether for legitimate reasons or not,[106] members of the Kikuyu community were generally deeply distrustful of officers of the Kenya Prison Department whose commanders were believed to be Kalenjin and Luo ODM supporters. On their part, Luo victims told stories about the indifference of Kikuyu police officers to their suffering. A Luo woman told us that police failed to collect the body of her relative and that she was not able to have the body brought to the mortuary until a Kalenjin officer came to her rescue two days later.[107]

In perhaps the most serious security lapse, police and administration authorities were too preoccupied with a false notion of peace and tranquillity that they completely failed to promptly deal with the real threats to security. It is the Commission's view that on 27 January too much focus was on clearing roads and dispersing crowds, which left the police and administration officials spread too thin to deploy in estates where persons' lives were being put in danger and where police presence was most needed. In his desire to simply quell the demonstrations and clear road blocks, the DC unduly gave in to demands of the

[106] The Commission was not able to categorically establish whether complaints from members of the public, particularly Kikuyus, against prison officers were genuine and resulted from abuses by prison officers, or were a mere reflection of the perception that the majority of prison officers were from the Luo and Kalenjin communities.

[107] See extract of her testimony in box above.

mainly Kikuyu crowd that prison warders be called off the street on the very day they were most needed in the OCPD's estimation. For the same reason and on his own admission, he also agreed to lift the partial ban on movement ("curfew"), a gesture immediately perceived by the demonstrators as an encouragement to carry on with their planned attacks. An eye witness recounted the immediate consequence of the lift as follows:

> *"**Q.:** […]You said the meeting was being petitioned by these people, so that he could lift the ban.*
>
> ***Witness:** Yes, on the curfew.*
>
> ***Q.:** The curfew needs to be lifted. What was the DC's reaction?*
>
> ***Witness:** He agreed to lift the ban and people clapped and people dispersed and when they dispersed he went with his officers and immediately the police left that Kariuki Chotara Road, that is when one of the Chemists, it is in the Centre of the town it belongs to a Kalenjin was looted and what they could not loot was burned outside the shop, immediately the DC left with the police.*
>
> ***Q.:** About what time of the day was this?*
>
> ***Witness:** It was between 10.30 and 11.00 a.m., My Lords."*[108]

Despite the general chaotic response to PEV, individual police officers were able to heroically rise to the occasion and save lives. Peter Otieno, a Luo and a union leader, told us how one Mutuku, a police officer, came to his family's rescue by firing in the air to scare off a group of Kikuyus who were about to break into his house and kill him and his family.[109]

The Commission also heard that the security forces – the Kenya Police, the Administration Police and the Anti-Stock Theft Unit – received considerable help from the Military who not only cleared the roads allowing police officers free movement to handle the actual crowds but on 28th January 2008 over flew

[108] CW 39.
[109] CW 40.

Karagita township in a helicopter gunship firing from the air and in the air to demonstrate power, which helped to clear the gathered mobs.

Narok District

Background

Narok District has been split into two, Narok North and Narok South districts. The administrative divisions are Central, Loita, Mara, Mau, Mulot, Olkurto, Ololungua and Osupuko. According to the Akiwumi Report, the area experienced ethnic fighting in 1992 between the Maasai and Kikuyu where the Maasai complained that the Kikuyu living upstream of areas such as the Enoosupukia water catchment area were diverting water preventing it from reaching downstream to the Maasai.[110]

The area has experienced ethnic related violence in the past, particularly between the Kikuyu and the Maasai. The Akiwumi Report notes at page 167 that William Ole Ntimama, the area MP since 1988, at that time warned non-Maasais that they would be evicted from Enoosupukia since they were residing in a water catchment area and the interests of so called non-indigenous communities (mainly Kikuyu) were subordinate to those of the indigenous Maasai community. At the time, Ntimama was a powerful Government Minister in the ruling party KANU and the Akiwumi report went on to note that in October 1993, Maasais armed with bows and arrows had started attacks upon Kikuyu and that there was no interference from the police and the provincial administration, and neither did the police make arrests nor disable the Maasai from attacking the Kikuyu even when they had opportunities to do so.

The major causes of previous violence in the area were claims of Kikuyu encroachment of Maasai land, Kikuyu domination of retail and transport business in the area as well as the choice by Kikuyu not to support the political

[110] Akiwumi Report.

parties enjoying support from the indigenous communities. But evidence was given by KNCHR that the post election violence of 2007 was unlike previous episodes of violence where the Maasai ganged up with Kalenjin to attack Kikuyu. This time round violence fizzled out quickly after Maasai elders prevailed on the youth to stop the violence in spite of incitement by politicians and local elites.

The Pre-Election Environment

The NSIS had indicated in a security briefing dated 27th September 2007 that Narok was one of the places it considered a potential flash point likely to witness election related violence due to incitement by politicians it did not name. Further testimony was provided by Naivasha DC Mr. Katee Lucas Mwanza (later transferred to Molo) that trouble was expected between the Maasai and Kikuyu community on the border of Narok and Naivasha Districts over the disputed Ngati Farmers Cooperative Society and the same evidence was corroborated by the NSIS. At the Narok South District Security and Intelligence Committee (DSIC) meeting held on 21 December 2007 it was noted that political temperature in the District was high and that politicians had resorted to holding night meetings contrary to the Electoral Code of Conduct while also engaging in door to door campaigns.

Evidence was provided by the KNCHR that immediately prior to the elections and more specifically on 24 December 2007, a local politician had held a meeting in Narok Town during which he threatened the Kikuyu and Kisii communities that they would be evicted if they did not vote for him, reminding them that Narok was not their home.

The Post Election Violence in Narok

Serious violence pitting the Maasai on one side and Kikuyu and Kisii on the other erupted on 3 January 2008 in Sogoo, Tendwet, Kimogor, Nkopen, Olmekenyu Center, Oleshapani, Meleleo and Ololungua Division while tension

was reported by the DSIC to be high in Mara Division and Ngoswani in Osupuko between Maasai and non-Maasai.

A witness, Isaac Moipeli, testified in Naivasha that he was displaced from Narok Town. He informed the Commission that he had witnessed an occasion where a prominent politician had addressed a public meeting about a month before the elections and incited the Maasai by asking them to uproot members of the Kikuyu community from the area. This is corroborated in evidence by KNCHR according to which, allegedly the politician organized and paid Maasai youths to unleash violence in Narok Town and its environs.[111] After announcement of the results of the presidential election, the witness says the politician went around Narok Town and asked that members of the Kikuyu community be evicted. Further, the Commission was informed by former Rift Valley PPO Everett Wasike that the politician's name was one of those repeatedly given to police as being behind the violence and we heard that a file was opened against him on charges of political incitement and a warrant of arrest was procured but he was not taken to court.

The DSIC noted that over 1,000 houses belonging to Kisiis and Kikuyus were torched, 2 persons killed, 60 others seriously injured and about 3,000 displaced during the violence. On 4 January at Olerai area of Mulot Division, Franklin Bett, the newly elected ODM MP for Buret, and Isaac Ruto, ODM MP for Chepalungu, addressed about 100 Kipsigis asking them to open the road and coexist with the Kisii who had supported ODM but to keep pressuring for President Kibaki's removal and calling for a re-tallying and /or recount of the votes alleging that ODM had been robbed of victory.

Evidence was received from the Narok South DSIC that on 5 January 2008 at Mulot Police Station, the late Richard Kipkalya Kones (ODM MP for Bomet), Otieno Kajwang (ODM MP for Mbita) and Omingo Magara (ODM MP for West Mugirango) asked the local community not to attack the Kisii. But they called on

[111] Exhibit 125A

residents close to the Kenya-Tanzania and Kenya-Uganda borders to close the roads so that Tanzania and Uganda would respectively complain of lack of fuel supply through Kenya thus bringing pressure to bear on President Kibaki to resign.

On 8 January 2008 both the DSIC and NSIS reported that handwritten leaflets had been found by members of the public at Ololulunga Trading Center (Narok South) warning PNU friendly communities operating businesses along the Narok-Olulunga Road to close their businesses and vacate the area. The NSIS reported that on 16 February 2008, more leaflets aimed at whipping up anti-Kikuyu sentiments were dropped in Narok reading,

> *"We cannot share the same space any longer with thieves who stole our votes and rights. We shall fight for our rights to the last. No Peace"*

From the evidence made available by NSIS, it would appear that in Narok South, the conflict between the Kipsigis and Kisii from neighbouring Sotik spilled over into the area. For instance on 16 February 2008, the Narok South DSIC reported that there had been burning of Kisii houses by the Kipsigis and that the Kipsigis also started grazing their livestock on Kisii farms. According to NSIS, the Kipsigis stated they were unwilling to let any of the Kisii return to their farms and would continue to cause havoc if they attempted to return. Further, the conflict in neighbouring Transmara District (Kilgoris Constituency)[112] between the Maasai and Kipsigis threatened to spill over into Narok South District where Kipsigis youths on 17 February 2008 at Njipship forcefully grazed their cattle on land owned by the Maasai. On 21st February 2008, hand written leaflets were circulated at Meleleo warning Maasai of revenge attacks by Kipsigis to avenge the killing of Kipsigis in Transmara.

[112] The NSIS had reported on tension between the Moitanik and Uasin Gishu clans in Olalui Location of Transmara as early as 22nd June 2007 pitting the Maasais against the Kipsigis following a declaration by Johana Ngeno a Kipsigis that he would seek the Kilgoris Parliamentary seat. The Maasai were of the view that the Kipsigis were outsiders who should not seek leadership positions in Maasai territory, according to the report.

Police and Provincial Administration Response

The Narok South DSIC acknowledged that there was an acute shortage of Administration and Regular Police and that this was compounded by a shortage of firearms and ammunition. Further, the DSIC observed the need for replenishment to enable security officers effectively restore law and order and protect the lives of displaced persons. While it is conceivable that the police and provincial administration had to make difficult strategic choices to contain much more serious situations that were underway in other places, one cannot help but wonder what would have happened if the situation in Narok had got out of control?

Further, evidence was received that in order to appease gangs that were bent on violating the law, the authorities succumbed to public pressure and blackmail where the DSIC unanimously strongly recommended that the OCS for Mulot be transferred for his personal safety after he received death threats from the Maasai community for causing the death of a person

The South Rift and Kisii Region

Introduction

A significant amount of the post election violence took place within the larger Kericho district. One strand of the violence in this area involved the neighbouring communities of the Kipsigis who live in south Rift Valley and the Kisii people (also known as Abagusii) who live in south Nyanza. The traditional homeland of the Kipsigis people, the largest sub-tribe of the Kalenjin community, is the original Kericho district. A subdivision of the district has yielded five smaller districts: Sotik, Buret, Kipkelion, Bomet and Kericho. The ancestral homeland for the Kisii people is Kisii district, which forms a part of Nyanza province. The original Kisii district, after subdivision, yielded South Kisii, Central Kisii, North Kisii, Borabu and Masaba districts.

Following the subdivisions, Sotik district, created out of the original Kericho district, borders Buret district to the north, Bomet to the east, Borabu to the south and Transmara to the west. Borabu, on the other hand, borders Masaba, Nyamira, Sotik, Buret and Trans Mara districts.

Another dimension of the violence in the larger Kericho district took place within and around Kipkelion area, which is now a district on its own. Kipkelion district is largely a settlement scheme comprising members from the ethnic communities of the Kipsigis, who are the majority, Kikuyu, Kisii, Luo, Kamba, and Luhya. The Kipsigis occupy three administrative divisions, Chilchila (formerly Fort Ternan), Londiani and Kipkelion.

The discussion of the post election violence in the South Rift relates to the events that occurred in the Kericho area, which in this case used to encompass the original Kericho district, unless the intention to the contrary is clearly stated. As the ancestral homes of the Kipsigis and the Kisii are contiguous, and as the violence in this region also involved the two communities both along the Borabu/Sotik common border as well as within Kericho district, it is convenient to discuss the violence as a systemic whole.

The Build up towards Violence at the Sotik/Borabu Border

According to several witnesses, an important explanation for the post election conflict between the Kipsigis and Kisii communities lies in an incident that had occurred at Nyamarambe area, within the original Kisii district on 22 September 2007, barely three months before the general elections. The incident involved a well-publicized assault on leading personalities in the main opposition party, the Orange Democratic Movement. The assault was alleged to have been orchestrated by Simeon Nyachae, a prominent Kisii politician who was at the time a Cabinet Minister in the Kibaki government, and who was viewed as one of the President's close confidantes.

During the incident, William Ruto, a Kalenjin, Omingo Magara, a Kisii, both national office holders in ODM, as well as Chris Bichage, a Kisii parliamentary candidate in the ODM party, were attacked physically by youths attending a public rally which Nyachae had convened in Nyamarambe. Bichage, who was severely beaten, needed hospitalization. According to Grace Kaindi, who was the Provincial Police Officer for Nyanza at the time of incident, the attack on the three was captured on television and became the subject of considerable national outrage.

Another witness, Samuel Omweri, informed the Commission that the attack on Ruto, viewed as an affront by the Kisii on the Kalenjin people, triggered revenge attacks by members of the Kipsigis community on Kisii people who had bought land in the Sondu area, which forms a part of the Kipsigis homeland. This evidence was confirmed by the Kericho District Commissioner, Wilson Njenga, who informed the Commission that the violence in Sondu led to the death of three people and the injury and displacement of several others. According to Omweri, members of the Kisii community who had bought land in Kipsigis territory in Sondu area, where they had lived for up to 30 years were forcibly evicted by their Kipsigis hosts, angry over the attack on Ruto. At the time the Commission heard this evidence, these people had not returned as yet to where they were displaced from.

The Commission sought to know from Kaindi what action, if any, had been taken over the well-publicized incident in Nyamarambe. She informed the Commission that all the persons who participated in the attack had been identified and arrested and were then placed in custody at Kisii Police Station for two or three days, as the police finalized arrangements to charge them in court. However, on the orders of the Commissioner of Police, they were released unconditionally. On this incident Kaindi testified as follows:

> *"You find that I get calls from Nairobi, my boss says, "Did you arrest these people?" I say, "Yes, for this and that". Then he says, "Well, warn them and let them go home". I comply."*

Other than the Nyamarambe incident, the electioneering process also provided opportunity for the building of tensions in the south Rift area. According to the information presented to the Commission, several individual occurrences contributed to the escalation towards eventual violence between the Kipsigis and Kisii people. One of them was the appearance in Kericho town area of inflammatory leaflets against members of the Kisii and Kikuyu communities, both perceived to be supporters of PNU. According to, the Kericho DC, the leaflets contained such messages as *CHOMA KIKUYU CHOMA; SHAMBA MPYA ITAPATIKANA; and NOTICE: FACTORY REMAIN ASHES*.

Several witnesses informed the Commission that there was much incendiary speech by political leaders, in the context of campaigns for the presidential and parliamentary elections. Eye witnesses who attended a number of rallies appeared before the Commission and gave an account of some of the inciting statements that formed part of these campaigns. For example, a witness testified that he attended a rally at Uhuru Garden in Kericho in August 2007 addressed by two leading ODM politicians. The witness claimed that the politicians exhorted Kipsigis people not to sell land to the Kisii people whose number, he complained, was already too large in the town. According to the witness, the politician said that "at the end of the day, the town will remain owned by only two tribes, Kisiis and Kikuyus." Another witness testified that although some of the speeches in rallies that took place in cosmopolitan areas were delivered in Kiswahili, a language understandable to most of the audience, the delivery of incendiary messages would often be done in Kipsigis, to cut off other communities present at such rallies.

However, political incitement was not confined to rallies held in the Kericho area. At an ODM rally held on 6 December 2007 at Manga in Borabu district, Kisii people were informed that the land constituting Borabu district was originally

part of the homeland of the Kalenjin.[113] According to Omweri, the common understanding by people within the Borabu area was that Kisii people were expected to vote in a particular manner for the continued favour of being allowed to occupy Borabu district, which might otherwise have to be given up for the Kipsigis.

At another rally in November in Kericho, Kipsigis politicians again complained that "you cannot even speak because Kisiis bought the land and built".[114] At yet another rally at Kapkatet, which a witness[115] claimed was addressed by other prominent ODM politicians, the Commission heard that the leaders rhetorically asked whether any Kipsigis owned land in Kisii area, to which the crowd answered "NO". They then wondered why Kisii people should be allowed to own land among the Kipsigis.

According to witnesses, there was an expectation of the eviction of non-Kalenjin people from South Rift long before the elections were held, and this added to the tension in the area. The evidence on this is provided by information gathered by witnesses in the course of daily interactions with ordinary Kipsigis people before the elections. For example, a Kisii woman who has been married to a Kalenjin man for more than 20 years, and whose marriage survived severe pressure imposed by the post election violence, informed the Commission that through every-day interaction with Kalenjin people, it became clear to her that they expected that, as a result of the enforcement of *majimbo*, other communities would have to leave the Rift Valley, and that this included people like her, who were non-Kipsigis married to the Kipsigis. According to the witness "they were saying nobody should be left there who is not born into the Kalenjin". This was also testified to by another witness, a Kisii woman who had settled on the Sotik side of the border for more than 30 years. She said, "We saw houses burning

[113] CW 116.
[114] Exhibit No. 122.
[115] CW 118.

and people had been saying, you know the neighbours, 'You don't belong here. This is our farm."

The following account by a witness lends further credence to the view that there was widespread expectation on the part of ordinary people that *majimbo* would result in the permanent eviction of certain people from the Rift Valley:

> *"Meanwhile the Kalenjin were outside the house. They taunted us and told us goodbye. They told us that our magnificent house was theirs now as it stands on their soil. I recognized some of them as the sons of our neighbour."*[116]

The final period before the outbreak of violence was marked by tension over the outcome of the election results. The Commission heard that there were rumours of the planned rigging of the elections in favour of PNU's Kibaki. In Kericho, the rumours were strong enough to cause a crowd of local people to march onto the premises of a local church, Abundant Grace Church, which they suspected was holding stuffed ballot papers for the PNU presidential candidate. This compelled a police search on the premises. The search, however, yielded nothing.[117]

The Commission was informed that the theft of livestock from the Borabu area into the Sotik district in the height of the tension between the communities exacerbated the tension and, according to Borabu District Commissioner, Asha Kiva, was the effective trigger for the violence. The DC testified that cross border theft of livestock was a common occurrence in the area but because of the prevailing tension, this particular incident was considered more aggravating than would have usually been the case.

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[116] Exhibit No. 119.

[117] Statement by W.G. Njega, District Commissioner Kericho.

Build up towards Violence in Kipkelion

Kipkelion district borders the districts of Molo (at Kuresoi), Koibatek, Nandi South, and Uasin Gishu. This is a volatile region, which has borne the brunt of clashes in recent times. The District Commissioner for Kipkelion, Aden Gedow, (Commission Witness No. 68), testified that although the area was largely peaceful in the run up to the 2007 general elections, there was considerable tension resulting from the spill-over effects of the bordering Kuresoi, which experienced considerable violence before the elections. Further, the events in the neighbouring Molo district, where displaced persons and victims of land clashes had sought refuge, had a spill-over effect, and elicited ethnic passion in Kipkelion and the desire to retaliate, adding to the tension.

DSIC reports indicate that prior to the elections, leaflets warning Kikuyus and Kisiis to vacate Kipkelion were circulated at Fort Ternan within Chilchila division and Kasheen. When leaflets appeared, the DOs of the areas in which these were found held peace meetings involving all the communities in their areas. However, according to Gedow no politician had made inflammatory speeches during the campaign period, a fact he attributed to the homogeneous nature of the ethnicity of the candidates that were contesting elective office.

NSIS Evidence on the Build up towards Violence

The Hotspot/Flashpoint report issued by the NSIS for the week ending 28 September 2007 predicted that election related violence might exacerbate misunderstanding between the traditional hotspot areas in, among other places, the Rift Valley. Specifically, it was reported that the "area bordering the Kisii districts and Rongo, Rachuonyo, Bomet, Kericho, and Trans Mara would continue experiencing hostilities following the recent Nyamarambe skirmishes."

The reports of the NSIS for the week ending 19th October 2007, reported an escalation of the situation noted in the previous report when it noted that "along the Kericho, Nyando border, tension persists between Kipsigis and Abagusii communities within Sondu area that has led to several houses being set ablaze by marauding Kipsigis youth armed with bows and arrows. This follows political

incitement by some Kipsigis leaders coupled with the perception by members of the same community that the Kisii were not reciprocating to their hospitality despite settling in their area. The ensuing clashes have left several people injured, seen an exodus of Luo and Kisii kinsmen from the area for fear of further Kipsigis raiders…"

The NSIS fortnightly intelligence report for the period ending 30th October 2007 narrated that "the Kipsigis-Kisii acrimony remains explosive following utterances by some political leaders in Sigowet division of Kericho district that Gusii be rooted out of the division."

The report for the week ending on 23rd November 2008, the last before the elections, spoke of a further increase in tension in the Sondu area as a result of threats of attacks by Kipsigis people on Kisii people who had returned to Sondu following the earlier eviction.

Territorial Disputes as a cause of the Tension and Ultimately the Violence

The Commission learnt that the post-election violence at the Borabu/Sotik border was in part the result of conflicting territorial claims by the Kipsigis and the Kisiis. Witnesses testified that the Kipsigis consider the land comprising Borabu district to be part of their ancestral land and the correct boundary between their district and Kisii to be some way into the Kisii side, at a place called Metamaywa.

We heard from Samuel Omweri, a community leader and a former Member of Parliament, that the Kisii people refute the claim by their Kipsigis neighbours and have a territorial claim of their own against the Kipsigis. According to Mr. Omweri, the Kisii claim that they occupied not only Borabu but also all the area up to a place called Kabianga, which is now a part of Kericho district. They claim that Kabianga is, in fact, a Kisii name and that the name is evidence of the fact

that the Kisii were the first occupants of the area.[118] The Kisii assert that they lived on the land up to the rivers Sondu and Oyani to the south and that they were evicted from these areas in 1946 to make room for the settlement of soldiers returning from the Second World War in Ethiopia and the Uasin Gishu Maasai who had been moved from Trans Nzoia.[119] As a result of being pushed out of their homelands, the Kisii found themselves being administered as part of what was called Sotik west during the colonial period. During all this time, the Kipsigis and the Kisii were part of Nyanza province. However, the Boundary Delimitation Commission acceded to a request by the Kipsigis to join with Nandis to form the "Kalenjin Alliance" in the Rift Valley (the areas covered by Sotik West, Kipkelion and Londiani), while the Kisii remained with the Luos as constituent ethnic communities forming Nyanza Province.[120]

The former DC for Borabu, Asha Katheri Kiva, told the Commission that the Kipsigis hoped that through the post election violence, they would drive their Kisii neighbours out of Borabu and establish what they consider to be the correct boundary between the two communities. The Commission heard that this was not the first time that the Kipsigis had violently asserted their territorial claim against the Kisii. They did so throughout the early years following the establishment of the settlement schemes for the Kisii in the 1960s and that as part of this there was fighting between the two communities in 1964 and again in 1969. More recently, there was election-related violence in 1992, 1997, and 2002 also provided occasion for the violent assertion of this territorial claim.
The Commission was further informed by Ms Kiva that rivalry, which from time to time broke into war, between the Kipsigis and the Kisii is an ancient phenomenon, predating the establishment of the colonial state that, on both sides, this rivalry has been passed down through folklore from generation to generation, on both sides.

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[118] Exhibit No. 116
[119] Above.
[120] Above.

The Kiliku Committee traced the conflict between the Kipsigis, the Maasai and the Kisii to the post colonial arrangements in relation to land. The splitting of the country into white highlands and native reserves was one of the practices of the colonial state. At independence, the white highlands partly forming the present border area between the Kipsigis and Kisii were apportioned between the Maasai, Kipsigis and Kisii communities and, under the facilitation of the Settlement Fund Trustees, members of the three communities bought land that was formerly owned by the departing settlers. Members of the Kisii community who had a higher population density settled in larger numbers in the area than the Kipsigis and the Maasai. The Committee noted that the Kisii had initially moved into the area through settlement schemes but lately they had done so through direct purchases and leases. These factors explain the significant presence of the Kisii in Bomet and Narok districts.[121]

In Kipkelion, according to the Kipkelion DSIC (Kipkelion District Security and Intelligence Appreciation No. 1/2008 Held on 18th January, 2008) Reports, the clashes underlie a history of ethnic animosity and hatred caused by disputes over land which the Kipsigis claim to be their ancestral land, but which was appropriated by the European settlers in the pre-independence times, and later sold to members of other ethnic groups. The Nandis also claim that River Kipchorian, which traverses the district, is their true boundary with the Kipsigis and is part of Tinderet. The problem manifests itself in an ethnically polarized environment and the land issue having been politicized. This explains why heightened clashes have almost always coincided with electioneering periods, with the question of displacement of the "indigenous" Kipsigis being the reason for much political agitation.

[121]Kiliku Report at p.55, paras 5.2.4 and 5.2.5.

Execution of the Violence:

(a) In Sotik/Borabu

The Sotik District Commissioner, Humphrey Nakitare informed the Commission that violence in his district began on 28 December 2007. At this point, the violence was confined to the district and had not spread to the border area. It took the form of blockage of roads and, according to Nakitare, "sporadic rioting all over the district". It was the opinion of the District Commissioner that the cause of the violence was "delay in announcing the presidential elections results."

The evidence of Nakitare was that the actors in these skirmishes were armed youth from the Kipsigis community. Conflict started on the 28th of December 2007, with marauding youth barricading roads using stones and trees and lighting bonfires. On the following day there was an upsurge of violence with much action targeting persons of non-Kalenjin origin perceived to be supporting the PNU. Property was destroyed and people hacked with crude weapons. On 30th December, the youths resorted to massive arson attacks in urban centers, and more specifically, Sotik, Kaplong and Chebilat.

Eventually the violence moved to the border area between Borabu and Sotik and now involved members of the Kipsigis and Kisii communities fighting at various points on different days on the long common border. The Sotik DC was asked the question as to who between the two communities started the inter-ethnic fighting and he answered that it was the Kipsigis who first attacked the Kisii. According to Asha Kiva, the Borabu DC, the first house was burnt by Kipsigis raiders at a place called Esise, in Ekerubo location, within her district. This was on 8th January. Before then, there had been no violence on the Borabu side, although the Kisii/Kericho road, which passes through Sotik, had remained barricaded. Kiva and members of her DSIC visited the place where the house had been burnt and convened a meeting in the affected area where, she said, there was a lot of tension. Even as the meeting went on, more houses were being burnt. Thereafter, the violence took the form of spot torching of houses of Kisiis

living on the Rift Valley side of the border, as well as sporadic fighting between youths on the border.

The Commission was informed by witness number 123 that in the course of the violence, a peace meeting was held in Sotik area and addressed by the leading members of the ODM including Omingo Magara, a Kisii, and Kipkalya Kones, a Kipsigis. According to the evidence, speaking in Kiswahili, Magara implored the Kipsigis people to stop the fighting with the Kisii people. In Kiswahili, Kones repeated the same message before he switched to speak in Kipsigis. In that language, the witness alleges, he told the Kipsigis to continue with the fighting.
The Commission visited Ribaita Primary School on the Sotik/Borabu border and was informed that the school had been burnt by the Kipsigis during the border fighting between the Kipsigis and Kisii. Several other schools along the common border, including Isoge, Rianyaemo, Saiga-Ngiya, Memusi, Magombo, Kebuse, Raitigo Secondary and Gonzagoza suffered varying levels of destruction.

In Kericho, it was the testimony of Wilson Njega, the local District Commissioner that violence broke out on 30th December, after the announcement of the presidential election results. The following day, a large crowd of people armed with improvised weapons marched on Kericho town from all directions. They invaded the premises of the Co-operative Bank and Equity Bank as well as Stage Mart Supermarket, and gained access after shattering windows and breaking down doors. They helped themselves to whatever of value they could lay their hands on and, according to the local OCPD Aliwa, some people attempted to access cash in the automatic teller machines in the banks. Aliwa added that a number of them who were armed with bows and arrows attacked the police with arrows. Responding with fire, police killed six people and repulsed the rioters.
According to Aliwa, the severest violence in Kericho was on 30th and 31st December, 2007 and 1st January, 2008. Thereafter, the violence changed form. Whereas, in the first three days or so, rioters confronted the police openly in Kericho town, the violence later moved away into the tea estates and the rural areas. Further, some of the violence was now carried out at night. DC Jenga

estimated that the violence lasted from 30th December, 2007 and for the next two weeks or so there was intermittent fighting although, according to him, this had been contained.

According to Aliwa, whereas the initial violence was committed by armed youth in the immediacy of their neighbourhoods, the subsequent violence began to display trends of raiders travelling long distances to commit acts of violence outside their home areas. For example, the attacks in Kipkelion were carried out by raiders coming from other districts. The attack in Mutaragon and Munistry were carried out by raiders from outside these areas. In the particular case of Mutaragon the raiders came from Nandi district. In the case of the attacks in Kericho, some were carried out by people from the neighbouring Buret district. Further, attackers also came from Bomet to attack tea estates which neighbour the district.

The Sotik DC, Nakitare, confirmed the existence of this trend when he told the Commission that, in the case of Sotik, attackers came from as far as Pokot.
The evidence of co-ordination of the violence is further supported by the Report of the Kenya National Commission on Human Rights which related the organized manner in which they were carried out. According to that Report, in areas like Kipkelion, in advance of contemplated attacks, Kalenjin attackers would place distinctive marks in front of all dwellings that belonged to members of their community as a sign to the raiders as to which houses to pass over when they carried out the attacks. Traditional calabashes were mentioned as one form of such distinctive marks. The report further stated that in the subsequent days, attacks on settlements were done from all directions and at the same time with clear direction, in a manner indicative of planning.

Another round of serious violence broke out on 31st January 2008, triggered by the killing in Eldoret of the Member of Parliament for Ainamoi, David Too. One of the outstanding incidents in this violence was the attack by a mob on the Ainamoi DO's office during which an Administration Police constable, Omar

Ahmed Dado, was killed by the mob and his colleague sustained an arrow shot wound. Aliwa described the incident as follows:

> *"When the message was received, a group of youths attacked Ainamoi DO's office where PC Omar Dado was stationed. He had a firearm. He tried his best to shoot in the air to scare them but they chased him. Where he went to hide, they burned that house until he was dragged out, killed and burned on the road. They went further and shot another Administration Police Officer with an arrow on the head, they snatched his firearm and they robbed all the buildings... (Thereafter) the criminals who stole the firearms sneaked them in the church where they were recovered."*

A Tea Picker Is Violently Attacked by Kipsigis

One of the saddest personal stories that came out of the Sotik/Borabu violence is that of Simeon Atandi Monyancha, who spoke to the Commission in Borabu. Monyancha was working for the Sotik Tea Highland Company as a tea picker. On 1 February, while picking tea, he was attacked and both his hands were amputated. His story as given to the Commission is told below:

I used to be a tea picker at Sotik Tea until 1st February 2008 when I was attacked by Kipsigis raiders who were attacking and burning property belonging to the Kisiis.

On this day, I was in the tea estate picking tea. At around 9.00 a.m. the head boy Mr. Daniel Kimetto, told us that there was violence all over and advised us to go to our houses to hide. I went to my house. I lived in Camp Five which consisted of many Kipsigis. I heard them saying that Kisiis must move out of Camp Five and join fellow Kisiis at Camp Majengo.

After securing a house at Camp Majengo, I packed my household items together with my clothes and began to go to the Camp Majengo.... I saw six armed young men with pangas, bows and arrows. They aimed at me with the arrows. I pleaded with them not to shoot me. They put the arrows down and started assaulting me with the pangas. I tried to block the pangas using both my hands to protect my head. I saw my left hand being cut three times. Then they cut my head on the left hand side. Blood spilt all over my face and I could not see what was happening. I lost consciousness.

When I gained consciousness, I found myself in Litein Hospital feeling a lot of pain and both my hand had been amputated.

It is during the second wave of violence that Chebilat, a border shopping centre between Sotik and Borabu was burnt extensively. A Kisii woman whose life time

investments in a school, located on the Sotik side, was extensively looted testified that there were requests by her Kipsigis neighbours that she should reconsider her decision to flee to the Kisii side, just before her school was burnt, as they feared that her flight would insight the Kisii community and attract retaliatory attacks on them. In the end, however, she had to move to the Kisii side because of fear for her safety when a gang of attackers arrived in her school, and the local people were unable to give her protection. In her view, some of the attacks were carried out by people from the inland and without regard to the views of the local residents at the border area. The attackers on her school left for her a message on one of the writing boards in the classrooms which well sums up the feelings that drove the violence. On the board they wrote:

"KISIIS AND KALENJINS WILL NEVER LIVE TOGETHER"

(b) In Kipkelion

According to Gedow, the Kipkelion DC, violence erupted on 30th December 2007, with the announcement of the final tally in the presidential election results. The announcement was immediately followed by widespread incidents of arson. Some areas within the district, in particular the areas of Molo, Soget and Kamatins, had intense skirmishes. Initially, there was an ethnic angle to the arson attacks but this later spilt over to all communities living in the district. Illegal roadblocks were mounted by youth at various spots along the highway, notably at Kapsoit.

The violence also targeted various government installations and resulted in the burning of and vandalism on some buildings and vehicles. The offices of three chiefs, 80 schools, 2 zonal offices and 7 dispensaries were vandalized. One forest guard was killed and there was illegal logging of forests.

The Commission conducted an extensive tour of the South Rift Valley area and was struck by the widespread nature of arson on homes of persons not considered to be indigenous to the area.

There was evidence of some level of training in preparation to commit violence. The Commission received evidence in the form of a digital video disk (DVD) recording that was captured in Kuresoi, which borders Kipkelion. The video showed attackers being trained at Kimaranya village in Keringet. The evidence as to training is supported by the evidence of the Kenya National Commission on Human Rights, which asserted that training and oath-taking took place in camps in preparation for the attacks. The report said:

> *"The training reportedly took place in the farms of senior leaders in the area or in the region's forests. One police constable, reportedly trained attackers in Kericho Town. The attackers were well equipped with weapons and materials that they would need to conduct some of their activities, such as power saws used in cutting down huge trees that were used to block the roads."*

According to the KNHCR Report the attackers in Kericho, Bureti and Londiani, the latter of which is in Kipkelion, reportedly sent warnings to their victims of the impending attack, before the attacks were actually carried out. Such warnings were delivered by telephone. The Report concludes that on that premise, there was a premeditated intent to forcibly evict the victims from the region.

Further claims regarding the violence was provided by the testimony of a Kipsigis farmer at Sachangwan location, Molo district. The farmer testified regarding a review meeting, to asses whether the violence had met its objects, held in his area at the end of the fighting. The witness informed the Commission that on 28th February, 2008, a meeting was convened by the Kalenjins at Baharini to discuss the aftermath of the post election violence. The meeting was chaired by a retired Assistant Chief, and attended by, among other local leaders. According to the witness, the background to this meeting was that non-Kalenjin homes had been burnt down and the owners having fled the area, the meeting sought to discuss measures for ensuring the ritual cleansing of the area youth, who had participated in the burning of non-Kalenjin homes during the post election

violence, as the burning of residences is considered an abomination under Kalenjin values. He testified that in order to achieve the cleansing of local youths who had participated in the burning of homes, the meeting agreed that a goat would be slaughtered for use in conducting the cleansing. Secondly, the meeting was the occasion for discussing how farms formerly occupied by those who had fled, would be purchased or hired out affordably. At the meeting, the witness said he disagreed with the idea of sharing out the property of neighbours who had fled from the area to escape the violence. As a result of his opposition, he was viewed as a traitor, and on 17th March 2008, his house was razed down by fellow Kalenjins, most of whom he identified.

Following the killing of the area legislator Too, there was an escalation in the level of violence in the area. According to police reports tendered by Gedow, 47 people died, 27 of them of arrow shots, 7 of injuries using crude weapons, 11 of gun shot wounds and two of burning. Property was also destroyed, with 3568 buildings totally razed down, 23 buildings partially burnt and 1542 buildings vandalized. According to Gedow, a large number of persons participated in acts of arson and almost each of them carried a container of petrol for use in the burning. The Commission heard that the main method of burning was by placing accelerants on sticks which would then be propelled by hand onto the targeted buildings. Others would just torch the houses directly.

Police and Provincial Administration Response

All the district commissioners and members of the police force that the Commission interviewed pronounced themselves satisfied with their response to the post election violence. However the Commission was concerned about a number of specific issues raised by the evidence in relation to their response. These are discussed below.

The account by government officials in Kericho was they were unaware the there would be post election violence and therefore did to provide for it. The worst case

scenario for them was the possibility of violence in the lead up to the elections especially in the areas that they considered to be prone to violence such as Nyagacho and Matobo in Kericho town. There were no contingency arrangements in relation to the violence that ended up engulfing the multinational estates in Kericho and, therefore, no provision to deal with the violence.

The response by the authorities in Kericho to the violence that they thought may happen was to mount peace committee meetings in their areas. Amid the hate messages that have been referred to in the evidence, the local administration carried on with the establishment of peace committees and the convening several meetings in the affected areas. All the officials that the Commission spoke to participated in or facilitated these meetings, which were organized by the Electoral Commission of Kenya. This was its preferred intervention in dealing with the possibility of electoral violence.

The ECK and other government officials who came before the Commission appeared to derive much satisfaction from the fact that these peace meetings had taken place throughout the country before the elections. They all seemed to regard the organization of such meetings as sufficient and exonerated themselves from blame for lack of preparation in regard to the violence that eventually occurred in the country. Officials seemed to ask this question: "what else were we supposed to do if, against our advice, people chose to fight?" With the benefit of what is now known, there must be asked serious questions as to the whether the peace meetings that were convened by the ECK had enduring value or whether they provided the easy option for public officials faced with the hate messages that abounded in the period before the post elections and which, in the view of the Commission, played a big role in the post election violence.

When violence broke out in Kericho town, which was invaded by multitudes of rioters, the police were unprepared to deal with it. They responded with extreme force, killing six people who they claim were among the rioters that had invaded the Co-operative and Equity Banks in the town. The area OCPD, Walter Aliwa, attempted to justify the killing by asserting that the rioters attempted to shoot

the police with arrows but there is no evidence whatsoever to support this claim. On the contrary, Aliwa's evidence that the police shot the rioters because "these were robbers who were breaking banks" is not the real reason why police shot into the crowd. In the view of the Commission, this shooting constitutes an unwarranted use of force by the police and must be investigated. In Borabu, the Commission was told that a policeman in plainclothes shot a man, Joshua Nyarunda. Police later claimed that the shooting was accidental, but no action was taken against the police officer involved.

The sudden onset of riots in the south Rift required police response to multiple situations at the same time. At the beginning of the violence, the strength of personnel in Kipkelion and Kericho districts was 350, of whom 100 were APs. The OCPD had to request for additional personnel from outside the district. These came from the Administration Police, Anti-Stock Theft Unit and the General Service Unit, and arrived on 1st January 2008 or soon thereafter. In Sotik, the DCIO sought fortification both from the Rift Valley and Nyanza Provinces, and in all, an additional 200 police officers came in as reinforcement. Had there been prior planning and appreciation of the possible eventualities, the reinforcement would have been available much earlier and might have prevented much of the initial violence. An example of the inability by the security agencies to make contingency arrangements was provided by Aliwa himself when he testified that he refused to even contemplate that ODM had a chance of winning the elections and therefore did not provide for the possible consequences of such an outcome.

Other than the excessive use of force by police, as exemplified by the Kericho town incident, the Commission received information that police response to rescue people under attack was slow or altogether absent, although in some instances they faced real obstacles. In one incident in Sotik area, the house of a retired couple was surrounded by raiders for nine hours before they were rescued. The wife recounted to the Commission their ordeal as follows:

"On 5th February, early in the morning my husband woke up and went to till the farm. Shortly after he went out he came running back to the house. He ordered us to close all the doors and windows. He told us that he saw a group of Kalenjin youth coming towards our house. A few minutes later we heard their voices outside. They were calling us by our names and they asked us to come out. We recognized their voices. One of them was our neighbour.

At around 9.00 a.m. they started breaking the doors and the windows of the house. They could not break into the house because of the grill reinforcement. I called the Chief to come and help us. He sent a vehicle and administration policemen. They could not reach us immediately because all the roads leading to Chepilat were barricaded by Kalenjin warriors. They came to us around 6 p.m. and they escorted us out of the house."

Another witness who sustained an injury when his home was surrounded and attacked by raiders recounted the following:

"When I turned I found that I had been speared on the left, where I am showing you. At that point, I called the Chief, the Chief told me that there is no way he could assist me. The Chief advised me to look for other means of assisting myself."

Fortunately for this witness, police on patrol arrived where he had been attacked and took him to hospital.

Police response to people in distress was hindered not only by the inadequacy of personnel on the part of the security forces, who were simply overwhelmed by the demands on them and were, unable to cope with the situations created by the violence but also because those under attack were spread over long distances in a rural setting. Moreover, the electoral process, to which the police

had provided vital support had hardly been concluded by the time they were called upon to deal with the post election violence. A large number of police officers were still on the way back to their duty stations when the violence erupted. Further, and as the police and other witnesses told the Commission, the emergence of illegal roadblocks hindered police movement, or altogether blocked off access to some of those in need.

To deal with the problem of blocked roads, the DSIC put in place a plan to clear the highway. The police deployed personnel on the major highways to monitor spots on the highway prone to blockages and, generally, conduct mobile patrols in the potentially volatile areas.

Further, the Commission received evidence that police sometimes stood passively as property was damaged and did nothing to restrain the violence or arrest the perpetrators. For example the Commission heard that, "Chebilat was not burnt in one day. It was burnt for almost three weeks. There were destructions in front of the officers".

The Commission received reports that, due to bias based on ethnicity, some officers were reluctant to prevent the violence or to provide protection to the affected persons. As part of such bias, there were reports that a Luo police officer was accused of blocking the Kipsigis from reaching the road in their bid to escape and instead redirecting them to their homes only for them to be attacked by the Kikuyus. Further, Kikuyu officers stood aside as Kalenjins faced violence and vice versa.

In some situations police failed to respond to situations of distress even where early warning and pleas had been communicated to them. The KNCHR Report states that a house was burnt a few metres from the Londiani Police Station in spite of prior notification of the police of an impending attack. Where there was police intervention, disproportionate force was sometimes applied. For instance, the KNCHR Report implicates, a senior police officer, in the killing of several civilians in situations that amounted to excessive use of force. The Report

further states that an OCS accompanied by other officers shot about 17 civilians in Londiani and Kericho during a riot.

After the death of MP Too which led to an upsurge in violence, the DSIC reinforced the available security personnel with additional officers drawn from the General Service Unit, Regular Police, Administration Police and the Criminal Investigations Department. Further, 30 members of the Rapid Deployment Unit of the Administration Police Department were sent in to reinforce operations.
At the Kipkelion DSIC meeting held on 12th February, 2008, the DCIO told the meeting that he had instructed personnel to search various premises which he believed were where the hate leaflets were being printed.

Response to IDPs

One of the issues authorities in the South Rift had to deal with, as a result of the post election violence, was the emergence of internally displaced persons. Kisii town became one of the largest reception centres for IDPs in the Western part of Kenya. According to local DC Augustine Nthiga, the district received IDPs from Upper Migori, Rachuonyo, Kericho, Siaya, Homa Bay, Bondo, Nandi, Bureti and Kakamega. At one point, there were 23, 000 IDPs in Kisii town.

In Sotik, the DC said there were 8500 people displaced from the district. Most of these were Kisii and Kikuyu. The Kipsigis returnees were absorbed by the local community and did not go to displacement camps. A temporary camp was established at the Sotik Police Station. These IDPs were thereafter taken to places of safety. The Kikuyu were taken to Nakuru and Molo and places in Central Province. The Kisiis were taken to Ekerenyo, a camp established in North Kisii district. Although Kiva, the DC in Borabu, told the Commission that those displaced by the fighting along the border were absorbed inland and that as a result, no camps were set up in her district, the Commission received evidence that IDPs displaced from along the border were facing a life of neglect from the authorities, including the DC herself, who had refused to even acknowledge the existence of the IDPs.

The Kericho OCPD told the Commission that that the number of IDPs from among tea plantation workers stood at 9,000. Of these 6,808 had been returned to their places of work by the time he testified before the Commission. 2000 business people had been displaced as a result of the violence out of whom 1269 had returned to their businesses at the time of his testimony. The last category of IDPs were persons who owned land in Kericho before the violence. The number stood at 250, of whom only 50 had returned to their land.

In relation to Kipkelion, the Commission received evidence that the district received IDPs as early as November, 2007 who had escaped the fighting in Molo and Kuresoi. These were received in Chepsion and Londiani. The District Commissioner arranged for meetings with them and they were returned to where they had fled from.

The conflict in Kipkelion led to the establishment of 17 IDP camps, with one hosting those of Kalenjin descent and the other of mixed ethnic composition. There were also heightened relocations of people moving to ethnically homogeneous locations, which they considered safe. There were convoys to Siaya, Kisii, Nyamira, Nakuru, Molo, Nyahururu, Nyeri and Thika.
Gedow admitted that initially, the Government did not facilitate these movements, ostensibly because "it was not the intention of the government to move people from their homes." He told the Commission that what they put in place were measures to protect life and property and not more.

Report of the Law Society of Kenya (South Rift Valley Branch) on Police Misconduct in Kericho district

The understanding by the Commission of the nature of violence that took place in Kericho district was greatly enhanced by the submission by the Law Society of Kenya, South Rift Branch, for which the Commission is grateful. Through its Secretary, Gideon Mutai, the Society submitted to the Commission the depositions made under oath of forty two different witnesses, testifying to

incidents of violence in the district, which either involved them personally, members of their families, persons known to them, or occurrences which they had personally witnessed. The first issue to be addressed is the credibility of the information provided by the Law Society. Out of the 39 cases of shooting that the evidence dealt with, it indicated that 23 people were shot dead while the rest sustained severe injuries whose consequences varied greatly. The Commission compared the list of the deceased persons provided by the Law Society and confirmed that these are already part of the list of deceased persons in Kericho which was provided by the MOH for the area, Dr. Ambrose Rotich. The information provided by the Law Society is, therefore, highly credible as it materially corroborates the evidence from hospital sources which the Commission generally considers to be credible. A number of broad matters are disclosed by the evidence collected by the Law Society, South Rift Branch, which greatly supplements for the inability of the Commission to hold hearings in the area. These are discussed below.

Out of the cases of 42 people covered by the evidence of the Society, it is indicated that police shot 36 of them. Two of the remaining six persons were Kalenjin men severely assaulted by police. As two others were shot by dead by "unknown assailants", there is no evidence that these were the police. The last one was a Kalenjin man shot with an arrow in Chebilat by unknown people.

A review of the cases covered by the evidence of the Law Society indicates that the epicentres of the violence in Kericho district included Kericho town, Ainamoi shopping centre, the Londiani junction, and Chebilat centre, which between them, accounted for 14 of all cases covered. The rest of the cases were widely dispersed through the district, and occurred in such places as Chesinende centre, Kapsuser centre and Chelimo estate. In this regard, the evidence confirms other available evidence which indicates Kericho town and Ainamoi to have experienced the greatest of the violence in Kericho district. The severest violence in Ainamoi coincided with the death of the local Member of Parliament, which has variously been discussed.

The evidence of the Society brings new insights into what happened in Ainamoi, following the death of the M.P. It is alleged that the death of the MP resulted in a large crowd of local residents marching on the Ainamoi DO's office, apparently to express their anger. It is indicated that these were met by police officers who shot in the air as a way of dissuading them from coming near the office. It is far from clear how many policemen were present but these could not have been many. The evidence mentions the name of the ill-fated Omar Dado and another policeman, Paul Chum, as having been involved in the unfolding stand-off. It is alleged that a policeman shot a person as he bent over the body of his brother, who had just been killed by the police and that Dado then gave chase of the shot person, who was later arrested. An allegation from the Ainamoi incident is that five villagers who were admitted in hospital as a result of gunshot wounds were subsequently charged in court with the unbailable offence of robbery with violence and were, at the time that the Law Society recorded their evidence, still remanded in custody. According to one of them, Francis Kipng'eno, the sole means by which they were identified was the fact that they sustained gunshot wounds. Kipng'eno said, "I know that the basis for my arrest is because I had gunshot wounds as all of us who were at Ainamoi were arrested and charged". Further, the facts constituting the offence that they face in court appear to revolve around the violence that took place in Ainamoi. Within the time available, it was not made clear to the Commission how an offence of robbery could be sustained against the two under the circumstances described, but the matter, we are told, is before the court. The regrettable violence in Ainamoi would need to be fully investigated and appropriate action, as the evidence will warrant, will then need to be taken.

The evidence of the Law Society adds to the already clear picture of arbitrary or high-handed conduct on the part of the police. In one case, a man was beaten and injured seriously by police who invaded a reconciliation meeting between the Kisii and Kipsigis at Chebilat on 5 February 2008. He was then arrested and abandoned on the roadside within Kisii area, in what must have been an

exposure to considerable risk, given the existing ethnic animosity at the time. His injuries must have been serous as he was hospitalized at Kaplong Mission Hospital for four days. The evidence also relates the story of a man from Kapsoit centre who claims that his place of work, a butchery, was invaded by policemen (GSU), who hacked and seriously injured him on the hand, using the implements for cutting meat that were within the premises. The policemen then robbed him of Kshs.51,000, belonging to the business, and shortly thereafter shot another man as he fled from the scene, having witnessed the hacking incident. The man who was shot corroborated the hacking incident as well as testifying to his being shot.

It appears that where police used ammunition on the crowd, they did so indiscriminately and in many of the situations, the shooting was not preceded by any form of warning. This conclusion is supported by the evidence of a significant number of the witnesses who recounted that "suddenly the police... started shooting at the crowd", or "police suddenly arrived and started shooting at us." The indiscriminate nature of the shooting is further demonstrated by the profile of the victims of the shooting, and the circumstances surrounding the shooting. One of these was a teenaged girl shot while coming from the *posho* mill, where she had gone to grind maize meal for the family. Two of the victims claim that they were shot in the vicinity of hospitals, where they had gone to see patients, and two others claim that they caught in a cross fire between police and rioters.

In each of the cases provided by the Law Society, very serious allegations are made against the police which, if true, would constitute grave offences on the part of the police. These cases would need to be investigated independently, as is discussed elsewhere in this report.

Evidence of Organization of the Violence in Kipkelion

The Sotik DC, in whose district violence began on 28th December, informed the Commission that the reason for the violence was the delay in the announcement

of the election results. The Commission found this difficult to believe, as voting had taken place only the previous day. The commencement of violence in Sotik so early and at any rate before the disputed election results had become an issue, is indicative of the fact that there were reasons for the violence other than the delay in announcing the election results, or the announcement of an outcome that many people in the south Rift believed to be incorrect and unjust.
The Commission considered the evidence which suggested that the attacks in the Kipkelion area were conducted in a highly co-ordinate manner. As part of this, the question of the source of the petrol that was used to burn property in Kipkelion was of some interest to the Commission. According to Gedow, allegations that a known person had transported petrol that was used to conduct arson were discounted by the investigations carried out by the police. He, however, admitted that petrol was used but could not trace the particular station where it was bought, partly due to the large number of persons who participated in the burning. The DC added that the possession of petrol at that time of the year (December 10th -23rd) would pass as normal as there was a possibility of stocking of fuel by people for fear of possible shortage.

However, the Commission finds it difficult to believe that common people, most of whom ordinarily have no use for petrol, would need to stockpile the commodity as a contingency against possible shortages in the electioneering period. The Commission wonders whether the widespread availability of petrol, which was then used in the burning of property in the area, could be a pointer to prior preparation.

As to the possibility of the violence having been planned, the DC denied knowledge by the District Intelligence Committee of impending violence, and that in any event, that was highly unlikely as it was largely a neighbour-against-neighbour conflict.

According to Gedow, no evidence had come to the knowledge of the DSIC of any oath-taking before and after the elections. However, the position of the provincial

administration that the violence was not planned must be considered in the context of a number of other factors that came to the attention of the Commission.

First, as discussed, the testimony referred to earlier that there was warning to victims by perpetrators of the violence before this was actually carried out. This fact is inconsistent with spontaneous violence and consistent with planning. Second, a large number of people would appear to have known that there would be violence long before this happened, as the Commission was told by Borabu residents. Third, it is the view of the Commission that the scale and extent of the violence is itself suggestive of planning. Fourth, there is evidence of some form of training having taken place in preparation for violence. Fifth, although the Commission was not able to establish the validity of the claim, there were allegations that some form of oath-taking also took place in preparation for the violence. Sixth, there is evidence of at least one meeting to review the situation after the violence had subsided.

Conclusions

It is the view of the Commission, the Kipsigis were unhappy with the presence of the Kikuyu and the Kisii in their homeland in large numbers. The tensions between the Kipsigis, on the one hand, and the Kisiis and Kikuyus, on the other, during the electioneering period resulted from this. It is the view of the Commission that an aspect of the violence was spontaneous, and that the disaffection with the election results or the perceived illegitimacy of the process could have been as the cause of the violence. The targeting of the Kikuyu and the Kisii during this initial violence was not only a backlash by the Kipsigis for the unjustified loss that they felt had been inflicted on them, but also an attempt to exact retribution against those in their neighbourhood who they felt contributed to that loss by voting in a manner inconsistent with their own voting patterns. Further, the violence was a form of vicarious vengeance against those presiding over a political a system felt to have robbed the Kipsigis of an electoral

victory. As supporters of a political system that they believed had deeply wronged them, the Kisii and Kikuyu were targeted in the violence that the Kipsigis unleashed following the announcement of the election results. The targeting of government property and businesses owned by Kikuyu and Kisii was consistent with this feeling. This phase of the violence was spontaneous, broke out immediately after the announcement of the results, was mainly opportunistic in nature, and found its greatest expression in urban areas.

However, it would be an oversimplification of the problem to say that the post election violence in the south Rift was solely caused by dissatisfaction over the presidential results, much as this was an important problem. Clearly, other factors were at work as well. As indicated by a discussion of the evidence the violence, initially spontaneous, increasingly showed signs of organisation, the longer it went on.

Further, in parts of the Rift Valley, violence began on 29th December, before the election results were announced. The Commission cannot therefore rule out that some of the violence was planned. The reasons for this would not have been dissatisfaction over the election results. It had to do with the interpretation of the "majimbo system" that some members of the Kalenjin community, the host community to a large number of other ethnic communities, had, which was that these other communities would be made to leave the Rift Valley once the majimbo system was put in place. Rising up in arms, in the context of the post election violence, therefore was a self-driven imposition of this version of majimbo, through the forceful removal of people from places that were not considered to be their homeland.

As discussed elsewhere in this report, the Commission finds that there was deplorable behaviour on the part of the police in the country, including in the Rift Valley, but the problems of the Kalenjin-dominated parts of the Rift Valley were not limited to police misconduct. These extended to citizen-on-citizen

violence, which accounted for the bulk of the killings that happened in that part of the country.

One of the explanations to the conflict in the south Rift is the competing claims over ethnic territory between the Kipsigis and Kisii. The coincidence of this conflict with the electioneering process, however, suggests, that whatever the merits of the dispute, it is manipulated into becoming an electoral issue, and an excuse for violence. The Commission did not receive sufficient information to determine the relative merits of these historical claims. However, the Commission was struck by the lack of a formalised articulation of this dispute in any form other than through violence. For example, the Commission did not receive evidence that there has been a process of political engagement by the leaders of the two communities that was aimed at discussing the existence of a border dispute and its possible resolution. In the circumstances, the border dispute is an occasional problem, manifesting itself when the two communities have different points of view on a matter that is important to them like elections and then vanishing until the next season of disagreement. The Commission does not have the confidence to make a finding that a legitimate border grievance exists between the two communities.

CHAPTER FOUR

Violence in Western and Nyanza Provinces

Western Province

Introduction

Western Province borders Uganda to the West, Nyanza Province to the South and Rift Valley to the East. The province is home to the Luhya ethnic group who are divided into various sub-groups. Though the rural parts are largely homogeneous, there are parts of the province which have settlement schemes inhabited by people from diverse ethnic origins. The urban centres are also ethnically mixed.

The Province comprises 19 districts, namely, Bungoma East, Bungoma West, Bungoma North, Bungoma South, Busia, Samia, Bunyala, Butere, Mumias, Kakamega South, Kakamega North, Kakamega East, Kakamega Central, Lugari, Mt. Elgon, Teso, Vihiga, Hamisi and Emuhaya.

Western Province is home to the mountainous and agriculturally-rich Mt. Elgon district, which is at the centre of a long standing dispute over land and cattle rustling between the Sabaot and other ethnic communities – Bukusu, Ndorobo, Teso, Kikuyu and the Luo. The dispute has pitted security forces of the Government of Kenya against a proscribed militia group, the Sabaot Land Defence Force (SLDF).

Because the problems associated with violence in Mt. Elgon predated the elections, the Commission was unable to establish any link with the 2007 PEV and therefore did not integrate it into investigation of PEV in the region. It was the evidence of General Mutinda Kianga, the Chief of General Staff of the Kenya Armed Forces, that the conflict in Mt. Elgon started long before the elections and continued even after the post-election violence. We were of the view that the issues concerning Mt. Elgon were of such magnitude that the Commission could not delve into them, given its limited mandate, time and resources.

Western Province has not been spared of the scourge of previous incidents of tribal clashes occurring particularly in 1992 and 1997. The *Kiliku Report* and *Akiwumi Report* identified some of the areas that were the subject of previous clashes in the Province.

In the *Kiliku Report*, the then Mt. Elgon sub-district in Bungoma was cited as having been rocked by ethnic clashes. The Report attributed the clashes to a number of factors including hunger for land by the Sabaot who felt neglected by the Government in that they had not, as a tribe, been considered for settlement schemes like other communities. The region affected by the clashes during the period covered by the Report now lies in Mt. Elgon District, which, for the reasons stated above is not within the ambit of this Report.[122]

The *Akiwumi Report* indicated that the clashes in Western Province occurred in the old Bungoma District, and to a very large extent in the old Kakamega District, along the Nandi Escarpment which constitutes the boundary between Kakamega and Nandi Districts. The causes comprised the incessant disputes over land, which was then exploited by politicians at the introduction of multiparty politics in Kenya. There was also violence as a result of the spill-over effects of the neighbouring conflict-prone Trans Nzoia District in the Rift Valley.[123]

Information presented to the Commission revealed a longstanding history of resentment against the Kikuyu ostensibly because of their perceived hegemony in political and economic areas at the expense of the indigenous communities.[124] When a heavy deployment of security officers, who were perceived to be agents of the PNU party, was noticed in the Province ahead of the elections, it only served to accentuate the rumours that the PNU party was planning to rig the elections, with the help of the State apparatus. The delayed release of the presidential

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[122] Kiliku Report, chapter 3, pages 22 to 40
[123] Akiwumi Report, chapter 2, pages 191 – 199
[124] See the evidence of CW No. 120 discussed elsewhere in this section.

results was therefore seen against this light and later, against that of the events occurring at the election tallying centre at the Kenyatta International Conference Centre, which served to heighten tensions.

Patterns of Post-election Violence in Western Province

The period before the elections was generally considered peaceful apart from incidences relating to political rivalry between candidates and their supporters.[125]From the evidence presented these incidents were within the competence of the security forces to control and were dealt with accordingly. Evidence was submitted to the effect that the violence in Western province predated the general elections.

On 18 December 2007 at Harambee market, East Kabras Location in Kakamega District, campaign vehicles belonging to Malava ODM parliamentary candidate Musavini Nambwa were burnt down when his convoy was ambushed at a roadblock created by youth allegedly allied to New Ford Kenya.[126] The angry youth also set ablaze a sugar plantation in search of Nambwa whom they believed had taken refuge in it.[127]

On 23rd December, 2007, youths shouting PNU slogans stoned vehicles on the Eldoret-Bungoma highway as they tried to block ODM supporters from travelling from Bungoma to Webuye. This prompted intervention by police officers and running battles ensued.

Post election violence in Western province was characterised by burning, looting and vandalising of property belonging to the Kikuyu community and by those

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[125] One such incident was in Khwisero Constituency where supporters of Mr. Bulimo of ODM Party and Hon. Julius Akaranga (NARC) clashed during an ODM political rally. See Minutes of Butere District Security and Intelligence Committee Summary No. 07/2007 for the Period Between 14th November and 24th December 2007.

[126] Exhibit 136 (c) (3).

[127] Above.

perceived to be sympathetic to PNU. The most affected towns were Kakamega, Mumias, Bungoma, Mbale, Lugari, Busia and Vihiga. The Provincial Commissioner, Mr Abdul Khalfan Mwasera,[128] noted in his evidence that during pre-election planning his team was mainly concerned about the violence erupting in the urban centres of Busia, Mumias and Kakamega as there had been pre-election tension.

The PC testified that post-election violence started in Mumias District on 27th December, 2008 following suspicion of ballot boxes having been hidden in the house of Joseph Mbacio Thiru, a businessman in Mumias town.[129] Members of the public proceeded to his premises, searched the house but found nothing. The public, composed of rowdy, stone wielding youths, chanting anti PNU slogans, began looting the house and in no time the rioters damaged his pick-up car and burnt down another one and set ablaze his house after emptying it of its contents.[130] According to the PC, the police managed to quell the disorder.

Tension and anxiety grew as the election results continued to trickle in. The Provincial Criminal Investigations Officer, Patrick Mugo Muhuni[131] told the Commission that on 28 December 2007 youths assembled into groups and run along the streets of Kakamega town shouting ODM party slogans and praising the ODM party Presidential candidate, every time the television stations announced results in which their Party or candidate had emerged victorious.

The Commission was told that the violence in Budalangi, Busia District, erupted on 29 December 2007 where it is alleged that armed supporters of the PNU candidate Raphael Wanjala shot one civilian in the area dead. This was followed by a retaliatory attack by supporters of the rival candidate, Ababu Namwamba, but police managed to control the latter's supporters and restore order. However, the patterns shifted on 30th December when it became obvious that the violence now targeted the property of the Kikuyu population, leading to

[128] CW No. 87.
[129] This incident is corroborated by KNHCR Report, Exhibit at p. 103 Para 426..
[130] See also Statement by JOSEPH MBACIO THIRU,CS 46.
[131] CW No. 89.

mass evictions. At Site and Service Scheme Plot No. 100, in Mumias, a group of rowdy youths invaded the home of Joel Ng'ang'a Wairire, and burnt two of vehicles before looting his house and setting it ablaze. They also gutted a supermarket he owned at Shibale market, and had his 35 acres of sugarcane and 5 acres of eucalyptus trees smothered.[132]

The road infrastructure in the province was affected as protesters burnt tyres on the roads and mounted illegal roadblocks. The major roads affected were Kisumu-Kakamega; Kakamega-Mumias; Kakamega-Eldoret. The road destined to Uganda was also greatly affected. The areas located near the Lugari/Uasin Gishu border were greatly and directly affected by the violence occurring in Uasin Gishu, hence when on 30th December, 2007, public transport at Kakamega-Turbo highway got paralysed with a large trench dug at Jua Kali in Turbo, the impact was felt in Lugari.

We were informed that Nambale recorded its first incident of violence on 27 December 2007. NARC candidate, a Mr. John Bunyasi (who was later arrested) was found with crude weapons in his car at a polling station. Earlier on, supporters of Bunyasi and those of his ODM rival clashed in Nambale's Urban Primary School polling centre, at which several people were injured.[133]

On the 27th December 2007, a pick-up vehicle belonging to a Mr. Taabu Joingo was burnt in Budalangi Constituency and pushed into River Nzoia following a mix-up of Budalangi parliamentary ballot papers with those of Bura in Tana River District. The vehicle was heading towards Bumadeya Primary School when the driver ran into a crowd supporting the main parties.[134]

In Kakamega North, a man was killed and another seriously injured when New Ford Kenya supporters and those of ODM clashed during a raid on the home of an ODM supporter.[135] According to information presented to the Commission by Edward Macharia Mukora, a victim of the violence and a resident of Mumias

[132] CS 46.
[133] Exhibit 136(c) (3).
[134] Exhibit 136(c) (3).
[135] Above.

Township before and during the period of the post-election violence, his property was looted and vandalized. Stanley Ng'ang'a Gathirwa, a resident of Mumias Township and a victim of the skirmishes, also stated that the police did very little to rescue and protect his property, which was broken into and looted. On 31st December, 2007 when his property was being consumed in flames, the police just stood by and watched as the arsonists went on.

The violence in Lugari took a different character in its organisation and target. Lugari is generally a settled area occupied by several ethnic groups among them the Luhya, Kalenjin and Kikuyu. Violence in Lugari was affected by events in the neighbouring Uasin Gishu District where the attackers targeted and burnt property of persons belonging to the Kikuyu community. It is alleged that the attackers were armed with pangas and arrows and used matches to burn grass-thatched house

According to the PC the violence that engulfed Western Province, *"*started on 27th [December 2007] in Mumias and then reached its climax on 31st [December 2007] and that was the end of our violence. The climax of this violence spread all over the province, most parts of the province except Bungoma North, Bungoma West and Bungoma East.*"*

The Commission received evidence of opportunistic attacks by the youth who engaged in wanton looting and destruction of property. One victim told us that youths took advantage of the situation. She testified that before the elections, she together with her parents used to live in Kefinco Estate in Kakamega town. They had received eviction notices through anonymous calls and reported the incidents to the police. However, she was told that due to insufficiency of personnel, she could not get any protection, and was advised to seek refuge at the premises near Mama Watoto Supermarket, owned by a Mr. Tharao. On 28 December 2007, at around 6 p.m. a group of young men numbering about twenty forced themselves into their compound and demanded keys to the house, claiming to have taken possession of it. She was ordered to leave as others shouted her father's name. She ran and took refuge at a house where local brew was being sold and overheard a group of patrons plotting a raid on their house,

ostensibly on the pretext that Kikuyus had unfairly acquired wealth at the expense of the members of the Luhya community. After the departure of the patrons, the lady host called the witness's mother, who herself was hiding in a friend's shop. Mother and daughter proceeded to take refuge in a hostel. On 28 December 2007, the hostel was raided and they fled to a home adjacent to theirs and owned by a person called Jeremiah. Before they reached, they were however identified by two men. They managed to get into the house, but soon thereafter, Jeremiah's house was also the subject of attack for the reason that he had hosted unwanted people.

Additionally, the Commission was told that the violence in other parts of the country had a direct impact on the entire region. On 31 January 2008 a group of youths blockaded the highway between Timboroa and Turbo Trading Centre, a general shortage of commodities was felt in the province as supply lines had been cut.[136]

Internally Displaced Persons

Most of the IDPs were members of the Kikuyu community and those sympathetic to PNU and its affiliate parties. An estimated 55, 862 people were displaced in Western Province. They sought refuge in police stations, schools, churches, district commission offices, district officers' offices, chief's offices and administration police camps. Initially, the IDPs were hosted in 32 temporary camps distributed among affected Districts-Kakamega North, Kakamega South, Butere, Lugari, Bungoma South, Teso, Hamisi, Emuhaya, Vihiga, Mumias and Busia.

The Mumias Special District Security Intelligence Summary No. 11/ 2008 for the period between 24/12/2007 and 2/1/2008 indicated that persons willing to relocate to safer destinations were escorted. The report also expressed concerns

[136] Minutes of Special DSIC Meeting held on 31stJanuary, 2008 in the District Commissioner's Office, Uasin Gishu District, Min 20/2008.

of real threat of attack on IDPS at the police stations, and recommended deployment of security personnel at the stations to beef up security.

1,916 Kenyans crossed the border and sought refuge in Uganda, 500 of whom were children. As at the time of receiving his testimony, 342 refugees who had been camping at Mulanda and Kiryandogo had come back to Kenya.

Displacement of persons typically flowed as a consequence of the post-election violence, and was characterised by movement of people to ethnically homogeneous areas to which they were linked either because of their community lineage or their ancestral homelands. The region also witnessed the influx of returnees from other parts of the country, most notably, Kericho, Nakuru and Naivasha. Most of these returnees were absorbed back into the families of the locals or their kin. Apart from facilitation of their transport to their ancestral homes, we were not informed of any intervention from the Government or from any of the agencies that were concerned with the welfare of the returnees, save for the testimony of PC who informed us that the Government had been distributing relief supplies to those IDPs who had assembled at the IDP camps.

Response by Police and Provincial Administration

The Provincial Commissioner testified that the security agents responded against charged mobs with restraint in a bid to reduce the number of casualties. He recounted how at Sigalagala in Kakamega South and Lutonyi in Kakamega Central the security officers used civilian vehicles to arrest youths who were harassing motorists on the highway.

However, there was ample evidence from the data gathered at hospitals and from the police to suggest that the police used excessive force, and in particular, firearms, in dealing with the demonstrations to control crowds which, in some cases, had turned violent. Information on casualties and deaths submitted by Dr. Caleb Olang'o Onudi, the Provincial Medical Officer, provides sufficient ground for an inference that deaths in Kakamega, Busia and Mumias occurred

as a result of injuries secondary to gunshots, or those as a result of assault by the police.

The records which were collected and collated from 9 major hospitals in the Province and harmonized with the figures from the police indicated that there were 98 died as a result of PEV in the Province as follows;

- Kakamega 31 deaths;
- Webuye, 21;
- Vihiga, 18;
- Mumias, 12;
- Busia, 9;
- Bungoma 7.

Post-mortems carried out on the 98 bodies revealed that 74 of them died of gunshots. Thus gunshot comprised 73% of all fatalities in the province. We were informed that inquest files in these matters have been opened but no further steps have been taken to investigate the killings. We find this state of affairs wholly unsatisfactory.

According to the Western PCIO Patrick Mugo Muhuni, as early as October 2007, Provincial Police Headquarters had formed a Committee to monitor all election-related events. The committee was expected to collect information from the eight police divisions and report to the Provincial Police Officer and other senior police officials, who would then evaluate and analyse the information before directing on the right cause of action. The security officers in the Province had been instructed to be on high alert for any possible disorder during the electioneering period. All the eight Officers Commanding Police Divisions in the Province were to conduct rehearsals on control of riots and generally, in maintaining law and order during the period. While the content of this training was not revealed to the Commission, the expectation was that it ought to have reflected in the manner in which the police handled the rioters.

The totality of evidence suggests that the police were overwhelmed and unreasonably resorted to the use of firearms. It further reveals insufficient manpower and facilities available to the police to counter the magnitude of demonstrations witnessed in the period after the elections. Information from the minutes of Butere District Security and Intelligence Committee Summary No. 07/2007 for the period between 14 November and 24 December 2007 indicated that adequate security measures had been put in place and the polling stations sufficiently policed. However, of concern was that with only a few days to the elections and in the light of the anxiety that had gripped the region, concrete plans were yet to be finalized with regard to fuelling and servicing of the vehicles to be used. This pointed to the insufficiency of vehicles to respond to any distress call during that period, hence making it easy to conduct demonstrations, looting and destruction of property.

The PC testified that the peace building and reconciliation campaigns spearheaded by the Provincial Administration in the province yielded quick results. As a result of the reconciliation efforts of the PSIC and DSICs, 26,861 households moved out of the temporary IDP camps, with some returning to their farms and others opting to stay with relatives and friends.

Additionally, Peace and Reconciliation Committees were set up in all districts comprising elders from the various communities, religious leaders and civil servants in Vihiga, Busia, Teso and Kakamega Central Districts. Workshops were also held on diverse dates to address the issues of hostilities at the onset of the conflict.

The Provincial Administration also established six temporary AP posts in Lugari to assist in the resettlement exercise.

Planning and Organisation

From the evidence, it appeared that the violence in Western Province was spontaneous, save for Lugari, which bore the hallmark of a planned and carefully organised onslaught against their victims and their property. The Commission received no evidence to suggest prior preparation for the violence

that rocked Busia, Bungoma and Mumias and takes the view that the violence in these areas was a direct result of disaffection with the final tally of the Presidential election results.

In the case of Lugari, an inference of planning is buttressed by the evidence that the attackers were under a central command. Additionally, the attacks came from one direction, off the neighbouring Uasin Gishu District. There was also some uniformity in the outfit of the attckers and the mode of attacks. The youths were clad in black balaclavas and had their faces painted in white and divided themselves into smaller groups once they entered a targeted area. However beyond this, we did not receive any credible evidence pointing to the culpability of any individual or group and we therefore recommend further investigations be conducted to establish who the perpetrators and executors of the violence were.

Conclusion

The Commission established that the violence experienced in Western Province was distinct from that experienced in other parts of the country in the sense that it was a direct consequence of political differences. These differences led to riots which were quelled by the law enforcement agencies thus resulting in a high number of deaths. From the totality of the evidence received by the Commission, the wave of violence, apart from Lugari, was spontaneous and directly flowed from disaffection with the final tally of the presidential results.

The evidence the Commission received reasonably supports an inference of planning in the case of Lugari However, the plotters, financiers and individuals engaged in whatever stage of the planning and execution process and where the attackers were trained, could not be identified from it, and remain obscure, hence the need for further investigation.

Nyanza Province

Introduction

"Luo Nyanza", as it is popularly known, neighbours Lake Victoria, one of the Great Lakes of Africa; the continent's largest lake, the largest tropical lake in the world, and the second widest fresh water lake in the world. It is the source of the longest branch of the River Nile and is a biological hotspot with great biodiversity which plays a vital role in supporting the millions of people living around its shores. While Nyanza Province is inhabited predominantly by the Luo, there are Bantu speaking tribes including the Kisii, Kuria and a few Luhya living in the province. The Province derives its name from the Sukuma, a Bantu-speaking tribe living on the Tanzanian side to whom the word *Nyanza* means a large mass of water. The provincial capital is Kisumu, Kenya's third largest city. The climate in the area is tropical and humid.

Nyanza Province consists of 21 Districts of which 11 are predominantly Luo and which are the subject of this part of the report. The main economic activities in the region are crop farming focusing mainly on sugarcane, tea, coffee and bananas, animal husbandry and fishing. Luo Nyanza has been politically active since pre-independence times and tends to vote as a block for its candidate of choice, especially since the re-introduction of multiparty politics in 1991.

Raila Odinga, a presidential candidate during the 2007 Election though a parliamentarian representing Nairobi's Langata constituency, has his roots in Bondo District and is the son of the late Jaramogi Oginga Odinga. The fact that Raila Odinga was the preferred candidate in the region and that the voters in the region believed that the results of the presidential elections had been rigged against him also contributed greatly to the wave of violence in Luo Nyanza that we shall shortly explore. As we shall see, Luo Nyanza rose up to protest what was seen as a rigged presidential election. Protestors thus suffered the brunt of police killings. Unlike in other parts of the country that were ravaged by violence

in the post election period, the majority of the deaths recorded in Luo Nyanza were as a result of shootings attributed to police.

Immediate Pre-Election and Election Period

Nyanza Province had been generally peaceful during the electoral period, although the ODM nominations were characterized by widespread violence. The Commission was informed by Grace Kaindi, former Nyanza Provincial Police Officer that as early as August 2007, reports of ethnic tension between the mainly Luo residents, who "unanimously" supported ODM, and non Luo residents, who were perceived to be sympathetic to PNU, had began filtering in to the authorities. They were sparked by an incident in Karatina in Central Province where the ODM presidential candidate Raila Odinga and his entourage had been unceremoniously thrown out of the Karatina Tourist Lodge (an establishment owned and run by an in-law of President Kibaki) in an incident that was widely reported in the media. In response, intelligence sources indicated that tension was building up in Rangwe, Siaya and Migori where ODM supporters vowed that politicians affiliated to NARC-K (PNU was yet to be formed) or any other party aligned to incumbent President Mwai Kibaki would face hostilities if they dared campaign in the ODM strongholds of Luo Nyanza. One such report indicated that a local ODM official had threatened to mobilize Homa Bay residents to evict the Kikuyu from the area should such an incident recur[137].

The Nyanza Provincial Commissioner informed the Commission that campaigns in Luo Nyanza were intense and the dominant ODM party was not keen to allow members from other political parties to campaign in the region. The Commission was told that from the month of October 2007, tension was heightened due to smear campaigns undertaken by rival politicians and that for instance in Rang

[137] Exhibit 97A

March, along the Kisii/Rongo border, some youth torched several sugarcane plantations belonging to both Kisii and Luo farmers. According to Ms.Kaindi,

> " *as the polling day approached, we continued to receive intelligence reports to the effect that some Luo youths in Kisumu had threatened to take unspecified action against the Kikuyu who had registered as voters in the area should they exhibit any form of support for or attempt to vote against ODM candidates".*

On his part, Simon Kiragu, the Kisumu OCPD, stated that he did not notice any tension and therefore apparently made no preparation in anticipation of violence:

> *"We experienced no problems during the campaigns. We did not anticipate any problems after the general elections. It took us by surprise when on [29th] December 2007 a riotous mob stormed the provincial works offices and burnt the main office block and nine Government of Kenya Vehicles. Another riotous mob stormed the KBC office and burnt five motor vehicles. By then the political temperatures were very high, people demanding for immediate release of the presidential election results by the chairman of the ECK[138]"*

The Nyanza Provincial Commissioner, Mr. Paul Poland Olando, stated that the Provincial Administration had put in place mechanisms to ensure peaceful campaigns and through the police had

> "*made preparations for effective management of the campaign calendar up to just before polling day and on 24th of Dec 2007, the Provincial security team met under my Chairmanship to make sure that plans were complete for effective management of the polling day and thereafter the District Commanders were equally instructed to do the same".*

We heard that the elections in the province including announcement of parliamentary results and presidential tallies were conducted in a generally peaceful manner and that when the Provincial Security and Intelligence Committee (PSIC) team met under the PC's chairmanship on 28 December 2007, they were satisfied that polling had been successful[139]. While voting was peaceful, the PC stated that the PSIC received intelligence from NSIS on 28th December 2007 predicting that there could be high levels of excitement if the results were in favour of ODM or protests if the results were not favourable.

[138] Exhibit 95A
[139] CW90

The NSIS had forwarded the information to the authroties for *"information and necessary action*" and the PSIC accordingly instructed all Provincial Police officers to mobilize the police to be alert and also made arrangements to ensure law and order was maintained.

Eruption of Violence

The Commission heard diametrically opposing views as to the catalyst of the violence in Luo Nyanza. The testimony of most Government witnesses can be summed up thus, that the authorities were suddenly confronted by of rampaging crowds and they had to restore law and order using all available means at their disposal. On the other hand a Catholic priest who testified before us expressed the view that "there were no indications of violence. As elections approached, more Police and security forces were deployed" and that the general feeling among the residents was that they had cast their votes peacefully and deserved an outcome amenable to their reasonable expectations namely a Raila Odinga win. The perceived delay to release the presidential results was therefore interpreted as a pointer towards rigging and the Luo community thus acted to pre-empt rigging but the police and the state machinery moved with recklessness and disregard to their lives in suppressing their freedom of expression during which serious crimes were perpetrated against the people fighting for recognition of their democratic rights.

These two discordant views were repeatedly enunciated by the authorities on one hand and the citizenry on the other. The priest told us that in his view, the demonstrations in Nyanza were peaceful but the police disrupted them leading to unnecessary violence. According to him, people went to the streets to demonstrate without violence or stone throwing but that police shootings provoked the residents who then turned violent as a way of expressing their displeasure with the police for using live ammunition. Throughout our hearings in Kisumu, we were confronted by these divergent views and we shall endeavour to distil the truth from those two extreme versions of events.

The Commission heard that the violence in Nyanza occurred in 3 distinct phases. The first was directly related to the context of elections and took place between 29 and 31 December 2007. It was characterized by demonstrations, riots, acrimony and discontent. The second phase occurred in the New Year and was reactionary apparently in protest against what was viewed as excessive use of force by police and also in response to calls for mass action by the ODM leadership which lasted until mid January 2008. The third phase was associated with two unrelated events, first the targeting of Luo by Kikuyu gangs in Nakuru and Naivasha leading to an influx of Luo IDPs from outside Nyanza and the murders, towards the end of January 2008, of two ODM politicians, Mr. Mugabe Were, MP for Embakasi and Mr. David Kimutai Too. Similar evidence was in fact tendered by the KNCHR in their report.

The Provincial Commissioner stated that while violence began on 29 December in Kisumu town, reports of violence were also received by the PSIC from Rachuonyo, Migori, Siaya, and Nyando districts. He informed us that most of this violence was particularly urban based and also concentrated along the highways in the Province. The PC added that there was a perception among the Luo community that the announcement of the presidential results had been delayed, which raised suspicion that the delay could lead to mixing up and rigging of the results.

The PSIC therefore instructed the provincial police officers to mobilize the security personnel to be on the ready, to ensure that officers who had been used on the polling day were available and that those who had been on leave were recalled. Pertinently, the PC stated that it was not possible to engage political leaders since at the time they were not on the ground. By 30 December 2007, we heard that many business people and families had moved out of Nyanza and virtually the whole of Luo Nyanza was engulfed in violence and security personnel had been deployed everywhere. Mr. Olando further told us,

> *"All government offices were closed, communication channels were not functioning, roads were blocked, telephone lines, land lines were*

dismantled. It was just practically impossible to assemble any people for any kind of discussion and as a security committee; we were concerned with bringing down the situation because you need to bring down the situation before you can go into discussions..."

One of the main targets of the violence was the Government on the perception that the polls had been rigged by Government agents and the feeling against the institution of government, government facilities, and Government personnel was extremely intense and hostile. According to the PC, it became difficult for Government officials to discharge their duty:

"My Lord, at that time it was practically difficult to engage the people in this Province about their perception because first of all, accessibility was difficult. Our main mode of conduct with the people which is public barazas was not possible, was not functioning, the people could not turn up and so it would have been difficult at that point, My Lord, the results have just been announced, people are taking great exception...The leaders are not there, you want to bring them together and according to them, you are the personification of the Government in the area, My Lord, it was difficult."

While the PC regretted the loss of life and property especially in Kisumu, we were surprised when he told us that there had been no indication there would be violence of the magnitude that arose after 29 December 2007. There was intelligence which he acknowledged to have received from the NSIS had already been made available to him indicating the possibility of an explosion of violence. Evidence was received that the Nyanza PSIC sought reinforcements because the magnitude of the violence and the time it was taking to suppress it had exerted fatigue on police officers. Further, as a result of the violence many idle youth resorted to criminal activities and at one point in time, the rioters and hooligans overwhelmed the security officers.

In spite of the security forces being stretched, the PC emphatically stated that there were no foreign soldiers called in to assist and that indeed there never was need to bring in foreign assistance to Nyanza. This was confirmed by the Kisumu OCPD, Mr. Simon Kiragu. The perception of there being foreign soldiers according to the PC and OCPD resulted from the deployment of the Rapid Deployment Unit (RDU), a unit within the Administration Police whose unique

uniforms and gear (red helmets with an upper green coats both back and front) the area residents were not accustomed to, doubting instead that these were indeed Kenyan police officers. We established that the rumours about the presence of foreign soldiers in the country were unfounded; instead it was the appearance of the Rapid Deployment Unit of the AP whose uniform the local population had not hitherto seen and thus wrongly tionally assumed to be detachments of Uganda's People Defense Force (UPDF).

The PC was of the view that the magnitude of violence that erupted after the disputed elections pointed to the need for Government to consider preparedness for large disasters that may occur in future.

Kisumu

Mr. Simon Kiragu, the Kisumu OCPD told the Commission that on 29 December 2007 a mob stormed the Public Works office, burning the main block and nine GK vehicles. Another group attacked the Kenya Broadcasting Cooperation (KBC) office and burnt five motor vehicles as tensions rose over awaited presidential election results prompting the police to move in and disperse the crowds using teargas. In the course of this violence, the Grand Kimwa Hotel was attacked. The next day, on December 30th, violence erupted again in the entire city of Kisumu. More than 4,000 people converged at Kondele market as early as 8.00 a.m demanding the immediate release of national presidential results while disturbances also erupted in other parts of the town with riotous mobs vandalizing and looting from shops perceived to belong to people who were "non-indigenous". Mr. Kiragu informed the Commission that riots then spread to Kondele, Nyalenda, Otongolo, Nyamasaria and Manyatta. The rioters were initially dispersed but they regrouped and violently stormed into the center of the city where they engaged in vandalism and looting of property. On the same day 7 people were burnt to death inside Minoki Building when there was massive looting within the town.

Mr. Kiragu's evidence concurs with the PC's testimony that from 30 December 2007, violence would start during the day and the rioting mobs would retreat at night and assemble the following day to start again. According to the PC, Kisumu City was targeted from three directions where the rioting mobs blocked the main entry points to the city: Kisumu-Nairobi highway at Karoki; Kisumu-Kakamega at Kondele; and Kisumu-Busia at the railway junction. Violence was then directed to Kondele area and the other outskirts of Kisumu.

The violence then assumed an ethnic dimension where it was targeted at residential buildings, commercial buildings, business centres and enterprises particularly belonging to the Kikuyu and Meru and later the Kamba and Kisii communities. Similar evidence was also given by KNCHR. The burning and looting of business premises belonging to some non-Luo individuals and also companies that were deemed as foreign affected Crater Auto Motors, Minoki House, Ramgharia Singh Rabha, Ukwala Supermarket, Imani Cycle Hardware, Bata shoe shops, Alpha House, Gamorager Singh Server, Imani Cycle Hardware, East African Cables Stockist, Njari Enterprises, Allkohols, Brontex House and the ground floor of Swan Center.[140]

By 30 December 2007, with presidential results yet to be announced the Government, according to Father Charles Oloo K' Ochiel of the Catholic Peace and Justice Commission, became a target for ventilation of public anger since

> " *the people felt that the only language that they could speak was by acting against the system that did not address their plight, their kind of suffering, their kind of pain and I would say that it is not that the people were prepared to destroy any Government institutions but I think they were reacting to the excessive force used by the police and the GSU*"

[140] Exhibit 95B

There were attempts to immobilize Government operations through the digging of trenches and barricading of roads, burning and overturning of Government vehicles. The Commission heard that rioters invaded the water company's offices where they looted, set ablaze the main office and burnt 17 motor vehicles and one motor cycle. Police managed to disperse the rioters before they could set the entire building on fire.

The Commission heard that the police kept chasing the crowds and using tear gas until they eventually realized they could not contain them without using live fire, and Mr. Kiragu took the decision that live ammunition was to be used:

> *"This is the time we now decided to use live fire to ensure that buildings do not continue being burnt and by so doing, we managed to chase the rioters out of the town and they retreated to the estates..."*

The PC stated that instructions to the Administration Police were channelled from Nairobi through him and in the course of 30 December, a GSU platoon, 50 regular police and 50 officers from the Rapid Deployment Unit (RDU) of the Administration Police were jointly deployed under the command of the OCPD Mr. Simon Kiragu, bringing his total manpower to more than 300 security personnel supported by ten vehicles. The RDU and GSU were assigned specific sectors to cover and worked independently while the Administration Police officers were put together with the regular police. After the lessons of the previous day's running battles and the difficulty of controlling the huge crowds, the OCPD embarked on a deployment pattern which would lock the people from entering the main city and containing them within the slum estates of Nyalenda, Manyatta, Nyamasaria, Kondele, Mamboleo, Otongolo, Bandani and Kanyakuor.

In order to ensure that the crowds did not enter the central business district, the OCPD placed "lock-ups" to prevent people from passing and going on into the town center at various entry points, including Obunga next to Kenya Breweries depot, Busia road at the railway crossing to contain the people from Bandani and Otongolo and at the Railway station. Other lockups were placed at Swan

centre (which was targeted and burnt by rioting mobs on December 29th), Kamasi, Makasembo Road, Meru, the main bus stop, Kashok Junction, Tuskys Supermarket, Kibuye and at Kondele city clock. According to the OCPD, ten vehicles supported the lockups and patrolled the roads within the estates to monitor the situation.

In the meantime, the roads heading to Kakamega, Busia and Nairobi were heavily barricaded by rioters who used big rocks, posts and burning tyres which made it difficult for anybody to pass through unless under police escort. Mr. Kiragu stated that the orders on the use of lethal force remained applicable. On 30 December, Mr. Kiragu informed the Commission that over 1,000 rioters armed with pangas and rungus forced their way into the Lake Basin Authority offices within Migosi area near Kondele where they stole unknown quantities of rice, beans and maize. Police were forced to use live ammunition so that these stores could be protected from being burned and 3 rioters were shot dead.

Later, more than 3,000 rioters attempted to storm Mega City Supermarket where they burnt a Kenol petrol station located along Nairobi Road while also attempting to storm the offices of the water company but were dispersed by officers under the OCPD's command using live ammunition and though none died at the scene several were believed to have been wounded by the bullets. Mr. Kiragu further stated that some victims of the above shootings were shot accidentally by stray bullets and killed while in the safety of their houses. Kisumu Central Police Station recorded 38 cases of shooting, Kondele Police Station 20 while 6 cases were from outside Kisumu municipality. Several of the victims had multiple gunshot wounds. The appropriateness or otherwise of the police tactics are dealt with at length in volume 2 of this report.

According to Mr. Kiragu, Kisumu experienced the worst violence on 31 December 2007 which was of extremely high magnitude and 25 rioters were consequently shot dead by police. The witness described the mobs as being "very aggressive", charging towards police officers and stoning police vehicles and police officers.

This, he said, prompted the police to use live ammunition to disperse the rioters and to make sure that the roads were passable:

> *"This included ensuring that the fuel meant for Uganda…had to pass through the Busia road which was heavily barricaded with burning tyres, posts and even sometimes shells of motor vehicles. The Government of Kenya was also under pressure to ensure that fuel meant for Uganda reaches the destination safely…it was very difficult for us."*

Part of the Kenya Uganda railway within the town was also uprooted. Mr. Kiragu stated that at the time and while the police had anticipated a scenario of celebration which could have turned violent, the crowds which engaged the police in running battles from street to street were so huge such that the police were overwhelmed. It was the OCPD's testimony that the situation did not ease and riots continued on a daily basis from 31 December with mobs retreating each evening and re-converging on the following day which became a daily routine only ebbing on 21 January 2008 when an Ecumenical prayer meeting was held in Kisumu city stadium where religious and political leaders appealed for peace. With the mediation talks proceeding in Nairobi, calm was slowly returning to Kisumu and the situation only subsided after the National Accord was signed. In total, police acknowledged having shot dead 48 people in Kisumu though Father K' Ochiel took the view that the number of alleged police shootings were under-reported. We agree with that assessment since the Commission received reports and post mortems confirming that at least 69 people were shot dead in Kisumu in this period. Mr. Kiragu informed the Commission that police had arrested and charged a total of 98 suspects.

Homa Bay

Mr. Jimmy Munene a Senior Superintendent of police in charge of Homa Bay divisional police headquarters stated that prior to elections; he had received a total of 50 new officers from a total of 78. He stated that violence in Homa Bay commenced on 29th December, 2007 at 6.00 p.m. and took the police by surprise. The confrontation between the rioters and the police which marked the

onset of conflict that was to rock this part of Luo Nyanza lasted more than a month. On this day, the protesters were dispersed using tear gas though the OCPD admitted receiving information that one person, Samuel Otieno Okungu, was shot dead by police at Shauri Moyo Estate[141].

The OCPD stated that on 30th December, 2007 he deployed all his available officers to all vital places- the Bank, Hospitals, Cereal Board, Water Sections, petrol stations and two supermarkets within the town. That notwithstanding, violence erupted in all corners of the town, with a crowd of more than 5,000 people barricading roads, looting and vandalizing business premises owned by Kikuyu, Kisii and Kamba. After announcement of the presidential election result, rioters stormed the Divisional offices and burned the main office block, 3 GK vehicles and a motor cycle. Another mob stormed the fisheries' offices where they burned three vehicles and the main office and one person was reportedly killed.

All available 300 regular police officers also drawn from the rural areas and prison warders from Homa Bay Prison were deployed within the town centre where violence was concentrated with a view to securing the main town from total destruction. The Commission was told that violence continued in the town virtually each and every day until the National Accord was signed in late February 2008.

The witness further stated that he had instructed all the officers not to use live ammunition and at first only tear gas was used but once the situation deteriorated, police were forced to use live ammunition to scare the mobs though the instructions remained that the officers were not to shoot at people but in the

[141] On the same day the OCPD acknowledged having received similar reports that one Kennedy Otieno Odoyo had also been shot at the pelvic area and had died at Shauri Yako estate while Wycliffe Ochieng Olela was found lying dead along the Rangwe – Oyugis road with gun shot wounds in the abdomen.

air. In spite of these instructions 3 deaths were reported as a result of gunshot wounds and Mr. Munene agreed that his orders were disobeyed.

Migori / Rongo

On his part, Mr. Edward Mwamburi the Senior Superintendent of Police in charge of Migori – Rongo police divisions stated that he was involved in pre election security arrangements from August 2007. He said he was required to provide 2 police officers each to a total of some 1,238 polling stations within his division for the polling day on 27th December 2007. Since he only had at his disposal 174 police officers, he requested for additional reinforcements and received some 400 National Youth Service men and women from Nairobi, 204 Administration policemen from Migori and Rongo Districts, 122 Prison Warders from Migori GK Prison and 8 forest guards from the District Forest Office who were all appointed special police officers in accordance with the powers conferred on the Commissioner of Police; which gave him a total of 1,274 police officers.

It was his testimony that he had prepared an operation order with regard to some precautionary measures in anticipation of what could happen after the elections mainly involving guarding of vital installations such as Hospitals, Banks and Commercial undertakings within Migori District. After peaceful polling and receipt of results, he stated that the 29th of December 2007 brought a rude shock with a huge crowd of people descending first on the Migori-Isebania-Kisii Highway and then on Migori Township chanting ODM slogans. The Commission heard that this crowd swelled within a short time and started looting within the shopping center. The police tried to use teargas but the crowds would not relent and that around the same time, similar events were taking place in Awendo and Rongo Districts. Since tear gas was not effective, Mr. Mwamburi stated that he issued an order for the officers to use firearms[142].

[142] The Operation order directed that first, officers were to use teargas and if that was not effective, then they were to switch on to the rubber balls and later on if there was real danger to loss of property and life, then would proceed to use firearms.

While the OCPD had anticipated dealing with lawful demonstrations he was shocked once the initially peaceful demonstrators numbering about 4,000 attempted to move to the Migori Prison. Some in the crowd were carrying sticks, pangas and stones and Mr. Mwamburi decided he would not let them reach the GK Prison in Migori upon which he intervened. As the violence progressed, he stated that he found it absolutely necessary to use live ammunition to fire in the air if only to scare the demonstrators whose magnitude threatened to overwhelm the 300 officers at his disposal. In his view, the situation was so unusual that a baton charge was inapplicable since the crowd was almost overwhelming the police and some fatalities eventually resulted when live fire was used.

The Commission heard that this first demonstration triggered off a series of demonstrations from 29 December onwards including the barricading of the Migori/Awendo/Rongo/Kisii Highway which is a major gateway to the Tanzanian border town of Isebania. According to the OCPD,

> *"My Lords, they kept on going every day and barricading the road everyday and whenever we made some moves to remove the stones, the place that we had cleared, when we go to the other direction on coming back those stones were back in place if not more than the initial ones that were placed on the roads"*

Mr. Mwamburi informed the Commission that 11 people were killed[143] in the process of quelling these riots. A total of 612 IDPs, majority of them business people in the area, camping in police stations were threatened with attack by the locals and a decision to move them to Nakuru was taken after mobs attempted to invade Kamagambo Police Station with this intention. The Commission heard that a police officer was killed at Sori in Karongo division by mobs who perceived

[143] According to Mr. Mwamburi, some of the bodies were collected from the hospital and buried by relatives secretly without notice.

him to be from a particular tribe. A total of 62 people, mainly youth, were arrested but most were released except for 18 who were arraigned in Court.

On 3 January 2008, at St. Camilla's patrol base, demonstrators attacked police officers and snatched a G3 rifle from one of the officers who was injured. The firearm was recovered 5 days afterwards without the ammunition. Further, four police officers were injured during the period of the violence. Mr. Mwamburi told us that he was transferred to another station on 4th February 2008.

Impact of the Violence

We heard from the Nyanza PC that by 11th February 2008, 102 people were reported dead and 685 people injured in the province while 40,000 non-Luos had exited the province. 9 government offices, 73 business premises and 415 residential houses were looted or burnt across the Province. 50 government vehicles were destroyed, 16 public service vehicles damaged mainly on the roads or where they had been parked and another 16 vehicles were damaged[144]. 2,886 people sought refuge as IDPs within the town. The Commission heard that the province received 126,821 returnees from outside Nyanza because they had been ejected from other provinces or they feared continuing to stay in those places most of who were taken in by friends and relatives or hired places to stay within the province.

The PC did not dispute the fact that a large percentage of the people who lost their lives did so through gun shots and/ or bullet wounds which was confirmed by the Provincial Medical Officer of Health Dr. Jackson Kioko who gave evidence that 90% of the deaths in New Nyanza General Hospital were from gun shots. We further heard that three security personnel were killed in the course of suppressing the violence.

[144] The majority of these vehicles were destroyed in Kisumu, Rachuonyo, Migori and Homa Bay Districts.

Dr. Jackson Kioko stated that though the Province had put in place systems in the health facilities for disaster preparedness, they had not anticipated violence of the magnitude that occurred in the post-election period. He also provided a breakdown of casualties from the various districts[145]. According to him, the total number of deaths recorded at the New Nyanza Provincial General Hospital was 64 while another 53 bodies were brought in from outside the hospital. He further stated that 129 people bearing gunshot wounds were brought in. However, in the Masaba Borabu area, he stated that most of the casualties received bore lodged arrow heads and were referred to Kisii. Doctor Kioko therefore acknowledged that medical facilities in Nyanza were overstretched and overwhelmed during this period and the number of cases that needed attention was such that there was not sufficient human resources to attend to the cases forcing surgeons to spend hours on end in theatres, *"because in some situations we had only one theatre and one operation was taking close to twelve hours…"*

He further presented statistics containing data from 33 public health institutions in the province but did not include data from over 200 private health facilities in the province clarifying that his records may not have been very reliable during the period of post election violence as record keeping in public health institutions was not conclusive and as such statistics given to the Commission may not represent the complete picture. We can nevertheless summarize his presentation as follows;

District Hospital	Casualties received	Gunshot Injuries	No of Deaths
Gucha	7	2	
Homa Bay	27	35	6
Rongo	21	3	-
Nyamira	29		-
Nyando	55	30	3

[145] The Doctor stated that Kisii General Hospital treated patients brought in from neighbouring districts while Migori District Hospital recorded a total of 19 deaths and 28 gun shot victims

District Hospital	Casualties received	Gunshot Injuries	No of Deaths
Kisumu	47	-	
Siaya	-	6	10
Rachuonyo	18	3	-
Kisii	58	12	6
Bondo	12	9	-
Masaba-Borabu	63		6
Suba	6	6	1
Provincial Gen. Hospital-Kisumu	256	71	64
Migori	47	28	1

The Commission was told by Dr. Margaret Oduor, a pathologist based at the Kisumu Provincial and General Hospital, that 56 bodies and 8 body parts were taken to the Nyanza Provincial General Hospital out of which 50 bodies had indications on the cause of death as gunshot wounds. 53 out of the 56 bodies were male, 3 were female while 3 were of children aged less than 14 years. Out of the 56 bodies, 50 were Luo. According to Dr. Oduor 53.6 % of the gunshot casualties had been shot from the back pointing to the inference that police shot people who were already in flight and not with an aim to immobilize but for purposes of killing and maiming. After examining the bodies she was able to recover 5 bullets.

Mr. Isaac Okero, a representative of the West Kenya Law Society, stated that his organisation was galvanized into action sometime in mid January 2008 following the killing of one George William Onyango whose shooting was broadcast on the KTN news. Following that event and the police reaction through Police spokesman Eric Kiraithe suggesting that this incident was a concoction, they contacted the deceased family members' and facilitated media access to highlight that this incident was not a 'movie' as alleged by police.

The Society furnished evidence comprising of depositions from affected members and informed us that there was a marked reluctance from victims to come forward and tell their stories. They attributed this to a very strong suspicion against law enforcement agencies and the justice system. The Society further

noted apathy from many victims who did not feel confident that recording statements would result in any justice. Further, victims especially of sexual violence were too fearful to seek the help of the police because not only were the police otherwise engaged but also due to a feeling of discomfort filing complaints with the institutions that they felt were associated with the perpetrators of the violence.

Among the depositions presented by the Society were some highlighting the crimes perpetrated by gangs of youths who were taking advantage of the lawlessness that prevailed. Other depositions related to attacks characterized by ethnic identification of the victims in various locales in Central and Rift Valley provinces. Mr. Okero indicted Government institutions charged with maintaining internal security for the failure to contain the post-election violence in Kisumu, *"*Well, more I think could have been done to arrest the escalation of violence at that time. There seemed to have been other priorities that they seemed keen to be engaged rather than to stop the violence and to protect those who are exposed to violence*"*.

Notwithstanding the police version of events that they were confronted by violent mobs prompting them to use live fire, Gregory Onyuro Ngoche testified that he was shot outside his home and that when he went to report the issue, the police officer on duty declined to record the incident at first on account of the complaint being a gunshot wound. A senior police officer however intervened and authorized the officer on duty at the report desk to take and record that information. Similarly, Alice Atieno, a former security guard, was shot in the head after arriving home from her place of work. She had as a result lost hearing and sight on the left side and was unable to eat save for liquids[146].

[146] In spite of a pledge by Government that all post election violence related cases would receive free medical attention, this witness stated that she had been unable to access treatment at Kenyatta National Hospital due to the cost involved and which she was not able to afford.

It would appear to us that the indiscriminate use of live ammunition by police by design or default targeted vital organs, for instance John Opiyo Ondiek a security officer with the Kisumu Municipal Council at Kibuye Market informed the Commission that he was shot by police from behind at his place of work sustaining injuries on his private parts. It would also appear that little or no effort was made at all to use non lethal means in riot control. Live ammunition was used indiscriminately to disperse peaceful crowds and /or demonstrators armed only with crude weapons. As described by Father K'Ochiel,

> *"The situation was terrible. Whichever place I passed through there were bodies and you could see the police everywhere and a lot of people and chasing of people by police, shooting there was looting going on.*[147]*"*

Ms. Grace Kaindi the former Nyanza PPO stated that the security forces were overwhelmed and that is why they sought reinforcements. Though many Government witnesses did not mention the use of live ammunition and where they did they pointed out that gunfire was used with the intention of scaring rowdy mobs bent on looting, the catastrophic humanitarian effects of this type of crowd dispersal tactics speaks volumes for itself and is a pointer to the dysfunction within the police.

Response by Police and Provincial Administration

The Nyanza PC informed us that once the violence erupted, the PSIC issued instructions to District commanders to stop the violence but the guidelines on how this was to be achieved was left to the individual commanders to manage the security situation. To sum up the view of the police and provincial administration, they were under a duty to maintain law and order and to protect life and property and as such, the rioting mobs had to be kept at bay and the vandalism they orchestrated from the 29th December 2007 had to be contained using all legal means available.

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[147] Exhibit 101 A

When the Kisumu OCPD was asked whether he had issued warnings before using live ammunition, he answered that the situation was so chaotic and the circumstances could not allow such a procedure and further, the situation was neither conducive to issuing any warnings neither would anybody in his view have abided by such proclamations. In such circumstances, he considered that the law allowed police to obviate the need for issuing a proclamation and proceed to use lethal force without even attempting a baton charge which he deemed to be impossible:

> *"People in thousands trooped in the town in the morning engaged in looting, breaking people's premises…we were trying to chase them using tear gas until when they became chaotic and started burning buildings, that is the time we decided that we should use any lethal fire…"*

Allegations were made before the Commission that the police had been responsible for burning some of the buildings recorded to have been burnt through the indiscriminate use of live ammunition and tear gas that could have come into contact with inflammable material in some of these buildings. But this was denied by the OCPD Kisumu who was categorical that neither the use of tear gas nor live ammunition could have been a possible cause of a fire in the event that they landed on inflammable matter. He did, however, concede that there were inflammable substances in Ukwala Supermarket which were exploding when the building was burning.

The Commission noted that most police officers had to work 10-12-hour shifts in particularly very difficult circumstances which tested their quality, training, discipline, experience and ability in what were clearly very difficult operations. Though Mr Kiragu agreed that where there was no threat to life-either of citizens or police officers by rioting mobs-or a threat to property, then there was no justification for using firearms, it is difficult to explain why over half of the gunshot casualties had wounds from the back which suggests to us that they were in flight and could not in such circumstances be construed as presenting any tangible threat.

CHAPTER FIVE

Violence in Nairobi, Central and Coast Provinces

Nairobi

Introduction

The City of Nairobi has through the years provided the barometer for Kenya's volatile politics from colonial times to the present. It began as a temporary camp at the turn of the twentieth century upon a chance decision by George Whitehouse the engineer in charge of construction of the Uganda Railway who chose this location as the springboard for embarking on the challenging phase of laying the railway tracks across the Rift Valley. This temporary camp-the most unlikely of locations- by default became Kenya's capital city and a commercial hub for the East and Horn of Africa region.

The city which currently covers 684 square kilometres is divided into four districts- Nairobi North, Nairobi West, Nairobi South and Nairobi East with the main administrative divisions being Central, Dagoretti, Embakasi, Kasarani, Kibera, Makadara, Pumwani and Westlands. Nearly 2 million of Nairobi's residents (estimates put Nairobi's population at somewhere between 4-6 million[148]) live in low income residential neighbourhoods and informal settlements like Kibera, Mathare, Dandora, Huruma, Korogocho, Kariobangi, Kangemi and Mukuru where crime and daily violence- including extortion, murder, illegal taxation and rape- has become something that ordinary citizens living here have had to live with.

[148] The total number of registered voters in Nairobi's 8 constituencies during the 2007 Elections was 1,275,021 (Source is Electoral Commission of Kenya voter registration figures)

The above areas which feature extremely high population densities and yet occupy less than one fifth of Nairobi's geographic area are of great significance to the city's politics and as we shall see, the ethnic differentiation in various quarters would become a defining feature of the character of violence in the post election period. Due to the neglect of most of these areas by the Central Government and the Nairobi City Council, organized criminal gangs have come in to fill the void left by the absence of the State and attendant services. Election contests are to a large extent influenced by these outfits whose members are available for hire by powerful political actors as instruments of intimidation against opponents. It is not surprising therefore that the NSIS in its security briefing of 24th December 2007 noted that all of Nairobi's 8 constituencies were potential flashpoints due to the fact that the stakes in the 2007 General Elections were extremely high and some politicians had consequently enlisted the support of multiple gangs like Mungiki to intimidate opponents.[149]

Mungiki (a largely Kikuyu gang active in almost all of Nairobi's informal settlements), Siafu, Bukhungu and Jeshi la Darajani (active in various neighbourhoods of Kibera) and the Taleban (a Luo gang based in Mathare) had before the elections, gradually taken over and were administering parts of the city's informal settlements where they created extreme fear. They argue that they maintain security where the State has failed and in this way levy fees thus dominating the population through the intentional use of terror as a means and strategy to instill fear in the society, control matatu (public transport) routes, changa'a (an illicit alcoholic beverage) brewing, sanitation facilities, water and electricity supply, extract protection money from businesses and other extortionist activities.[150]

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[149] For example, in a briefing dated 5th February 2008 NSIS had observed that some parliamentary losers in Nairobi had allegedly funded Mungiki to eliminate parliamentarians.

[150] "Who Are The Mungiki?", presentation to the Commission, Exhibit 27A

As noted in evidence produced by the KNCHR, the above dynamics, tribal loyalties and the ethnic mix of politics in the city's poor neighbourhoods strongly contributed to the pattern of violence that Nairobi witnessed.

The rent disputes between mostly Kikuyu landlords and largely non-Kikuyu tenants are among the most serious underlying causes of ethnic conflicts in the poor neighbourhoods of Nairobi.

The Immediate Pre-Election Environment

The situation report dated 19th October 2007 showed that Kikuyu landlords in Mathare and Kayole had issued eviction notices to Luo tenants under the pretext of renovating their houses. According to NSIS, the landlords feared that the tenants could become uncooperative if the ODM presidential aspirant Raila Odinga won since he had reportedly promised that an ODM Government would regulate house rents. NSIS correctly pointed out that this issue was likely to foment ethnic tension in the area and undermine security in the post-election period. This alone should have forewarned police to make arrangements to prevent commission of crimes and maintain law and order in Mathare, which as we shall see later was never done.

Similar suspicion and acrimony among Kikuyu landlords on the one hand and Luo and Luhya tenants on the other was also reported in Kibera, Kawangware, Dandora and Pipeline Estate in Embakasi where tenants were likewise issued with quit notices out of fear from the landlords that the tenants would gang up and refuse to pay rent[151]. Further, talks of possible plans to rig the outcome of the election in Langata constituency against Raila Odinga, the area MP, had created anxiety and NSIS advised that the slightest suspicion towards that end would trigger unparalleled violence.

[151] NSIS security briefing for the week ending 3rd December 2007

The Post Election Violence in Nairobi

Witnesses who spoke to Commission investigators narrated how the violence started in Kibera, Mathare, Dandora, Kariobangi and Kawangware upon announcement of the Presidential results and the subsequent swearing in of President Kibaki on 30th December 2007. From information gathered, violence in Nairobi occurred in 3 major phases; the first immediately after the announcement of the Presidential election results on 30th December which continued into the New Year as police prevented ODM supporters from holding a "million people" march to Uhuru Park within Nairobi's Central Business District to protest what ODM and its supporters believed was a stolen election victory; the second wave of violence followed the announcement of a partial cabinet by President Kibaki and appointment of the ODM-Kenya presidential candidate Hon. Kalonzo Musyoka as Vice President on 9 January 2008 and the third phase occurred upon the killing of the late Embakasi MP-Hon Melitus Mugabe Were on 29th January 2008 in Nairobi's Woodley Estate.

The Commission received evidence from many witnesses who suffered terribly during the violence both in terms of their own ordeals and in dealing with the devastating consequences especially the deaths of family members, trauma, and stress for families, displacement from their homes, the loss of income, businesses and property as well as coming to terms with living within IDP camps. Sexual and other forms of gender-based violence (SGBV) encompassing a wide range of human rights violations in the chaos of the post election period reached epidemic proportions in Nairobi and this area proved the most problematic in terms of determining the extent of violations. These issues are discussed at length elsewhere in this report. It is enough for now to note here that the sexual violence experienced demands immediate responses through the provision of more effective physical protection especially in the poorer environs of Nairobi where women and children were and continue to be most at risk.

A common thread in many of the accounts of the post election violence that we heard is the wanton destruction of property and the severe effect arson has had on people's lives. For instance, a witness narrated to the Commission investigators how she was forced to move from her house in Mathare 4A by a gang of Luo men who were evicting Kikuyu on the night of 30th December 2007 and she was forced to take refuge at the Mathare/Huruma's Chief's Camp. When she went to check on her property the next day, she found that all her belongings had been stolen and another person had already occupied her house which she had obtained through the Amani Housing Trust Mathare 4A Development Program. Another witness informed the Commission investigators that on 29th December 2007, gangs of Luo youth went around the Mathare 4A area yelling that Kikuyu must leave and fearing for her own and her family's safety they fled the next morning leaving all possessions behind during which many houses were set ablaze. She sought refuge at the Eastleigh Air Force Base and when she went back to her house on 3rd January 2008, she found that it had been razed to the ground.

A yong man from Mathare 4A told our investigators how two of his relatives were killed on 30th December 2007 in Dandora by gangs of Kikuyu (Mungiki) youth who were moving from door to door flushing out and killing non-Kikuyu. He stated that in Huruma where he moved to, rival zones were created where one zone dubbed Othaya had pro-PNU Kikuyus while two other zones housed pro ODM Luo and Luhyas with each area being a no go zone for the opposing tribes.

Information made available to the Commission indicates that initial violence in Nairobi appeared to target the Kikuyu in areas where they were a minority and they in turn organized attacks in areas where they were a majority. We noted one insidious form of violence that was visited on members of the Luo community, the forced circumcision reportedly attributed to members of the Mungiki Sect. Dr Jotham Micheni confirmed that Kenyatta National Hospital attended to 2 such cases of forced or traumatic circumcision. Evidence was received from a Luo lady who was raped in Huruma by a gang of 10 men on 29 December 2007 who told her they were looking for ODM people who were giving

the Government trouble and that they wanted to circumcise them. After being violated she was forced to watch as the hooded men cut off her husband's penis with a panga (see chapter 6 on gender and sexual violence). According to evidence from KNCHR, on 1 January 2008 a 15 year old Luo boy was forcibly circumcised during fighting at Kiamaiko. On 21 January 2008, eight Luo men had their genitals chopped off and even young boys, some as young as 11 and 5 years, had their genitalia cut with blunt objects such as broken glass.[152]

As we have seen at the beginning of this chapter, Nairobi's informal settlement areas are balkanized largely along tribal lines and specific ethnic groups are dominant in specific areas within the slums. We received information from KNCHR that in Kibera for instance, the Luo are the majority in Kianda, Raila village, Gatwikira and Kisumu Ndogo areas; Makina is mainly populated by Nubians while Laini Saba and Soweto are dominated by Kikuyus. Luhyas dominate in Mashimoni and Lindi areas. We were able to establish some of these facts during our site visit to Kibera on 11th July 2008.

Once the violence broke out, looting, destruction of property and arson became rampant forcing people to move to the "ethnic enclaves" they perceived as safe as tribally aligned gangs took over and exercised total control. Toi Market in Makina area which prior to elections had housed over 3,000 traders was burnt down. During our site visit to Kibera we were informed by local residents and community organizers that this market provided employment to perhaps a similar number of people while thousands of suppliers depended on it for livelihood not to mention the tens of thousand of customers it served.

The violence was also characterized by forceful displacement and evictions while areas such as Dandora and Mathare North saw deep seated rent disputes escalating to violence. As earlier explained, there was a perception that landlords (mainly Kikuyu) over-charged in rent and discriminated tenancy on ethnic lines which brought an expectation among ODM supporters of rent reduction if ODM

[152] Exhibit 125, paragraph 128

won. Some tenants therefore took the opportunity provided by the catechism of post election chaos to evict landlords and started charging reduced rents while a new round of violence ensued when the owners hired gangs to reclaim their property[153].

Information was provided by the NSIS security briefing dated 21st February 2008 that tension was high between the Kikuyu and the Luo residing in Mathare following a police operation to evict people who had illegally occupied other peoples' houses. The briefing went on to state that Luo youth were preparing to resist future attempts to evict them and threatened to blow up such buildings. In this state of affairs, the NSIS noted that the Mungiki had "taken advantage to settle their differences with the Taliban largely composed of Luo and thus violent confrontations were predicted to continue with devastating effects". NSIS further noted that Mungiki adherents were assembling at Lucky Summer Quarry, Gituamba, Gitare Marigo and Dandora Dumpsite in preparation to attack residents of Babadogo, Glue Collar, Kariadudu, Mugure and Kasabuni areas.[154] Other areas that NSIS received intelligence as being targets for Mungiki attacks were Mathare North, Kariadudu and Ngomongo where the objective was to evict those who had forcefully occupied houses and refused to pay rent. Incidentally, an NSIS briefing after the violence broke out points out that jailed Mungiki sect leader Maina Njenga warned Mungiki members against being misused by politicians in response to their being hired in Mathare, Kariobangi, Kibera and Huruma to cause terror[155]

Noting that NSIS had forewarned on the potential conflict that was set to be sparked by the rent disputes prior to elections, we fail to see why the police did not take measures to prevent this from happening. The chaos in these informal settlements could have been avoided if the police had taken contingency measures as advised by NSIS and this attitude of indifference to the plight of

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[153] Exhibit 125

[154] NSIS Security briefing for 22nd February 2008

[155] NSIS security briefing dated 25th January 2008

those the police were meant to protect depicts a force that was perhaps incognisant that their motto is "utumishi kwa wote" (service to all). Instead, the police chose to deploy massively, not where they were most needed, but concentrated at Uhuru Park to prevent the ODM rallies. In this respect, we agree with the conclusion by the Kenya Human Rights Commission (KHRC) Executive Director Ms. Muthoni Wanyeki who told us that "It's our summation that prioritization should have been more in line to the responsibility to protect". Issues related to policing priorities and strategy during the post election violence are discussed in more details elsewhere in this Report. It will be enough to observe here that it would appear that, based on available intelligence which was already in possession of the Commissioner of Police, the obvious choice ought to have been quick containment of the violence in the slums for protection of life and limb and freeing more police officers for deployment to the Rift Valley where carnage of extreme cruelty was unfolding with the police numbers unable to contain the situation.

In mid January 2008, NSIS reported that non-Kikuyu residents of Mathare slums were alarmed by the migration of the Kikuyu community from the area which made them apprehensive that this movement out of Mathare could be a precursor of attack by Mungiki members[156]. In the meantime, as the Kenya National Dialogue and Reconciliation Process went on, tension remained high and NSIS noted that ODM councillors were mobilizing for mass action in case the Kofi Annan led talks collapsed[157]

Dr Jotham Micheni the Director of Kenyatta National Hospital told the Commission that they had not anticipated the kind of violence that gripped Nairobi and the country. Though they were prepared for some element of violence, the scale and form it took was unexpected which was compounded by the fact that a good number of staff had travelled upcountry to vote and those who had travelled to the western part of the country were unable to come back

[156] NSIS briefing dated 15th January 2008

[157] NSIS Security Briefing for 26th February 2008

for a whole month due to blockage of roads. Moreover, some staff members became IDPs and in general the hospital staff was not immune from what was happening to other members of public.

While it was the Police Commissioner's testimony that 28 people died in Nairobi from election related violence, the statistics the Commission was able to compile tell a different story. It is incomprehensible that the Commissioner of Police should state with finality that the police were the only source of facts in terms of accurate figures when he produced statistics that purported to be the definitive figures of deaths. The figures were contradicted by other figures obtained from Government sources. For example, Dr. Daniel Mulwa Nguku head of the Nairobi City Mortuary[158] provided information showing that between 30 December 2007 and 30 January 2008 a total of 111 bodies were booked in by police who categorised them as "Post Election Violence Bodies." As we discuss elsewhere in this report, we find it problematic that it is the police themselves who determined that some deaths were due to the election violence without a formal announcement to this effect other than the advice from the officer who booked in a body. Incidentally, no body brought in by the police after 30th January was designated as having died from post election violence and no reason was given

Response by Police

With ODM calling for countrywide mass action to protest what they deemed as theft of their election victory, police were deployed to cordon off Uhuru Park to prevent the ODM and its leader Raila Odinga from holding its meeting there. This effort to prevent ODM's meeting took a severe toll on the police and had devastating consequences on law enforcement and maintenance of law and order elsewhere in the city. The NSIS reported that police officers deployed on security

[158] The facility has a capacity to store 250 bodies though most time it holds more than three times this number, in the words of Dr Nguku, "Ours is a facility which…cannot afford to say it is full"

duties at Uhuru Park complained of being overworked, delay in payment of allowances and being unable to bathe or change uniforms and thus NSIS recommended that police welfare be addressed in appreciation of their role in maintaining law and order.

We received evidence that police action in various locales appeared uneven and disjointed. As early as 13th December 2007, NSIS had warned that police officers planned a go slow on voting day to protest the Government's failure to award them salary and allowances increments. This security briefing further noted that police planned to report to assigned polling stations and do nothing more and thus the NSIS warned that such action was likely to compromise security during the election period. It is not understandable why this information was not acted upon and it is not surprising therefore that a number of victims perceived the police as either indifferent or missing in action when they were most needed. For instance, a businessman in Huruma told our investigators that

> *"There was no police presence in the estates…The Kikuyu tribe most of whom owned businesses started organizing themselves to defend their businesses. There were Kikuyu zones and Luo zones and no one was allowed to venture into others "territory"…The Kikuyu eventually vacated their premises and left the houses to the Luo who started renting out the houses for as little as Kshs 500/-. Some of them are still occupying the houses to date. Most of those who perpetrated the violence were gangs who took advantage of the situation"*

On the other hand where the police were present, we received evidence that citizens going about their business suffered just as much at the hands of police. A pastor in Kibera (Darajani/Makina) stated how on 17th January 2007 within Kibera, he had witnessed a police officer kicking some goods left behind by some women one of whom was arguing with the officer asking him to stop destroying her wares. He explained:

> *"As the argument ensued, I saw the policeman beating the woman with the butt of his gun. The woman fell down and the policeman stepped on her neck and started firing his gun upwards…since I knew her I rushed out towards them"*

When he tried to intervene, the police officer "asked whether I was the messiah who came to save" and the pastor was warned that he would be shot. The pastor

tried to help the fallen woman but all of a sudden fell down and woke up to find himself in hospital where he was told he has been shot and had been in a coma for 2 days. This story was corroborated by the victim who narrated how this particular police officer hit her with the butt of his gun when she went to ask him not to destroy her goods,

> *"It was a very hard blow. It made me fall down…I was very frightened and shocked. When I was on the ground, this policeman stepped on my neck. He was wearing boots. He had his weight down on me…I saw the pastor coming towards me. I know this man…Even though I was yelling and begging the policeman not to kill me, he didn't stop with the boot hard on my neck…I could hear him [pastor] calling out as he came-asking the policeman why he was destroying [my] things… I lost consciousness then… Next I remember a [woman] was trying to pick me off the ground…I looked and saw the pastor lying on the ground…The [woman] told me the pastor had been shot"*

Likewise, a resident of Kibera stated that she was in her house in Kibera Laini Saba on Monday 31st of December 2007 when she felt something hit her on the left breast and she fell down bleeding. It was only then that she realized she had been shot. She stated that good Samaritans were unable to take her to hospital immediately since there were gunshots everywhere but she was eventually taken to Mbagathi Hospital and referred to Kenyatta National Hospital where she remained for a week after having been operated on to remove the bullet lodged in her breast. Upon discharge from hospital, she found her house had been looted.

The Director of Kenyatta National Hospital told the Commission that 61 people were treated for gun shot wounds at the facility, adding:

> *"what I can say is that a lot of gunshot wounds came from Kibera… Mathare, Kariobangi and Dandora. Those are the areas that had a great number of patients. But as I said, 61 patients out of 462 contributed to a percentage that was 13%."*

We therefore find that during the post election violence, the brunt of the suffering in Nairobi was borne by poor people living in low income neighbourhoods. It is the obligation of the State to ensure that all its citizens, irrespective of social status, have a right to live in a wholesome environment free

from the fear of crime and it is the duty of the Government to ensure that this right is not infringed by State neglect or acts of extreme cruelty perpetrated by its agents on a segment of society. The citizens of some of Nairobi's poorest neighbourhoods found themselves in a quandary since those who were entrusted to protect them were either not present, did not seem to care and in the cases where they were present, they were just as brutal as the marauding gangs causing the violence. This is particularly worrying since the Police Commissioner when asked if, with wisdom of hindsight, there was anything he would have handled differently, he retorted without hesitation or any iota of embarrassment or regret that,

> *"If similar situations occurred today, I would do exactly what I did. I would not change a thing my Lords that is the honest truth because in the enforcement of law and ensuring that law and order is brought about in the protection of lives and properties, there is nothing that we shouldn't do to ensure that our people are safe. That is the incidences as to why there is police in the first place. And in doing so my Lord we take pride in ensuring that we have protected lives and taken all measures necessary to ensure that people are safe. If anything was to happen like it did last time, we would do it exactly the same way".*

A Luo man who ran an electronic business in Kijiji cha Chewa (a predominantly Kikuyu settlement), told us that on 29th December 2007, the OCS Muthaiga had posted 2 lorry loads of police to guard the area:

> *"but the youth were so many they overpowered the police who ran away from the scene. After the election was announced ODM youth overpowered PNU youth and the police…They came with paraffin and [set fire to] the whole estate...The estate was burnt by idle youth in the estate…I was targeted by the Youth because I was trying to restrain them from doing bad things like looting and stripping women naked…I lost business worth Ksh 70,000/-…I reported everything to the police at Muthaiga Police Station, after recognizing the Youth [but] nothing was done. The police said they were busy with post election work and to date nothing has been done"*

Not only did the police appear overwhelmed, but we were given evidence that police were divided along ethnic lines and victims confessed to having received assistance from police officers from their ethnic groups while facing hostility from officers who were not from their tribe. According to the KNCHR:

> *"Some officers from the Kalenjin and Luo communities when asked to stop the looting are reported to have told the victims 'wacha kazi iendelee' (let work go on, drawing from the PNU slogan). Some police officers also took advantage of the situation to charge victims for safe passage. This was fairly widespread in Dandora Phase 4, Mathare and Ghetto. Police officers demanded money from people who wanted to escape hostile environments or who had fled and were returning to retrieve property…"*

In hearings before the Commission, the police adopted an unduly defensive attitude which in our view clouded any objectivity expected of them in assisting the Commission in its investigating public inquiry. From the totality of the evidence tendered before us, we find on a balance of probability that the institution of the police failed the citizens of Nairobi at large and the residents of the less privileged neighbourhoods in particular.

While there will be no doubt protests that we had no right to condemn the police without conducting trials during which the police could defend themselves in detail against all charges made, it is our considered view that full due process protections of the type that are required in criminal trials were not necessary for the purpose of stating whether or not the police as a public institution performed to the expectation of Kenyans in their hour of need. In Nairobi, it is our view that they did not.

Central Province

Introduction

Central Province is located in Central Kenya, bordering Rift Valley Province to the North West, Nairobi province to the South and Eastern Province to the West. It covers an area of about 13,220 sq. kms. and has a population of approximately 4,226,515 persons and a population density of 320 persons/sq. km.

The province comprises 11 districts: Nyeri South, Nyeri North, Nyandarua North, Kirinyaga, Thika, Muranga North, Muranga South, Kiambu West, Kiambu East, Nyandarua South and Gatundu.

Central Province is the ancestral home to the Kikuyu community and has in the past not experienced the ravages of election-related violence owing to its ethnically homogeneous composition. The urban areas, particularly those close to Nairobi, tea, coffee and sisal estates in the larger Kiambu and Thika Districts have a large number of non-Kikuyu. The province voted overwhelmingly for the PNU candidate and incumbent president, Mwai Kibaki, during the 2007 General elections.[159]

Build up to the Violence

Information submitted by the Provincial Commissioner, Japheth Rugut,[160] reveals that the period leading to the elections was peaceful but highly charged both at parliamentary and civic levels, with the majority overtly in support of the PNU and its affiliate parties. Candidates from the other parties conducted their campaigns in a non-confrontational and peaceful environment.

There were incidents of violence reported to have taken place in period leading to the elections. One such case is an incident took place on 24th November, 2007 at around 6.00p.m when supporters of Ephraim Maina Mwangi and those of James Nderitu Gachagua, both of whom were contesting the Mathira Constituency seat, clashed at Muberethi area. Many people were injured and one person died as a result.[161] In yet another incident which occurred on 10th December 2007, supporters of James Nderitu Gachagua allegedly attacked and

[159] Exhibit No. 125, para 488.

[160] See also presentation by Mr. L.N. Lenayapa, District Commissioner, Kiambu East to the Commission of Inquiry into Post Election Violence.

[161] ECK Submissions to the Commission of Inquiry into Post-election Violence, ECK Preparedness and the Security Arrangements during the 2007 General Elections. This was the subject of proceedings before the ECK.

injured one of the supporters of Peter Ngibuini Kuguru, an aspirant for the Mathira parliamentary seat.[162] Other reports reveal incidences of harassment of persons sympathetic to Raila Odinga and the ODM party.[163]

Patterns of Post Election Violence in Central Province

The Provincial Commissioner gave evidence to the effect that the news of the final tally of the presidential results, which declared PNU candidate Mwai Kibaki the winner, was received with jubilation and fanfare. However, soon thereafter, this was replaced with gloom as information started trickling in to the effect that violence had erupted in other parts of the country and members of the Kikuyu community had been targeted. This news was given a human face when the province started receiving IDPs from other parts of the country and from within. Thirty people, majority of whom were of Luhya and Luo descent had pitched camp at Karuri Police Station in Kiambaa Division. As the wave of violence in other parts of the country billowed, Kiambaa division hosted a total of 8000 IDPs. Kiambu Municipality Division received a total of 1435 IDPs while Githunguri Division hosted 2100 IDPs.

The Provincial Commissioner informed us that during the first three weeks of January 2008, there was a state of anxiety, uncertainty and worry in the entire province. This state of affairs had been caused by, *"*reports that things were moving from bad to worse.*"*[164] The PC recounted how around 18th January 2008, rumours started circulating that by Monday, 21st January 2008, *"*members of other communities resident in Central Province would be attacked to avenge the atrocities meted out on Kikuyus in Nyanza, Rift Valley and Western Provinces.*"*[165] These rumours were exacerbated by the harrowing tales

[162] Above.
[163] Exhibit 125.
[164] Presentation by Mr. Japheth K. Rugut, the Provincial Commissioner, Central Province to the Commission of Inquiry into Post Election Violence, p.5.
[165] *Id.*p.6.

narrated by the IDPs, who had fled from those regions and had arrived in the Province.[166]

It is in these circumstances, the Commission was told, that the local Kikuyu community started threatening people from other communities. These prompted members of those communities, mainly Luos, Luhyas, Kalenjins and Kisiis to vacate their houses and camp in the various police stations.

On 3rd January 2008, rioting mobs blockaded the Nairobi-Nakuru Highway, but the barricades were removed after the intervention by the Limuru DO, who convened and addressed a public meeting at Ngararíga.[167]

On 4thJanuary, 2008 at Gakeu Village, Kirima sub-location, Nyandarua North District, 12 houses belonging to persons from the Kalenjin community were torched. The police arrested seven suspects and charged them with the offence of arson.[168] On the same night, persons of Kikuyu descent displaced from the Rift Valley, notably Molo and Nakuru, started arriving in Limuru Town and the D.O. earmarked Kirathimo Red Cross Centre as a camp where they would be accommodated.

In some cases, the centres holding IDPs from other communities were threatened with burning by members of the Kikuyu community who demanded that the camps should be broken up and those in the camps should leave and go to their homeland. On 5th January 2008, fracas started in Limuru town outside Bata Shoe Company gate and outside Kirathimo Red Cross Centre which was accommodating the IDPs. Security personnel dispersed the riotous mobs who were angered by the presence of the IDPs. It was the intention of the mob to attack the Bata workers, majority of who were persons of non-Kikuyu origin.[169]

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[166] The statement by the District Commissioner, Kiambu West District, Peter Leley, indicated that in his District, the first group of 14 IDPs of Kikuyu origin and their families arrived in Limuru Town on 4th January, having traveled from different parts of the Rift Valley province like Nakuru and Molo where post election violence had started.

[167] Above, p.4.

[168] Nyahururu Law Courts file 46/08 Cr. 242/6/08.

[169] See Statement by Peter Leley, DC, Kiambu West District.

The attack on 5th January 2008 instilled fear on people of non-Kikuyu descent, prompting them to camp at the Railways Go-Down, opposite the Bata Shoe Company. The next day, fracas erupted after youths clashed with the persons taking refuge at the Railway Station. Once again it took the intervention of the DO and the OCS Tigoni Police Station to quell the violence. However, the DC assessed the gravity of the situation and directed them to evacuate all non-Kikuyus to Tigoni Police Station.

Information from the DSIC reports indicates that in Limuru Town, about fifty rowdy youths armed with crude weapons set ablaze business premises owned by Nelson Oluoch Owegi, the Limuru ODM coordinator. Later the youths attempted to attack members of the Luo community who had fled their homes and were camping at the Tigoni Police Station, but were repulsed by police.

There were cases where business enterprises belonging to non-Kikuyus were targeted for looting and destruction. In Kiambu West District, a commercial building estimated to be worth Kshs. 800,000 and whose tenant was Odhiambo Oluoch, the ODM Chair, Limuru, was gutted on 16th of January 2008.

On 22nd January, 2008 in the same district,[170] a group of unknown arsonists razed down 3 houses belonging to members of the Kalenjin community and one belonging to a Turkana. The case, we were informed, was still pending under investigations at Ol Kalou Police Station by the time of the testimony.

On 23rd January, 2008, PC Joseph Kiplangat of Tigoni Police Station was shot by an unknown gunman from a roof top. He broke his leg and was taken to Kiambu District Hospital. At around 7 p.m. on the same day, three men were shot by police while in the act of looting the Limuru Bata Shoe Company display shop.[171]

On 23rd January, 2008 youths assembled outside Bata Shoe Company demanding that the non-Kikuyus being accommodated by the Company be asked to leave. They were addressed by the security personnel but they refused

[170] The Statement did not indicate the exact place of the incident.
[171] The matter was still under investigation at the time of the testimony and an inquest file has since been opened (Inquest No. 2/2008).

to budge. The intervention of the MP-elect did not bear fruits as the youths, armed with crude weapons and numbering about 2,000 positioned themselves on a fly-over , on top of buildings and in the area outside the factory. About 60 security officers established a buffer zone between the Company's premises and the youths.

At some point, the surging youths set ablaze the security guards' office and broke into the Bata Shoe Factory shop, looting the shoes inside. A scuffle ensued and seven police officers sustained minor injuries and were treated at Tigoni sub-district hospital and discharged. In the process of trying to control the crowd, three people died.

On 24thJanuary, 2008, one Peter Odhiambo, a member of the Luo community from Bondo was found slashed to death along a foot path within Karanjili area, Limuru.[172] On the same day, 2 people were forcefully circumcised using a blunt tool, and were taken to Tigoni Sub-District Hospital where they were treated and discharged.

On 30th January, 2008, a group of youths numbering about 100 from the Holding Estate, Kiambu East, armed with crude weapons barricaded the roads to the Estate intending to attack persons belonging to other communities. They were however dispersed by Administration Police personnel.[173]

Previously on 28thJanuary 2008, within Nyandarua South District, a group of persons set on fire 104 houses, 1 tractor, 1 harrow, 10 sheep and 6 cows belonging to persons from the Kalenjin community. On the same day, a mob lynched Lukas Matete, a Luhya casual labourer to death. Information from the DSIC reports indicates that in Kiambaa and Nderi areas a group, mostly of youth staged a demonstration to the DO's office in Kikuyu town, demanding among other things, the immediate stoppage of the Rift Valley killings and evictions and destructions targeting their people; the immediate evacuation of the Kikuyu people to safe places by the government and guarantee of their security wherever

[172] The matter is still the subject of investigation in Inquest File No. 3/2008 at Limuru Police Station.
[173] See Presentation by L.N. Lenayapa, p.4.

they were. The demonstrators also demanded that the Government issues them with vehicles to transport their kin back to the Central Province away from the conflict areas.

On 7th February, 2008, youths barricaded the Nairobi-Nakuru highway, but it was opened by a joint operation by the regular police and Administration Police. Three people were injured by the mob but were rushed by good Samaritans to Thogoto Hospital where they were treated and discharged. On 8th February 2008, two semi-permanent houses were burnt in Nderi, Kiambu West and the fence surrounding the compound of Steel Rolling Mills partially destroyed.

According to the KNCHR report produced to the Commission as evidence, there were threats and actual evictions of non-Kikuyu people in Nyeri in early February. The report states that unsigned notices were circulated in Nyeri town in estates occupied by non-Kikuyu such as Majengo, ordering non-Kikuyu people to leave. This led to the exodus of non-Kikuyu people out of Nyeri, especially when more leaflets started circulating. One of the leaflets read: "*No more clashes but war. Luo, Luhya, Nandi, we give you 24 hrs you pack and go, failure to that we need 200 heads before peace holds once more.*"

Internally Displaced Persons

The Commission was informed that the inflow of the IDPs was received with mixed reactions, with some residents empathising with the incomers and providing food and shelter. In areas such as Kikuyu township, the incoming persons would be absorbed into the society by the local residents. This explains the absence of major camps in the Kikuyu township area and other areas of the province such as Muranga North. In other places, they would be left to fend for themselves or settle in the camps, for example, in Ruringu, Nyeri. Yet still, there were individuals who hosted them. In one such case widely reported in the

media a woman hosted around 90 IDPs in her two-bedroomed house in Othaya.[174]

Further, there were instances when youths within Central Province took advantage of the unrest to engage in unlawful activities. There were instances when non-Kikuyu employees working in various companies were targeted for attacks and eviction so as to create employment opportunities for themselves in those companies. Such companies included Universal Corporation Limited (UCL) and Steel Rolling Mills, both in Kikuyu; KARI and KEFRI and other research institutions also situate in Kikuyu; Tea Estates and Bata Shoe Company in Limuru; BIDCO and other industries in Thika; flower farms in Ol Kalou.[175]

Nyeri Police station hosted 900 IDPs; Tigoni Police Station, 5,390; Ruiru Police Station, 620; Juja Police Station, 600; Thika Police Station 552; Maragua Police Station 68; Kinangop Police Station, 66; Karatina Police Station, 193; and, Kikuyu Police Station, 500. The cumulative total was 8,889. Those persons willing to leave were facilitated by the Kenya Red Cross to their ancestral homes which they considered safer, although many others were left to fend for themselves and received no assistance or other support.

Meanwhile the number of IDPs ejected from Rift Valley, Nyanza Provinces increased, with the figure of 18,406 recorded on January 31st, 2008 rising to 86,314 by the 5th day of March, 2998. The PC also tendered figures indicating the number of IDPs hosted by each of the districts in the Province, Kiambu West hosted 19,096 IDPs; Thika 5,437;Kiambu East,8,164; Nyeri South, 2,236; Nyeri North, 3,872; Murang'a South, 2,503; Murang'a North, 2,910; Gatundu, 3,452; Nyandarua South, 16,800; Nyandarua North, 19,605; and Kirinyaga, 149.

It was the PC's evidence that the majority of the IDPs remained within the Province until the tension subsided on around February 29, 2008.

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[174] Exhibit 125, paras 492 and 501.

[175] Above.

Response by Police and Provincial Administration

The heightened tensions at the time and episodic violence before the elections reported pointed to the potential eruption of violence in isolated parts of the Province. The expectation therefore was that the police and provincial authorities would put in place adequate security measures to pre-empt any breach of peace and order. However, it is our assessment that they were ill prepared to satisfactorily handle the overwhelming influx of IDPs. The security arrangements seemed to be trained on elections and more. The PC told the Commission that in the light of the rising tensions in the Province, and in view of the need to prevent the eruption of violence, he mobilised all security agencies and local leaders in the district to be on high alert. From the security intelligence reports, the DSIC had planned coverage of election campaigns as early as September and attended each and every political rally within the district.

The PC testified that he also convened several meetings in the districts with the members of the public with a view to promoting peaceful coexistence and appealing against retaliation. He held meetings on 25th January 2008 in Nyandarua North, Ol Kalou, Ngorika and Limuru. On 1st February, 2008 he attended a peace meeting in Nyeri South and on 5th February, he convened a similar meeting in Kiambu West.

There were peace meetings convened by the DSIC on 1st February 2008 in Limuru town and Wangige town of Kikuyu division, and attended by several MPs including Fred Gumo (Westlands), Uhuru Kenyatta (Gatundu South), Lewis Nguyai (Kikuyu), Peter Mwathi (Limuru), Elias Mbau (Maragwa), Johnstone Muthama (Kangundo), Eugene Wamalwa (Saboti), and Momoima Onyonka (Kitutu Chache). This may have pacified the situation. In total, the PC said 37 peace and reconciliation meetings were held across the Province.

According to him, these meetings down-scaled the hostilities towards other communities. As a result, a significant number of them were able to report to their places of work in the day and get back to the camps in the evening.

Incitement

Witnesses informed the Commission that there had been several planning meetings that had been convened in the Kikuyu-dominated parts of the Central Province/Rift Valley Province border. These meetings had been used to recruit fighters, to coordinate communal violence and to organize funding. There have been reports that a pastor, a former MP and sitting one urged people to take up arms in self-defense in the Limuru area.[176]The allegation is corroborated by the intelligence reports covering the period between 15th January to 15th February, 2008, in a mammoth rally attended by some Kikuyu MPs and politicians. They blamed the killing of youths on police officers hailing from Rift Valley and Nyanza and called for their transfer from the area. The report states thus: "One politician called on the Kikuyu community to be ready to defend themselves and urged the rich to contribute money towards the cause. Another politician alleged that ODM was being backed by Western countries to destabilize the Government."[177]

There were claims of prior planning of the violence in some parts of Central Province. The Commission received reports alleging that a group of business persons met on 26th January 2008 at Kikuyu Country Club to fundraise for the eviction of non-Kikuyu residents. Weapons to be used in raids were supplied by persons whose names were made available to the Commission. Small businesses all in Kikuyu, supplied weapons such as machetes.[178]

The reaction from the security agencies to the crisis had been *ad hoc* and lacking in direction. From the reports, it could be discerned that the DSIC did not see any need to follow up on what appeared to be an overt call to arms, and instead subjectively dismissed them as outbursts of anger. The report says thus: "The

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[176] Exhibit 21J, Special Brief: Civil Society Responses to the Kenyan Crisis, Kenya Human Rights Institute, p.4.
[177] Central Province Security Intelligence Committee Report for the Period between 15th January to 14th February, 2008, p.3

[178] Exhibit 125.

leaders were reacting out of anger following the killing of three youths who were protesting the displacement of their kinsmen from Rift Valley*".*[179]

The Central Province Security and Intelligence Committee Appreciation for the period between 15th January to 14th February, 2008, reports that there was hate mail circulated by unknown persons on the Kenya Power and Lighting Company Limited web mail in Nyeri, calling upon the Kalenjins to rise and defend their ancestral land, and to deliver them from the Kikuyu dominance.

The Resurgence of Mungiki

The resurgence of the Mungiki could be seen as a form of encouragement to retaliatory attacks or, in the alternative, a response to the call to arms by the politicians to defend the Kikuyu community against aggression by non-Kikuyus. Further, despite noting the resurgence of the outlawed militia grouping, Mungiki, there is little else in the appreciation by the Central Province Security and Intelligence Committee indicating a decisive response to the threat to security posed by the proscribed sect.[180]

> *The Kikuyu community seems to be slowly accepting the Mungiki sect following aspersions that the government was unable to protect them against hostile communities during the post election violence. This could pose a challenge to security agencies, hence calls for concerted efforts to stem the same.*[181]

The resurgence is consistent with the claim as to the politicization of militia as a vehicle through which ethnic hatred and animosity could be driven. Many of the acts of violence perpetrated by this militia outfit at the time may be explained as retributive violence that was specifically targeted at members of ethnic

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[179] Above, p.4.

[180] Central Province Security and Intelligence Committee Appreciation for the Period between 15th January, 2008 to 14th February, 2008.

[181] Central Province and Intelligence Committee Appreciation, "Upsurge of Mungiki Activities Noted", MIN 22/2008. The Report proceeds to identify specific areas of increased activity. For example, it says, "*In Nyandarua, the Mungiki spiritual leader has directed sect members to recruit ten thousand (10,000) new members to defend Kikuyu in the Rift Valley. Consequently, ….. theSect Recruitment Officer, has recruited one hundred and thirty (130) youths from Dundori and Ol Kalou"*

communities perceived to be supportive of the ODM Party, and against whom accusations had been made for targeting members of the Kikuyu community in other parts of the country.

Some of the encouragement to attacks also had a coercive aspect to them. A report titled Special Brief on Civil Society Response and submitted to the Commission as Exhibit 21J cites a witness as saying that,

> *there [sic] have also been reports of intra-ethnic violence in the Wangige area of Kiambu District where Kikuyu men have been attacked by gangs for "failing" to "defend" their own community from "aggressors". Local human rights defenders are being "screened" and the security and safety of those of Kikuyu origin are at risk."*[182]

There were reports that landlords also became targets of the attackers. They were forced to give notices to their non-Kikuyu tenants to vacate.[183]

Hate Speech

There were reports of the circulation of malicious cell-phone text messages that propagated hate speech and alarming rumours. This had the effect of poisoning an already tense political environment. The statements revolved around the denigration of individual political actors and their affiliate political parties. Examples are the hate leaflets on Raila Odinga found at Ndaragua, Nyandarua North District. The leaflets read: *"Raila is planning a revolution christened December 28 Orange Revolution*" with the assistance of Dick Morris and Prof. George Ayittey of Ghana." Similar leaflets found at Kahuro in Muranga, accused Raila of being a terrorist, devil worshipper, communist, expert in overthrowing governments, tribalist, and deceptive, dishonest, practising witchcraft to win presidency.[184]

[182] Exhibit 21J, p.4.
[183] Exhibit 125
[184] DSIC Reports Min 94/2008.

Additionally, there were also reports of demeaning references by the Kikuyus to persons of other tribes as *nduriri* (an imperious reference within the context of the speech to people of non-Kikuyu descent) and specific references to the ODM presidential candidate and the Luos as *kihii* (loosely translated as an uncircumcised man in the Kikuyu language). The KNCHR reports one prominent Kikuyu politician and former MP as having said that the Kikuyus cannot be led by a *kihii.*[185]

The Commission also received information to the effect that religious leaders in areas such as Limuru and Nyeri used the pulpit to convey messages amounting to hate speech against non-Kikuyu communities, ODM and generally whipping up Kikuyu ethno-nationalist passion. The leaders uttered phrases such as "*ciaigana ni ciaigana*" (enough is enough), suggesting that the Kikuyu community should no longer simply stand by while attacks against them continued. The report continues, "In Kirathimo IDP Camp in Limuru, which hosted returnees from other provinces, one religious leader urged the people that, *"The Kikuyu should be armed the way I am armed with the Bible."* Gospel artistes performed in Limuru at rallies attended by the local community where hate messages were disseminated."[186]

KNHCR reported as follows on hate speech:

> *Local language media also disseminated hate speech to Kikuyu audiences in Central Province and in the diaspora. Call-in shows on radio stations enabled individuals to make unregulated hateful statements. Inooro FM put on air highly emotional and distraught victims of violence, a factor that tended to whip up the emotions of its audience. Music in the Kikuyu language played on Kameme and Inooro radio stations also engendered or raised ethnic tensions. One such song variously played by Inooro FM, lyricised about Raila Odinga and the Luo community in very negative terms.*[187]

[185] Exhibit 125, Para 502.
[186] Exhibit 125, para 512.
[187] Above, Para 513

Findings

The totality of evidence received by the Commission suggests that the violence in Central Province was mainly targeted against persons perceived to be unsympathetic to the PNU presidential candidate, Mwai Kibaki, and therefore responsible for the evictions of non-Kikuyu from conflict-stricken areas across the country.

The re-emergence of Mungiki and associated criminal gangs followed the killings and evictions Kikuyus in ODM party strongholds in western Kenya. The turbulence, in our view, provided a perfect opportunity for these proscribed militia to reinvent and package themselves as instruments for the advancement of political and ethnically motivated violence.

The Commission also notes the distinct nature of the post-election violence with respect to Central Province. In the past ethnic clashes, the major protagonists were the Kikuyus and other the other tribes on the one side and the Kalenjin on the other. This was a reflection of the political alignments of the day when the Kalenjin who enjoyed the patronage of the regime of the time. Subsequent political events saw the Kikuyu community isolated by the other ethnic groups hence when post 2007 elections violence erupted in Central Province, the communities from other parts of the country bore the brunt of violence in the Province.

Coast Province

Introduction

Coast Province consists of 13 Districts and 21 Constituencies with a population of slightly over 3 million people according to the Kenya Bureau of Statistics projections of 2007. The main ethnic groups are the Mijikenda comprised 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 in the province are the Taita – Taveta, Orma, Pokomo, Munyoyaya, Malokote, Bajuni, Swahili and people of Arab descent; the last 3 of whom mainly inhabit the Coastal towns. In total there are 15 Coastal ethnic groups and members of Caucasian communities living in the Province.

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 Province. Some ethnic groups have been classified as 'insiders' or indigenous communities, while other communities are routinely referred to as 'outsiders'. These are the Kamba, Kikuyu, Luo and other upcountry people resident at the Coast.

Mombasa town is the capital of the province whose mainstay is tourism and related activities. Fishing and agriculture also offer livelihoods to a substantial part of the residents. 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 which issues explain some of the political dynamics. The persistent claims and allegations of exploitation and exclusion are blamed on the so called non indigenous communities commonly referred to in the Province as *'watoka bara'* or *wabara*. Since the re-introduction of multi – party politics in 1991, the politics in the region has become polarized along tribal lines and politicians have exploited the existing latent tribal animosity to intimidate certain communities giving rise to violence against other communities depending on the prevailing political climate. For example, the Likoni and Kwale violence of 1997 was premised on the stereotyping of upcountry people as having appropriated to themselves local resources and having benefited unfairly at the expense of the indigenous residents and they were thus targeted in the violence whose sole aim was to drive them from the region and achieve an intended poll result[188]. The polarities and tensions created

[188] For further reading, see the Akiwumi Report at 233 – 278.

by this episode remain evident between the so called local 'insiders' and upcountry 'outsiders'.

As we shall see, these parameters surfaced in 2007 only that this time round, the indigenous communities joined hands with some upcountry communities like the Luo (themselves targets of the 1997 violence) to target the so-called GEMA communities – composed of the Kikuyu, Embu, Meru. The Kamba who have a significant presence in the province were also targeted. Many GEMA community members thus suffered a double blow since they had been victims of election violence in 1997 and had barely recovered from their losses when they were again targeted and attacked in the 2007.

Local communities have for years decried the perceived marginalization and under development of the region without tangible action being taken by successive Governments since independence to deal with these deep rooted feelings. The issue of land at the Coast has specially been problematic and has been described as a ticking time bomb. More recently other factors like perceived mistreatment of residents at the hands of police in the name of fighting terrorism, poor education levels and bad infrastructure have all served to fuel feelings that successive Governments do not care about the region.

While the perceived manipulation of the presidential results was the trigger for the 2007 violence in the Province, it is clear that there is deep underlying resentment which has never been addressed by the State over the years. The situation is further complicated by economic competition for resources with migrant upcountry communities seen as benefiting at the expense of the indigenous people and this background explains the salient issues, causes and manifestation of the violence in the region as will be expounded in detail hereinafter. As noted by King'ori Mwangi Coast PPO,

> *"My Lords, our assessment of the Coast Province was that there was a potential violence much higher than any other part of the country because of the underlying issues of poverty, their political feeling of being excluded and a lot of unemployment. All these going by the*

history of the Coast… we felt the issues here, the threats were higher than other parts of the country".[189]

Pre-Election Period

The Commission heard from various witnesses that Coast Province was generally peaceful in the run up to the elections and residents eagerly waited to cast their votes. Many arrived at their respective polling stations as early as 4.00am on the morning of 27 December 2007. The only hitch reported by voters was the discovery at the last minute that voter registers had been split alphabetically and this unannounced change created a lot of confusion and delays. Surprisingly, and also commendably, this did not lead to any violence. In Garsen constituency of Tana River District the Commission was told of some low level violence on 27th December after voting which was confirmed by Mr. Wilfred Mbithi, ACP. In that incident, a police helicopter had brought in ballot papers for tallying purposes sparking rumours that the incumbent MP Hon. Danson Mungatana of PNU had flown in foreign ballot boxes with marked ballot papers.

There was clear evidence of a high level of competition between the two leading presidential candidates, Mwai Kibaki and Raila Odinga and therefore a palpable divide between PNU and ODM supporters in the Coast. Witness testified that the pre-election period had been characterized by a political environment that was greatly polarized since the Constitutional Referendum of November 2005. We heard that the Referendum had created very high expectations and the majority of the Coastal people saw real hope for positive change in the ODM party and its presidential candidate Raila Odinga who was widely expected to win the presidential poll. The common belief in the region was that Raila could only lose if the poll was rigged.

In the meantime, the NSIS was apprehensive and viewed the Coastal area as a potential flashpoint where political party supremacy, religion and race had

[189] CW 141.

ignited violence in the past[190]. Another fear cited by NSIS was the land problem between squatters and landlords where sentiments were high that the Coastal people had been marginalized by outsiders. Tana River District featured consistently in Intelligence reports where there was an ongoing conflict between the Orma and Wardei communities within Bura and Galole Divisions and also between the Pokomo and Somali over a disputed 3-mile strip along the banks of River Tana. Finally, intelligence was furnished by NSIS regarding the activities of an outfit by the name Revolutionary Republican Council (RRC) that was reportedly training its militia within Mwagulu Forest of Kwale District with the help of ex-military servicemen allegedly with the aim to "disenfranchise upcountry people and later reclaim land owned by perceived outsiders".

It was noted in Intelligence reports that the RRC had identified a training ground for Digo, Duruma, Taita and Taveta communities in Kilibasi area of Kinango Division, Kwale District. Indeed the Coast PPO did confirm the existence of the RRC which he stated, *"claims that they would like to have the Coast Province declared as a republic, independent from the rest of Kenya…we did consider them to be a threat to our security operation and we had taken measures to make sure that they did not disrupt the election or wage violence against other people after the election, my Lords."* Accordingly the authorities had neutralized the group by the time of elections.

NSIS also noted that there were threats of eviction of upcountry people especially Kikuyu, Luo and Kamba residing within Kipini Settlement Scheme in Malindi District. NSIS reported that the *majimbo* debate had elicited a strong anti-Kikuyu sentiment in Coast Province and that some unnamed politicians planned to use majimboism as an excuse to mobilize local youth to attack perceived outsiders. Consequently, the Kikuyu community inside and outside the province robustly opposed the proposed majimbo system[191]. As the PC put it:

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[190] NSIS evidence, Exhibit 20

[191] Exhibit 20

> *"In the way it was being put was that Majimbo would ensure that local people would benefit from the resources accrued from local enterprises the revenue generated in Coast province would be for the benefit of Coastals. I think this is how they were looking at Majimbo. That key positions, revenue accrued from tourism, from the ports, would be- will remain at the Coast here and benefit the Coastal people"*

Given the Intelligence that was available, we discern that there was reason to prompt the authorities to make sufficient security arrangements early enough to address these security concerns and perhaps this was done which is why the Coastal region remained peaceful during the campaign period. This was also alluded to by the Coast Provincial Commissioner Ernest Munyi when he stated that due to the high level of competition during the campaign period, he had found it "proper and imperative to put in place precautionary measures just to ensure that his office could be in better control of the situation in the Province in the event of any violence". The PC further stated that in making these arrangements, he had relied on NSIS security reports which information was supported by the Coast PPO Kingori Mwangi and Wilfred Mbithi the Mombasa Urban OCPD.

After the completion of voting, the Commission heard that people in the province keenly followed the vote counting peacefully from various places through television and radio broadcasts. Exhibit 149 was tendered containing information showing that initial tallies indicated Raila Odinga in a clear and widening lead over Mwai Kibaki before 30 December 2007. It was expected therefore that this trend would continue and ODM supporters who were the majority in the region started early celebration for the expected victory of their candidate.

The Election Results Trigger

The Commission was then told that tension, anxiety and fear started gripping the region and particularly Mombasa on the 28th and 29th December 2007 when tallying of the final results had not been completed and when Raila Odinga's

margin over Mwai Kibaki was suddenly drastically reduced. From the various witnesses, we were able to establish that the trigger for the chaos that rocked the region was the declaration of President Mwai Kibaki as the winner coupled with the suspicious manner in which the Electoral Commission handled the situation. Indeed there were early signs of trouble when on the 29th December 2007 groups of young men gathered from 3.00 pm along Kenyatta Avenue, Abdul Nassir road and Digo road roundabouts chanting slogans and expressing disquiet. This early trouble appeared intended to share their feelings on the prevailing political situation as it then was.

In the meantime, there was a lot of tension in many other places at the Coast as people waited peacefully for the final presidential tally results. For instance, in Kisauni, tension was reported to be very high with the youths contemplating to hold a public protest on 29th December 2007 against the delay by ECK in releasing the presidential poll result. We heard that many youth gathered in various spots eagerly awaiting the announcement of the presidential results and some in their conversations tried to envisage what a Raila Odinga win would portend and how his Government would be.

Hussein Khalid, Programmes Coordinator for a Mombasa based NGO Muslims for Human Rights (MUHURI), testified that violence in the region was triggered by the announcement of the presidential results against a background of long standing underlying issues which had not been addressed over the years and by the conviction of many people at the Coast who happened to be ODM supporters that they had been robbed of victory. After ECK announced Kibaki as the winner, extremely disappointed, angry and frustrated youth were primed for violence since the general feeling was that Raila Odinga had been robbed of a victory and this bitterness was expressed in slogans such as, *"Haiwezekani"* (it is not possible), *"Haki Yetu"* (our right), "No Raila No Peace", *"Tutamaliza wacky"* (We shall finish the Kikuyus), *"Maisha Bora"* (Better Life), *"Wakikuyu ni waizi"* (Kikuyus are thieves); as avenues to express anger while also singing in praise of their favourite candidate Raila Odinga and ODM.

A religious leader however told the Commission that the violence appeared to have been planned prior to elections. He gave reasons for his belief that a Member of Parliament from the Coast Province was responsible for organization of the violence that rocked the area. This sentiment was further echoed by other witnesses; for instance, a witness told us:

> *"I witnessed the violence that was going on at that time within Bokole. At a shop we call Safaricom Building owned by a Kamba known as Philip Kiluko, I found a group of youths trying to break in. They were all former security guards for a politician during the campaign period. I talked to them. I enquired from then why they were doing that and one of them told me that each of them had been paid Kshs 300/- to cause the mayhem to express disgust at the election results and that even if ODM could have been declared the winner, the violence would still have (happened)…I met a friend of mine and he told me that since he had seen me during the ODM nomination, we should go to the politician's home with him at Mikindani to get funds for the violence..."*
> .

Another witness, appeared to lend credence to those accusations. He stated:

> *"I was told that the MP funded the youth to loot and burn all businesses belonging to non ODM members so that they remain as poor as themselves. One time during the violence, I accompanied some to the MP's home … he addressed us and told us that he is happy with our actions meaning the violence and further told us that it should continue until President Kibaki relinquishes the presidency. Therefore, I believe the MP fully supported the youth's action"*

The foregoing are important leads to further investigations into the role played by a local politician in the post-election violence considering that there were intelligence reports from NSIS about the potential of violence in the area.

According to Hussein Khalid, some of the violence at the Coast was actually caused by the police. He produced exhibit 149 stating that

> *"there were instances where we felt some of the skirmishes that were witnessed could have been avoided, for instance had the police acted in a more civil manner, where they dispersed meetings or processions that were legally organized, where notices had been issued and they had to come in to disrupt peaceful processions. We also felt that a number of issues that came to the fore were ethnic in nature. There were people or a certain community that were being targeted by others and that very little was done or they were disjointed efforts by*

the Government. The Provincial Administration was calling meetings to discuss and deliberate issues with local leaders, women leaders, it was a bit disappointing to actually note that the police were actually out shooting people, killing, sometimes injuring individuals to the extent of even having them admitted to the hospital".

His evidence was tested in cross examination, and he maintained that violence broke out on 30th December 2007 at various points in the Province simultaneously and that a particular community was targeted though, in his view, there was no planning. People simply captured the moment and decided there and then what to do with absolutely no prior arrangements. This contradicted what the PC Earnest Munyi told the Commission, that during the violence leaflets were circulated saying that *"The Kikuyu community should leave their properties and their lands and go back to where they came from".* It was thus the PC's view that

"there was an element of feeling… that this could have been planned. Because on 31st (December 2007) at exactly 11 in the morning groups of people were converging simultaneously at that particular time in Kisauni, Changamwe and were trying also to cross from the Likoni side of the ferry trying to come to Island …so that kind of situation one can conclude that there was some element of planning".

Nature and Extent of Violence

As we have seen, the violence in Mombasa Town erupted on 30th December 2007 and continued unabated for 3 days. We were told that huge groups of youth armed with crude weapons engaged the police in running battles including stoning police in Mishomoroni and Changamwe's Bangladesh area. The main highway to Nairobi was blocked at Mikindani and the OCPD reported that riots also broke out in Chaani, Bokole, Magongo Mwisho and Miritini. In the meantime, the whole of Likoni was engulfed in violence.

According to the Police, 25 deaths occurred though Dr. Anderson Kahindi the Provincial Director of Medical Services gave a figure of 32 people as having been

killed[192]. Of these one died of arrow wounds, 5 from gunshots, 11 died in a house fire, another 11 had multiple injuries, 2 were indicated to have been lynched by a mob while it was not possible to ascertain the cause of death in 2 cases.

Further, we heard from the OCPD that 24 vehicles were burnt, 29 residential houses destroyed and 240 commercial buildings, including kiosks and other temporary structures were destroyed. The youth targeted property belonging to the Kikuyu community as an expression of anger against them for allegedly supporting Mwai Kibaki. In order to escape the onslaught, many residents found it prudent to paint the letters 'ODM' on their property and motor vehicles as a measure to avoid being attacked[193] .

We were informed by several witnesses that most of the youths appeared to be intoxicated.[194] The PC observed that the Coast had a drug problem especially among the youth and it was probable, therefore, that drugs were bought for the youth to engage in violence. The further presumption is that the youth had the benefit of leadership and coordination.

The Commission was told that demonstrators first vented their anger pulling down unoccupied structures then lit bonfires and tyres and then barricaded roads thereby paralyzing transport and leading to most people staying indoors. What had started as protest demonstrations over the presidential outcome took an ethnic twist with demonstrators targeting for destruction property belonging to the GEMA communities, especially the Kikuyus whom they felt had contributed to their marginalization.

By Monday 31st December 2007 about 20 shops had been broken into and 4 houses had been burnt in Changamwe. Most of them belonged to members of the Kikuyu and the Meru communities who by this time were fleeing to safety and seeking refuge at the Moi International Airport, Mombasa. This gave an

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[192] Exhibit 143

[193] Exhibit 150

[194] Testimony of PC Ernest Munyi, CW 140.

opportunity to criminals to engage in an orgy of looting and destruction. We heard that crowds shouting slogans of "*Maisha Bora"* (Better Life) and No "Raila No Peace" invaded business premises belonging the Kikuyu and Meru communities where they looted all the stock. The extent of the violence was also felt as far as the Mombasa mainland shopping centre and Soweto where 4 public Motor Vehicles were burnt and bars were looted. The orgy of looting was dubbed "ODM shopping".

Likoni, a largely peri-urban area bordering Kwale District and inhabited predominantly by the Digo and other Mijikenda communities and a small number of upcountry GEMA residents was not spared. Testimony was furnished that 2 petrol stations were burnt down while Mt. Sinai Primary School and some businesses owned by Kikuyu were destroyed. In this area, the Ngombeni Chief's camp was attacked and razed down on 5 January 2008 evoking memories of the 1997 pre-election violence where the Likoni Police station had similarly been invaded.[195] The Kenya Ferry services business stalls were vandalized and looted and for 3 days the South Coast was cut off from Mombasa town which is linked by the ferry service that was rendered un-operational due to the prevailing mayhem.

In Kisauni, the Commission heard that there was low level violence on 30th December 2007 where youths burnt tyres at the roadside at Mlaleo and GEMA community members started to move out. We were further told that the police did absolutely nothing to contain the situation and these protests continued in Mlaleo, Mtopanga and in Bamburi Mwisho. Between 30th and 31st December 2007, Mshomoroni, Kadogo, Mtopanga, Bombolulu, Mwandoni, Kiembeni, Bamburi, Mtongwe, Shikaadabu, Miritini, Bomu and Migadini areas remained no go zones. On 31st December 2007 and subsequent days, there was massive destruction of property especially those belonging to members of the Kikuyu community. Furniture shops, supermarkets and select bars were attacked and looted with the violence spreading to Mshomoroni and even Nyali west. On 1st

[195] See the Akiwumi Report as above note 188.

January 2008 in Mshomoroni, Changamwe, Likoni and Kisauni there was massive destruction of property, looting and burning of houses and kiosks. 20 shops were reported looted in Changamwe, four houses burnt and a young boy reportedly shot by a 'stray' bullet.

Similarly, some violence was experienced in Taita and Taveta districts where on 2nd January 2008, ODM youths angered by the presidential poll result went on rampage in Taveta, Mwatate and Voi towns. In Taveta, 15 shops were broken into, goods stolen and or looted and some of these shops burnt amongst them a popular establishment known as 'Makuti'. Several people were injured in the skirmishes and one person was killed.

Some Coastal areas did not experience any level of violence in spite of earlier NSIS fears. For instance, though Malindi District remained tense following announcement of the presidential poll result, no incidents of violence were reported at all. In Lamu district, we received evidence that people merely expressed their anger and disappointment through discussions and no violence was experienced.

While Government witnesses stated that violence had been brought under control by 1 January 2008, we did hear testimony that the situation only became controlled sometime in mid January 2008.[196] For instance, we heard that on 3 January 2008 violence was reported in Kisauni, Maweni, Bombolulu and Changamwe areas where kiosks were destroyed and used to block roads. The demonstrators were dispersed by police using tear gas and shooting in the air. In this incident, one man was reportedly shot in the head and many others were seriously injured. On 5 January 2008 youth leaders in Mvita organized a demonstration which disrupted shops, markets and matatu transport. The Commission further heard that in Ukunda, shops were burnt while others were marked with an 'x' as a sign that they would be attacked and 2 German tourists were killed in Diani.

[196] Exhibit 149

On 10th January 2008 in Mvita, demonstrations were called after the Friday prayers leading to the closure of shops as police dispersed the demonstrators who then resorted to running battles with the police. This was repeated again on 18th January 2008 and we heard that organized demonstrations by youth and some civil society organizations became the order of the day. One youth was reported to have been shot dead in this mayhem and many people were injured, shops remained closed while police fired in the air and employed tear gas to disperse the demonstrators. Overall, we heard that a measure of calm returned to Mombasa by 25th January 2008 as the Koffi Annan mediation process gave many people hope of lasting peace.

The post election violence left 303 families homeless in Kisauni, Changamwe and Likoni. 6 people were burnt to death in a house in Miritini and Dr. Anderson Kahindi CW 143 informed us that the Coast Provincial General hospital handled 109 casualties while Jocham Hospital attended to 16 cases. 5 people died of the bullet wounds in the province.

Response by Police and Provincial Administration

The PC stated that security forces who were deployed to quell the skirmishes did their level best and that he was *"satisfied because the violence was quite intense in the two days and especially the second day and were it not because of the presence of security personnel, then the violence could not have been controlled within that limited period of time."* While we shall shortly revert to this issue, we commend the PC's decision to call a meeting of local leaders who appealed to the public through the 5 FM stations in Mombasa to help bring peace back to Mombasa and Kilindini. This action made a big contribution in bringing peace in Mombasa and Coast Province in general. This was confirmed by the PPO who

added that the voice of a bishop and particularly that of the Chief Kadhi[197] was very important in appealing to people to maintain peace.

The PPO felt that the police had dealt with the situation to his satisfaction and that by 1st January 2008 the violence had largely been contained. He also acknowledged that he had received a lot of complaints from citizens lamenting that *"our officers were not protecting their premises adequately enough".* He explained that in response to the looting, the police had resorted to the use of *Albadiri*, which in local terms is *"giving people a number of days to return what they had taken and they will not be prosecuted; a lot of property was returned."*

We heard that almost 10,000 people were displaced on the first night of violence and sought refuge in various police stations. Not surprisingly, the police through the PPO and the OCPD Wilson Mbithi told us that though they expected election related problems at the Coast they had not imagined violence of the magnitude that occurred. It is our finding that serious efforts were put to securing vital public installations such as the Kenya pipeline depots, the port of Mombasa, the Kenya Petroleum Refinery and fuel depots in Shimanzi which meant that with the available security personnel, it was not possible to provide reasonable protection to others' property. This is borne by cross-examination of the OCPD,

> **Q.:** Bwana OCPD, you're almost telling this Commission that the police will be there to protect the bigger assets, the bigger installations and that is why the pipeline - nobody - I mean the oil depots, the ports, the banks were not touched, But *mwananchi's* kiosk their shops were broken into. And you explain the logic behind guarding that and not the mwananchi's kiosk.
>
> **Witness:** My Lords without giving any other details, it was not possible for the police to provide security to every individual's business premises.

While obviously appreciating that police could not be everywhere all the time, we were repeatedly told that police took too long to come to the rescue of citizens

[197] The PPO further stated that on a night when people had come out with *pangas*, he had talked to the Chief Kadhi who went on air on the radio station Radio Rahma and by talking to the people he was able to cool down the situation without any violence.

and property under threat and sometimes did not appear at all, in spite of giving assurances that everything was under control. For example, a witness testified that:

> *"The same day on the 31st December in the evening around 6 p.m, I was called again by neighbours in Likoni, who told me that shops of Kikuyus were being broken into and things were being looted. I also called the police there and they assured me things are okay there (are) no problems but within a short while I was told the shop was broken into but they were even unable to open the doors so they had to break the concrete. The steel door they were unable to open it so they broke the walls."*

When he received news that another of his shops was under attack, he called *"*the Nyali police Station and they told me everything was okay but within minutes the shop was broken into and everything taken away*."* He lost property and goods estimated at Kshs 3 million. The witness furnished the Commission with video footage capturing the looting of one of his shops which evidence he also stated he had put in the hands of the police together with posters which clearly depicted the faces of people who were looting his shops.[198] By the time he appeared before us on 1 September 2008, he said no action had been taken by police against the perpetrators, some of whom could clearly be identified from the footage and posters.

The lethargy and incompetence experienced by the witness and others depict another hallmark of poor policing in addition to other negative allegations including taking part in the violence and even worse, of having taken sides. The evidence points to a serious degree of inefficiency and dysfunction within the police, and we cannot therefore in such circumstances help but come to the conclusion that either the police did not bother to prevent the commission of crimes in this region or if they were willing to, then they were obviously overwhelmed by the magnitude of the unfolding chaos. Surprisingly there was no concession by the police that there were any lapses in their policing duties.

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[198] Exhibit 144 (a)

Further, we heard from two witnesses that prior to elections, it was openly discussed amongst the Coastal people that they would attack Kikuyu and Kamba business premises if the election results were flawed. One would therefore have expected that the administrative arm of the Government in collaboration with the police and other security agencies would have verified such warning signs and moved very swiftly to put in place some measures to ensure that such eventuality did not occur. Of course no precautionary measures were put in place despite the acknowledgement that some areas were dubbed as hot spots. The information produced in Exhibit 150 is therefore credible that security forces did not make any preparations to address the anticipated violence, to forestall looting, destruction and other forms of chaos.

We were concerned by evidence tendered before us that there was a big presence of GSU officers in Likoni but that they were only visible and not active. This gave the impression to the residents that these particular officers were there with specific instructions to protect tourists along the main routes but had no brief to quell the violence and so they just watched as the tragedy unfolded. However as stated by Hussein Khalid, the Provincial Administration led by the PC Ernest Munyi made an effort at some point to meet the local leaders with a view to finding a solution to the situation if only to avoid the escalation of violence. That aside given the attitude of the security forces at this point in time we are not surprised that a fairly manageable situation escalated into full blown violence that took an ethnic angle and that not only were security forces caught unawares but they were completely overwhelmed. Further, it emerged that the riot drill pamphlet providing guidelines to the suppression of riots "was last issued in October 1962 and if there is any one that came after this one I may not be aware about it my Lord[199]".

The OCPD said it was:

> *"just a show of force meaning that your presence at a scene of disturbance is assumed to be enough to make the rioters disperse, that is the first one. Number two, if they don't disperse after show of*

[199] Testimony of CW 143

force then you are required to use the teargas. The third one if they would not disperse after you throw teargas to them then the pamphlet allows the use of the button, the truncheon now. And finally if they do not oblige and the situation is so bad that is the only time you can resort to the use of firearms my Lord".

Another troubling aspect regards the evidence we received that in numerous instances where the police arrived on time, "they allowed these people to loot items but implored them not to cause any bodily harm to other persons"[200]. The PC, the PPO and the Mombasa Urban OCPD categorically denied being aware of a 'loot but not kill' order. They also rejected the suggestion that they were overwhelmed for lack of adequate preparation, which would justify them seeking to appease the mobs by allegedly telling them to loot but not to kill. However, testimony was consistent from a number of witnesses that police who were patrolling in Land Rovers gave the protesting crowds a go ahead to loot but not to harm or kill anyone.

[200] Testimony of Hussein Khalid CW 149

PART III

Extent and Impact of Post Election Violence

This part of the Report deals with cross cutting issues arising out of the violence which the Commission came across in the course of its investigations. These are:

- Sexual Violence;
- Internally Displaced Persons
- The Media and the Post Election Violence
- Extent and Consequences of PEV: Figures on Deaths, Injuries and damage to property

CHAPTER SIX

Sexual Violence

Introduction

One of the well known and regrettable tragedies of major conflicts and breakdowns of law and order is sexual violence. This has happened around the world. Sadly enough, it also was a consequence of the 2007 post election violence in Kenya. Like others who either lived through or followed this terrible period of Kenya's history, the Commission heard anecdotally and from the media about sexual violence against both women and men. These reports, admittedly informal, included heart wrenching tales of rape, gang rape, sexual mutilation, loss of body parts, and hideous deaths. In addition, the Commission also gradually learned that the various forms of genital violence against innocent victims were not just one-off tragedies but major life-changing events. Among others, the Commission heard tales of family members being forced to stand by and witness their mothers, fathers, sisters, brothers, and little children being raped, killed, and maimed: innocent victims contracting HIV AIDS after being sexually assaulted because the breakdown of law and order and the deteriorating security situation kept them from accessing medical care soon enough to prevent it: husbands abandoning their wives who had been defiled, and the inevitable psychological burden of powerlessness and hopelessness that left individuals who had experienced sexual violence feeling alone, isolated, and unable to cope, not just for one moment in time, but possibly forever. Worse still, the Commission also heard that some individuals who had lost family members and property, and who had been chased away from the only homes they had ever known, also had experienced multiple forms of violence that included sexual violence.

Hearing bits and pieces of these life shattering experiences alerted the Commission to the need to make its inquiries into the sexual violence that occurred following the 2007 election a central focus of its investigation into post

election violence. At the very least the Commission thought it would be appropriate to look in depth into the sexual violence that had occurred. Its reasoning was twofold. First, sexual violence is a form of violence and as the Commission was about violence, it felt strongly that there should be a focus on it in the Commission's investigations. Secondly, being ordinary lay people from various walks of life, the members of the Commission also were personally horrified by the stories of sexual violence that came to our attention. Like others, members of the Commission too felt compassion for the victims of post election sexual violence and wanted to learn and expose what had happened. The Commission also felt that it should do something to make sure that the scourge of sexual violence that happened after the election did not become an endemic in Kenyan life that, could be one day could recur in the lives of ordinary people.

The Commission felt it needed to explore the situation given that like others it only heard isolated stories and did not know anything concrete about the sexual violence that happened. The Commission sought to the best of its ability to answer four basic questions to fulfil its mandate to explore the full extent of violence that Kenya had experienced, including sexual violence. First, the Commission wanted to know whether sexual violence actually had taken place. Secondly, the Commission wanted to know exactly what had occurred, how it manifested, and its extent. Third, the Commission wanted to understand, how and why it happened, and fourth what evidence there was for all of the above.

Being lay people rather than specialists in the subject of sexual violence, members of the Commission understood that not only did they not have the answers to the above questions, but that they also did not know how to go about getting them. The Commission realized that while armed with reasonable questions and good intentions, it could not embark on this inquiry alone. The Commission needed assistance from specialists who knew Kenya's social and political landscape, were familiar with the history, causes and nature of sexual violence in general, and who had worked with victims of such violence. The Commission knew that while women normally are the main victims of sexual

violence when order breaks down, men too had experienced horrid types of sexual violence after the Kenyan election. These included sodomy, forced circumcision, and even mutilation of their penises. Between hearing of women who had been gang raped and mutilated, the accounts of ethnically driven sexual violence against certain men was also horrifying. Furthermore, the Commission also understood that any inquiries it might make into sexual violence would also involve interacting with victims. The Commission appreciated all the sensitivities associated with doing so, including the usual problem of finding victims who would agree to discuss what had happened to them.

The Commission wanted to make its inquiries into sexual violence part and parcel of all of its investigations into the post election violence that engulfed Kenya after the 2007 election. The Commission knew, however, that to do so it would need the help of experts. Fortunately, there are a number of groups in Kenya who work around the theme of sexual violence. These agreed to assist in all parts of the Commission's work, both before the Commission took evidence in Nairobi and while gathering testimony in the countryside. In Nairobi, the Commission held three planning meetings with civil society organizations that address sexual violence, including those who had worked on these matters after the elections in Kenya. In the middle of the crisis, forty organizations in Kenya came together to reach out to women and others who had experienced sexual violence following the 2007 elections. They gathered under the auspices of the Inter-Agency Gender Based Violence sub-cluster co-chaired by the United Nations Fund for Population Activities (UNFPA) and the National Commission on Gender and Development. This umbrella group included a variety of different groups from departments in the ministries of gender and health, and the judiciary, various UN agencies (e.g. UNFPA, the United Nations Development Fund for Women (UNIFEM)), the Red Cross and Red Crescent Movement, and from various local and international non-governmental organizations (NGOS). Even before the Commission began its sessions, the sub-cluster had responded to the post-election sexual violence, particularly against women, including

providing victims with medical, psycho-social and other counselling services. Hence the sub-cluster was in a unique position to help the Commission with its work and did so.

During consultations with the SGBV sub-cluster, the Commission was able to ask them questions about how sexual violence manifested, where the Commission might find evidence of it, and how it should go about collecting this evidence. The Commission also decided internally that matters relating to sexual violence would be an integral part of its inquiry into the post-election violence. As Justice Philip Waki, the Chairman of the Commission noted on the first day of the Commission's hearings, sexual violence is "silent" and "preying" because it is "underreported, under-investigated and …insufficiently addressed", also adding that the Commission would focus on it in all parts of our investigation, declaring ourselves open to "receive any credible information and evidence from survivors".[201]

The Commission realized that it probably would be easier to find out what had happened in Nairobi than in the countryside, where lack of anonymity and fear of speaking to the Commission might be a greater problem. The Commission also understood that if all testimony from victims of post-electoral sexual violence was taken in private rather than in public, the issue of sexual violence against women in the post-election period might get lost and never be discussed or flagged to the general public. To pre-empt these and other potential problems, the Commission took five major steps. First, to help locate and speak to victims of post-election sexual violence in various parts of Kenya, the Commission enlisted assistance from UNFPA and UNIFEM as well as from four sub-cluster members. They included CARE Kenya, FIDA Kenya, the Kenya Women Empowerment Link, and the Catholic Diocese of Nakuru. As a part of this effort, CARE did a study in the slums of Kibera and Mathare, while the Centre for Rights Education and Awareness (CREAW) did another and also produced a

[201] CIPEV Hansard, Vol. 1, pp. 1, 238.

documentary about sexual violence in the Rift Valley. CARE Kenya also held a workshop for victims of sexual violence to explain what the Commission was doing and to find out who among them might be willing to testify before. Further, they provided counselling services to women and prepared them to testify before the Commission in addition to giving the Commission some recommendations to be followed when victims, most of whom were women, appeared before the Commission. Secondly, to ensure that the work on sexual violence was culturally sensitive and to allow the Commission to contact specialists as needed, the Sub-Cluster set up a committee, including a resident gender expert from UNIFEM, to work with the Commission's investigators, and to identify and prepare victims who wanted to testify to the Commission.

Thirdly, to encourage victims of sexual violence to come before the Commission and to make it less painful for them to speak to investigators and to the Commission, the Commission hired two female investigators who had experience in dealing with sexual violence against women in particular. They included one international police investigator and one Kenyan lawyer. Fourthly, the Commission made it a point to allow two lawyers to take part in its proceedings, who had experience in dealing with gender issues, the Federation of Women Lawyers (FIDA) and the Centre for Advancement of Women and Children[202]. They had opportunity to examine every witness appearing before the Commission, including government officials, the police, victims, and other interested parties, throughout our meetings all over the country. Their questions added another dimension to the Commission's understanding of what had happened to women and other victims of sexual violence and the extent to which the government and others had assisted or failed to assist those in need. Fifthly, fully cognizant of the potential challenge of asking someone who had experienced sexual violence to relive it by testifying before the Commission decided to hire a full time

[202] The Commission granted FIDA a limited standing as an intervener on 15 July 2008 and the Centre for the Advancement of Women and Children on 29 July 2008. Their terms are discussed in CIPEV, Hansard, vol 1, 9-25 July 2008, p.228 and vol. 2, Naivasha, 28-29 July 2008, p.1128.

psychologist to interact with and assist victims both before, during, and after they testified to the Commission.

Collecting Evidence

This Commission is the first investigation of electoral violence to focus on sexual violence. This contrasts with the Kiliku and Akiwumi Commissions which did not address it. As such, the Commission was in uncharted territory. Not only did it seek advice as noted above, but also tried to take account of the difficulty victims faced in coming forward. Some told the cluster group or investigators that they were ashamed of what had happened to them and did not want to discuss their experiences in public, fearing further humiliation. Others worried that if they testified in the open, their attackers might retaliate against them, as this increased the possibility of them being identified.

Understanding that potential witnesses had suffered incalculable physical and psychological horrors from which they might never recover, the Commission arranged for private hearings, which also allowed victims to describe what had happened to them and enabled them to open up, in some cases to the point of naming their attackers. In short, the Commission and the Kenyan victims of sexual violence encountered issues similar to those faced elsewhere in the world when dealing with its aftermath. Even then, with all of the efforts to sensitize members of the Commission and provide a safe environment in which victims could testify, it was still difficult for victims to steel themselves and come forth to meet with the Commission. This accounts for the relatively small number of victims, 31 in all, who testified before the Commission or submitted statements, something the Commission understood and appreciated, but nevertheless regret given the strong belief by the Commission that the problem of sexual and gender based violence in the post election period merited more time in the Commission hearings. This not so unusual problem may also have been accentuated by the sad history of Kenya's past electoral violence and the reality that perpetrators have not only gone unpunished, but have continued afterwards as powerful political figures. That sobering reality as well as the relative

powerlessness of Kenyan women in many areas of life may have made potential witnesses shy away after considering that the potential cost of their testimony far outweighed any perceived expectations that they may have had for obtaining justice.

Furthermore, some cases of sexual violence against men that took place after the 2007 elections were hitherto unheard of and new to the Commission and to Kenya. The tragic novelty of this experience meant that there were even fewer support groups available to men than to women. That, added to the humiliation of the violations meant that no male victims came forward to testify to the Commission, something the Commission understood, but nevertheless found regrettable.

The Commission heard from witnesses, some of whom were specialists or had treated victims of sexual violence, and others who were victims. The former testified in public about the character, magnitude, and extent of the violence. This permitted the Commission to learn much about what had happened, approximately how many people were affected, and how various organizations had responded in the face of this crisis. Others, mainly victims, testified mostly in private. The private hearings began in Nairobi after which the Commission heard from victims of sexual violence in Naivasha, Nakuru, Eldoret, Kisumu, and Mombasa, but not in Kisii where no victims came forth.

Public Testimony by Expert Witnesses

The Commission received testimony from three specialists on sexually based violence, most of whose work has been with female victims. These were: Millicent Obaso,[203] a Sexual and Gender Based Violence Advisor for CARE International who also is an HIV/AIDS Advisor for East and Central Africa; Jane Onyango, the Executive Director of FIDA Kenya; and Dr. Sam Thenya, an obstetrician gynaecologist, and Chief Executive Officer of the Nairobi Women's Hospital which established a Gender Violence Recovery Centre (CVRC) in 2001 that has been a

[203] CW 10

Mecca for women. They discussed the post election sexual violence in Kenya between December 2007 and March 2008 and their encounters with it. They told the Commission that sexual violence was rampant during this period consisting mainly of rape and gang rape, defilement, genital mutilation, sodomy, forced circumcision, and sexual exploitation.

Millicent Obaso's testimony discussed the horrific experiences of women in Kibera and Mathare where her organization had worked. There her organization collected information from 40 victims, and analysed in depth the cases of 13 of these victims. She the Commission that most victims were poor women who had been raped in their own homes by youth, gangs of up to 20 men, GSU personnel ,and some police officers. The victims ranged in age from 25-68 with over 62% being married, widowed or divorced, and 38% single. Slightly over 61% had attended primary school, 15 % secondary school, and 23% had never been to school at all. Most were still homeless or living in IDP camps, having lost their possessions, livelihoods, and homes. Ms. Obaso recounted several terrible tales from victims of sexual violence which not only hit women worst but which she told the Commission, was the direct consequence of existing inequalities between men and women in Kenya, and something that affected the way in which husbands responded to the rapes of their wives and daughters. She explained that over 75% of the individuals her group interviewed said they had been raped at home in front of their spouses and children, causing a great deal of stress that resulted in their being abandoned by their husbands. As she explained, *"the man came, the father of the house and when he found that his wife had been raped and the same man raped his daughter and rapes his daughter-in law, he said I am finished with [this]; I cannot deal with this. I am going to find myself another woman, [b]ecause this is the biggest taboo in my home and I cannot even be cleansed and who are the perpetrators"*[204]

[204] CW 10, with the remainder of this witnesses discussion and quotations drawn from pp. 233-42

The witness told the Commission that abandonment after being raped, sometimes by up to 20 men, was just the beginning of the horror visited on these women. Most who were left had no place to go, the majority did not report what had happened with the police or their chiefs, and when they did many were received with hostility or turned away. Some contracted HIV AIDs because they could not get to hospital in time to receive post-exposure prophylaxis (PEP), a drug which the Commission was informed prevents HIV infection if administered in time, while others who were already infected with HIV/AIDS were unable to get their daily doses of anti-retroviral drugs (ARVS) to manage the disease, others became pregnant as a result of the violations. Furthermore, the witness told the Commission that some women were disabled and when they were being interviewed they could not walk properly while others who did not receive proper treatment, still had blood streaming down their legs which was visible to their children.

Ms. Obaso told the Commission that she felt these terrible violations against women needed to be taken very seriously and made recommendations including implementing the Sexual Offences Act, developing guidelines for police, compensating women, providing psychosocial support to them and their families, "*looking at these women as human beings while...finding their perpetrators*", and passing on the experiences of what happened to women to the Truth and Reconciliation Commission.

Jane Onyango[205], testified about the work of FIDA in IDP camps in Nairobi, Nakuru, Eldoret, Mombasa, and Kisumu Kenya that included legal aid, counselling and humanitarian services which they provided to women and children living in very poor, congested and insecure conditions. She told the Commission that these conditions encouraged further sexual violence. She reiterated similar experiences as those recounted by Ms Obaso: gang rapes, fear of reporting to the Commission either in private or public, inability to access

[205] CW 11

police stations, loss of property, homes, legal documents and possessions, and abandonment by their husbands. One woman in Mathare, who was already HIV positive, who had returned home to stay safe after being chased by a gang, she experienced the terror of her house being knocked down by another mob who proceeded to gang raped her before she passed out. In another case, a Luhya woman married to a Kikuyu was abandoned by her husband on 30 December. He returned two days later and threatened to kill her, and sodomize her, saying he regretted marrying a Luhya, he threw her belongings out of their house, and refused to let her see her children. Ms. Onyango also told the Commission that women are traditionally seen as lesser human beings something that propels sexual violence and the insensitive response of the police which leads to victims' fears of reporting, believing they could be turned away or even killed for doing so.

The Commission also received testimony from Dr. Regina Karega[206], the chairwoman of Kenya's National Commission on Gender and Development, which came into existence in 2004. She made a number of suggestions about measures which she felt would increase the likelihood of perpetrators of sexual violence being charged. These included having mobile courts and increasing the number of centres for victims of conflict both to assist and protect them. Michael Gachanja Wachira[207], a program officer with the Centre for Rights, Education, and Awareness (CREAW) presented a DVD of women in the Rift Valley who voiced their experiences concerning sexual violence after the 2007 election. He also gave the Commission a presentation based on an in depth study undertaken in Nairobi, Nakuru, Burnt Forest and Eldoret from the end of January through 25 April 2008. The Commission was interested to learn that 82% of the victims did not formally report their experiences of sexual violence, especially to the police. The Commission was told that the reasons for non-reporting ranged from having been attacked by the police (32%), fear of being attacked again (24%), thinking nothing would be done (45%), and not being able

[206] CW12
[207] CW13

to identify the rapist (31%). Others, the Commission was told, did not know where to report the incident, had been asked not to report the matter (34%), or did not know how to do so (27%). The witness told the Commission that some respondents, especially those raped by powerful figures in authority, including police, who had sexually assaulted women, were effectively untouchable. This finding mirrored other testimony given to the Commission concerning the response both by government and security personnel to other types of post-election violence. The very individuals who might have helped them were people to whom they could not go for help: perpetrators at the worse and otherwise often indifferent bystanders to the plight of ordinary citizens whom they should have assisted. The witness also testified that some women in IDP camps in Naivasha were reduced to trading sex for money to buy food for their families while others were raped by individuals who invaded IDP camps as was the case in Nakuru, or did not have access to medical services.[208]

Dr. Sam Thenya[209], the CEO of the Nairobi Women's Hospital, which provides free services to female and male victims of sexual violence, explained to the Commission that his hospital offers comprehensive treatment to survivors of sexual violence, including administering a drug, known as Post Exposure Prophylaxes (PEP) medication which if given within 72 hours of rape reduces the chances of the victim being infected with HIVAIDS and other sexually transmitted diseases (STDs). He also relayed to the Commission the other types of services offered by his hospital including psychological and mental health and other services.

Dr. Sam Thenya told the Commission that his hospital was inundated with patients during the post election period. It treated 653 individuals to whom it was able to offer comprehensive services, including the administration of PEP. This number excludes others who came to the hospital after the 72 hour period when PEP is in effective as the hospital's statistics include only those who

[208] Exhibit 12 B.
[209] CW 14

receive its "comprehensive services", therefore to some extent not fully taking account of the total number of individuals who came to the hospital to be treated for sexual violence. Adding in those treated at other hospitals in other parts of the country with whom he partners, Dr. Thenya testified to us that at least 900 individuals were treated, noting this was the just the "tip of the iceberg". Many more victims of sexual violence could not get to his or other hospitals to obtain treatment given the lack of security and means of transport when law and order broke down. This was an additional tragedy Dr. Thenya relayed to the Commission, adding to the Commission's understanding of the ways in which sexual violence and the results of post election violence intersected. For those on whom Dr. Thenya had collected data, 524 or 80% suffered from rape and defilement, 65 or 10% from domestic violence with the remaining 10% from other types of physical and sexual assault. The majority of the patients were women, even though the hospital treated a small number of males who had been sodomized and subjected to other form of sexual brutalization. About half of the 524 were adults and the other half were children with 207 knowing their attackers. The majority of the attackers were known but not named, followed by neighbors, relatives, and friends. Of the patients coming to the Nairobi Women's Hospital, 58% were from Nairobi, with the rest coming from Kiambu, Nakuru, Naivasha, Eldoret, Makueni, Machakos, and Ongata Rongai.[210]

Dr. Margaret Makanyengo, a Consultant Psychiatrist and Head of the Department of Mental Health Services and the Gender Based Violence Recovery Centre (GBVRC), [211]also testified and said that their GBVRC acted as a "one stop shop" offering psychological and mental health services to victims of sexual violence. From December 2007 to June 2008 they recorded 184 cases of sexual violence, 80% of which stemmed from the post election situation. Ironically, the Commission heard that in January and February, at the height of the violence, the numbers of patients they saw actually dipped, something the witness

[210] The figures come from Dr. Thenya's testimony and from Exhibits 14 A-C
[211] CW 23

attributed to the lack of transport and the general level of insecurity in the city. Here she echoed the statements of other witnesses.

Notwithstanding the abundance of information the Commission received about the nature, numbers, and manifestations of post election sexual violence from the above organizations and from other witnesses, the Commissioner of Police, Major General Hassan Ali[212] had told the Commission the police had not collected any information or statistics on crimes such as rapes.[213] Given the evidence adduced by the witnesses above and the victims of sexual violence against the police, the Commission was concerned over the apparent lack of interest of the police in sexual violence in general and particularly in not taking action against their own officers who perpetrated the crimes.

Testimony from Victims

The Commission received testimony from victims of sexual violence in public, in private, from statements collected by investigators, including those from victims who did not wish to appear before the Commission but nevertheless wanted their stories heard. The Commission also obtained records of interviews given to other organizations including those headed by the specialists above, who testified before the Commission. This included evidence from women, men, girls and boys who were raped, sodomized, and had their genitals mutilated. It is noted that women and girls were the majority of those affected.

The Commission and its investigators collected testimonies and statements from many different parts of Kenya even though was difficult to access victims in IDP camps, particularly once the government began its program of to resettle IDPs, "Operation Rudi Nyumbani" which made it more difficult for the Commission to trace, reach, or obtain information from victims.

[212] CW 1
[213] CW 1

The people whom the Commission heard from in direct evidence and from statements to investigators are real people with real lives. The combined horror of post election and sexual violence they experience has destroyed their lives. What began as one horror and one loss was quickly compounded into many. These experiences continue to overwhelm those who heard them, including the Commission. Mass violence can easily be reduced to anomic numbers. While numbers are necessary to profile the sexual violence that occurred after the 2007 election, they also can turn tragic histories of normal people into a sea of faceless anonymity if viewed in isolation. To avoid this and to retain the human face of the post election sexual violence experienced by its victims, the Commisison did its best to encourage victims of sexual violence to come and tell about their experiences.

Hence, following the presentation of figures compiled by the Commission to help in synthesizing what happened, the rest of this chapter tells the story of post election violence through the eyes of the victims who testified to the Commission, mostly in camera. The chapter consists in either summarizing what they told the Commission or using direct quotes from their testimonies and statements to the Commission to illustrate broader points.

Who Were the Victims of Sexual Violence?

The demographic characteristics of the victims of post-election sexual violence who testified and whom the Commission's investigators interviewed are as follows.[214] The Commission received statements from a total of 31 women ranging in age from 17-55 years old, some of whom testified in private and others of whom just gave statements the Commission's investigators, but did not appear before the Commission. Many were victims of other aspects of post election violence including being forced to flee from their homes, having their

[214] The figures here were compiled from data collected by a Commission investigator working on sexual and gender based violence.

property destroyed, losing their family members, and suffering from other types of violence. Twelve of the thirty came from Nairobi, two from Naivasha, six from Nakuru, four from Eldoret, six from Kisumu, one from Mombasa, but none from Kisii, even though sexual violence occurred there too. While the Commission feels that much of what it heard was broadly indicative of what happened, its assessment comes from a small group of people who do not constitute a statistically representative sample. For reasons noted earlier, victims of sexual violence are often reluctant to testify.

The Commission was able to find thirty women who agreed to testify. However, while men and male children were also targets of sexual violence, none were willing to be interviewed by the Commission's investigators or to testify before the Commission. This was the situation in Naivasha where there were many forced male circumcisions, including on a teenaged boy who was near where the Commission's investigators were taking statements, but was too traumatized to record his story.

Of those testifying to the Commission or whose statements were recorded, the majority were not well off, if not poor. Before the post election violence many were engaged in small business activities. These included selling cereals, vegetables, and second-hand clothes, working in beauty shops and bars, engaging in subsistence farming, and working as casual labourers on farms or as house maids. In Nairobi, all those interviewed lived in the slums of Mathare and Kibera, while the victims in Nakuru, Naivasha, Eldoret, Kisumu, and Mombasa lived on the outskirts of the towns or in the rural areas. Eighteen of the women interviewed were attacked in their homes, seven while fleeing from violence, three while looking for food or children lost as a result of the prevailing mayhem in their neighbourhoods, one while being dragged out of her house by someone she knew, with the remaining suffering other experiences. Twenty four of the thirty victims who gave statements to the Commission or to its investigators were gang raped. Seventeen rapes were committed by civilians involving 2 to 12 individuals while 7 were committed by state security agents

involving the 4 by the GSU, 2 by Administrative Police, and one by the Kenya police. The gang rapes perpetrated by the GSU involved 2 to 4 officers, 3 to 7 in the case of the Administrative Police (AP) and 2 in the cases of the Kenya Police. Six other cases of rape were committed by individuals rather than gangs, with four cases involving civilians and another two officers from the GSU and one who was an AP. Only one case involved forced circumcision. In Nairobi, six of the twelve cases of sexual violence were HIV positive before being attacked, two were infected after being raped, one was infected with an STD during the attack, while the remaining three had not been tested and did not know their status. Seven of these same individuals had been gang raped, five of which were committed by GSU officers. As mentioned earlier, the Commission also heard from Kenyan experts that the majority of the victims of sexual violence were either unable to or did not seek out medical care.

Who Were the Perpetrators?

From testimony witnesses gave to the Commission and that received from specialists who worked with victims of sexual violence, the Commission learned that the perpetrators of the post election sexual violence included the following: state security agents (e.g. administrative police, regular police, and members of the General Service Unit (GSU)), members of organized gangs (e.g. Mungiki, Kalenjin warriors, and others), neighbors, relatives, supposed friends, and individuals working in IDP camps.

It is always impossible to get into the minds of perpetrators of violence particularly those engaged in sexual violence. However, the testimony given to the Commission suggests certain underlying themes, however irrational they may seem to outsiders or to victims themselves. It appears to the Commission different perpetrators acted for different reasons. In some areas, sexual violence was a means used to pressure people to leave their homes, to retaliate against them for having voted for the wrong candidate, tribe, or party and in tandem with that to dominate, humiliate and degrade them and their communities into a pit of powerlessness. Here it dovetailed with the overall post-electoral violence. In

other areas, sexual violence was an opportunistic act played out against a background of lawlessness and a vacuum of power that created disorder bordering on anarchy. In other cases, sexual violence was used to coerce and control helpless IDPs who traded sex unwillingly for basic needs with the perpetrators being individuals in the camp, individuals from surrounding communities (e.g. when women went out to collect food and water), or security personnel, and humanitarian workers in the camps each of whom preyed upon helpless women in different macabre ways.

Security Forces

In discussing their attackers, victims of sexual violence singled out members of various security forces who were meant to have protected them. Two victims, a 50 year old widow,[215] resident of Kibera who had lived there for ten years and who had children and [216]a 46 year old married woman with ten children, who ran a shop selling vegetables and charcoal described their experiences of being gang raped by GSU officers to the Commission. They told the Commission the officers entered their houses under the pretext of looking for the weapons and young men that were barricading roads and the railway line in Kibera. Another 55 year old woman from Kibera Laini Saba interviewed by investigators recalled a similar horrendous experience. In her statement she told of looking outside, seeing that there were security officers, and therefore not bothering to lock her house. Worse still, as they were security officers, she let them in after which, they ransacked her house while pretending to look for the members of the illegal group, Mungiki, and gang raped her when they could not find the group they were working for . She narrated her life altering story as follows:

> "*I went to my house. The GSU followed me and said they were looking for young men who were involved in the violence. They were 3(three) G.S.U men who got into my house. I had not locked my house and when they came in I did not bother to lock because they were security men who were supposed to care for us. One of the G.S.U officers stood*

[215] CW 17
[216] CW 18.

at the door, the other two got in. They told me they were going door to door looking for the young men who were involved in the violence. I told them that they would check since I was not hiding anyone. I told them that I was alone. By that time I was alone in the house. They told me that we, women, were the ones encouraging the young men because we were preparing food for the "Mungiki". They were using Swahili language. I insisted I was alone and I have never seen Mungiki. They told me that if they could not find Mungiki at least I was available. I asked them "what have I done." One G.S.U grabbed me and said "we can't leave you alone." He then threw me on the bed and hit me on the face. He tore my inner pants and then raped me. Then the second one raped me...."[217]

Another 34 year old woman, also from Kibera Laini Saba had a similar experience which was captured in a statement she gave to the Commission's investigators. She described the horrors visited upon her as follows:

"The army men started running after the young men who were said to be "Mungiki" and had killed other people along the railway line. Having seen that they were army men, I just went to my house and locked the house. I had gone out of my house just to know what was happening. The army men then came and found me in my house. They were three (3) men. It was 5:00pm. They asked me 'mama wapi mzee-mother where is your husband' I told them I don't have a husband. I only have one child and I have taken her... to my parent's home in Meru. They told me to give them my identity card and 'the weapon that my husband uses'. I insisted that I don't have a husband. They saw a PNU calendar hanging on my wall. They then told me 'nyinyi ndio wale watu tulikuwa tukitafuta-you are the people we were looking for.' One of the army men ordered me to climb on the bed, the other was standing on the door and the other was

[217] CIPEV Investigators Jobsheet, Nairobi, 10 July 2008.

ransacking the house looking for weapons or the people hiding in my house. One of the army men told me 'climb on the bed and remove your inner pants' I got shocked him being a security officer. He pushed me on the bed and started raping me. The army man who was ransacking the house was the second one to rape me and the army man guarding the door was the third to rape me".[218]

A 50 year old woman and a resident of Kibera testified in camera to the Commission recounting to the Commission what had happened to her in the following statement:

".....[A]t around 6:30 pm two (2) motor vehicles came with GSU policemen in uniform, green (with patches) and they had a cap the same colour. Thinking that they were coming to assist us, we were very happy but that was not the case. They hit a jiko that had fire and it fell on my daughter Juliana and she got burnt on her feet.....one policeman hit my eyes. I fell down and my blood pressure rose. He tore my clothes. He raped me I got unconscious as the other ransacked the house. The same man raped my daughter J. She became pregnant though on 5/7/08, she had a miscarriage"[219].

In some cases, the security agents attacked individuals, including teenagers, during flight. According to the statement of a 17 years old girl from Eldoret currently living in a children's home in Nakuru, she was attacked by 7 Administrative Police Officers who gang raped her. At the time of the attack, she was running away from her sister's house which had been attacked by some raiders during the post election violence.[220]

Not only did the Commission hear of commissions by security officers, who should have helped to prevent sexual violence rather than engaging in it

[218] CIPEV Investigators Jobsheet, Nairobi, 10 July 2008.
[219] CW 17, Statement, Exhibit 17A
[220] CIPEV Investigators Jobsheet, Nakuru, 30 July 2008.

themselves, but also of deliberate omissions on their part. The Commission received information that some security officers refused to record cases having to do with sexual violence. According to a married woman living in Mathare, [221]who was able to identify some of her attackers by name, she went to Pangani Police Station and the police "*told me that they do not want to listen to cases about rape. If it is about robbery I should report and I reported and they gave me an OB number*." In addition, when a married female resident of Kibera who had been gang raped, CW 18, went to report at the Kilimani Police Station, she was told "*to choose between the two, either the issue of the house being burned or being raped."*[222]

The woman explained to the Commission that although she had identified the men who gang d raped her and looted her property; the police at the Pangani Police Station released the perpetrators without offering her an explanation. The police only said that "*this [was] about politics and that [she] should leave"*. A Mr. Magara, a police officer at the Pangani Police Station even went to the extent of asking for a bribe. He asked the woman to pay him *"shs.6,000 before he takes up the case and [she] told him [she]could not afford that."*

Although security agents are expected to be neutral in the course of their work, the Commission received information from witnesses that some of security agents were ethnically biased, if not hostile, to individuals not from their own ethnic groups or others that they perceived to belong to political parties that they themselves did not support, According to a 29 year old married mother of two, a Luo from Naivasha, who worked for a flower company[223],the police officers, who were from another ethnic group, failed to help her take her injured brother to hospital and when he died, they refused to collect his body and take it to the mortuary. A Kikuyu gang had been looking for the woman's husband and when they could not find him, they set upon her brother, cutting off his testicles

[221] CW 15
[222] From testimony and Exhibits no. 15 and 18.

[223] CW 36

and his penis. Not only did they refuse, but they warned his wife that if she insisted, she "*would end up like [her brother] and that it was not their work".* The body thus remained uncollected for two days, started rotting and was eaten by dogs. It was only later that she got help from other police officers who were Kalenjin.

It is the Commission's view that the involvement of state security agents in the perpetration of sexual violence and the fear of incriminating themselves may partly explain why the police omitted data on sexual violence in the reports they presented to the Commission. The Commission also felt that it was unfortunate that the Commissioner of Police testified that he could not determine whether sexual violence was fit to be reported and was unaware that anyone had been arrested and charged for commission of such crimes.[224] Furthermore, the horrendous experiences of the women who testified before the Commission illustrated the same broad concerns with the security forces. The Commission also learnt about this from other witnesses speaking about the post election violence in Kenya. These included those who were supposed to be keeping order and protecting citizens but were rather perpetrators themselves, a refusal to help citizens who came directly to officers for help or to report crimes, a breakdown along ethnic lines mirroring the way in which violence as a whole manifested after the election, and a callous indifference if not outright hostility to victims who often had experienced multiple tragedies and had their lives turned upside down, sometimes in minutes and sometimes in days.

Furthermore, what the Commission heard from these witnesses once again reminded the Commission about the precariousness of both state and society in Kenya. The testimony the Commission received brought the realization once again that if the current state of impunity and the belief that individuals in authority and their followers have a license to maim and kill without being held accountable continues, both sexual violence and other forms of post election

[224] CW 1, See Hansard, Vol. 1, p. 47

violence would easily happen again. In short, while different in some respects, in others the sexual violence after the election also mirrored many facets of the post election violence in general.

Organized Gangs

According to statements received by the Commission, the victims of sexual violence from some areas told us that they were attacked by members of organized gangs. In Nairobi, Naivasha and Nakuru, there were claims that Mungiki was involved, with their members targeting men as opposed to women. This might explain why there were no reported cases of rape and defilement in Naivasha, but instead there were cases of men being targeted and being forcibly circumcised.

Dr Kariuki Gichuki, the current Medical Officer of Health for Nakuru[225]confirmed having received 6 cases of forced circumcision which he described as *'traumatic circumcision….because usually circumcision, either you are in the hospital or in a traditional setting that is clean and boundary kind of surgical procedure but this one was a bit crude and not orderly'*. The doctor further referred to the cases as ones of *'pilary amputation' and explained that 'usually, circumcision is the surgical removal of foreskin but in [a particular case] a 22 year old male [had his] whole penis actually cut'.*

In addition to destroying property, killing and maiming, the members of the Mungiki gang were said to target men from specific communities believed not to practice circumcision and also believed to be in support of a particular political party with a view to circumcising them. The cruelty of what transpired differed from victim to victim. A married Luo woman with two children, originally from Huruma estate in Nairobi but displaced to an IDP camp[226] testified in camera as follows:

[225] CW 46
[226] CW 16,

"…I heard many people outside saying that "even here there are some ODM people we want to circumcise". ….'they were many and were making a lot of noise. They pushed the door saying that 'Kihii-kikuyu for uncircumcised man' you are the ones troubling us……I saw my husband lying… down. They opened his zip, lifted his penis and cut it with a panga…. I managed to slip away and one alerted them and they said it is okay I would go away and that it is my husband they wanted to teach a lesson and circumcise."[227]

As a result of this attack her husband died due to the injuries sustained during this hideous incident.

In explaining the extent to which some victims suffered in the hands of such gangs, a woman, whose testimony has been referred to previously in camera that,

"I found that his [my brother's] penis had been cut and placed on his mouth, his testis were chopped off and placed on his hand. I found that blood was still pouring out of his body and he was kicking as he was dying…..the following day, another workmate of mine informed me that his [my brother's] head had been chopped of and that dogs were eating his private parts. My brother was clobbered before he was mutilated. The people who did that to him were using spiked clubs. They had fixed nails on the club and as they hit his face, the nails would pluck flesh from his body".[228]

Neighbours and Others individual Criminals

The Commission also heard from witnesses that in some areas, the victims of sexual violence were attacked by their own neighbours or by individuals from neighbouring villages. Hence, most of these victims were able to identify their assailants. In the cases where sexual violence was perpetrated by civilians, this was often accompanied by other crimes such as theft, arson and other types of

[227] CW 16, Exhibit 16 B.
[228] CW 16, Exhibit 16B, Statement

violence. As a 40 year old married Kikuyu woman from Mombasa[229], told the Commission she was able to identify one of her assailants while being gang raped because he had worked at the same place. Among her attackers, who screamed "ODM, ODM" as they stoned and entered the couple's house she was able to identify some individuals who also stole both her household and business properties, torched a sitting shade .., burnt beddings, and slaughtered her three goats. She subsequently made a police report. None of the looters were arrested and the rapist was "*set free shortly thereafter."*[230]

Humanitarian Workers and IDP Service Providers

The Commission was told by experts that some women were exposed to sexual exploitation during their stay at IDP camps. Desperate and vulnerable women were forced into prostitution to fulfil the need to feed their children, doing whatever was necessary to do so. The testimony of Millicent Obaso, mentioned earlier, told the Commission that that some women were subjected to sexual exploitation by some persons managing the IDP camps in order to access basic commodities such as food, tents, medicines and beddings. She testified Commission that:

> *"Sexual exploitation …is really, using power and authority over vulnerable people for sexual favours in exchange for services. Here in Kenya, we saw a lot of that in terms of food distribution. [It is a form of] forced prostitution of course when women are vulnerable, when they have to feed their children. So if a man asks them to have sex even though they may not want to, they will say yes to get the money and feed their children".*[231]

It is unfortunate that the Commission did not hear testimonies of the victims of such types of sexual violence. This could be explained by various factors. There is a possibility that such witnesses feared that providing such evidence to the

[229] CW 153
[230] CW 153,
[231] CW 10,

Commission would jeopardize their situation further. In addition, by the time the Commission was at the heart of its hearings, many of the victims residing at the camps and who would have had evidence to that effect, may have been relocated to other areas under the government programme 'Operation Rudi Nyumbani'.

Unintended Sexual Consequences of General Violence

The Commission obtained evidence from two men, both residents of Kisumu, who were victims of police shooting. Although these did not present themselves as victims of sexual violence, the general violence of which they were victims had incidental sexual effects. In one case, Gregory Ngoche[232] testified that he was shot by the police while resting in his home with members of his family in Kisumu. He sustained injuries on his leg and was hospitalized for several days. As a result of the shooting, he suffered a sexual dysfunction. Another witness, John Apiyo,[233] testified that he worked as an askari in Kisumu and was shot from behind by a stray police bullet as they tried to deal with a riot within his place of work. He sustained an injury on his testicles from the shooting and now has a sexual dysfunction.

Impact of the Victims' Health and Socio-Economic Conditions

Victims of the post election sexual violence experienced a number of unintended consequences in the aftermath of being attacked which the Commission heard about from witnesses who testified and from those who did not but nevertheless gave statements to its investigators. These consequences included infection with HIV/Aids, physical injury and psychological trauma, desertion by their spouses, unwanted pregnancy, and loss of trust that they might have had previously in state security agencies.

Some victims of sexual violence already had HIV/ AIDs and others contracted it as a result of being raped and being unable to access medical services in time to reduce the chances of or prevent infection. In addition, witnesses told the Commission that even when they advised their perpetrators of their HIV AIDS

[232] CW 104
[233] CW 93

status and showed them their medication, their attackers went on to rape or gang rape them, thereby perversely choosing to risk becoming infected themselves. As Millicent Obaso, of Care Kenya explained,

> *"Some of the women declared to the perpetrators that they were HIV positive, but the men ignored and went ahead and raped them. My Lord, this is very dangerous because most of the perpetrators, the youth gang, were between 20 and 25 years. They have spouses or they are planning to marry or have wives and they may be spreading this virus, but who knows, maybe some of these perpetrators themselves were HIV+ and they also infected the women they raped who were not HIV+. I would urge my lord that you monitor the HIV/AIDS prevalence in Mathare and Kibera over the next one year or two years to see to what extent the prevalence is going up*". [234]

This same point was reinforced by Dr. Samuel Thenya, who explained that there

> *"are those who are on HIV treatment or who [were] HIV positive and they were sexually assaulted. Now call it poetic justice or what you may, but it means that the person who assaulted them then has also been exposed to HIV/AIDS. And of course the perpetrators did not come to us. So you* have *a group of people out there who assaulted others who are HIV positive and therefore have been infected with HIV/AIDS".*[235]

Many victims of sexual violence were injured extensively and suffered enormous psychological trauma. A Mathare resident told the Commission that those who circumcised her also cut her vagina to the extent that the attending doctors told her it was impossible to stitch her and instead gave her a drug. A 36 year old woman from Eldama Ravine told the Commission that when she was gang raped:

> "*it was either the second or the third man who said that he was not able to get into me properly so they cut me. I think it was the panga*

[234] CW 10
[235] CW 142

they were carrying that they used. They cut my vagina."[236]In explaining the extent of the injuries she sustained after being gang raped by GSU officers, told the Commission[237], *"...these people hurt me because at my age I had stopped getting monthly periods. These days I bleed a lot. I have a smelly watery discharge and I have heavy bleeding and have sores around my private parts.....I feel a lot of pain in my private parts especially when I am having periods and I stopped having periods. This was caused by the men who attacked me...."*[238]

In describing the psychological r effects of sexual violence, Ms Obaso explained the encounters of other women who did not appear before the Commission because of fear and humiliation, as follows:

"*This [sexual violence] happened to many. Some women were seriously violated. They had bottles pushed up their private parts and others had sticks pushed up into their private parts"*[239] After witnessing the extent of the injury that her brother sustained, his subsequent death and the fact that his remains had been eaten by dogs [240]told the Commission, "*I am traumatised. I usually have bad dreams. I keep seeing how my brother died in my dreams. Even as I speak, I fear getting nightmares. I get them every time I narrate the story. …the day my brother was killed, I wished I could die. I walked on the road and I was almost knocked by a car*".

The witness also indicated that her nephew (the late brother's son), one '*Ochieng was present when his father was being clobbered and mutilated. He has since gone mad. He keeps on saying 'dad they are chopping off your thing [to mean*

[236] CW 37.
[237] CW. 17
[238] CW 17.
[239] CW 17.
[240], CW 36

penis]'".[241]Some victims of sexual violence were raped in the presence of their family members a situation that traumatised them as well as the members of their families present during the ordeal. After both she and her daughter were gang raped with her daughter becoming pregnant and later having a miscarriage, a witness told the Commission that *"[her] children were traumatized*," something which the Commission reviewed as a huge understatement given the depth of the multiple tragedies visited on victims of Kenya's post election sexual violence.

Another horror awaiting victims was the fear of and actual abandonment of rape victims by their husbands and even other family members which occasioned a breakdown of families at a time when the very least a victim needed from those close to her was comfort instead of castigation and additional loss. A witness from Eldoret who recorded a statement with investigators in Eldoret on 6 August 2008, did not report or seek medical attention after being gang raped for fear that her husband would beat and abandon her, which he did anyway. Other witnesses who testified reported being kicked out of their homes or abandoned when their spouses heard they had been raped.[242], Furthermore, when the parents of a 36 year old married Kikuyu woman originally from Eldama Ravine with four children, who had been raped by the Kalenjin men who also killed her husband, heard she had been gang raped and had contracted HIV AIDs, she told the Commission in testimony and in her statement that her immediate family, "*… started separating themselves from me, "kujitenga". My parents would not even use the same utensils that I used. [They] extended the same sort of treatment to my children…[M]y brother, [name withheld] even sharpened a knife and threatened to kill me and my children because we (my children and I) were suffering from AIDS'….. 'after I got separated from my family members I had been very lonely. I decided to get myself a partner, a person of similar (HIV) status so that we could help each other".*[243]

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[241] CW 36, Statement, Exhibit 36.
[242] As the commission was told by CW 15 and17
[243] CW 37, Statement, Exhibit 37 A.

In addition, the Commission heard from other witnesses about unwanted pregnancies, including the cases of two 14 and 16 year old girls who had been raped after which they found themselves doubly burdened.[244]

These are a just a few examples of the unbearable and lingering consequences of the post election sexual violence that witnesses were courageous enough to recount and explain to the Commission. These same victims of gang rapes, mutilation, HIV/AIDs, abandonment, psychological trauma, homelessness, loss of property, and violence-induced poverty are in a state of utter misery, feeling isolated and lonely. Some still are in constant contact with this Commission's psychological counsellor who assisted them when they spoke to its investigators and testified before the Commission. Furthermore, a culture of distrust in state security agencies has been heightened now that their role as perpetrators is more widely known. This also has contributed to the broader culture of impunity surrounding election related violence in Kenya since the 1990s. Furthermore, it means that victims of sexual violence are now probably even less likely to report the crimes against them given the response they received from some of the security agencies which were supposed to help them rather than attack or abuse them.

Institutional and Legal Challenges to Responding to Sexual Violence

Other matters affected the proliferation of sexual violence after the 2007 election, coupled with the seemingly endless spread of post election violence in general, thereby contributing to a large and unnecessary number of deaths and injuries, including injuries resulting from sexual violence.

As mentioned elsewhere in the Commission's report, the delay by government in responding to the violence when it began, the failure to anticipate it, the admission by officers in the public administration and security forces of being overwhelmed, and their lack of coordination in dealing with the violence, all

[244] See the testimonies and statements of CW 10, CW 17, and the statement taken by the CIPEV investigators on 30 July 2008 who decided she did not want to be part of the hearings.

meant that law and order increasingly broke down, thereby inviting a further spread of violence, including sexual violence. As the proprietor of the Pepper Tree Restaurant in Naivasha noted, violence might have been controlled if security had been enhanced as it was in Gilgil town where there was a heavy army presence. This contrasted with neighbouring Naivasha and Nakuru, where there was no intervention of security agents leading to a resulting free-for-all of uncontrolled violence. The consequent spillover of the lack of government control manifested in, roadblocks, lack of security, and lack of transport, all of which kept victims of sexual violence from getting timely medical care. Furthermore, this had a spillover effect in that many medical staff personnel were unable to get to work, there were not enough trained individuals to assist victims, and drugs often were in short supply.

In addition, the lack of a coordinated government policy, whether agreeing to keep systematic figures concerning casualties and incidences of sexual violence rather than ignoring it, as well as not communicating instructions to hospitals and citizens that medical fees had been waived, meant that some victims of sexual violence who could have received medical attention did not do so because they thought they would have to pay with money they did not have.

In spite of the above, many institutions who had no official responsibility to assist victims of post-election sexual violence offered invaluable humanitarian assistance. The Commission received evidence of the remarkable work of the Kenya Red Cross Society, Médecins Sans Frontières, the Nairobi Women's Hospital, a number of churches, organizations who came to testify and others about which the Commission still may be unaware. Some of these groups such as the Kenya Red Cross provided first aid, tents, food, clothing and helped survivors reunite with their families, while others, such as the Nairobi Women's Hospital served as a front line facility, which gave medical care and psychological support to victims of sexual violence and engaged in fundraising so that they could offer their services to victims for free.

Aside from the above and the Commission's desire to dig deep into the horrifying and life altering sexual violence that affected Kenyan women as well as some men, the Commission itself was challenged stymied by a number of factors. By definition, its work depended on the information that victims and institutions were willing to share. However, for the reasons mentioned earlier, many women and men did not want to speak about what had happened to them either in public or private whether because of shame, fear, distrust of authorities including us, their inability to identify perpetrators, or in contrast because of possible retaliation by those who had attacked them, including people whom they knew. Others who had never received medical treatment or counselling worried about being traumatized again if they spoke of what had happened to them. Even some individuals, who were courageous enough to come forth, sometimes broke down in the course of testifying. Still others did not want to give evidence because of cultural sensitivities that included discussing rape in public. A case in point is Mombasa, where victims feared that they could be shunned and ostracized by their communities for having lost their virginity before marriage. The Commission also faced logistical problems in finding victims especially those who had fled to other areas or had left for unknown places after some IDP camps were closed when government began its "Operation Rudi Nyumbani" resettlement program. Furthermore, given the limited time we had to collect evidence about sexual violence from victims, the Commission did not have enough time to verify whether some of what was heard was specifically related to post-election violence or part of other crimes outside the Commission's mandate, an issue that was compounded because most victims did not report about the sexual violations that they suffered and most did not receive medical treatment, Reports would have been a means of verifying their evidence. A further issue was that most women had little or no information about what to do or where to go to report violations against them, something compounded by the response of the police and indifference if not hostility to victims by communities themselves.

Legal issues arising from sexual violence in conflict situations also present another set of challenges in terms of appropriate responses by government and others. There is a general agreement that sexual violence has been used as a weapon of war in most conflict situations. While Kenya has ratified a number of treaties prohibiting violence against women, it either has not incorporated them into its laws or acted on those parts of the law that reflect them including Chapter V of the Constitution or the Sexual Offences Act of 2006. Others speak about other areas where there is an alleged legal lacuna concerning AIDS and family protection, areas where bills pending before Parliament may assist. However, the Commission is not of the opinion that sexual violence stemming from the post election breakdown occurred because of unresolved legal matters. Rather it is the result, in part, of the failure to enforce laws that have already been passed by Parliament.

Recommendations

As a result of the Commission's focus on the sexual violence stemming from the post electoral violence following the 2007 election, it recommends the following:

In the course of its inquiries, the Commission found that, although the government hospitals had established Gender Violence Recovery Centers (GVRCs) offering free medical services to victims of sexual violence, victims of sexual violence mostly did not know they existed. Hence, at the minimum the Commission takes the view that citizens should be informed about them in awareness campaigns, something that is going on already in places like Mombasa and which will need to be replicated in other parts of the country.

The Commission also believes there a need to establish GVRCs as departments in every public hospital with their own staff, facilities, and budget. Currently, the GVRCs fall under other departments and rely on them for funding as well as personnel, something that has reduced their prominence and ability to provide services.

In addition, with some reservations, the Commission proposes the creation of gender unit/sections within every police station where victims of sexual violence can be treated with sensitivity and where their cases will be properly recorded and investigated. Currently the existing units are limited and do not entail any more than having a female officer available to deal with female victims. However, for any such unit to be effective would require a complete change in attitude within the security forces themselves, including the police. Training the police how to handle cases of sexual violence and in first aid would be of use only if mechanisms for accountability within the security forces themselves are established and acted upon. At the very least, this would include police and other security personnel being severely punished for perpetrating crimes of sexual violence and being dismissed if they mishandled victims of sexual violence. In short, new units without new patterns of behaviour and new sanctions would be utterly useless.

The Commission also encourage Non-Governmental Organizations (NGOs) working in the health sector to partner with medical institutions and share information to ensure a swifter and improved response to sexual violence.
The Commission considers there is low level of awareness about the possibility of help that victims of sexual violence can receive. Further, there no pressure on the part of law enforcement to do the right thing when dealing with cases of sexual violence. The Commission, therefore, recommends the establishment, under Kenyan law, of the office of rapporteur on sexual violence. The responsibility of the rapporteur will be to highlight, on a continuous basis, the fact that sexual violence is a serious crime and needs an equally serious response on the part of law enforcement authorities. The rapportuer should have an appropriate staff to assist in the discharge of the functions of the office. The rapportuer should be required and empowered to work with existing government institutions that address sexual violence, including the courts, the police, and the National Commission on Gender. The rapporteur should be required to present, on an annual basis, a report to the National Assembly, outlining a view on how, during the year, cases of sexual violence were handled.

That said, in all societies sexual violence and how it is handled is reflective of the broader social and political culture. In Kenya, the issue has been magnified because of the diffusion of electoral violence since the 1990s. Hence, ordinary citizens, including women but also men have been victims of the cannon fodder of violence perpetrated by politicians. Violence as a whole consequently has grown unchecked, has become increasingly dispersed, and is a product of a larger breakdown of order and lawlessness that came to a head after the 2007 election. In this context, the Commission was dismayed and shocked to hear in graphic detail about the unspeakable horrors of sexual violence visited on the witnesses who spoke to it as well as the many women and girls and the men and boys who did not. But, in the end the Commission was also not surprised as the sexual violence after the election was just one more unspeakable aspect of the violence that engulfed Kenya following the 2007 election and could do so again unless checked immediately.

CHAPTER SEVEN

Internally Displaced Persons

Introduction

The point of discussing the plight of Internally Displaced Persons (IDPs) here is to make recommendations to promote and enhance their future protection. IDPs have been defined as, "*persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violation of human rights or natural or human-made disaster, and who have not crossed an internationally recognised state border*[245]"

IDPs are the human face of the problem caused by PEV. The extent to which the problem is or is not addressed will be the barometer by which the government will be judged in addressing problems and effects of PEV. Hence, where possible the Commission visited IDP camps and talked to IDPs specifically about their problems and experiences. Moreover, most of the witnesses who interacted with the Commission had some experience with some form or other of displacement hence the importance of addressing the issue. The Commission went out of its way to hear the evidence from residents of IDP camps and others who were displaced. However, given the mandate of the Commission, its scope was limited to IDPs from the PEV.

The Commission was made aware of the fact that internal displacement has been a permanent feature of Kenya history from colonial times onwards. Starting with the eviction of natives from their ancestral land to make way for settlers in colonial Kenya to recent violent evictions accompanying the 1992, 1997 and 2002 election, IDPs have been a constant feature of the country's political landscape. Even before the 2007 General Elections there was already a problem of population displacement as a result of the following factors amongst others:

[245] Francis Deng, The Guiding Principles on Internal Displacements; E/CN.4/1998/53/ADD. 1, February 11. New York, NY; United Nations, New York, United Nations

(a) Pre-election violence in Molo district.[246]

(b) Border and land disputes in places like the Sondu which is the confluence of three districts; Nyamira, Nyando and Kericho occupied by the Kisii, Luo and Kipsigis respectively.[247]

(c) Cattle rustling and banditry in the Pokot/Transnzoia, Transnzoia/Marakwet District border.

(d) Natural disasters such as drought in large parts of Northern Kenya that often lead to conflicts over natural resources like water leading to displacement.[248]

These multiple causes of displacement make it very difficult to come up with accurate statistics concerning causs of displacement, gender, age, social and economic standing. This makes it difficult for both the government to devise comprehensive policies and interventions to deal effectively with IDPs. According to the government there were 350,000 persons displaced as a result of PEV after the 2007 elections.[249]

Some of these already existing causes of population displacement were exacerbated by the PEV. A particularly disturbing feature of the PEV brought to our attention is that some of the IDPs have suffered successive displacements as a result of previous election related violence. Several witnesses testified that they had suffered multiple evictions in 1992, 1997, 2002 and 2007.

Extent of Displacement Resulting From the 2007 Election Related Violence

The Commission toured various hotspots of violence and IDP camps to get a firsthand view of the extent of displacement as well to hear from the IDPs themselves. We heard testimony of aspects of flight and departure and the

[246] Evidence of Rift Valley PC, Mohammed Noor. There were skirmished reported in Kuresoi Division of Molo District in August 2007.
[247] Wilson Njega, DC Kericho.
[248] Testimony of Mohammed Noor.
[249] Francis Kimemia, Permanent Secretary in charge of Provincial Administration and Internal Security, Office of the President, Exhibit 4A.

struggles endured at the camps. It was sadly clear to the Commission that internal displacement as a form of violence has been a permanent feature of the conflicts in Kenya that have accompanied the transition from a single party to a multi party system.

The election related 1992 and 1997 "ethnic" clashes resulted in displacement of thousands of people. According to the Kiliku Report, an estimated 54,000 people were displaced in the 1992 clashes.[250] The Justice Akiwumi led Commission, which was appointed in 1998 to inquire into the tribal clashes that rocked the country since 1991 did not make any findings as to the number of persons displaced as a result of the clashes either in 1992 or 1997.[251]

The internal displacements following the widespread violence that hit the country after the announcement of the 2007 presidential election results were, however, unprecedented in terms of the number of victims and the widespread nature of the phenomenon. While previous conflicts led to internal displacements concentrated in the multi ethnic regions of Western, Rift Valley and Coast, the 2007 PEV resulted in massive country wide forced displacements, which were urban as well as rural in contrast to the past.

Violent and sudden displacement from a place one considers their home is often the worst form of loss entailing, as it does, a sense of loss of self. Most of the IDPs the Commissioners interacted with had no other home apart from the place they were evicted. Displacement meant not only the loss of a home but loss of friendships and other relationships, economic and personal, built over many years, dispersal of relatives, a loss of memories that constituted one's being. That most of the displacement was violent in nature aggravated the loss. Whatever interventions this Commission purposes to alleviate the suffering of IDPs, it regrettably cannot make up for the mental and psychological trauma associated with displacement.

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[250] Kiliku Report, , Exhibit 136A. This figure did not include all the districts that were affected by the violence.
[251] Akiwumi Report,. Exhibit 134A.

The sudden departure and flight by IDPs was necessary to protect lives. In very exceptional but isolated cases IDPs succeeded in salvaging property or other valuable possessions. IDPs were subjected to violence and in extreme cases members of families were split up and even a mother lost her child during flight.

> *"AB was a 46 year old married woman with 9 children. They were aged 19 years old to 2 ½ years old. She originally lived in Kipkaren and was a businesswoman in Eldoret town while her husband was in the matatu business. In 1992, as a result of the clashes, her house was burnt and she lost all her merchandise and belongings. Despite this, she managed to recover form the ordeal and rebuilt her life once again. In 2002 she was attacked again and unfortunately her right hand and breast were burnt. In 2007, her family was once again attacked. Her husband and older children managed to flee once the violence began on 28th December 2007. She stayed behind with her six younger children. At night some men broke into her house, raped her and beat her. She was once again burnt when the raiders poured on her the food she was cooking. The following day, she left her house with her six children but one got lost in the ordeal. She had to walk up Eldoret town where she was re-united with her three elder children. She is now residing at the Eldoret Showground IDP Camp.*
>
> *When asked what recommendations she had for the government, AB said; "We would plead to the government to assist us because right now we have nowhere else to go, we have nothing. I don't have land; I don't have any money to start a business. I cannot support myself in any way. I have no direction, sometimes I wish I could just die but I remember that I have children and if I die I do not know who I would leave my children with. My children are the one who give me*

strength, they are the one who make me live in this earth. If I was alone right now, I would be dead by now."

In some other cases the departure of individuals stemmed from threats or the anticipation of violence. However, in most cases IDPs were forcefully evicted physically through violence against them and the destruction of their property.

Most IDPs left their homes under emergency conditions not knowing where to go or their ultimate destination. In certain circumstances the IDPs left while under attack from marauding gangs of youth. The most common destination was a police station or administration police or chief's camp, church or trading centre which were considered secure. Other persons in distress hid in the bushes and forests until they felt it was safe to proceed to a place of relative safety.

The Commission was also told of instances where the general public and the police were fully involved in the evacuation and protection of IDPs. Individuals and institutions involved in protecting IDPs should to be commended since this was fraught with risk particularly during the time of intense violence. According to Bishop Cornelius Korir, the Catholic Bishop of Eldoret Diocese;

..... [I] asked the watchman (of the church compound) to open the door in case somebody needs to be rescued so we opened the door and the people started coming in. I did not know there was fire all over the place so by evening there was no space here. The church was packed they slept inside we had the closing prayer on 31st evening which is 10 o'clock to midnight. There was no space for us but we said the prayers inside. There was no fighting outside. ..... By 1st [January] more people were coming, 2nd there was no space here even outside. Even where we were passing there was no space. People kept on coming and it was tough but it is now ODM and PNU ..... [W]e were getting information, people had been trapped so we did a lot of evacuation. We were evacuating people using our lorries. The goodness is that the elders were looking after the people

especially after this church was burnt with people inside. So of the people had gone in our churches in the interior parts and the elders could look after them, feed them and there was a fight between the youths and elders. The youth want to finish the other group. So the Kalenjin elders had to look after them. They were really harsh so we had to do evacuation as far as Plateau, far in and we were using ourselves and the Kenya Red Cross and the Government.

Duncan Okore, who was the Officer in Charge of the Naivasha Maximum Prison, instructed his officers to open the doors of the prison compound on 31st December 2007, to women and children from Naivasha town who came as a result of threats of violence received. It is important to note that at this stage no incidents of violence had been reported in Naivasha Town. According to the witness, there were no arrangements made to receive IDPs but despite this, the original 40 to 50 IDPs, mostly women and children, were duly accommodated within the prison staff canteen and church. From the 27th January 2008, the prison began to receive more IDPS whose number peaked to about 10,000 on 2nd February 2008. Subsequently, the Kenya Red Cross Society, the Catholic Church, Medicin Sans Frontiers, World Vision came to make an assessment and provided humanitarian assistance.

IDPs had to find a safe means of transport as well as safe passage to the camps. Once again ordinary individuals and public officers acted admirably in providing safe passage for IDPs. Of special mention is the role of the Kenya Armed Forces, who in their statutory duty of 'aid to civilian authority"[252] provided safe passage by clearing roads, providing security and ferrying IDPs to safe and secure places.

Settlement Conditions in IDP Camps

The IDPs fled to the nearest places which they considered safe. These were mainly located in churches, trading centres, chief's camps, administration police

[252] Testimony of General Kianga, Chief of General Staff, Kenya Armed Forces, CW 7.

camps and police stations. In many areas the camps in which the IDPs initially settled were the subject of attack or threats of attack by criminal gangs and marauding youth. This phenomenon was particularly evident in the North Rift Valley and in Nakuru.

A further characteristic of these camps was that they were ethnically divided reflecting the ethnic divisions at the time. In Nakuru, when the violence erupted, the IDPs were initially taken to the police quarters at Kasarani and the Central Police Station and thereafter relocated to one of two camps. The DC testified that when the non Kikuyu IDPs were taken to the Nakuru ASK Showground Camp, they were rejected by the IDPs there and had to be moved. Depending on their ethnicity, IDPs opted to go to one of two camps. The Luos, Luhyas, Kisiis and a few Kalenjin were accommodated at the Afraha Stadium IDP camp while the mostly Kikuyu IDPs chose to proceed to the Nakuru ASK grounds. Only Kisiis ended up in both camps. The former camp comprised mainly Nakuru town residents while in the latter IDPs came in from other parts of the Rift Valley. Coincidentally, this situation mirrored the prevailing political situation.[253]

In Naivasha, the two main camps established were also ethnically divided. The Kedong camp consisted mainly of Luos, Luhyas and Kalenjins who were mainly displaced flower farm workers working in Naivasha while the Naivasha Stadium camp consisted of Kikuyu's displaced from other parts of Rift Valley.[254]

Security

Initially, IDP camps were set up on an *ad hoc* basis without any planning. The first port of call was in areas which were considered secure for settlement. These included police stations, administration camps, trading centres and churches. However, because these camps were set up in an *ad hoc* fashion

[253] Testimony of Gordon Ogolla, Chairman Law Society, Nakuru Commission Witness No. 47. Also testimony of Wilson Wanyanga, DC Nakuru, CW 44.
[254] Evidence of Lukas M. Katee,, CW No. 33 and also Willy Lugusa, OCPD Naivasha, CW 34.

security soon became a major concern, with numerous threats of attack coming from the outside.[255] Illustrative of this situation is the testimony of Angelus Karuru, the Officer Commanding Police Division (OCPD) of Eldoret;

> *"..... during the skirmishes we were ferrying people from the interior to various Police Stations and churches. There were various IDP Camps at the time, we had one at the Divisional headquarters which is at the Police Station, Holy family Catholic Church we had another one, Soi Police Station there was also another one, Kipkabus there was another one and also at Iten Police Station. When we realized that these people were almost being attacked in these camps, they requested to be moved to a safer place and that is when we started moving them to one central place for ease of protection."*

The former Rift Valley Provincial Police Officer told us, the locals around Kaptagat wanted to attack the IDPs who had sought safety at Kaptagat Police Station. The OCS broke all protocol and called the PPO directly and told him, *"Afande, send me reinforcement, these people are going to kill us here."* The OCS managed to negotiate with the gangs surrounding the station who allowed the OCS to give safe passage to the IDPs camped at the station.

IDPs in most camps organised themselves into representative committees to access services, security and other matters. Young men were mobilised in what is commonly referred to as vigilante groups to provide security within the camps.[256] Another security problem was that individuals who had to seek food, water or other services outside the camps. Here, we received reports that some women were victims of violence when they sought food or water outside the camp.[257]

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[255] For example, threat of attacks by gangs of youth to IDPS at Mogotio Police Station as per testimony of Mr Stephen Ikua, DC Mogotio.

[256] The Commission visited the Nakuru ASK ground camp and the Naivasha Town IDP Camp which had constituted committees.

[257] George Wachira,, Commission Witness No. 13. Exhibit 23B titled, "Women paying the Price: Sexual and Gender based Violence during the 2007 post-election conflict in Kenya"

Survival and Sustenance

As stated earlier, most IDPs had to leave their home with nothing except the clothes on their back. The situation was aggravated during the height of the violence when basic services were not available and the supply lines were blocked. The IDPs depended mainly on relief food and basically had no way of earning a living.

During the initial stages of the violence, there were concerted efforts by both local and international NGO's and well wishers to provide food, water and other basic needs to the residents in IDP camps. However, as the violence subsided, the burden of providing sustenance to the IDPs was left mainly to the Government and the Red Cross. The IDPs complained that the food rations were drastically reduced.[258]

Access to other facilities

Evidence presented indicated that access to basic facilities such as medical/health services, education, social and economic services, was generally more difficult for IDPs and their families than it was in general due to the violence being experienced at the time. A lot of rape victims and those who were HIV+ did not have access to essential medical services.

Initially, IDPs had to settle at Police Stations, DOs offices and Administration Police and Chief's camps which, while secure, were ill suited in other ways. A witness described the situation at the Naivasha Police Station on 29th January 2008, in the following terms;

> *"When we arrived at the police station, what I saw was a sea of people. It was packed with so many people on arrival everybody was calling me, " Sister, we are here, we have been here for the last two days without food, the children are cold, can you get us help"? There*

[258] Testimony of Peter Kariuki, Chair of the Nakuru IDP Committee

was a cry from all over. You can imagine the crowd and everybody is trying to state their needs. I also decided to also talk to the Deputy OCS and the first thing which I saw was children who were so dehydrated and I learnt that there was no water because the tank which was there was empty. I don't know when water had been brought to the camp.

So, the first thing was to try to find out who owned that so that we can mobilize to get water. I was told it belonged to Oserian Flower Farm which is around the lake and I got some contacts to call. Later I got a driver and the police promised me security so that we can b able to get water. So, I asked the parish whether they can allow us to draw water from the borehole to bring to the police station because what I saw was so pathetic. So, that is what we did, I got security to escort the truck and then the driver arrived to go and bring us water.

I also called the DC that same morning and asked for a meeting with him because I wanted to find out who were the actors on the ground trying to bring humanitarian services and how can we come in and if there was anything we could do to ease the suffering of those people. So, when we met with him he said that the Red Cross were already on the ground. We told him that we were concerned about the women and children and we have a hall in the parish and if we could evacuate the women and children to the Catholic Parish Hall where there is water and sanitation because the situation at the police station was deplorable. At that point there were no toilets and you can imagine with so many people".

At the camp centres, *ad hoc* schools were set up for displaced children but they were hardly equipped to handle students. Most camps had education facilities for young children but the older primary and secondary school children presented a greater challenge.[259] Due to the existence of free primary school

[259] Testimony of Peter Kariuki. CW 49.

education, it was easier to have children admitted to the nearest primary schools. Hence, for example, children from the Nakuru ASK grounds were readily admitted to the neighbouring Lenana, Moi and Prison primary schools.[260]

Police Response

As the influx of IDPs was neither anticipated nor foreseen, there were very few officers, police or administrative, to guard the IDPs. Hence, decisions had to be made to move the IDPs to larger more secure camps in urban areas. In any event, it is understandable that during the time most security officers had been involved in election and related duties as one witness states;

> *"Our officers were a bit tired because the campaign period had been long and they were covering and again there was a holiday in between which they were alert especially the Christmas and boxing day and they were also covering the election day at polling stations, they were there at the counting and tallying of parliamentary and presidential votes in all polling stations within the district and their efforts were mainly diverted towards evacuation and saving lived immediately after the incident".*[261]

Quite apart from the lack of security to protect convoys of IDPs, the initial movement of IDPs was hindered by blockage of roads, by menacing gangs and a lack of adequate means transport.

As we have noted earlier, initial IDP camps were set up within Police Stations which were wholly unsuited for holding large groups of people.[262] Subsequently, more formal camps were set up as the violence stabilised. Perimeter fences and security lights were provided in most of the camps with a number of police officers also patrolling the camps especially at night. However, the general

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[260] Exhibit 49A.
[261] Adan Gedow, DC Kipkelion District, CW 68.
[262] See also the evidence Augustine Nthiga, OCPD, Kisii Central, CW 110. There wasn't enough space at Kisii Police Station to accommodate arriving IDPs.

complaint was that there were an inadequate number of police officers to provide sufficient security to the IDPs in camps.[263]

Government Organisation

On 4th February 2008, the Kenya National Dialogue and Reconciliation mediated by H. E Kofi Annan with the Panel of Eminent African Personalities issued a statement which set out, amongst others, immediate measures to deal with the humanitarian crisis gripping the country. The statement set out the framework for dealing with displaced persons in the following terms;

> The final goal of the National Dialogue and Reconciliation is to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.
>
> 1. **With Respect to Immediate Measures to Address the Humanitarian Crisis:**
>
> a) Assist and encourage displaced persons to go back to their homes or other areas and to have safe passage and security throughout
>
> b) Provide adequate security and protection, particularly for vulnerable groups, including women and children in the camps.
>
> c) Provision of basic services for people in displaced camps:
>
> - Ensure that there is adequate food, water, sanitation and shelter within the affected communities – both those in displaced camps and those remaining in their communities.
> - Provide medical assistance with a special focus for women, children, people living with HIV and AIDS and the disabled, currently in displaced camps.

[263] Exhibit 13B.

- Ensure all children have access to education. This will involve reconstruction of schools; encouraging return of teaching staff and provision of teaching materials, and assistance for children to return to their learning institutions.

d) Provide information centres where the affected can get easy access to information regarding the assistance that is available to them and how to access it, for example, support for reconstruction of livelihoods, or tracing of family members.

e) Operationalise the Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post 2007 Election Violence expeditiously by establishing a bipartisan, multi-sectoral Board with streamlined procedures to disburse funds rapidly.

f) The Fund is open to public contributions and all citizens and friendly countries, governments and international institutions to donate generously.

g) Ensure close linkages with the ongoing national and international assistance to enhance the effectiveness of delivery.

h) Ensure that victims of violence in urban areas are not neglected in the implementation of the above.

i) In order to promote food security, displaced farmers should be assisted to return to their farms. All farmers affected by the crisis should be assisted and encouraged to safely resume their farming activities.

The coordinating agency for matters concerning IDPs in Kenya is the Ministry of State for Provincial Administration and Internal Security through the Disaster and Emergency Response Co-ordination Department. There is also the Ministry of State for Special Programmes (MSP).[264] While Kenya has specific policies and interventions to deal with the problems of IDPs, it lacks a legal framework

[264] Report on the Role of the Ministry in Relation to the Post Election Violence forwarded to the Commission letter dated 20th August 2008(Ref: OP/SP.3/55/2A).

governing the issue of IDPs. Hence, a number of issues are dealt with in an *ad hoc* manner.

In January 2008, the Ministry for Special Programmes established the Mitigations and Resettlement Department. The department assists IDPs in resettling and return to their former livelihoods. This involves amongst others, the following activities; reconstructions and rehabilitation of destroyed homes, profiling, provision of transportation, construction of social amenities, and provision of food.

The Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post-2007 Election Violence[265] is also managed by the MSP. The government formed the advisory Board for the National Humanitarian Fund for the Mitigation of Effects and Resettlement of Victims of Post -2007 Election Violence.[266] The government injected an initial amount of Kshs 1 billion in to the fund and is expected to raise money from other donors. The purpose of the fund is to, among other things, provide *ex-gratia* funding for:-

1. As part of its work, the Resettlement of persons displaced as a result of post-2007 election violence;
2. The replacement of basic household effects destroyed as a result of 2007 PEV.
3. Enabling the victims of the post 2007 election violence re-start their basic livelihood.
4. The reconstruction of basic housing, rehabilitation of communities utilities and institutions destroyed as a result of the 2007 PEV.

MSP drafted the National Disaster Management Policy in April 2007. The policy deals with a myriad of disasters and is not specifically focused on the problems of IDPs. There is currently a National Disaster Operations Centre whose role is to co-ordinate disaster management.[267]

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[265] Legal Notice no. 11 of 2008 dated 30th January 2008.
[266] Gazette Notice no. 1038 of 15th February 2008.
[267] Testimony of Dr Hezron Nyangito, PS Ministry of Medical Services. CW 28.

Dr Sam Thenya, the Director of Nairobi Women's Hospital, speaking of his interaction with the centre stated as follows;

> *"Without giving excuses, the post election violence caught us all unawares, but the general response was that when we called on the National Disaster Management Committee or whatever they are called ….. they asked us what did we expect them to do and my understanding would be they would be telling us what to do".*

The obvious conclusion from that interaction is that there exists a gap in the level of response to disasters including one that makes specific reference to problems related to IDPs.

At the district level, we found that most areas had a Disaster Management Committee constituted to deal with the humanitarian issues related to PEV. While initial arrangements were usually made by the DC and the DSCI, they also set up committees to deal with IDPs but the membership of those committees was fluid and varied from district to district. Augustine Kimantirie Nthiga, the OCPD Kisii Central District gave an account of how arrangements were made;

> *"When we started receiving IDPs, the DSIC met and we discovered we needed to have the people close ranks in Kisii. So we called the businessmen, the medical practitioners and the disaster management committee. We also called church elders for those who could have knowledge of counselling because those who were arriving were giving different stories and we felt that they required counselling. So we called and formed lots of committees, also sub-committees to feed IDPs who were arriving with nothing".*

In Nakuru, the District Commissioner gave evidence that the Disaster Committee was composed of government officials, the Nakuru Business Association membership, local and international NGOs led by the Kenya Red Cross Society, and the churches.

Special mention must be made of the Kenya Red Cross Society. The Kenya Red Cross Society was the lead co-ordinating agency for relief and humanitarian efforts throughout the PEV period. Set up by an Act of Parliament, it nevertheless operates independently and in conformity with the principles of the Red Cross Movement.[268] Their efforts and those of their volunteers must be recognised and commended. We also wish to commend the efforts of various international and local NGOs who stepped up to the call to assist Kenyans in distress.

Government Response to IDP Crisis

The intensity of the PEV, confronted the government with a rare dilemma about how to approach the displacements that were occurring. There were reports, exhibits and testimonies from authorities on the government's lack of preparedness to deal with the initial IDP crisis. The general consensus among government officials was that whereas violence after the general election was anticipated, the magnitude of the violence was not and was overwhelming. This problem notwithstanding, the government success or failure to deal with the PEV crisis will be judged by the number of IDP camps standing.

During the Commission's consultations and hearings, two groups of IDPs with competing or divergent interests emerged; those in camps and those who had been reintegrated within various communities. Because of their visibility, the problems of those in camps could easily be identified and dealt with. Further, mobilisation among those in camps was much easier as evidenced by the fact that most camps we visited had constituted representative groups. On the other hand, the re-integrated IDPs were dispersed, not easily identifiable and because of their dispersal, they could not easily be found to present their grievances.

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[268] Chapter 256 of the Laws of Kenya. During the PEV period the Kenya Red Cross Society issued periodical bulletins on the prevailing humanitarian situation. These are available at www.kenyaredcross.org.

The government asserted the constitutional right of every Kenyan to acquire property and live in any part of the country. Hence its policy on resettlement was largely governed by this principle. For example, the DC of Kipkelion testified that, *"it was not the intention of the government to move people from their homes or from their farms."*[269] A clearer statement of the government policy came from the DC of Naivasha, Mr Katee. In the following verbatim exchange;

> ***Mr David Majanja:*** *..... There was information that it is no government policy to transport people back to their ancestral homes. Is that the position?*
>
> ***Mr Katee Mwanza****: Yes, my Lord, at least at the time although the transport was not there. We were saying that as Government we will look like we have been defeated by the situation, by saying A says move out, then we assist person B to move out. We are saying as a Government we are agreeing with what the A says. So in this we would have looked very bad and we start now transporting people from outside Naivasha while these people, my Lord, you know some of them have been here for more than 20, 30 years. They have been working here they earn their livelihood. No to kick these people out to take them to a rural area where there is no source of livelihood, then you are pushing them into a grave without any alternative.*
>
> ***Mr David Majanja:*** *So it is the Government policy to take them back where they were removed.*
>
> ***Mr Katee Mwanza:*** *It is the Government policy to take them back where they were removed. Indeed that is why my Lord, I requested Kedong Ranch which is a private organisation to give us part of their land so that we could construct the tents for our people. We knew*

[269] Adan Gedow, DC Kipkelion.

these people provided labour for the flower farms. They also earn some revenue. Now to take them to Kisumu, would mean the end of the road.

The general perception amongst the IDPs was that the government was keen to resettle those who had land hence there was a great expectation that IDPs would be resettled by being given land. This is captured by the sentiments of the Nakuru ASK IDPs who recommended that, *'the government firstly relocates the IDPs to some safe area until a lasting solution is found. The government should use the Ksh. 10,000 it is offering to IDPs to purchase a piece of land for them as stop gap measure."*[270]

The main challenge for re-settlement is to guarantee security in areas from which IDPs were displaced and help them reconstruct of their lives. One witness stated that that the reasons IDPs do not want to go back is that, *"if they went back, their neighbours are the same people who killed them. They cannot go and stay in a tent because an arrow can penetrate the tent."*[271] The success of this effort would largely depend on peace and reconciliation efforts.

For the IDPs who remain in camps, the problem of re-settlement continues even upto now. According to a witness, Mr Peter Kariuki, who was at the material time the chairman of ASK Ground Nakuru IDP camp, the camp had about 10,200 people comprising the following; 10% were land owners, 60% were tenant farmers; 25% businessmen and women and 5% squatters.[272] Obviously, it would be easy to identify and assist individuals needing to be resettled on their own property once a level of security was guaranteed. However, finding solutions for the remaining 90% is more difficult. Other than paying them outright, the government would need to find ways to assist them including providing start up capital on concessionary terms.

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[270] Exhibit 49A.
[271] John Mwangi, CW 41.
[272] Exhibit No. 49A.

The reintegrated IDPs also face problems as illustrated by the evidence of Ms Asha Katheri Kiva,[273] who was the Borabu District Commissioner just after the election. She testified her district, situated along the volatile Kisii-Sotik border received a few IDPs who went to camps in Keroka. However, it was clear from subsequent witnesses that most IDPs from the Sotik side of the border, who were predominantly Kisii, were easily accommodated by family and friends.[274] They were initially given food rations by the government when the violence started but no further interventions were made despite various entreaties to the government to look into their plight. Similarly, the most of the Kipsigis displaced during the skirmishes along the Sotik-Borabu border did not proceed to camps but were housed by their neighbours and relatives.[275]

At the peak of the PEV, Nyanza province received 129,821 IDPs. The Provincial Commissioner told the us that, *" they were popularly known as returnees, that is, people from Nyanza Province who were coming back to Nyanza presumably because they had been ejected from other provinces or they feared to continue staying in other provinces. They are not in camps; they are living with their relatives and friends. Some have hired places to stay in the province."* The PC gave testimony that to assist these returnees he had to give blanket orders that their children be admitted to school immediately.

In April 2008, the government engaged in *operation rudi nyumbani* (operation return home). The aim of the operation was to encourage the IDPs to return to their homes. As part of *operation rudi nyumbani* the following interventions were made;[276]

- Payment of Kshs. 10,000.00 to persons leaving the camp.
- Provision of transport to home areas.

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[273] Commission Witness No. 113.
[274] Private Witness (Commission Witness No. 122). According to the witness, these IDPS, numbering about 400 in Nyansiongo had formed an association to pursue their interests.
[275] Mr Humphrey Nakitare, Commission Witness No. 112.
[276] Exhibit 4A.

- Relocation to transitional camps nearer farms and areas of displacement while awaiting provision of proper housing.
- Provision of building materials.
- Provision of seed, fertilizer and ploughing services.

The Commissioners visited North Kisii farm in Geta Sub sub-location of Cherengany Division of Trans Nzoia East District.[277] According to evidence received, on 2nd January 2008, hundreds of armed youth invaded the farm and burnt over 100 houses. Two people were also shot dead with poisoned arrows. The farm residents abandoned their homes for temporary encampment at the neighbouring trading centre.[278] By the time the Commissioners visited the farm, most of the residents had been resettled by the government which provided construction materials, ploughing facilities, fertilizers and seed. They residents were expecting the sum of Kshs. 10,000.00 to be paid shortly thereafter. The residents of that farm were on the wholly satisfied with the measures taken by the government to deal with their plight.

According to the government, as at 8th July 2008, 210,594 IDPs had been resettled leaving 21,431 in camps. The resettlement programme cost the government an estimated Kshs. 30 billion.

Because of time limitations, we were unable to assess the overall success, efficacy and other matters related to *Operation Rudi Nyumbani*. However, certain complaints stand out. Firstly, the sum of Kshs. 10,000 given per family is too little given the losses suffered by the IDPs. We also received reports from IDPs that they had no choice but accept the resettlement. They also indicated that this was used as a means of getting the IDPs to leave the camps. This took the form of a coincidence between the launch of the program and a shortage in basic

[277] The Commissioners visited Geta Farm on 9th August 2008.. The Commissioners also visited Endebess IDP Camp.
[278] Exhibit 73.

amenities such as water and the intention and scheduled closure of camps have left IDPs no choice but accept the government handouts.[279]

Conclusion and Recommendations

As we have stated previously, the subject of IDPs is not a new phenomenon in Kenya, it is not one that neither lacks political recognition nor prescribed solutions. Indeed the African Peer Review Mechanism **(APRM): Country Report of the Republic of Kenya**[280] prepared in May 2006 recognised the problem. We quote the relevant paragraphs of the report:

> **APRM: Country Review Report of the Republic of Kenya**
> [.....]
> **3.1.9. OBJECTIVE 9: TO PROMOTE AND PROTECT THE RIGHTS OF VULNERABLE GROUPS, INCLUDING INTERNALLY DISPLACED PERSONS, REFUGEES AND DISABLED PERSONS**
>
> **i. Summary of the Country Self-Assessment Report (CSAR)**
>
> **Internally Displaced Persons**
> Regarding the internally displaced persons who are forced to migrate from their natural locations due to clashes, the report reveals that, in contrast to refugees, they lack adequate relief support and security, and only receive occasional food and blankets from politicians without any follow up. In addition, there is no resettlement or economic programmes to aid them.
>
> Vulnerable groups in the report were characterized as those groups marginalised from the mainstream society and, due to years of neglect, do not fit into society at a political, economic or social level. The report asserts that this group is numerically a minority, and identifies the Yaaku, Galjeel, Ogiek and Endoris in this regard. The Yakus were evicted from the forest where they had been better protected. During the screening of Somalis, the Galjeel had their identity cards confiscated, were asked by police to leave for Somalia , and, as the report indicates, were also attacked by security forces in August 2005. The Ogiek have lodged a lawsuit to resist the Government's decision to evict them from their ancestral homes. The

[279] Visit to Naivasha Show Ground IDP camp and Nakuru ASK IDP Camp. Testimony of Peter Kariuki, Commission Witness No. 49. Also testimony of Commission Witness No. 152.
[280] At page 111 -117. Also available at http://www.nepad.org/2005/files/aprm/APRMKenyareport.pdf

report states that little protection or special polices have been designed to address the needs of these vulnerable groups.
[…]

ii. Findings of the Country Review Mechanism (CRM)
[…]
Internally Displaced Persons (IDPs)
The CRM visit to Nyeri Provincial Headquarters confirmed that IDPS were scattered in the Rift Valley districts of Kirinyaga, Thika and Muranga and resided in the slums. No government resettlement policy or development programmes had been put in place at Provincial level, and after the clashes, the district leaders had encouraged the IDPs, in the absence of any resettlement measures, to go back to their former dwellings. The inaction displayed by the district leadership in integrating the IDPs into the mainstream society has implications for long-term reconciliation of ethnic groups in Kenya, and poses a challenge for unity and nation building. The lack of concerted central Government policies and interventions to alleviate the plight of certain segments of society following conflict is likely to be taken advantage of at the local level to the detriment of vulnerable groups like IDPs.

iii. Recommendations
The Panel recommends the following:
• The Government of Kenya to enact and implement a clear policy on refugees and internally displaced persons [Government of Kenya].
[…]

A further review of the implementation of the APRM for the period June 2006 – June 2008,[281] in respect of promotion and protection of the rights of vulnerable groups including internally displace persons and refugees addressed the issue as follows;

[…]

3.10 Objective Nine: Promotion and Protection of the Rights of Vulnerable Groups Including Internally Displaced Persons and Refugees

The Government, through various poverty reduction programmes such as HIV/AIDS, ASAL programmes and educational bursary funds has focused on mainstreaming the vulnerable groups (including orphans of HIV/AIDS, the youth, women, the physically challenged, older persons and the ageing) to participate fully in national development agenda.

[281] Kenya Progress Report on the Implementation of the African Peer Review Mechanism (APRM) National Programmed of Action, June 2006 – June 2008.

This objective called for mechanisms to protect the rights of the vulnerable groups through:

i. *Enactment and implementation of policies and programmes aimed at empowering and protecting the rights of vulnerable groups;*
ii. *Stepping up security and strengthening response capacity of law enforcement agencies in conflict prone areas;*
iii. *Streamlining immigration, screening procedures and eliminating discriminatory screening practises.*

The Government has also achieved the following:

- *It has introduced Development Interventions Programme in the North Rift districts to compliment the disarmament programme during the year 2006/07*
- *It has promulgated the Refugees Act, 2006 into law on 30th December, 2006. This provides for the recognition, protection and management of refugees within the country*
- *It has given the concern about the problem of squatters and internally displaced persons, and as a follow-up of the planning in the period 2006/07; Ksh 1.3 billion has been set aside in the 2007/08 fiscal year to acquire land for settling them. With allocation of land parcels, those affected are expected to improve their living standards, increase food safety and be able to share in the growth of the country.*

Following the post election crisis, Kenya found itself with an unprecedented number of IDPs including children, women and people with disabilities. The Government in response to this established 181 IDP camps located in various parts of the country to accommodate the 350,000 displaced persons.

The following measures have been undertaken in respect to the post-election IDPs:

- *With the help of the Red Cross, the Government provided food, drugs including ARVs, clothing, blankets and other requirements to the IDPs.*
- *The President, the Prime Minister and members of the cabinet visited the IDPs*
- *Restoration of security in the affected areas*
- *Resettlement of 106,651 of IDPs by mid May 2008*
- *The Government has raised Kshs 457 Million out of the required Ksh 31 Billion for the resettlement of IDPs as proposed in the National Reconciliation and Emergency Social and Economic Recovery (NRESER) Plan.*
- *The Government has urged members of parliament and local leaders to preach and promote peace among affected communities*

From the evidence we have gathered so far, there exists sufficient basis for enacting a clear policy and legal framework for dealing with the IDPs.[282] Moreover, the UN Guiding Principles on IDPs provide the necessary parameters for such policy and legislative interventions. The guidelines oblige state parties to ensure protection of and assistance to IDPs in all phases of displacement. While there are coordinating organs for dealing with emergency situations, it is now

[282] Report from Office of the High Commissioner for Human Rights Fact –finding Mission to Kenya, 6 -28 2008, Recommendation No. 7 at p.18. Exhibit No. 21N.

imperative to put the problem of IDPs on a sound statutory footing where lines of authority and responsibilities are assigned. There is no reason why such an enactment cannot be put in place within the next four months, and we so recommend.

Secondly, we think that the statement issued by the Kenya Dialogue and Reconciliation on 4th April 2008 provides a sufficient basis for providing a benchmark for the needs of those displaced by PEV. An urgent evaluation needs to be carried out to assess the effectiveness of the current programs in place to address the plight of IDPs. Such a process needs to be carried out in an open and transparent manner involving all the stakeholders. We recommend the process commences immediately.

As the problem of IDPs has been with us for ages and is not going to be wiped out with a magic wand, we recommend that the issue be submitted to the Justice and Reconciliation Commission for follow up.

Lastly, we conclude that the successful return of IDPs will be based on three outcomes namely the safety of returnees, restitution and return of property to the displaced and the creation of an economic, social and political environment that sustains them. There is clearly a consensus that unless the root causes that led to internal displacement are resolved, the problem of displacement will continue to haunt us for a long time. And that is the duty of every Kenyan.

CHAPTER EIGHT

The Media and the Post Election Violence

Before, during, and after the elections, politicians, government, NGOs, members of the media itself, and parts of the public, all had views about whether and how the spread of information through the print and broadcast media had contributed to the 2007 post election violence. The Commission asked a number of individuals to testify before it concerning the role of the media in the post-election violence.

The Commission therefore invited the Permanent Secretary from the Ministry of Information and Communications, the Attorney General, and the Chair of the Editors' Guild, who also is the Managing Editor of the Nation Group, to testify before it to solicit their views. Furthermore, a number of members of the public who were victims or witnesses to the post-election violence outlined their experiences to the Commission both in formal testimony and in other statements to its investigators.

Many recalled with horror, fear, and disgust the negative and inflammatory role of vernacular radio stations in their testimony and statements to the Commission. In particular, they singled out KASS FM as having contributed to a climate of hate, negative ethnicity, and having incited violence in the Rift Valley. However there were also similar complaints in other parts of the country even though they did not come directly to the attention of the Commission. These included the vernacular music and negative ethnicity allegedly coming from Kikuyu FM stations including Kameme, Inooro, Coro, and others in other different parts of the country. This was mentioned critically in various sections of Exhibit no. 125, the KNCHR's report on Kenya's post 2007 election violence.

Dr. Bitange Ndemo, the Permanent Secretary of the Ministry of Information and Communications testified before us. He told the Commission that the media had been controlled by the state formally from the 1930s until the mid- 1990s. He explained that as KANU still was in power up to 2002, the expanding media

continued to be subject to harassment, torture, imprisonment, and fines for expressing their views. Censorship and self censorship also ensued, stemming from fear of reprisals by the state. Dr. Ndemo told us that various media outlets continued to voice the views of the ruling party KANU as late as the 1990s even following the 1991 repeal of section 2A of the constitution and the return to multi party democracy in Kenya. The witness noted that only after the 2002 election did the Government engage in a process of liberalization. This included licensing many new stations, something he told us that positively affected all parts of the media.

However, the witness mentioned that these changes took place in the absence of a new regulatory and legislative framework, leading to something of an uncontrolled free for all. In Dr. Ndemo's view some media took advantage of this lacuna and began to "operate freely and sometimes recklessly and irresponsibly" including using individuals who were not trained journalists, who were partisan, and sometimes were politically biased. In his statement to us he argued that media houses took sides in the run up to the 2007 election, that there were complaints that "most editors had been compromised", and that "some media houses became sensational and unnecessarily alarmed their audiences and inflamed their passions". He told the Commission that the live broadcast of vote tallying of the 2007 election results at the KICC and the visible acrimony of political leaders inflamed tensions, bringing "the country to the brink". Faced with an unprecedented outbreak of violence following the announcement of the presidential results and threats of more violence, the witness said the Ministry asked the media houses to desist from live broadcasts concerning politics even though the Ministry itself had no way of fully enforcing its demand legally. Instead, in the end, it was the Ministry of Internal Security which told the Ministry of Information it wanted to invoke Section 88 of the Kenyan Communications Act, to which the latter complied. In his testimony to the Commission, Amos Wako, Kenya's Attorney General stated emphatically that "the ban was not proper", was unconstitutional, and "definitely illegal", an opinion he conveyed in writing to the above ministries.

The Commission also heard from the PS of the Ministry of Information and Communications that it "found itself constrained to control FM media content at the height of the post-election violence" as reputable media outlets around the world used headlines like "Hate radio spreads new wave of violence in Kenya". After banning live political broadcasts by the media" on 31 December 2007, the PS told the Commission they were criticized and resisted by the newspapers. The witness explained to the Commission that the Ministry felt it was being criticized unfairly on all sides: initially for not having done anything to "curb all the hate radio" (later admitting the Ministry has the "power to license and cancel them") even though the Ministry had reprimanded "some of the worst offenders", and then later for banning live political broadcasts, which the Ministry also felt was fuelling violence.

Dr. Ndemo told the Commission that he believed the actions taken by his Ministry were in "good faith" and with the "overriding national interest in mind." He also said that there was "a need for a legislative framework governing the media…underscored by media misconduct during the post-election violence". Nevertheless, he noted that the Ministry has continued to work with the existing Media Council established under the Media Act and also has a variety of informal forums through which it interacts with the media.

In addition, the Commission heard testimony from Macharia Gaitho, Chairman of the Kenya Editors' Guild. He told us that while the media had been "accused of playing a part in fanning the [post election] violence" the accusations were not specific and in his opinion came from various sides of the political spectrum which were aggrieved because they felt they were not supported by the media. He disagreed with Dr. Ndemo concerning the alleged partisanship of the media, claiming it was very diverse, also stating that there was nothing wrong in taking sides or positions as long as that was made clear to the reader. Contrary to the PS, he thought the "media [had] played a very critical role in lessening tensions". In fact, he told us that in his opinion the media had acted very responsibly by not airing the many inflammatory statements made by politicians designed to incite people. Later, he explained that it might have been better if the media had

aired more rather than fewer inflammatory statements by politicians who then would have been exposed to the public for who they were.

Mr. Gaitho also reminded us that the media had used discretion in what it printed and also noted that the ban, advocated by the PS of Information and Communications against the media was eventually declared illegal, noting:

> "*People were talking about going to war, people were talking opening about resisting and a civil war and all those kinds of things. Some of those statements from very senior political leaders may have slipped thought but I would say 90% of them were caught before they were aired or published.…We are seeing a situation where politicians create a problem, politicians promote violence, politicians incite the people and then when things do not go their way they start to blame the media. That ban as we all know was unconstitutional, it was illegal; the Editor's Guild joined up with the Media Institute and went to court and just before the hearing the Attorney General, the government, revoked the ban and we went back to live broadcasting and what was not acknowledged during that period is the role, very positive role the media played in calming tensions."*

In contrast to the PS of Information and Communications, Mr. Gaitho argued that cutting off live broadcasts from the KICC concerning the results of the election "contributed much more to raising tension than continuing those broadcasts, because then people started wondering what is happening". The witness explained to the Commission that the Editors' Guild also supported legislation against hate speech although he was not in favor of clamping down totally against FM stations.

The Commission received testimony and other statements from a number of individuals who included government officials, victims of the violence, and witnesses to it. In particular, they singled out KASS FM, a Kalenjin language fm station, for escalating the climate of hate and inciting violence, a phenomenon that apparently occurred on other FM stations in other parts of the country too. Witnesses made specific reference to KASS FM. They claimed KASS FM in conjunction with politicians used derogatory language against Kikuyus, mouthed

hate speech, and routinely called for their eviction, thereby helping to build up tensions that eventually exploded in violence.

Dr. Bitange Ndemo submitted to the Commission of letters and internal memos his Ministry had received from two pastors, one voicing concern about the KASS FM breakfast show "Lee Nee Emeet" on 19 February 2007and another on 29 November 2007, complaining about various aspects of Kiss FM, Classic FM, and Easy FM, including their promotion of "ethnic tension". On 26 November 2007, Dr. Ndemo wrote back to the first letter writer with a c/c to the Media Council of Kenya, stating that "*We are equally appalled by the presentations in various FM stations and as per the law we can only complain to the Media Council. We have therefore forwarded your letter to the Media Council".* Later on 12 February 2008, the Media Monitoring Unit in the Ministry alerted him "*that some individuals are circulating e- mail messages which are a threat to law and order as well as peaceful co-existence between Kalenjins and Kikuyus*". The email of 18 January 2008, attached to the memo called the law which allows all Kenyans to live in any part of the country a "*legal error in our [the Kalenjin's] history*". It also argued that Kalenjin have been systematically marginalized in terms of education, the distribution of social services and infrastructure, unemployment and called for the community to "*defend ourselves to the bitter end" "urg[ing] our people to ensure that every family is fully equipped with our normal tools; if we can afford, ferry two warriors from upcountry fully armed and house them until we have this thing sorted out".*

Correspondence submitted to the Commission by the Ministry of Information and Broadcasting from May-August 2008, containing a few letters between the Ministry and the Media Council, internal memos within the Ministry and between the Ministry and the National Peace Forum principally focuses on KASS FM, but also mention a Luo station named Nam Lolwe and a Kikuyu FM vernacular radio station, Inooro FM, which the Ministry thought could "*entice more youth to join the sect [Mungiki] that continues to pose security challenges to the country*". With respect to KASS FM the Ministry found the international transcript from 2 May 2008 "was inciting the public to violence" and

communicated its views to the Media Council. In August, after having used a firm, also hired by UNDP earlier to monitor KASS FM in the run up to the December 27, 2007 election, the Media Council decided that Kass FM was innocent of the charges of airing and inciting and inflammatory live broadcasts on 31 May and 16 June 2008, but was found to be "negligent" in the way it handled its discussions with its callers". The Attorney General wrote to the PS in the Ministry of Information and Planning on 17 July saying that it believed KASS FM had "breached the provisions of the Media Act 2007 and specifically clause II Section (a) of the Second Schedule".

At the local level, the District Commissioner for Koibatek in the Central Rift Valley testified to the Commission that "the vernacular radio stations did not do a service to this country" and said "I have not heard any vernacular station condemning the violence we had in this country. He told us he knew the "message was not very good", but "admitted not having monitored the radio stations to find out what they were actually saying" since he did not understand Kalenjin. He admitted that he did not have specific examples of what actually was said either by KASS FM or by Changey FM, the two vernacular stations in his area, nevertheless adding that "it is common knowledge that this is what happened", referring to the hate and incitement allegedly propagated by Kass FM. In our view the D.C.'s failure to monitor the stations and obtain transcripts from them to substantiate allegations made concerning what they said and what activities they were engaged in meant that we were unable to substantiate his views.

Bernard Kinyua, the D.C. for Uasin Gishu in the North Rift described a similar scenario. When asked under cross examination whether any inciters were arrested, any complaints were made, or any action taken once he became aware of the problem, he told us, "I think the inciters were many. We had the media, radios and such are not institutions that we were in a position to deal with," adding "We did not complain about the media, we did not complain about the

general incitement that was there because it was obvious, it was very clear that there were outbursts by politicians during campaigns."

To compensate for the above lack of hard data, the Commission itself attempted to obtain tapes of some FM radio stations from a variety of sources beginning with the Ministry of Information and Communications. In his testimony to the Commission, Dr. Ndemo said he would provide the Commission with tapes from the Ministry's monitoring from KASS FM from October 2007 until March 2008. The Commission did receive some selected tapes from the Ministry, but only starting from 18 February 2008. Our various attempts to obtain tapes from other sources were also unsuccessful. These included unmet requests for tapes or transcripts from FM vernacular stations to Strategic Relations and Research Limited, a firm contracted by the UNDP to monitor the media during the 2007 election, the Communication's Council of Kenya (CCK), and the KNCHR. The result is that the Commission was unable to acquire any tapes or transcripts by KASS FM or other FM vernacular stations from before, during, or immediately after the 2007 election. Hence, to some extent the Commission's situation is not dissimilar to that of the DC for Koibatek: it heard many allegations of what was said, but it does not have the actual transcripts of who said exactly what during this very critical period.

Beyond this, one transcript the Commission received from the Ministry of Information and Communication KASS FM's Broadcast on 18 February 2008, said various organizations were already conducting investigations into the post-election violence. It exhorted listeners to be cautious to whom they spoke about these matters. It suggested that just speaking to anyone without knowing who they are might cause them problems or be incriminating and that it might be better for them to tell those who wanted information to see the chief or some other opinion leader rather than answering questions themselves. As it noted, "You may answer [a] question whose answer will in future spell doom for you" "Be very careful and refer the investigators to political leaders, chiefs or church leaders to answer the questions." Also, it told his listeners "You may be asked to

explain how a neighbour of yours left his farm or property and then you answer in a manner that will later place you in an awkward position. I am not saying you conceal the truth, but tell the truth if you have been appointed to undertake that particular duty because not everybody should talk" "Some of you may be offered money for information and then tomorrow you are in a very difficult situation". *It* added that given "the way the country is now, nobody likes you", pleading with listeners to "be careful", noting that "not everybody who is investigating is doing so in good faith, some will be doing so to incriminate some particular people or community in the…violence".

The Media Monitoring Unit in the Ministry of Information and Communication in a memo it passed on to the Commission recommended that "Kass FM should be held to explain why they are barring members of the community from disclosing whatever they know about the post election violence." They also noted that "The Truth and Reconciliation Commission and other agencies interested in knowing the truth on what happened in the run-up to the December general election and the resultant post elections violence will not receive co-operation of the members of the community at all" adding, "So what is the station hiding".

Some few exceptions to the above generalization of no concrete information are two examples of FM hate speech the Commission received. One from Bahasha FM in Nakuru , recorded at 8 a.m. on 30 January 2008 and received by the KNCHR notes, "Kikuyu are like mongoose which is ready to eat chickens. All other tribes, i.e. Luo, Kisii, Luhyas are all animals in the forest. They cannot be able to lead this country like Kikuyus". Second, Nam Lolwe Station in Kisumu broadcast the following from an anonymous caller "Our people are dying in Naivasha and Nakuru and some other tribes are living with us. They should be flashed (sic) out those who don't belong to this town."

The Commission would have liked to have thoroughly analyzed a full body of transcripts from Kenya's vernacular FM stations given the allegations against them made by a number of the Commission's witnesses.

In his testimony to the Commission, Kenya's Attorney General, Amos Wako stated that in his opinion "the recent post- election violence" "w[as]coming very close to…crimes against humanity", a point he told us he made elsewhere as early as 3 January 2008. The KNCHR goes one step further than the Attorney General, arguing that "the violence following the 2007 General Election meets the criteria of crimes against humanity under Customary International Law in so far as it involved conduct including the multiple commission of acts of inhumanity against civilian populations, pursuant to or in furtherance of an organizational policy to commit such attacks in the theatres of violence."[283]

That said, and with the full recognition of how close to the edge Kenya came during the 2007 post election violence, the Commission would not recommend a free for all monitoring of the press and other media. This would have the negative potential of taking the country back to the draconian days of a state controlled media, from which it has so recently just barely escaped. However, the Commission does believe that speech in the media, including in vernacular FM radio stations, aiming to foment ethnic hatred and/or incite, organize, or plan for violence should be investigated thoroughly in a timely fashion when it occurs.

[283] Exhibit no. 125, p. 149 and pp. 144-50.

CHAPTER NINE

Extent and Consequences of the Post-Election Violence: Deaths, Injuries and Destruction of Property

Deaths and Injuries

Loss of life through conflict is a measure of the scale of conflict hence the need to ascertain the number and causes of death. Further, it is a recognition that conflict is basically about human life and all else is secondary. The Commission also understood its terms of reference as requiring it to "establish the facts and circumstances surrounding the post election violence". This means that we had to establish the number of persons who died and those who were injured as a result of the post election violence.

The Akiwumi Commission, which investigated the tribal clashes occurring in country since 1991, did not aggregate data in respect of the clashes. The Kiliku Report which also investigated ethnic clashes in 1992 documented 779 deaths and 654 injuries in the districts that were the subject of the inquiry.[284]

Dr. Hezron Nyangito, Permanent Secretary of the Ministry of Medical Services, gave evidence to the effect that his Ministry established several committees to deal with, among other issues, the preservation and disposal of bodies and to ensure that that post mortems were carried out. He emphasized that, *"in the case of post election violence, we gave instructions that we have to record it. This is because we appreciated the fact that the violence of this nature and therefore we had to do all we could to document those whose indications were victims of post election violence."* Most of the medical officers who testified confirmed that this was the position. Moreover, we were the Commission was informed that it

[284] Exhibit 136A at Page 78.

was normal practice to take the history of the victim, his or her relatives to determine the circumstances of death and therefore determine whether the death or injury was as a result of PEV.

The multiple-cause-of-death information from 1,133 deaths was in respect of the period between 27th December 2007 and 29th February 2008 which is the period that the Commission has considered covering reflected the post election violence. The period was merely indicative of the period when the PEV began and ended. In seeking this evidence, the Commission relied upon information provided by respective hospitals in the five provinces under inquiry. These were: Western, Rift Valley, Nyanza, Nairobi and Coast.

The twenty nine districts covered are Bomet, Bungoma, Bureti, Busia, Eldamaravine, Homabay, Kakamega, Kericho, Kiambu West, Kipkelion, Kisii, Kisumu, Litein, Migori/Rongo, Mombasa, Mumias, Nairobi, Naivasha, Nakuru, Nandi North Narok, Nyandarua South, Siaya, Sotik, Suba, Trans Nzoia, Uasin Gishu, Vihiga and Webuye.

In analyzing the deaths, the Commission relied on specific sources of data, including:

- Medical and post-mortem reports submitted to the Commission by various medical officers and government doctors and the Ministry of Medical Services.
- Various police returns, reports and statements submitted by Officers Commanding Police Divisions (OCPDs).
- Reports received from private hospitals and institutions.
- Various witness statements, depositions and oral testimony.

In order to compile this report, multiple-cause records cited above were reviewed and then linked with various other records on the corresponding individual death records. Thus, data on age at death, sex and other variables, where available, were added to each record on the multiple-cause file.

The Police, according to Commissioner of Police, Maj. Gen. Hussein Ali, documented 616 deaths as having occurred during post- election violence period at the date of his evidence..[285] The Commissioner of Police was emphatic that only the police could give authoritative figures for those who died as a result of PEV.[286]

While Commission has tried to establish the true extent of deaths and injuries we recognize that for various reasons not all deaths that occurred as a result of the post election violence may have been captured for various reasons. Some of the these reasons include the following:

a) Some deaths may not have been reported to the hospitals or to police stations due to the prevailing security concerns situation at the time.
b) In many cases those who were injured did not report to hospital or health centres for fear of their safety or because in the ordinary scheme of things the injuries were considered minor compared to other problems being experienced at the time;
c) In some cases injuries were not properly documented due to the fact that hospitals were understaffed and supply of drugs and other medical supplies were disrupted.[287]
d) In some instances, patient referrals were problematic as some roads were blocked paralyzing efficiency in documentation of injuries. and violence. [288]
e) Injured persons may have sought alternative medical attention, for example, through traditional healers or unlicensed practitioners.

After considering all the available evidence before us as a whole, the Commission concludes that it is unlikely that there would be any more or less deaths than those reported to the Commission. It is unlikely that given the publicity given to this Commission, existing evidence and information of undocumented deaths would not have been brought to our attention.

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[285] CW 1, Exhibit 1

[288] CW 63, Statement, Exhibit 63

Because of the lack of uniform reporting requirements, some of the documentation the Commission examined lacked all the details relating to the person injured or deceased. For example, the age of the person would be missing, or because of the situation prevailing at the time, the precise date or time or place of death could not be ascertained. In some cases, only a preliminary cause of death could only be determined without the confirmation of a properly conducted post mortem. For example, in Migori relatives of persons who were shot during the skirmishes did not want post mortems carried out.[289]

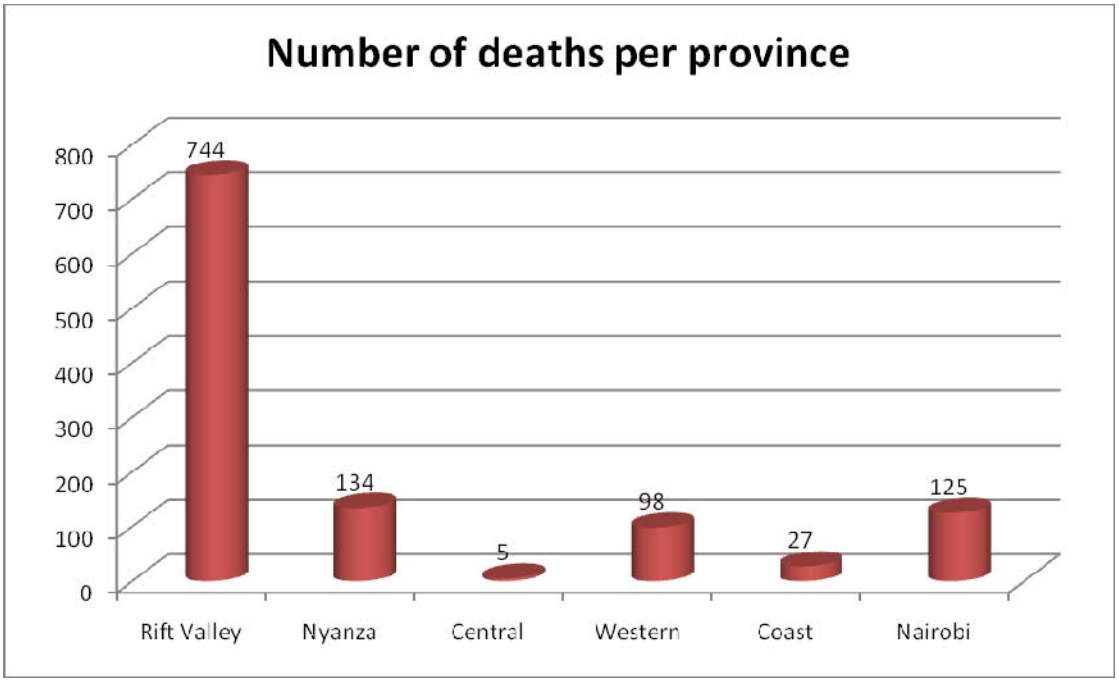
[289] CW 94, Edward Mwamburi, OCPD Migori.

District breakdown of deaths

	District	No. of deaths
1	Bomet	4
2	Bungoma	7
3	Bureti	24
4	Busia	9
5	Eldamaravine	23
6	Homabay	7
7	Kakamega	31
8	Kericho	42
9	Kiambu West	4
10	Kipkelion	23
11	Kisii	9
12	Kisumu	81
13	Migori/Rongo	26
14	Mombasa	27
15	Mumias	12
16	Nairobi	125
17	Naivasha	50
18	Nakuru	213
19	Nandi North	7
20	Narok	19
21	Nyandarua South	1
22	Siaya	10
23	Sotik	5
24	Suba	1
25	Trans Nzoia	104
26	Uasin Gishu	230
27	Vihiga	18
28	Webuye	21
	TOTAL	**1,133**

SUMMARY OF DEATHS PER PROVINCE

Rift Valley	744
Nyanza	134
Central	5
Western	98
Coast	27
Nairobi	125
TOTAL	**1,133**



Of the total deaths, there were 11 children, 74 females and 1,048 males killed. The distribution of documented females and children who died as a result of PEV is indicated in the table below.

Women and Children Deaths who died as a Result of PEV

Item	District	Female	Children
1	Naivasha	11	0
2	Nakuru	8	0
3	Trans Nzoia	14	0
4	Uasin Gishu	9	10
5	Kericho	1	0
6	Bureti	1	1
7	Kipkelion	1	0
8	Kakamega	3	0

9	Mumias	1	0
10	Webuye	7	0
11	Homabay	1	0
12	Kisumu	5	0
13	Migori/Rongo	1	0
14	Mombasa	7	0
15	Nairobi	4	0
Total		**74**	**11**

The table below summarizes the deaths that were recorded in some districts as unknown persons. Some bodies were too decomposed for any reasonable identification to be done while others were collected on the streets by police who could not positively identify them. There were cases where bodies were burnt beyond recognition.

Summary of Unidentified bodies per District

Item	District	Unidentified Bodies
1	Nakuru	25
2	Nandi North	1
3	Trans Nzoia	18
4	Uasin Gishu	33
5	Eldama Ravine	1
6	Bureti	1
7	Sotik	1
8	Narok	2
9	Kakamega	1
10	Bungoma	1
11	Vihiga	8
12	Kisumu	7
13	Siaya	1

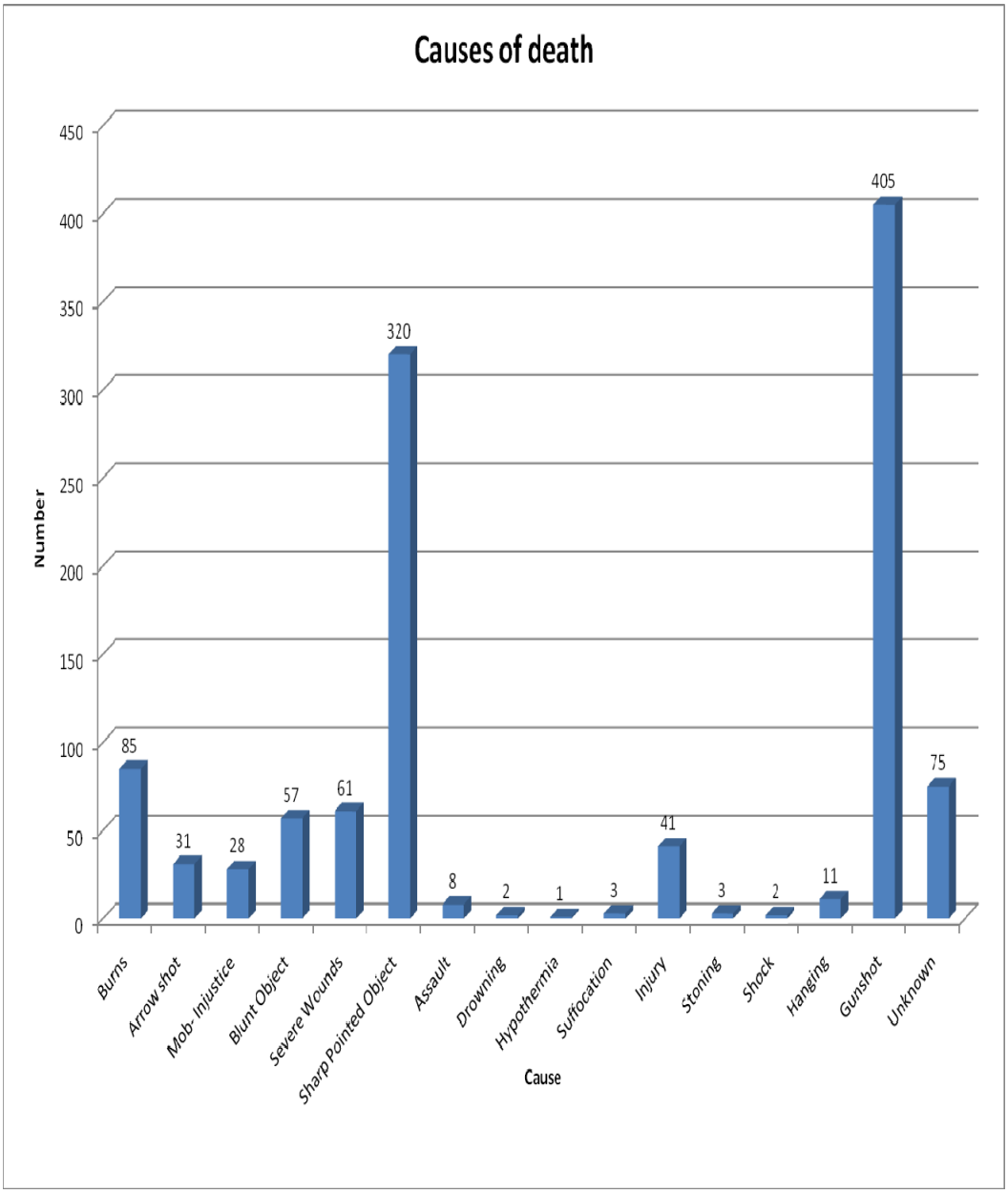
14	Migori/Rongo	5
15	Kisii	2
16	Mombasa	2
17	Nairobi	10
Total		**119**

We were the Commission was informed by the Director of Medical Services, that the Government's DNA machine had broken down and was being repaired hence the identification of bodies was in the process of being done in conjunction with the Kenya Red Cross Society.

Causes of death

The causes of deaths as documented were burns, arrow shots, mob- injustice, blunt object, severe wounds, sharp pointed object, assault, drowning, hypothermia, suffocation injury, stoning, shock, hanging, gunshots and unknown causes.

In cases where gun shot wounds were the underlying cause of death, the total number of people killed as a result of this was 405, distributed in all the districts. This represented 35.7% of the total deaths and stood at 405 out of the total 1,133 deaths. It was followed with deaths through injuries sustained as a result of sharp pointed objects at 28.2%. The third category were the killings through burns which recorded 85 deaths representing 7.5% of the deaths. Unknown causes caused 75 deaths representing 6.6% while 5% of the deaths were as a result of injuries sustained through blunt objects which stood at 57. The other causes of deaths were distributed amongst different causes as indicated in the data below.


Causes of death
Number
450
400
350
300
250
200
150
100
50
0
85
31
28
57
61
320
8
2
1
3
41
3
2
11
405
75
Burns
Arrow shot
Mob- Injustice
Blunt Object
Severe Wounds
Sharp Pointed Object
Assault
Drowning
Hypothermia
Suffocation
Injury
Stoning
Shock
Hanging
Gunshot
Unknown
Cause

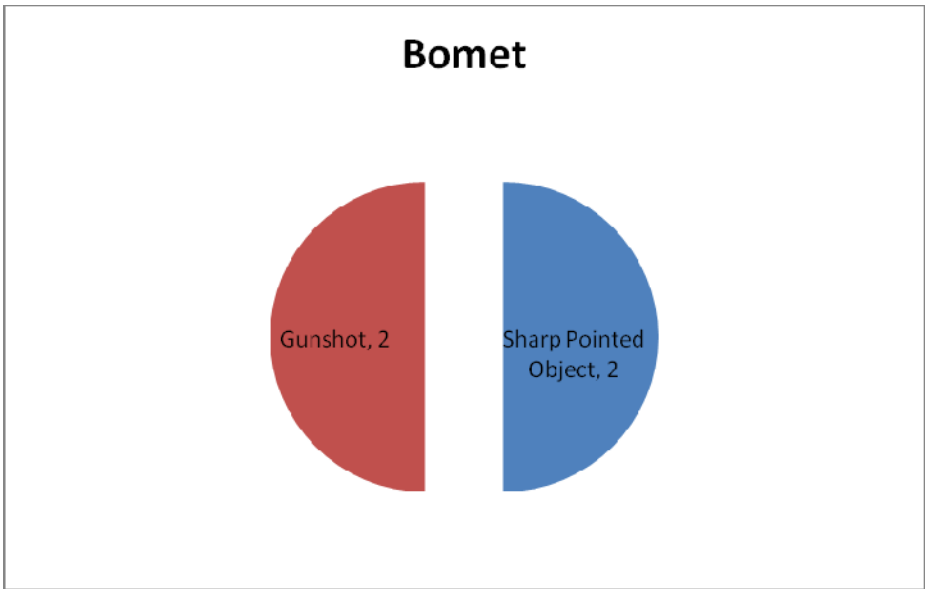
Analysis of Causes of Death Per District

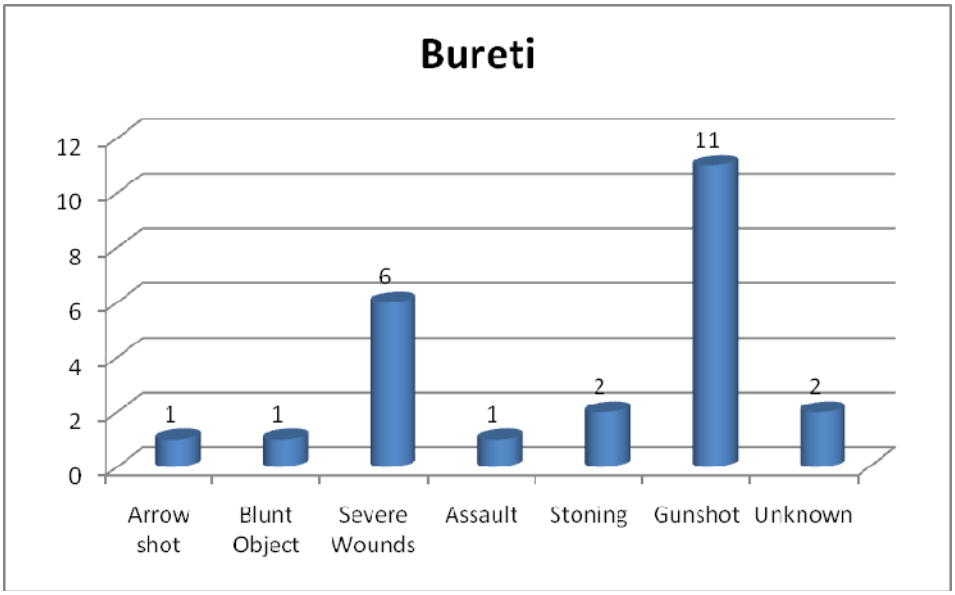
	District	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Total
1.	Bomet						2									2		4
2.	Bungoma															7		7
3.	Bureti		1		1	6		1					2			11	2	24
4.	Busia			1												8		9
5.	Eldamaravine		3	1		7						3				7	2	23
6.	Homabay											1				6		7
7.	Kakamega							3				2				26		31
8.	Kericho	2					2						1			33	4	42
9.	Kiambu West															3	1	4
10.	Kipkelion		17				2									4		23
11.	Kisii		1									1				4	3	9
12.	Kisumu	7	1		5	2						1		1		64		81
13.	Migori/Rongo											1				24	1	26
14.	Mombasa	8	1	3		4			1		1	4				4	1	27
15.	Mumias			1												11		12
16.	Nairobi			21	9		29							1		23	42	125
17.	Naivasha	22	1				1					17				7	2	50
18.	Nakuru	10			24		148				1					22	8	213
19.	Nandi North	1	1	1			1	2								1		7
20.	Narok						18									1		19
21.	Suba						1											1
22.	Siaya															9	1	10
23.	Sotik		1				1									1	2	5
24.	Nyandarua South																1	1
25.	Trans Nzoia	3			1		21									77	2	104
26.	Uasin Gishu	32	4		16	42	92			1	1	11				28	3	230
27.	Vihiga				1		1		1							15		18
28.	Webuye						1	2							11	7		21
	TOTAL	85	31	28	57	61	320	8	2	1	3	41	3	2	11	405	75	1,133

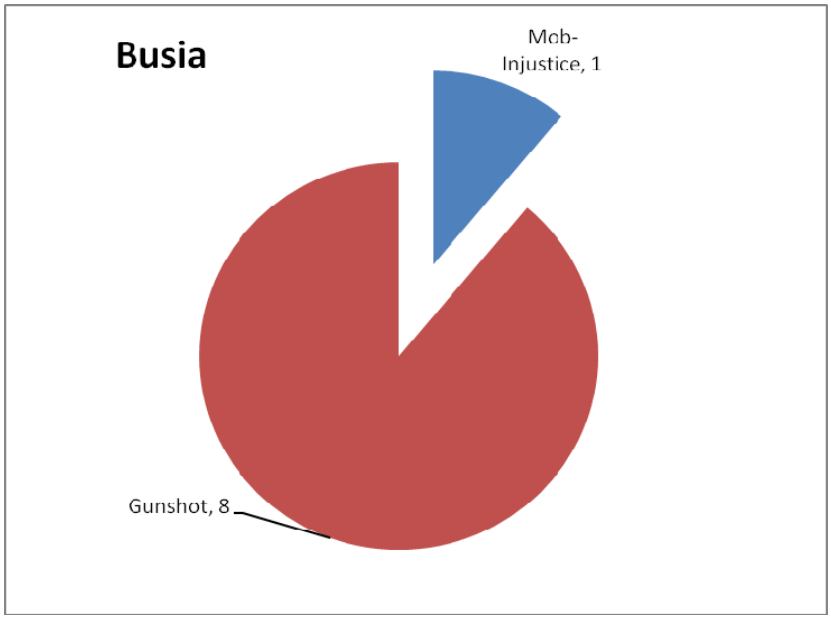
KEY

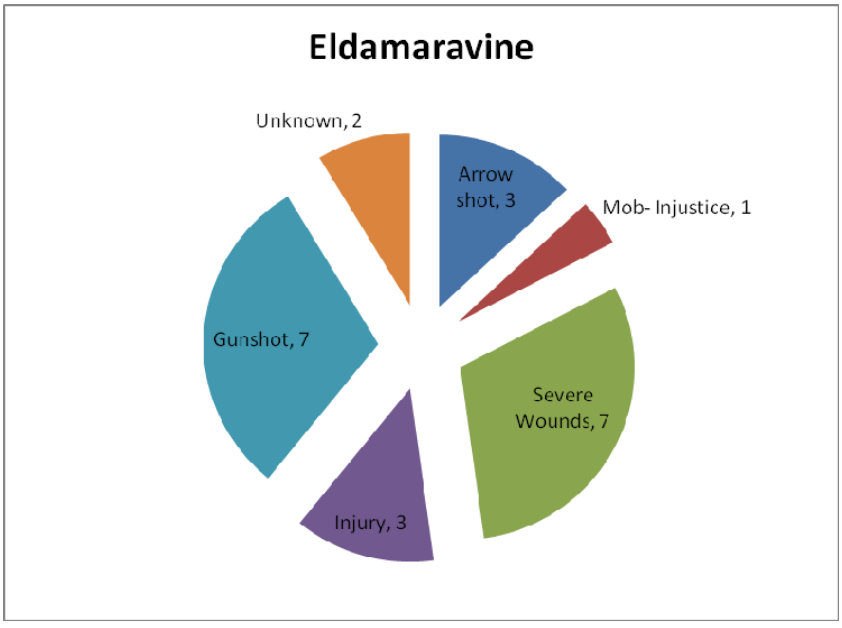
A Burns
B Arrow shot
C Mob- Injustice
D Blunt Object
E Severe Wounds
F Sharp Pointed Object
G Assault
H Drowning
I Hypothermia
J Suffocation
K Injury
L Stoning
M Shock
N Hanging
O Gunshot
P Unknown

The causes of death as reported in each district illustrated in different charts are as follows:






Busia
Mob-
Injustice, 1
Gunshot, 8


Eldamaravine
Unknown, 2
Arrow
shot, 3
Mob- Injustice, 1
Gunshot, 7
Severe
Wounds, 7
Injury, 3

The causes of deaths as documented were burns, arrow shots, mob- justice, blunt object, severe wounds, sharp pointed object, assault, drowning, hypothermia, suffocation injury, stoning, shock, hanging, gunshots and unknown causes.

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This represented 35.7% of the total deaths out of the total 1,133 deaths. It was followed by deaths through injuries sustained as a result of sharp pointed objects at 28.2%. The third category were the killings through burns which recorded 85 deaths representing 7.5% of the deaths, unknown causes resulted in 75 deaths representing 6.6% while 5% of the deaths were as a result of injuries sustained through blunt objects which stood at 57. The other deaths were distributed amongst different causes as indicated in the data below.

Provincial and district breakdown for causes of death

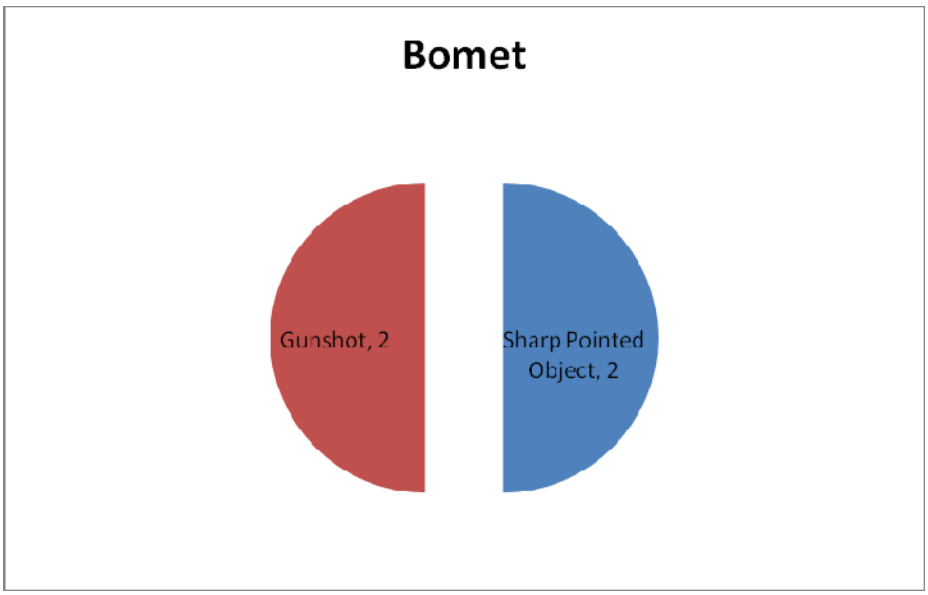
District	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Total
Rift Valley																	
Bomet						2									2		**4**
Bureti		1		1	6		1					2			11	2	**24**
Eldamaravine		3	1		7						3				7	2	**23**
Kericho	2					2						1			33	4	**42**
Kipkelion		17				2									4		**23**
Naivasha	22	1				1					17				7	2	**50**
Nakuru	10			24		148				1					22	8	**213**
Nandi North	1	1	1			1	2								1		**7**
Narok						18									1		**19**
Sotik		1				1									1	2	**5**
Trans Nzoia	3			1		21									77	2	**104**
Uasin Gishu	32	4		16	42	92			1	1	11				28	3	**230**
Sub Total	**70**	**28**	**2**	**42**	**55**	**288**	**3**	**0**	**1**	**2**	**31**	**3**	**0**	**0**	**194**	**25**	**744**
Western																	
Busia			1												8		**9**
Kakamega							3				2				26		**31**

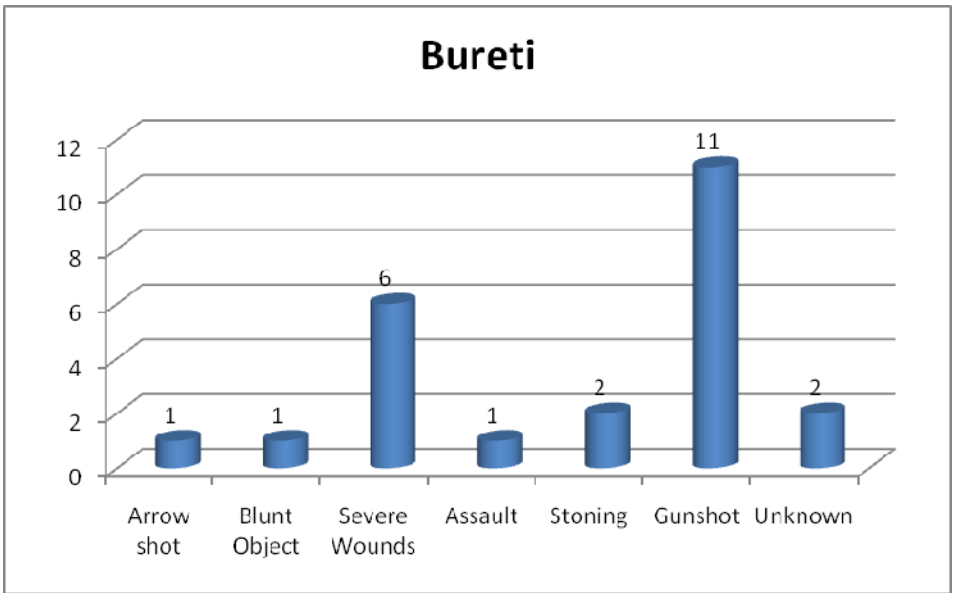
District	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Total
Bungoma															7		**7**
Mumias			1												11		**12**
Vihiga				1		1		1							15		**18**
Webuye						1	2							11	7		**21**
Sub Total	**0**	**0**	**2**	**1**	**0**	**2**	**5**	**1**	**0**	**0**	**2**	**0**	**0**	**11**	**74**	**0**	**98**
Nyanza																	
Suba						1											**1**
Siaya															9	1	**10**
Kisii		1									1				4	3	**9**
Kisumu	7	1		5	2						1		1		64		**81**
Migori/Rongo											1				24	1	**26**
Homabay											1				6		**7**
Sub Total	**7**	**2**	**0**	**5**	**2**	**1**	**0**	**0**	**0**	**0**	**4**	**0**	**1**	**0**	**107**	**5**	**134**
Central																	
Kiambu West															3	1	**4**
Nyandarua South																1	**1**
Sub Total	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**3**	**2**	**5**
Coast																	
Mombasa	8	1	3		4			1		1	4				4	1	**27**
Nairobi			21	9		29							1		23	42	**125**
TOTAL	**85**	**31**	**28**	**57**	**61**	**320**	**8**	**2**	**1**	**3**	**41**	**3**	**2**	**11**	**405**	**75**	**1,133**

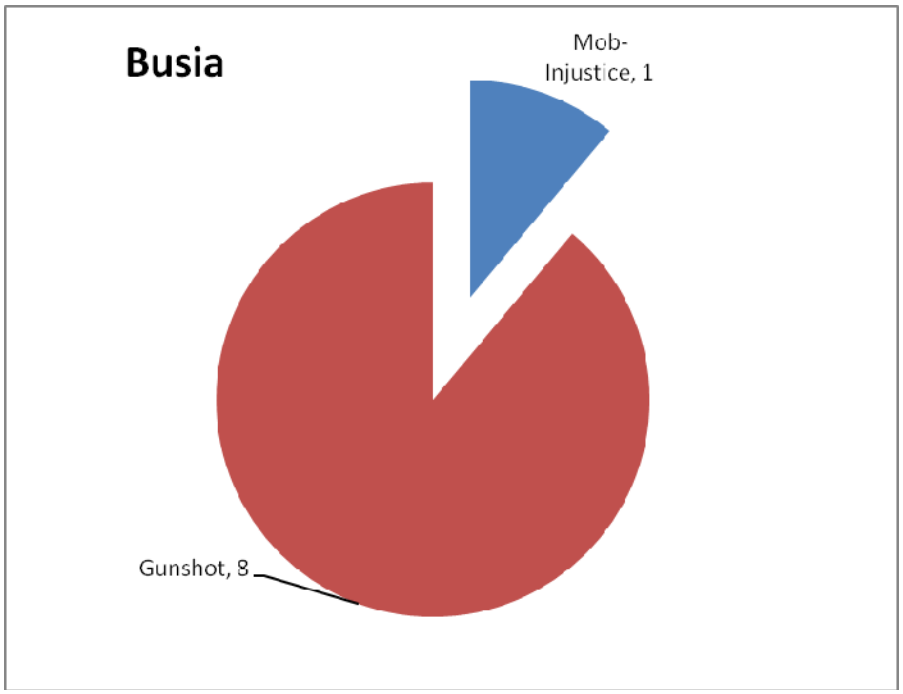
KEY

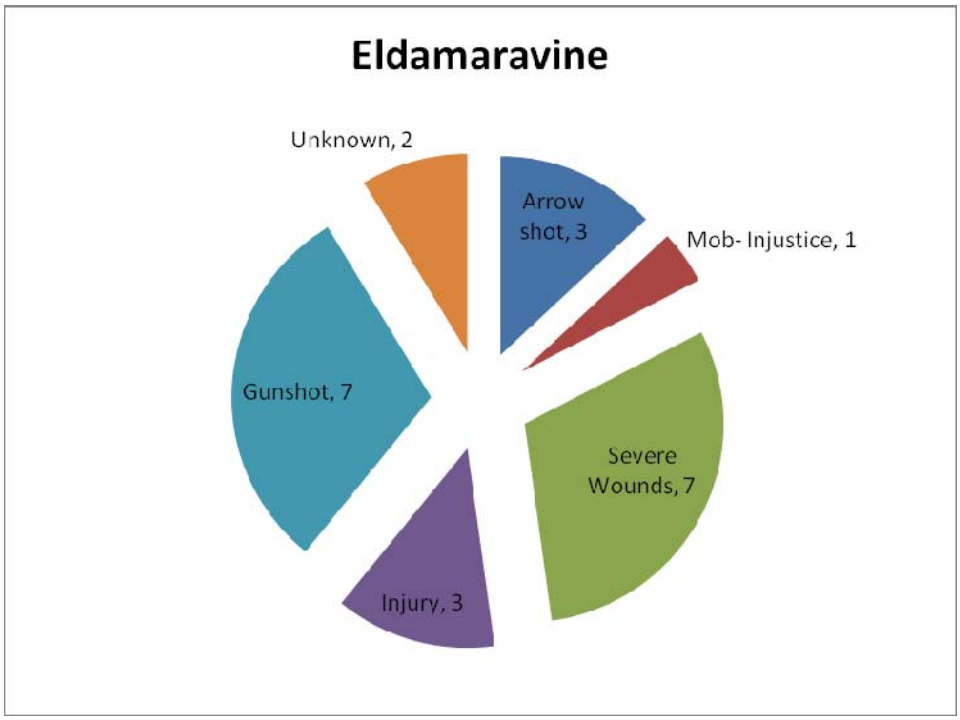
A	Burns
B	Arrow shot
C	Mob- Injustice
D	Blunt Object
E	Severe Wounds
F	Sharp Pointed Object
G	Assault
H	Drowning
I	Hypothermia
J	Suffocation
K	Injury
L	Stoning
M	Shock
N	Hanging
O	Gunshot
P	Unknown

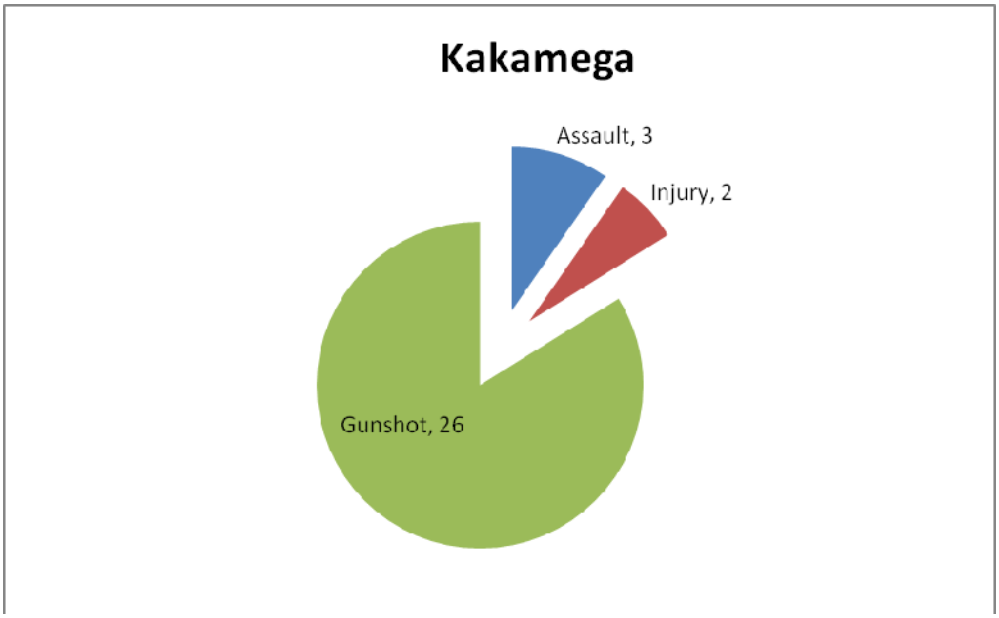
Causes of death as reported in each district illustrated in different charts are as follows:

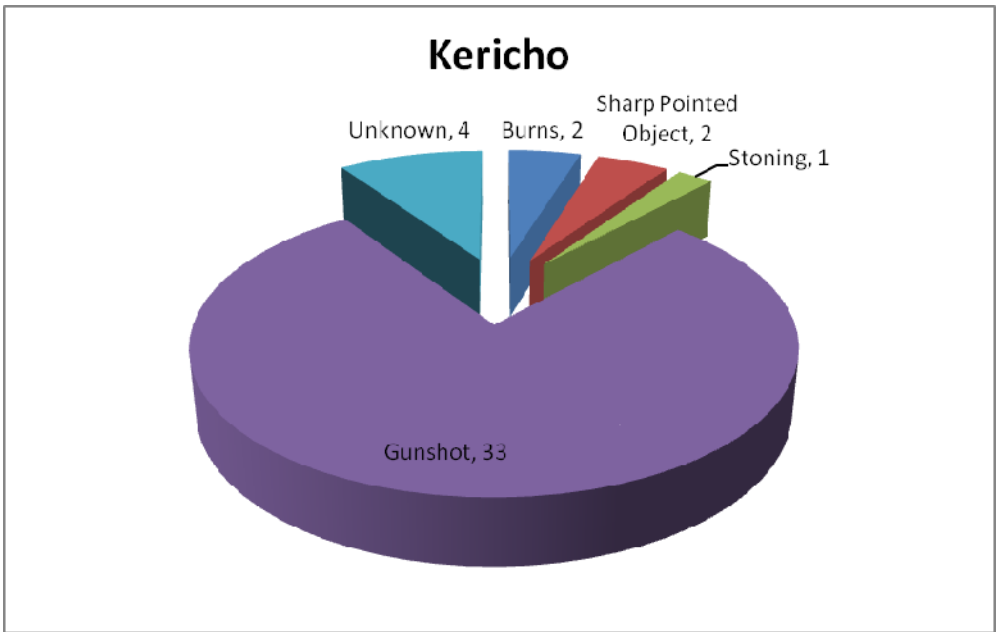


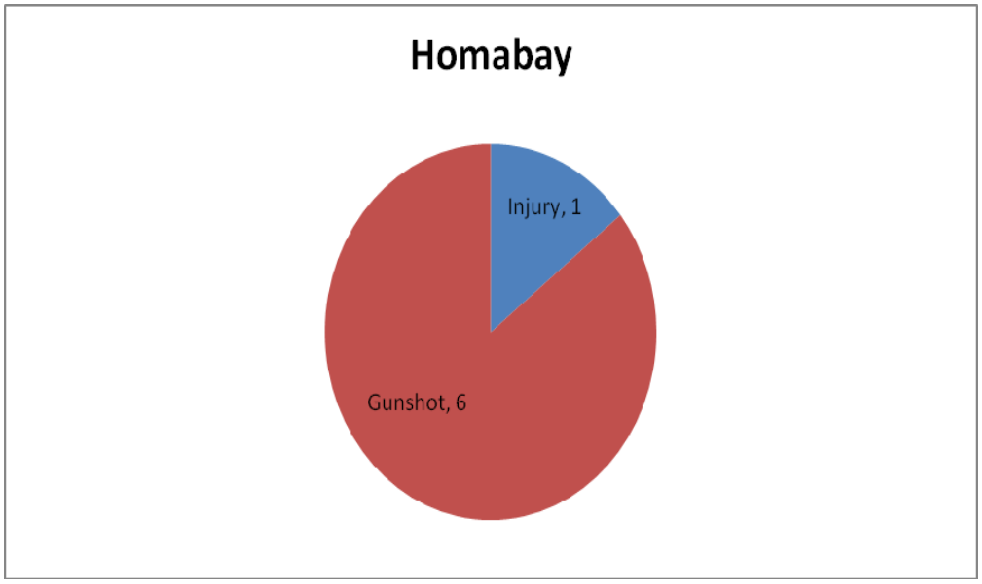


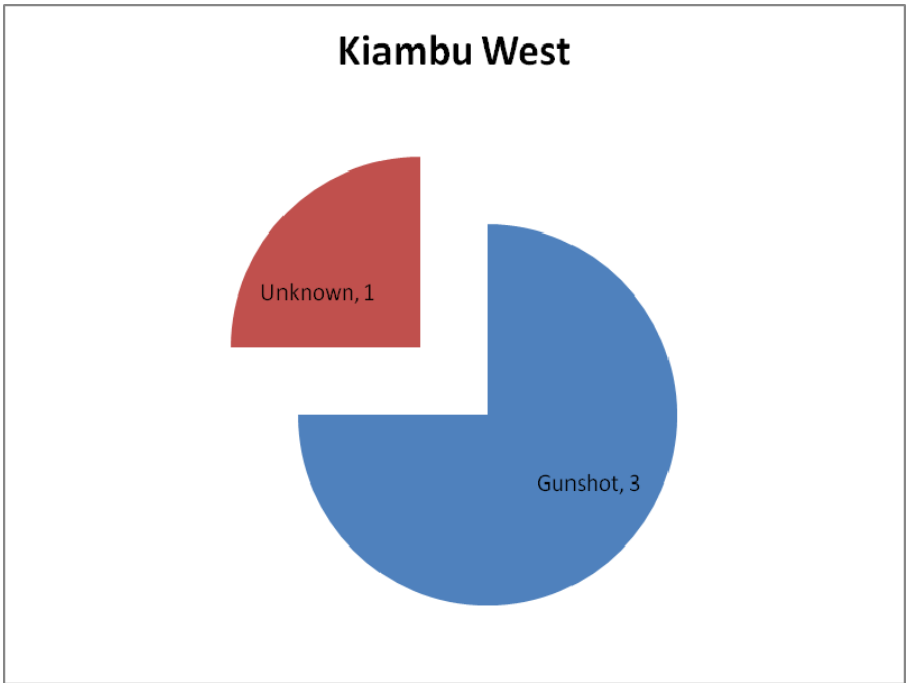

Busia
Mob-
Injustice, 1
Gunshot, 8

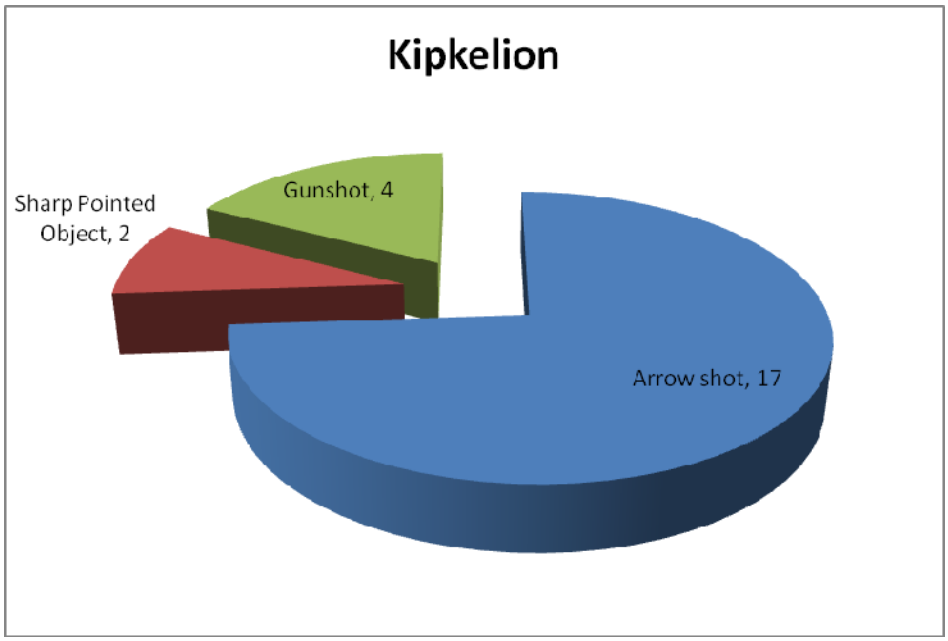

Eldamaravine
Unknown, 2
Arrow
shot, 3
Mob- Injustice, 1
Gunshot, 7
Severe
Wounds, 7
Injury, 3

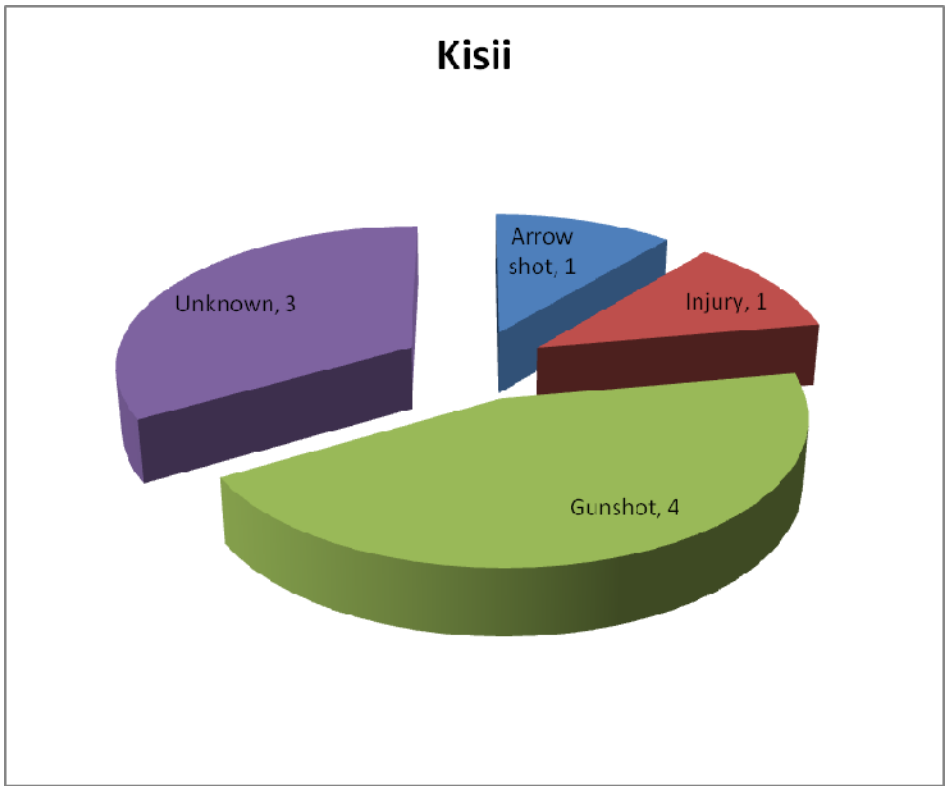

Kakamega
Assault, 3
Injury, 2
Gunshot, 26

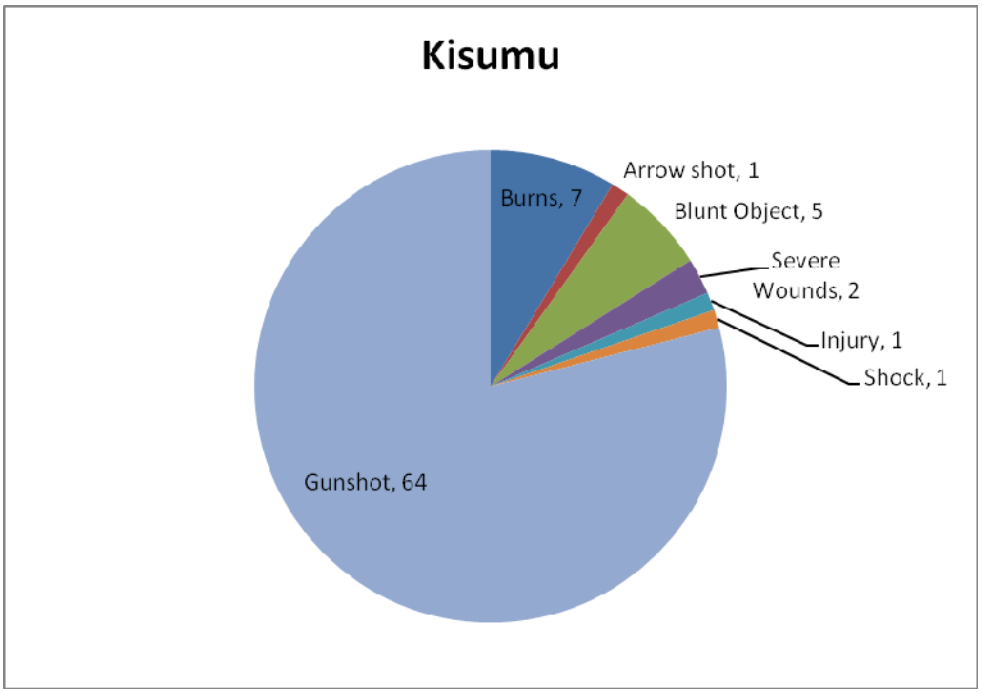

Kericho
Unknown, 4
Burns, 2
Sharp Pointed Object, 2
Stoning, 1
Gunshot, 33

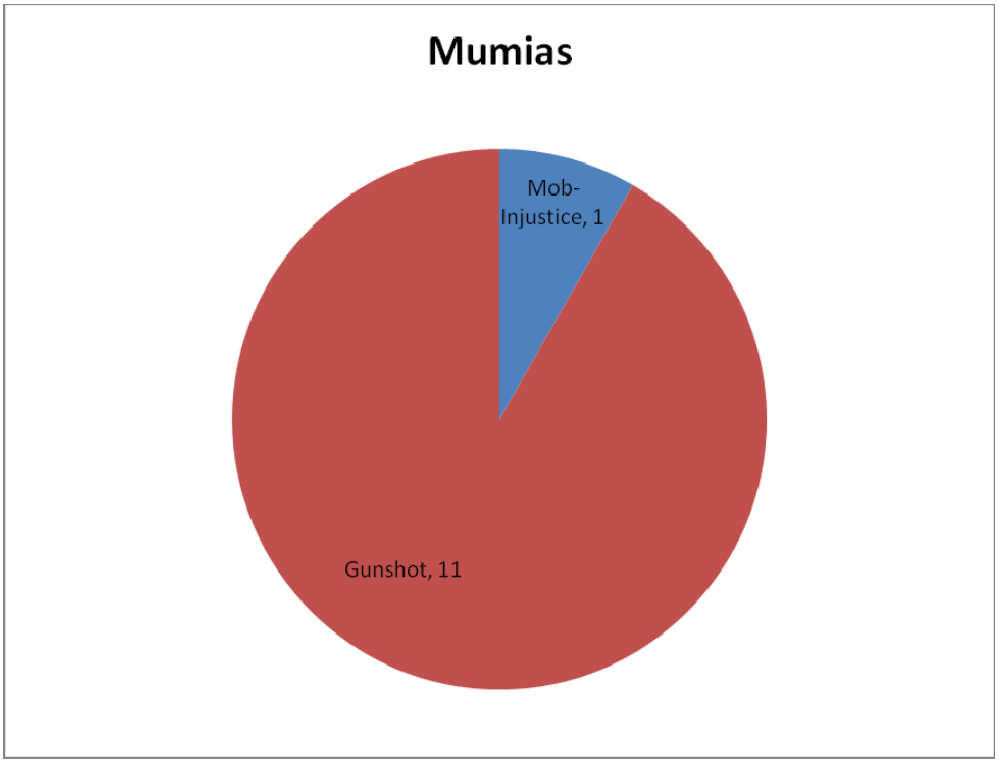

Homabay
Injury, 1
Gunshot, 6

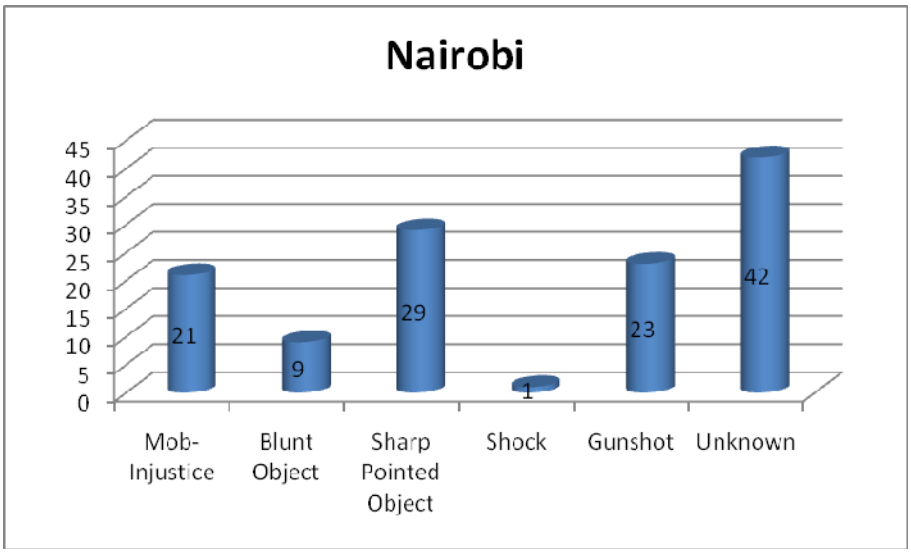

Kiambu West
Unknown, 1
Gunshot, 3

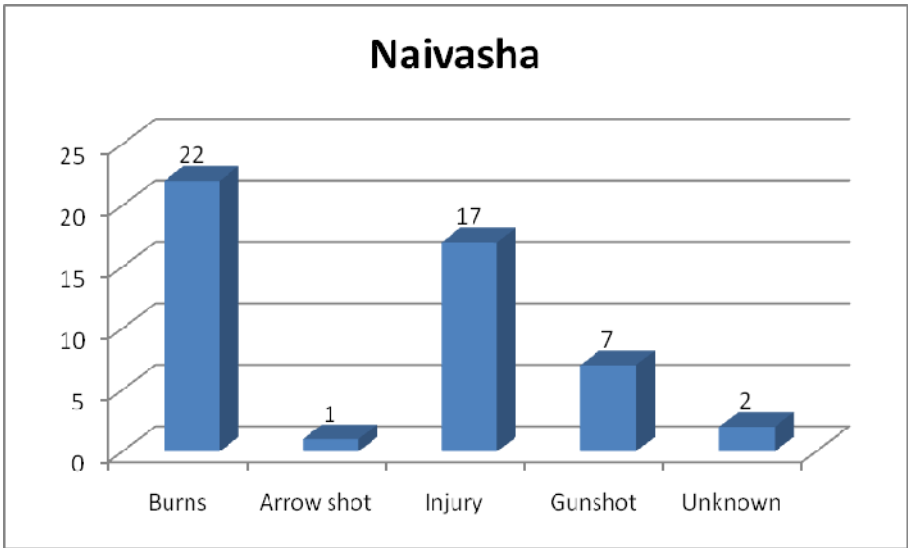

Kipkelion
Sharp Pointed Object, 2
Gunshot, 4
Arrow shot, 17

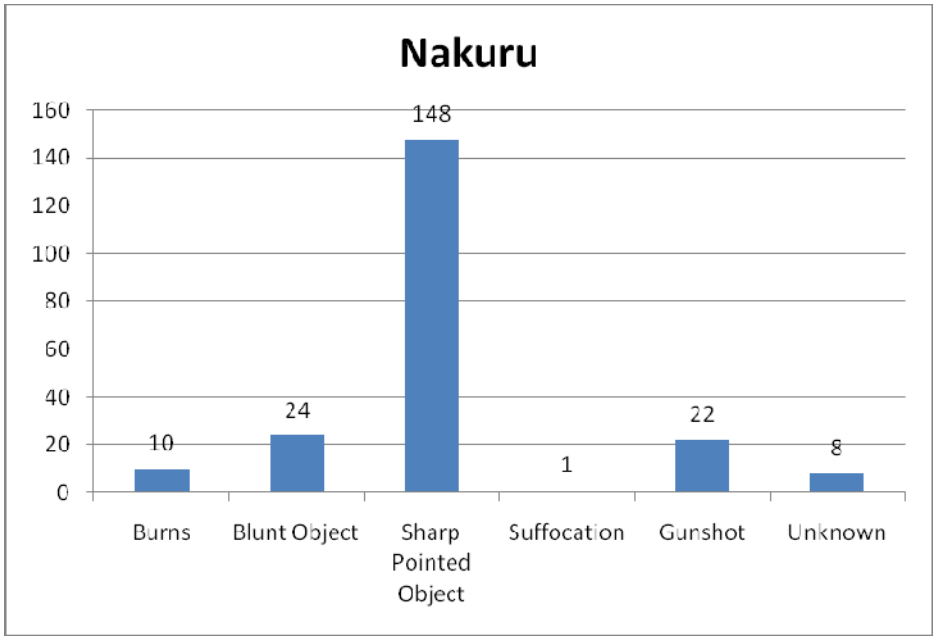

Kisii
Unknown, 3
Arrow shot, 1
Injury, 1
Gunshot, 4

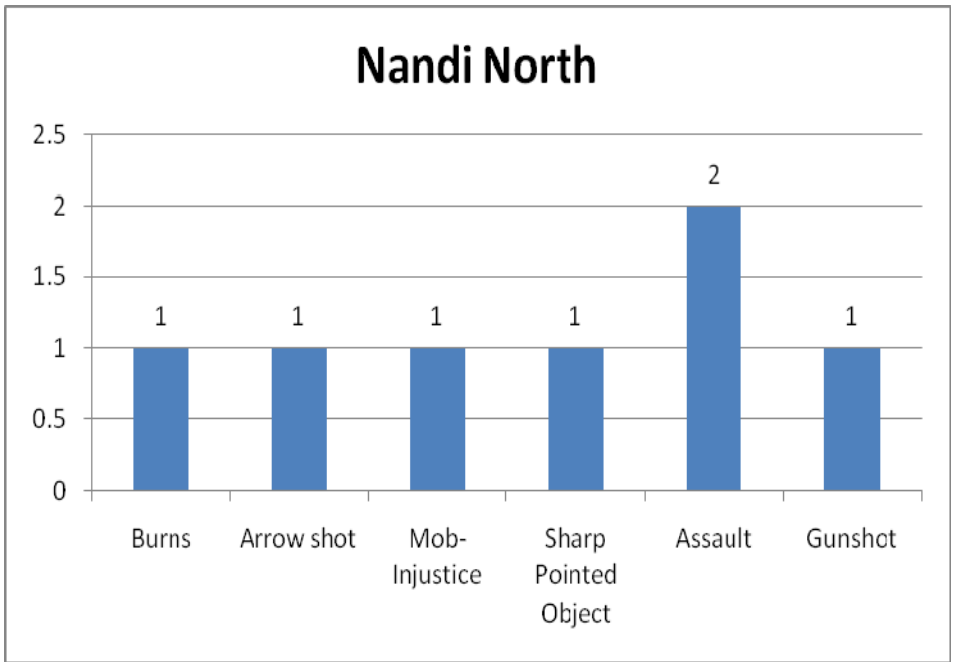

Kisumu
Burns, 7
Arrow shot, 1
Blunt Object, 5
Severe Wounds, 2
Injury, 1
Shock, 1
Gunshot, 64

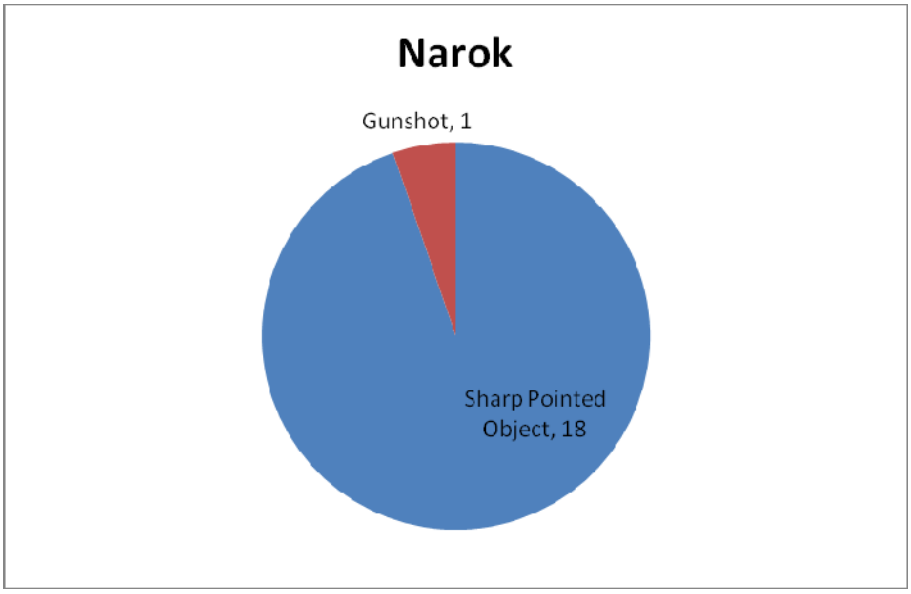

Mumias
Mob-Injustice, 1
Gunshot, 11

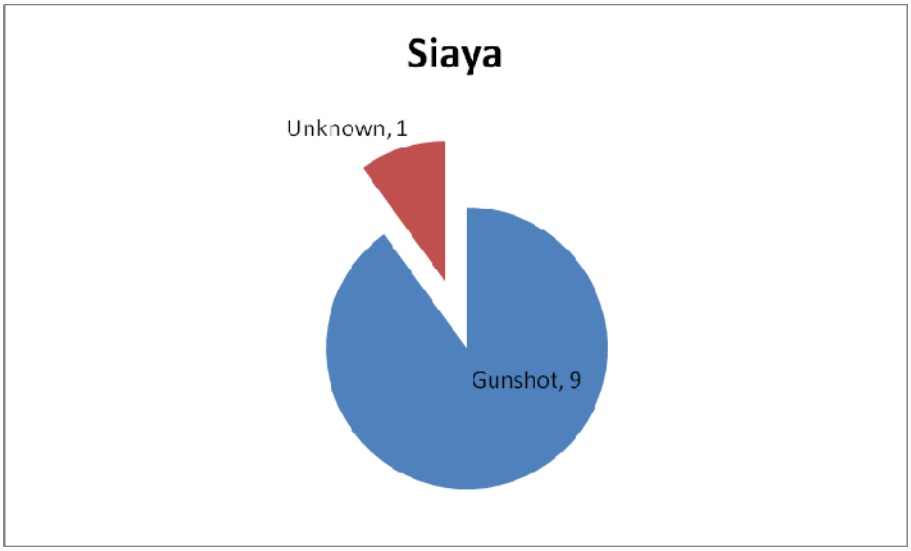

Nairobi
45
40
35
30
25
20
15
10
5
0
21
9
29
1
23
42
Mob-Injustice
Blunt Object
Sharp Pointed Object
Shock
Gunshot
Unknown

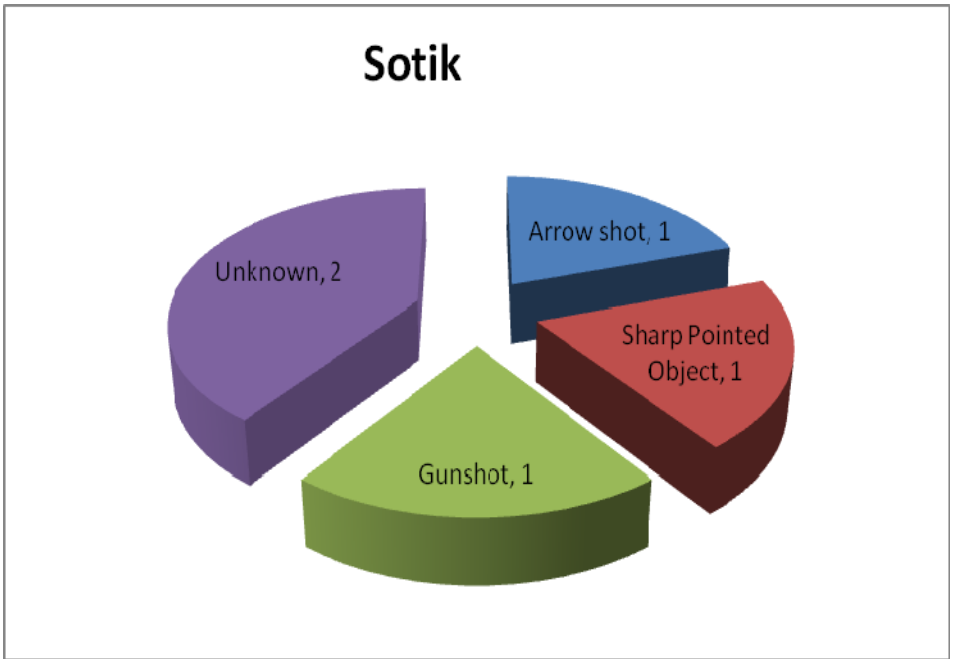

Naivasha
25
20
15
10
5
0
22
1
17
7
2
Burns
Arrow shot
Injury
Gunshot
Unknown

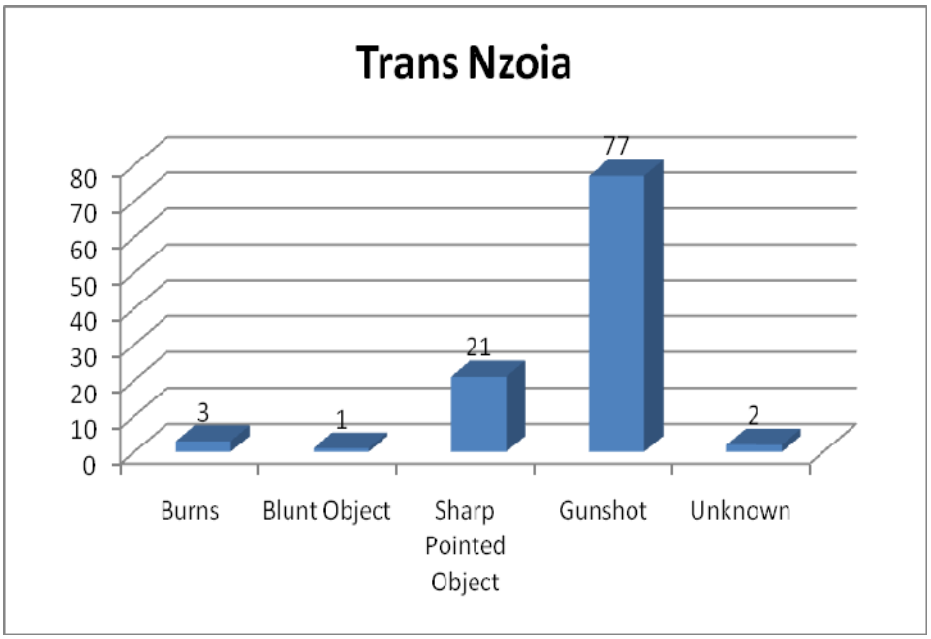

Nakuru
160
140
120
100
80
60
40
20
0
10
24
148
1
22
8
Burns
Blunt Object
Sharp Pointed Object
Suffocation
Gunshot
Unknown

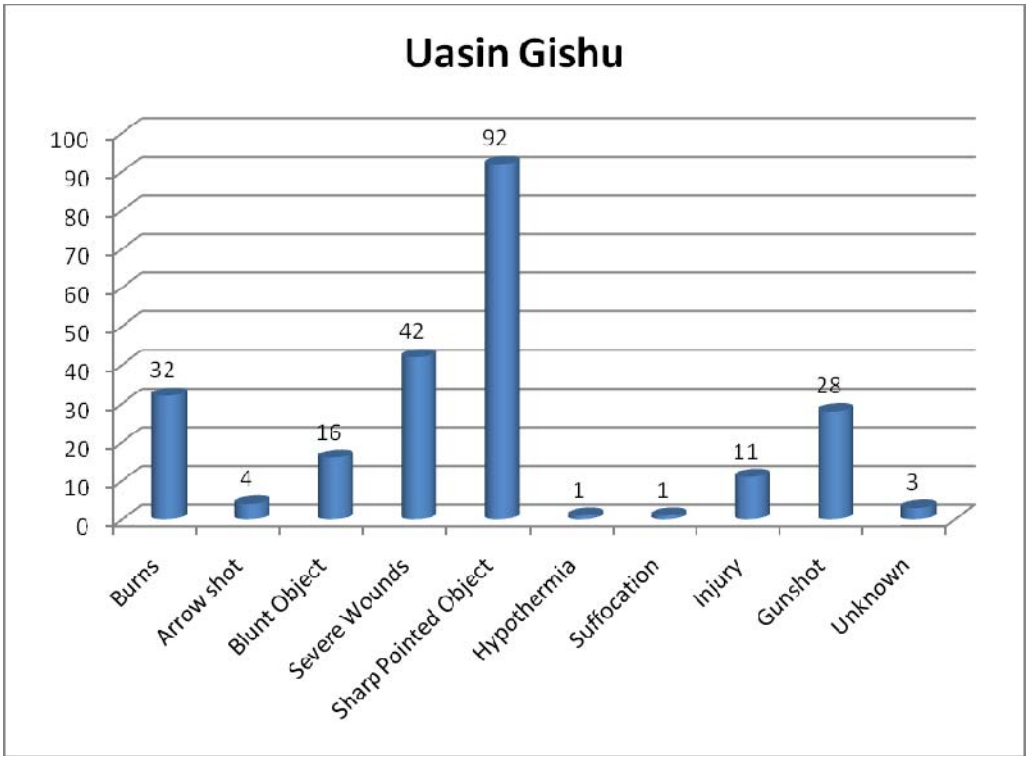

Nandi North
2.5
2
1.5
1
0.5
0
1
1
1
1
2
1
Burns
Arrow shot
Mob-Injustice
Sharp Pointed Object
Assault
Gunshot

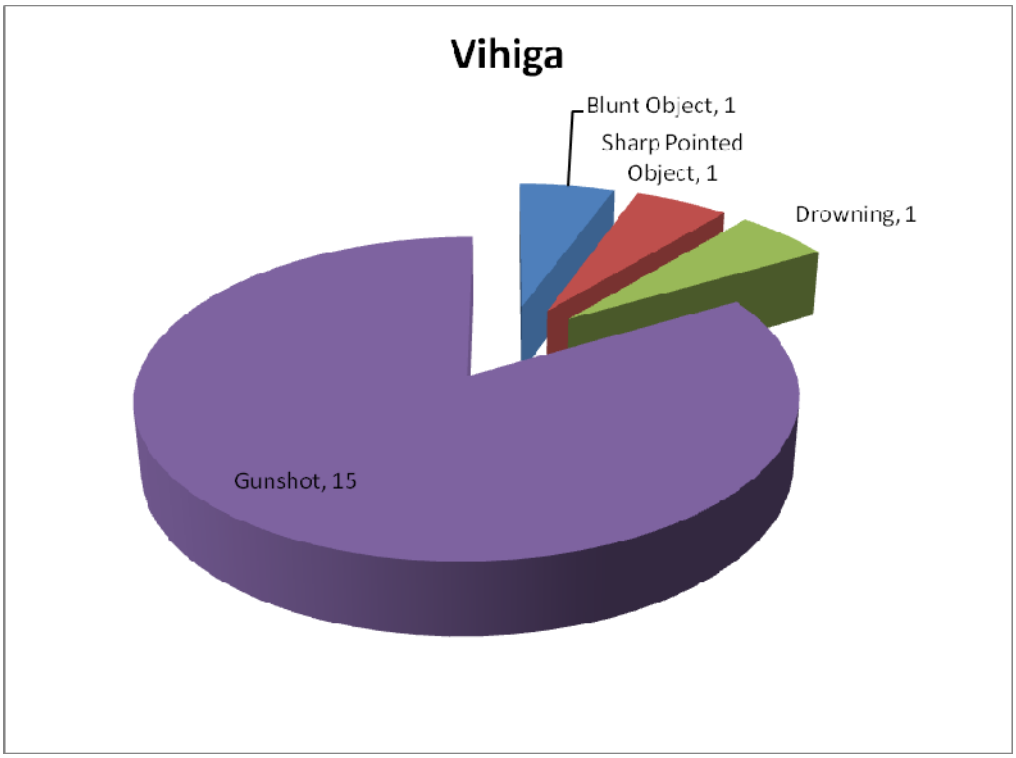

Narok
Gunshot, 1
Sharp Pointed Object, 18

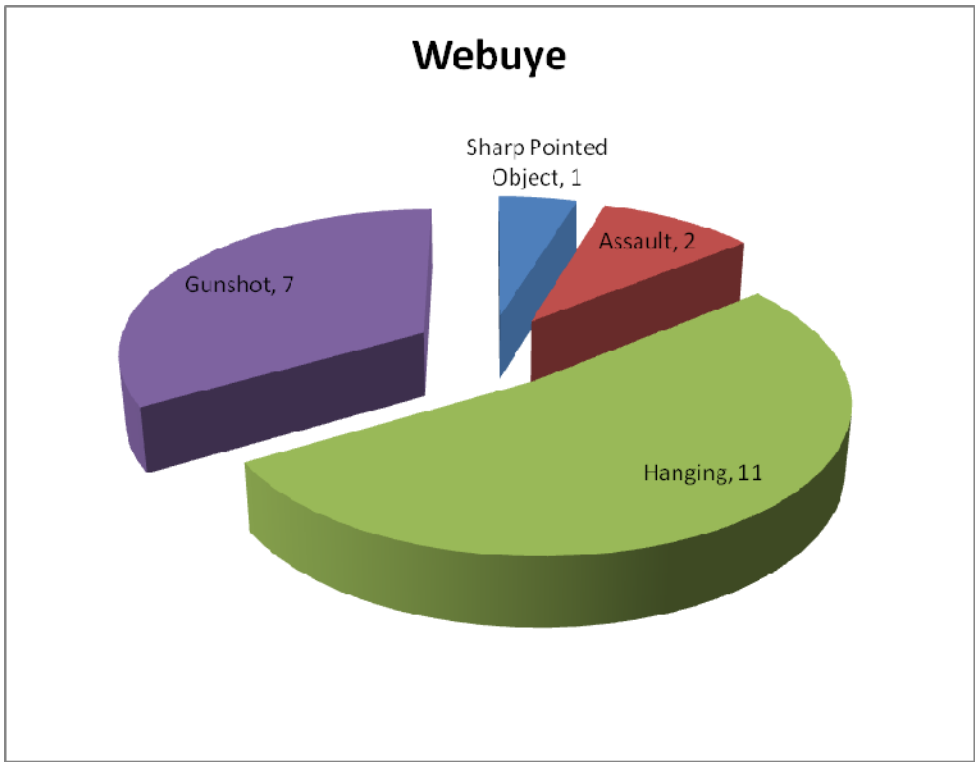

Siaya
Unknown, 1
Gunshot, 9

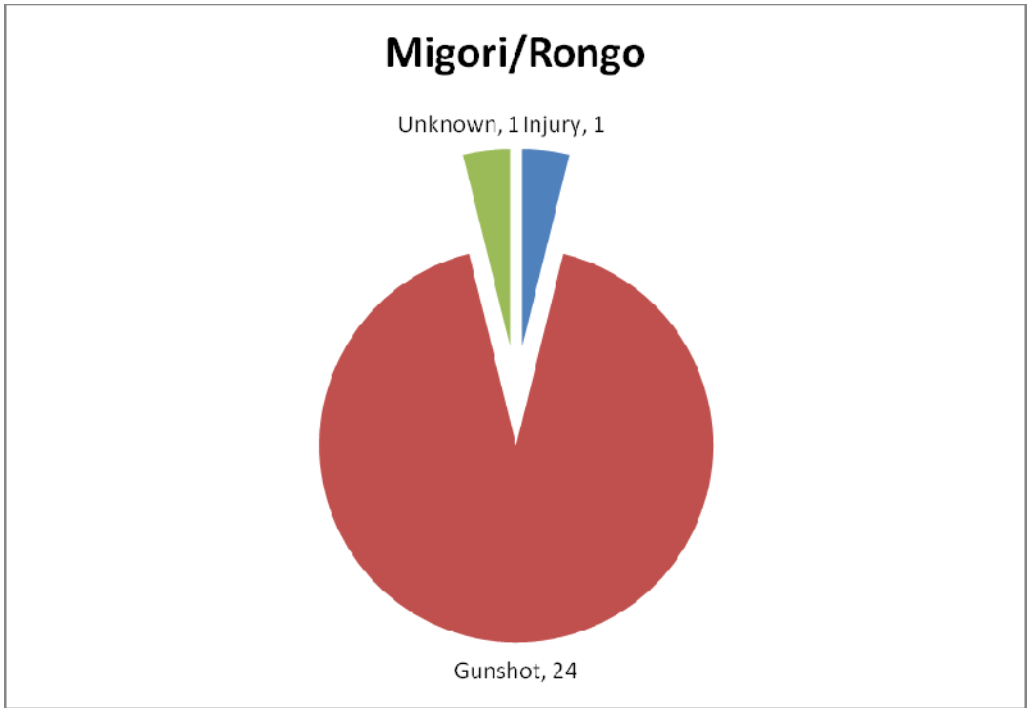

Sotik
Arrow shot, 1
Unknown, 2
Sharp Pointed Object, 1
Gunshot, 1

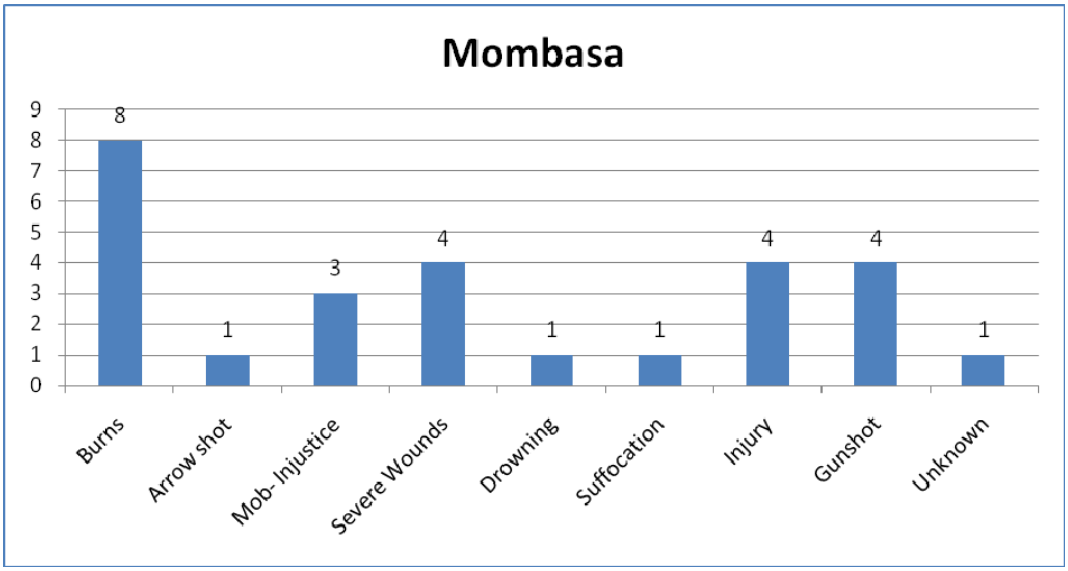

Trans Nzoia
80
70
60
50
40
30
20
10
0
3
1
21
77
2
Burns
Blunt Object
Sharp Pointed Object
Gunshot
Unknown

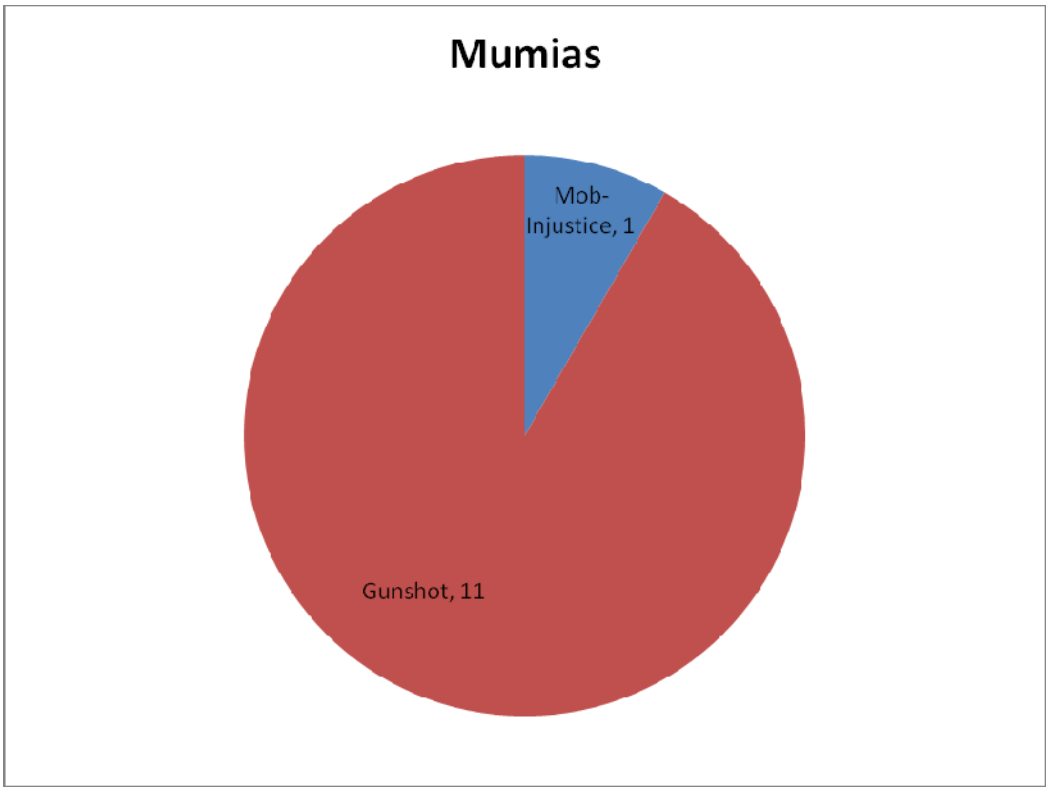

Uasin Gishu
100
90
80
70
60
50
40
30
20
10
0
32
4
16
42
92
1
1
11
28
3
Burns
Arrow shot
Blunt Object
Severe Wounds
Sharp Pointed Object
Hypothermia
Suffocation
Injury
Gunshot
Unknown


Vihiga
Blunt Object, 1
Sharp Pointed Object, 1
Drowning, 1
Gunshot, 15


Webuye
Sharp Pointed Object, 1
Assault, 2
Gunshot, 7
Hanging, 11


Migori/Rongo
Unknown, 1
Injury, 1
Gunshot, 24


Mombasa
9
8
7
6
5
4
3
2
1
0
8
1
3
4
1
1
4
4
1
Burns
Arrow shot
Mob- Injustice
Severe Wounds
Drowning
Suffocation
Injury
Gunshot
Unknown


Mumias
Mob-
Injustice, 1
Gunshot, 11

Key Indicators

- The gun shot wounds represented 35.7% of the total deaths that stood at 405 out of the total 1,133 deaths.
- Most shootings took place in Trans-Nzoia district recording 77 deaths, followed by Kisumu with 64 deaths and Kericho with 33 deaths.
- Nakuru recorded the highest number of victims who died of injuries inflicted by sharp pointed objects with the number standing at 148 while Uasin Gishu recorded 92 deaths.
- Most burns were documented in Uasin Gishu district with 32 deaths followed by Naivasha with 22 deaths.
- Uasin Gishu recorded the highest number of deaths as a result of fatal injuries which cased 42 deaths, while blunt objects caused 24 deaths in Nakuru followed by Uasin Gishu at 16. Fatal arrow wounds were mostly used in Kipkelion standing at 17.
- Webuye district recorded 11 deaths as a result of hanging.

According to the statistics, most deaths in each given district took an ethnic dimension in which, apart from killings by the police, most of those killed did not belong to the ethnic tribe in the district. Apart from the 405 killings directly linked to the police, the remaining 732 deaths were as a result of citizens killing fellow citizens due to the political stand-off at the time of the killings or for other unknown reasons.

Injuries

The table below illustrates an overview and is a summary of injuries sustained by various individuals in 32 districts. These injuries did not result in death. Individuals who sustained such injuries reported to various hospitals and sought treatment. In the time available, details as to the degree and effects of injury were not made available to the Commission. It is possible that while some of the injuries may have been slight, a number of them were serious, possibly life changing experiences.

Provincial breakdown of reported injuries

	District	Burns	Arrow shot	Mob-Injustice	Blunt Object	Traumatic Circum-cision	Sharp Pointed Object	Assault	Fracture	Head injury	soft tissue injury	Gunshot	Total
1	Bondo	0	0	0	5	0	5	0	0	0	1	9	**20**
2	Bungoma	0	0	0	0	0	4	0	3	1	1	5	**14**
3	Rachuonyo	0	0	0	0	0	0	8	0	1	1	3	**13**
4	Busia	0	0	0	0	0	11	16	1	6	14	4	**52**
5	Nyando	0	0	0	16	0	9	0	0	0	0	30	**55**
6	Homa Bay	0	0	0	7	0	10	0	0	0	0	35	**52**
7	Kakamega	0	0	0	0	0	0	3	3	0	1	15	**22**
8	Kericho/ Kipkelion	1	7	0	5	0	17	0	0	0	5	10	**45**
9	Gucha	0	0	0	0	0	0	0	0	0	0	2	**2**
10	Siaya	0	0	0	0	0	0	0	0	0	0	6	**6**
11	Kisii	0	23	0	1	0	4	0	0	0	18	12	**58**
12	Kisumu	8	0	0	101	0	103	0	0	0	60	71	**343**
13	Masaba/Borabu	0	0	0	0	0	56	0	0	0	0	7	**63**
14	Migori/	10	0	0	7	0	19	0	0	0	11	31	**78**

	District	Burns	Arrow shot	Mob-Injustice	Blunt Object	Traumatic Circum-cision	Sharp Pointed Object	Assault	Fracture	Head injury	soft tissue injury	Gunshot	Total
	Rongo												
15	Mombasa	13	2	0	2	0	94	0	0	0	12	10	**133**
16	Mumias	0	0	0	0	0	0	0	0	0	0	23	**23**
17	Nairobi	5	5	0	0	2	122	0	41	64	42	61	**342**
18	Naivasha	1	0	0	0	4	37	0	0	0	0	11	**53**
19	Nakuru		163		49		131					16	**359**
20	Nandi North	0	0	0	60	0	151	0	9	0	0	8	**228**
21	Uasin Gishu	73	29	0	0	0	173	0	14	28	117	71	**505**
22	Kuria	0	0	0	7	0	0	0	0	0	0	0	**7**
23	Nyamira	11	3	0	7	0	20	2	0	0	1	0	**44**
24	Nandi south	6	0	0	0	0	66	167	1	2	50	45	**337**
25	Trans Nzoia	36	0	0	329	0	137	0	0	0	0	9	**511**
26	Suba	0	0	0	0	0	0	0	0	0	0	6	**6**
27	Vihiga	0	0	0	0	0	0	0	0	0	0	18	**18**
28	Webuye	0	0	0	0	0	1	0	0	0	9	7	**17**
29	Koibatek	0	0	0	4	0	24	0	0	2	0	3	**33**

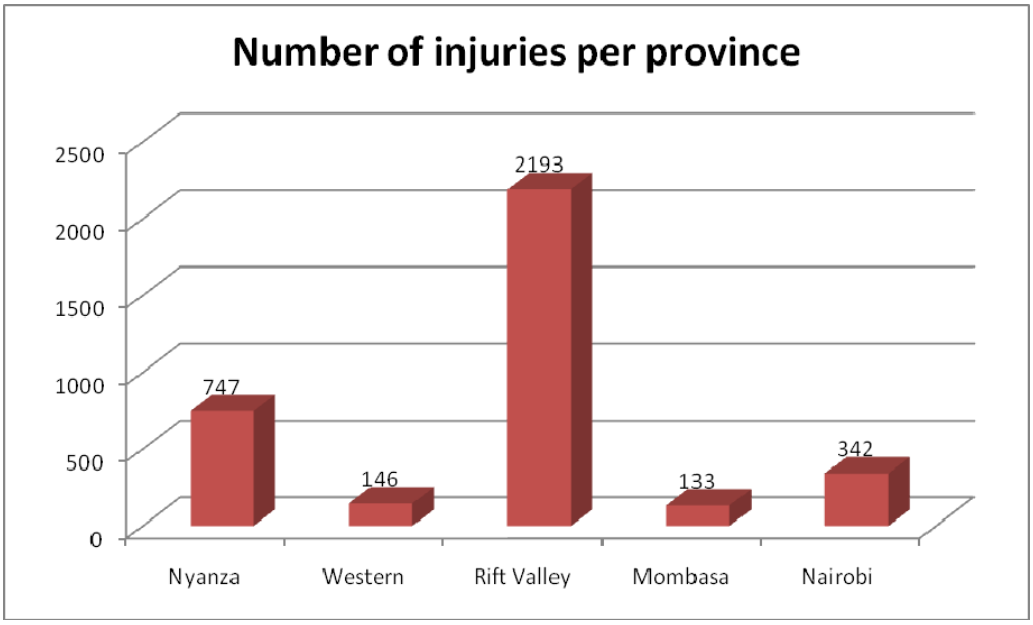
	District	Burns	Arrow shot	Mob-Injustice	Blunt Object	Traumatic Circum-cision	Sharp Pointed Object	Assault	Fracture	Head injury	soft tissue injury	Gunshot	Total
30	Eldama Ravine	0	7	0	0	0	8	0	2	0	11	0	**28**
31	Bureti	0	10	0	0	0	10	0	0	0	6	25	**51**
32	Narok North	0	18	0	4	0	17	0	0	0	0	4	**43**
	TOTAL	**164**	**267**	**0**	**604**	**6**	**1229**	**196**	**74**	**104**	**360**	**557**	**3,561**

As indicated previously, the injuries documented here in respect of persons who were attended to in hospitals and other established institutions. Thus, this is only an indication of the persons who were injured during the PEV.

Highlights

SUMMARY OF INJURIES PER PROVINCE

Nyanza	747
Western	146
Rift Valley	2193
Mombasa	133
Nairobi	342
TOTAL	**3,561**



Key Indicators

- The total injuries documented during the post-election violence were 3,561, of which, majority of the injuries occurred as a result of sharp pointed objects. These injuries were recorded in most of the districts apart from Vihiga, Suba, Kuria, Siaya, Gucha, Kakamega and Rachuonyo. Uasin Gishu district recorded the highest number of injuries at 173, Nandi North 151, Trans-Nzoia 137 while Nakuru recorded 1,341 injuries in this category.

- Injuries sustained as a result of use of various blunt objects came second overall with 604. In this category, Trans-Nzoia district recorded the highest number of casualties with 329 injuries, Kisumu 101 injuries while Nandi North district came third with 60 injuries in this category.
- Gunshot injuries that were not lethal to life. Kisumu and Uasin Gishu districts recorded the highest gun shot injuries at 71 injuries each. Nairobi at 61, Nandi South 45, Homabay 35 while Migori/ Rongo districts at 31.

- Traumatic circumcisions which are commonly referred to as forced circumcisions were also recorded. 2 cases were recorded in Nairobi while Naivasha recorded 4 similar cases.
- Most arrow shot injuries occurred in Nakuru with 163 shots followed by Uasin Gishu at 29 and Kisii at 23.
- Uasin Gishu recorded the highest number of injuries as a result of burns at 73 followed by Trans-Nzoia at 36 burns.

Overall, injuries sustained by citizens against fellow citizens were the highest at 3,004 while those caused by state agents- i.e the police stood at 557. In analyzing the injuries, the Commission looked at the evidence submitted to it from various medical officers, Kenyatta National Hospital statistics, Moi Referral Hospital statistics and the Ministry of Health statistics.

Private and Government Properties Destroyed

The table below illustrates two major categories of property destroyed by civilians during post-election violence period. The source of this information is from police and administration records. The information is therefore classified into two categories; private property and Government property.

Private properties destroyed, we opine that the number of private property may only be in respect of what was reported and documented by the official sources. The information is therefore classified into two categories; private property and Government property.

Private Properties destroyed

There was destruction of motor vehicles reported in Nyandarua, Homa Bay, Kipkelion, Uasin Gishu, Nandi North, Trans Nzoia West, Trans Nzoia East and Kericho Districts. A total of 160 vehicles were reported destroyed as follows: 128 saloon cars, 8 buses, 6 tractors 15 trucks and 3 PSV matatus. Kipkelion district recorded the highest number of destroyed motor vehicles at 44 followed by Kericho at 39 vehicles destroyed. Uasin Gishu had a total of 56 motor vehicles

destroyed, Koibatek 7, Nandi North 4, Trans Nzoia West 3, Homa Bay 3 and Nyandarua 1.

Destruction of properties in Western Province was recorded in Busia, Vihiga, Kakamega, Lugari, Mumias, Butere and Mt. Elgon districts. In most of these districts, both residential and commercial buildings were destroyed. A total of 1,060 such properties were destroyed. Kakamega recorded the highest in Western province with 444 destroyed properties, Lugari 431, Busia 66, Mumias 41, Butere 38, Mount Elgon 35 while Vihiga documented 5.

There was widespread destruction of residential home in the following districts: Nyandarua, Migori, Kisumu, Kipkelion, Molo, Uasin Gishu, Koibatek, Marakwet, Mombasa, Trans Nzoia West, Trans Nzoia East, Borabu and Sotik. A total of 64,832 houses were destroyed. Uasin Gishu recorded the highest destruction at 52,611, Kipkelion at 6,642 while Trans Nzoia recorded 860. The other districts recorded significant destructions destruction as illustrated in the table below. Kisumu, Nandi North, Mombasa and Kericho recorded the destruction of commercial buildings. Kisumu had 50, Nandi North 335, Mombasa 240 while Kericho recorded the highest destruction with 1,960. The total number of commercial buildings destroyed stood at 2,256. In Borabu district, 1 public school and 10 farm machineries were destroyed. 60 kiosks and 30 shops were burn in Sotik district.

Destruction of livestock was not widespread. It was recorded in Nyandarua and Kericho. In Kericho, 85 livestock were killed while 10 goats and 6 cows were killed in Nyandarua. Kipkelion was the only district that recorded massive destruction of crops. 36, 566 bags of maize, 8,100 bags of beans, 800 bags of Irish potatoes, 40 tones of cabbages, 30 tonnes of kales, 20 hectares of sugar cane and 3,219 plants of coffee were destroyed.

Government Properties Destroyed

There was burning of Government vehicles in Homa Bay, Uasin Gishu and Nandi North. A total of 12 vehicles were burnt made up as follows, Homa Bay district recording the highest at 9, Uasin Gishu at 2 while Nandi North recorded 1.

There was widespread destruction of government offices in Homa Bay, Kisumu, Kipkelion and Nandi North. In Homa Bay, offices and equipment estimated at 10 million shillings was destroyed including the District Works office and Fisheries department offices. In Kisumu the water company offices, Provincial Public Works offices, Kondelle Chief's office, and 32 government offices were destroyed. Two zonal education offices were destroyed in Kipkelion and the chief's office and Kimondi forest offices in Nandi North were also destroyed. In Migori, 20 National Cereals Produce Board buildings were destroyed, 1 Kenya Broadcasting Corporation building was destroyed in Kisumu; 2 Administration Police posts in Kipkelion; 3 government buildings in Nandi North; 16 government buildings in Trans Nzoia East; and 3 government houses in Sotik district.

There was vandalism recorded in Kipkelion district where 8 dispensaries and 3 forest stations were totally vandalized. Forests and plantations were not spared either. 367 trees were cut in Kipkelion, the Nyayo Tea Zone Nursery was destroyed and Kimondi Forest plantation was destroyed in Nandi North district. A total of 8 Government schools were destroyed in Kipkelion district while Burende Primary School was destroyed in Nandi North district.

Properties destroyed per District during PEV period

District	**Private properties**	**Government Properties**
Nyandarua	23 permanent houses 104 Semi Permanent houses 1 tractor 6 cows 10 goats	Nil
i)	23 permanent houses	Nil
ii)	104 Semi Permanent houses	
iii)	1 tractor	
iv)	6 cows	
v)	10 goats	
Vihiga	5 properties	1 property
Busia	66 properties	Nil
Kakamega	444properties	Nil
Lugari	431 properties	Nil
Mumias	41 properties	Nil

Butere	38 properties	Nil
Mt Elgon	35 properties	Nil
Homa Bay	1 tractor; 1 saloon car; 1 lorry	Fisheries department offices; District works office; 1 office; 8 Government vehicles; 1 motorcycle; office and equipment worth Ksh. 10 million;
i)	1 tractor	District works office
ii)	1 saloon car	1 office
iii)	1 lorry	8 Government vehicles
		1 motorcycle
		office and equipment worth Ksh. 10 million
Migori	13 houses	20 NCPB
Kisumu	50 Commercial buildings 200 residential houses	KBC building South Lake Water Offices Provincial public works offices Kondelle chiefs office 32 Government offices
Kipkelion	200 residential6642 houses burnt 44 vehicles burnt 36566 bags of maize 8100 bags of beans 800 bags of Irish potatoes 40 tones of cabbages 30 tones of kales 20 ha of sugarcane 3219 plant of coffee	South Lake Water Offices3 Chiefs offices 2 Administration Post Posts 7 Dispensaries vandalized 1 Dispensary staff house destroyed 2 Zonal education office destroyed 3 Forest stations vandalized 8 Schools destroyed 367 Trees cut
		Provincial public works offices
		Kondelle chiefs office
		32 Government offices
Kipkelion	6642 houses burnt	3 Chiefs offices
	44 vehicles burnt	2 Administration Post Posts
	36566 bags of maize des	7 Dispensaries vandalized
	8100 bags of beans	1 Dispensary staff house destroyed
	800 bags of Irish	2 zonal education office

	potatoes	destroyed
	40 tones of cabbages	3 Forest stations vandalized
	30 tones of kales	8 Schools destroyed
	20 ha of sugarcane	367 Trees cut
	3219 plant of coffee	
Molo	1564 Houses torched	Nil
Uasin Gishu	52611 houses	2 GK vehicles
	56 civilian vehicles	Nil
Koibatek	1215 houses torched 7 vehicles burnt	Nil
Nandi North	76 commercial buildings 329 private buildings 4 vehicles burnt	3 Government buildings 1 GOK vehicles DO Residence Kosirai Chief's office Nyayo tea zones nursery Burende primary school Kimondi forest office Kimondi forest plantations
Marakwet	6 commercial buildings401 homes torched	3 Government buildings
Mombasa	329 private buildings29 residential houses 240 commercial building	1 GOK vehicles
Trans Nzoia West	4350 houses torched 3 vehicles burned	DO Residence Kosirai
Trans Nzoia East	860 houses burnt 3 vehicles burned	Chief's office16 Government building destroyed
Kericho	1960 Commercial building 85 Livestock 6 Easy coach buses 14 James Finley trucks 2 Akamba buses 4 Unknown tractors 10 private 3 PSV Matatus	Nyayo tea zones nursery Nil
Borabu	310 houses torched 1 public school destroyed	Burende primary school Nil
		Kimondi forest office

		Kimondi forest plantations
Marakwet	401 homes torched	NIL
Mombassa	29 residential houses	NIL
	240 commercial building	NIL
Trans Nzoia West	350 houses torched	NIL
	3 vehicles burned	NIL
Trans Nzoia East	860 houses burnt	16 Government building destroyed
	3 vehicles burned	
Kericho	1960 Commercial building	
	85 Livestock	
	6 Easy coach buses	
	14 James Finley trucks	
	2 Akamba buses	
	4 Unknown tractors	
	10 private	
	3 PSV Matatus	
Borabu	310 houses torched	
	1 public school destroyed	
	10 farm machines destroyed	
Sotik	89 Residential houses burnt 60 kiosks burnt 30 shops burnt 3 government houses burnt 20 residential houses brought down	Nil
	60 kiosks burnt	

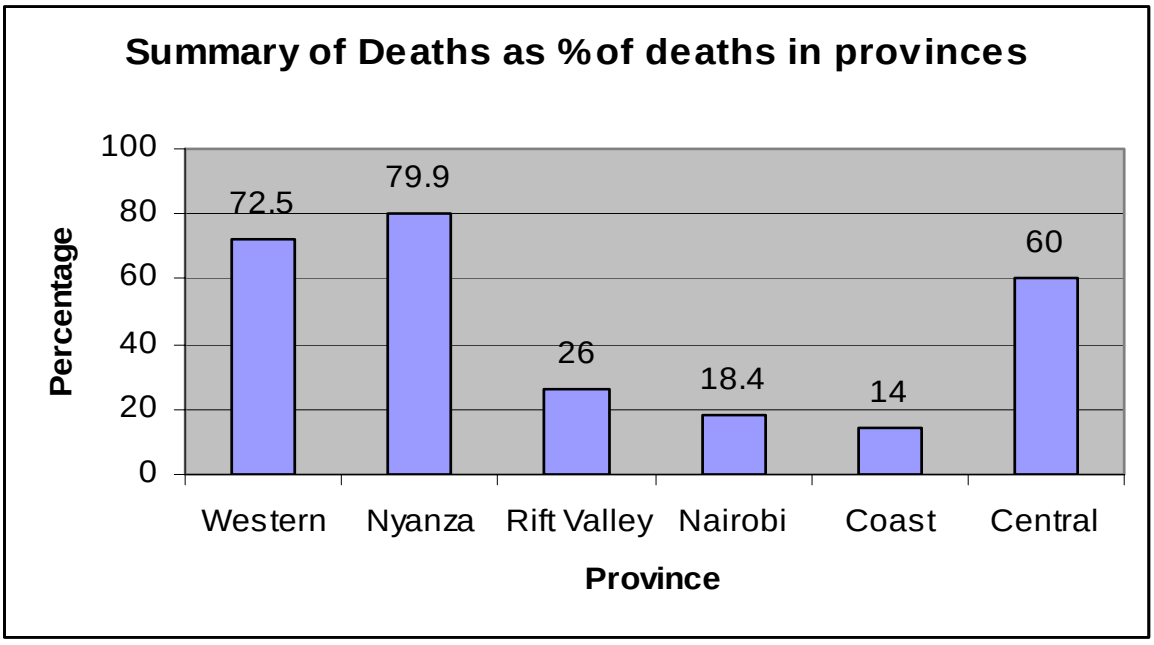
Conclusion

The information on the deaths that occurred during the post election violence tells a number of stories. The Rift Valley Province accounted for 744 deaths that is, 66% of all the deaths that occurred during the post election violence period. The Commission's conclusion is that Rift Valley was the epicentre of the post election violence. Nyanza with 134 deaths, constituted 12% of the deaths experienced, while Nairobi with 125 deaths constituted 11% of all the deaths, the third largest number of deaths.

The causes of death in the provinces lead to a number of broad conclusions. In Western province, gunshots accounted for 74 deaths out of a total of 98 representing 72.5% of all the deaths in that province. In Nyanza 107 deaths out of 134 or 79.9% were the result of gun shots. In Nairobi 23 out of 125 deaths or 18.4% were the result of gun shots and in Rift Valley gun shots accounted for 194 out of 744 or 26% of those killed. Coast Province recorded 4 out of 27 deaths or 14% as a result of gun shooting and in Central 3 out of 5 deaths were reported representing 60% of the total gunshot deaths.

Summary of Deaths from Gunshots

Province	No. of deaths	Percentage
Western	74	72.5%
Nyanza	107	79.9%
Rift Valley	194	26%
Nairobi	23	18.4%
Coast	4	14%
Central	3	60%
TOTAL	**405**	



It is the view of the Commission that since no evidence to the contrary was ever shown, police were responsible for all cases of shooting. The Commission

concludes that the disparity in percentage terms of the number of those shot, as a fraction of the total deaths in each province, may have a correlation with the preparedness the police had to use ammunition on people. Evidently, this varied from province to province, with Western province exhibiting the most robust use of ammunition, followed by Nyanza. It appears that police in different provinces did not respond uniformly with regard to the use of force, even when faced with similar situations.

Further, it is the view of the Commission that all deaths other than those by gunshot were caused by civilians. The number of deaths in the Rift Valley as a result of arrow shots and sharp objects is very high. The picture that emerges from these figures is that the Rift Valley faced an extraordinary amount of violence between ordinary citizens. Bows and arrows as well as machetes played a defining role in that violence. For these improvised weapons to have achieved such a large number of fatalities demonstrates the concentration of the violence, and is consistent with the testimonies received by the Commission.

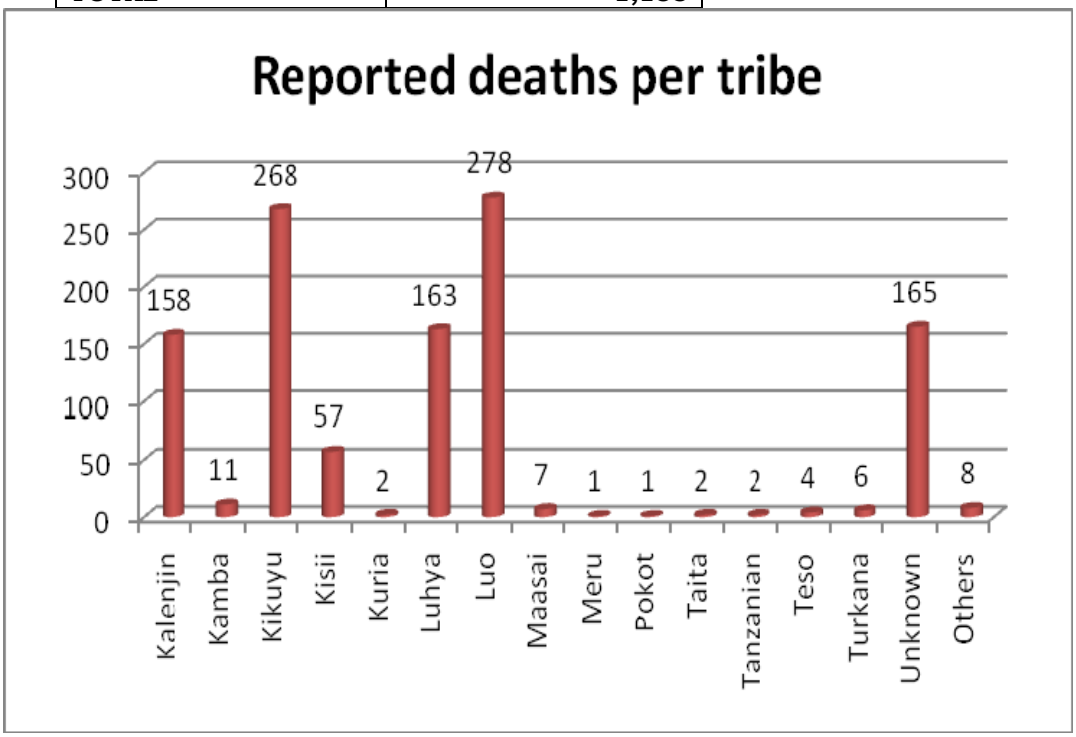
The evidence received by the Commission was that in Nyanza and Western Provinces, there were relatively low levels of fatality resulting from citizen-on-citizen violence. If it is assumed that gunshot deaths in these provinces were caused by police and that non-gunshot deaths represent civilian-on-civilian violence, the relatively low figures of 27 deaths representing 20% of the total deaths in Nyanza province while in Western 24 deaths representing 24.5% of the 98 deaths corroborate the testimony. It follows, then that police shot and killed a large number of people in these two provinces. If so this is inexcusable and highly regrettable.

The Commission also examined the ethnicity of those who died where such information was available from the evidence presented. The Commission decided to disaggregate information on the ethnic identities of those killed in the post election violence for the reason that it demonstrates that all ethnic communities that were involved in the violence sustained losses of life. This conclusion counteracts the notion which all the ethnic communities that were involved in the post election violence were found to harbour that members of their particular

community were the sole victims. The information shows that all sides sustained significant losses.

Number of deaths during PEV distributed per tribe

Tribe	Number
Kalenjin	158
Kamba	11
Kikuyu	268
Kisii	57
Kuria	2
Luhya	163
Luo	278
Maasai	7
Meru	1
Pokot	1
Taita	2
Tanzanian	2
Teso	4
Turkana	6
Uknown	165
Others	8
TOTAL	**1,133**



CHAPTER TEN

Findings

The findings we make in this Chapter are derived from the facts collated and analysed from oral and documentary evidence submitted before the Commission. There are 4773 pages of recorded sworn testimony from 156 witnesses and 144 other witnesses who submitted depositions and recorded statements. There are nine volumes of exhibits running into more than 3500 pages and we had at our disposal, in terms of our terms of reference, official reports of previous investigations, investigations from other institutions or organizations and research material from our own researchers and investigators. It must be said that the Commission had only a limited period to carry out exhaustive investigations and we do not doubt therefore that there may be information out there which did not reach the Commission. We were nevertheless encouraged by the enthusiastic support and response we received from members of the public and we believe the information gathered enables us to state with confidence that our findings are made fairly and fully.

The preceding chapters make various findings in relation to the topics discussed and those findings remain valid. What follows is a summary of the broad findings as distilled by the Commission. On the basis of those findings the Commission has made its recommendations as required in the terms of reference.

Findings in Relation to the Extent of Violence

6.• A total of 1,133 people died as a consequence of the post-election violence. The geographical distribution of the deaths was unequal, with most of the post-election violence related deaths concentrated in the provinces of Rift Valley (744), Nyanza (134) and Nairobi (125). The districts of Uasin Gishu (230), Nakuru (213) and Trans Nzoia (104) in the Rift Valley Province registered the highest number of deaths related to post-election violence.

7. • A total of 3,561 people suffered injuries inflicted by or resulting from sharp pointed objects - 1229, blunt objects -604, Soft tissue injury - 360, Gunshot - 557, Arrow shots - 267, Burns -164, Assault - 196, etc.

8. • A total of 117,216 private properties (including residential houses, commercial premises, vehicles, farm produce) were destroyed, while 491 Government owned properties (offices, vehicles, health centres, schools and trees) were destroyed.

9. • Gunshots accounted for 962 casualties out of whom 405 died. This represented 35.7% of the total deaths, making gunshot the single most frequent cause of deaths during post-election violence. It was followed by deaths caused through injuries sustained as a result of sharp pointed objects at 28.2%. The Commission has received no evidence to suggest that where gunshot was recorded as the cause of death or injury, it was from a source other than the police. This calls into question the contention that post-election violence was a citizen-to-citizen violence, and it validates the view that police action accounted for a good part of the post-election violence.

Findings In Relation to the Causes and Patterns of the Post-Election Violence

1. In contrast to the pre-election violence, which was mainly between candidates and their supporters, the post-election violence had a distinct ethnic dimension.

2. Initially, the violence witnessed was spontaneous and was in part a reaction to the perceived rigging of elections. In areas like the Rift Valley and the Coast, it targeted members of the Kikuyu and Kisii communities perceived to be

associated with the PNU party and with President Kibaki who were seen as the beneficiaries of the "rigged" election, while in Nyanza and Western, the spontaneous violence was mostly directed towards government facilities and gradually took the form of looting and destruction, and while it also targeted Kikuyus and Kisiis, the intention appeared to be not to kill them but rather to be expel them and destroy their property.

3. Subsequently the pattern of violence showed planning and organization by politicians, businessmen and others who enlisted criminal gangs to execute the violence. That was the case particularly in Rift Valley and Nairobi. In places like Naivasha, Nakuru and the slum areas of Nairobi, Kikuyu gangs were mobilised and used to unleash violence against Luos, Luhyas and Kalenjins and to expel them from their rented residences and, similarly, organised Kalenjin youth particularly in the North Rift attacked and drove out Kikuyus living there.

4. Some of the pointers to the organisation include the fact that:

- In instances, warnings were issued to the victims before the attacks;
- The violence involved large numbers of attackers, often mobilized from areas outside the location of the violence;
- Petrol and weapons were used in various places to carry out the attacks and destruction, which required arrangements as regards acquisition, concealment and transport; and
- Sometimes the attacks specifically targeted only members of given ethnic groups to the exclusion of others.

5. Some responsibility for the violence must also be laid at the feet of the country's politicians who precipitated the violence by among other actions and omissions:

(i) Conducting the election campaigns in a strident and confrontational manner, thereby creating an atmosphere of tension;

(ii) For party political ends, casting the *majimbo* debate in ethnically divisive terms; and

(iii) Failing to create confidence among voters around the electoral processes and institutions.

6. The administrative authorities, including the police, the security forces and the provincial administration, must also take responsibility for various omissions and commissions in regard to the violence arising from:

- Failure to act on intelligence regarding the possibility of violence following the elections;
- Failure properly to respond appropriately and adequately to the violence and its effects, thereby aggravating the suffering of the victims;
- In the case of the security agents and the police, resorting to an unjustified use of force and causing death and injury unnecessarily; and
- Failure to act with discipline and impartiality and at times descending into acts of serious crime against civilians.

Findings In Relation to Sexual Violence

General

7. Because of the context in which it took place, the sexual violence experienced took the form of gang and individual rapes, many of which were ethnically driven, as well as horrendous female and male genital mutilation. Women and children's labia and vaginas were cut using sharp objects and bottles were stuffed into them. Men and boys, in turn, had their penises cut off and were traumatically circumcised, in some cases using cut glass. Furthermore, entire families, including children often were forced to watch their parents, brothers and sisters being sexually violated.

8. Aside from the above life shattering events, many victims of sexual violence experienced other injuries, lost family members, their houses, property,

had no place to go or to turn for help, and have ended up alone or in IDP camps without a means of earning a living.

Perpetrators

9. The Commission found that perpetrators of sexual violence were not just ordinary citizens, neighbours, and gang members, but also significant numbers of security forces. These included members of the General Service Unit (GSU) as well as regular and administration police. Many victims let members of the security forces into their houses assuming they would help them. Instead, they found themselves being attacked by those they thought would help them. This entailed a gross betrayal of trust.

10. Members of the security forces also participated in gang rapes. In addition, they colluded with each other, including having some of their own standing guard outside victims' houses while they raped and mutilated inside victims' dwellings.

11. Even when victims told perpetrators (whether members of the security forces, gangs or individuals) that they were HIV positive, perpetrators chose to rape. This is likely to result in an increase in HIV AIDs in Kenya.

12. Perpetrators often told victims the sexual violence inflicted upon them was punishment for belonging to a specific ethnic group or purportedly having supported a particular political party.

Victims

13. For a variety of reasons, many victims were not able to access timely medical care, including obtaining the drug PEP, which if taken within 72 hours, prevents HIV AIDS and sexually transmitted infections. The reasons for not obtaining medical care included the following: a breakdown in security and the fear of leaving home, lack of transport, ignorance about PEP and not knowing they would not have to pay and could receive free medical care, fear of being stigmatized if it were known they had been raped, and an overriding concern to

protect, feed, and shelter their children and family members at their own expense.

Response by Authorities

14. Authorities in general were totally unprepared to respond to sexual violence. Although the police took many victims of sexual violence to hospitals, the Commission also received evidence that in other instances they were unprepared either to record or investigate criminal complaints of sexual violence. This was exemplified by the Commissioner of Police, Hussein Ali's testimony to the Commission, where he stated "We will determine whether those crimes are fit and whether the people have been arrested and charged".

15. The void created by the lack of official response to sexual violence was partly filled by private hospitals, including the Nairobi Women's Hospital, some government facilities, and a number of NGOs, including the Kenya Red Cross.

Effects

16. Other than the extraordinary physical and psychological trauma stemming from being a victim of sexual violence, victims also suffered acute injuries, permanent disabilities, contracting incurable diseases like HIV AIDs and hepatitis B, ostracism, abandonment by their husbands and parents, loss of abode and income, as well as extreme feelings of humiliation.

17. The Commission learned from its own psychologist that many female victims still are alone, unable to cope with the above traumas and in need of help which is not available to them. A number of victims who had not received medical attention by the time they came before the Commission only managed to do so as a result of the Commission's intervention.

Findings In relation to Internally Displaced Persons

18. As a result of the PEV approximately 350,000 persons were displaced from their normal abodes of residence and or business. IDPs were concentrated in Western, Nyanza, Rift Valley, Central, Nairobi and Coast Province. About 1,916 Kenyans sought refuge in Uganda.

19. People were displaced as a result of violence and threats of violence. They moved from their places of residence and business to places considered safe like police stations, administrative posts, churches and trading centres. 20. Thereafter they moved to formal camps or were integrated with their relatives and friends in urban centres or their ancestral homes.

21. Conditions in the IDP camps were less than satisfactory. We found that security was wanting as IDPs were always subjected to threats by criminal gangs. We also found complaints about the inadequacy of food, shelter and sanitation. Most of the inhabitants of IDP camps were women and children.

22. Government and administrative response to the problems of IDPS was initially slow and *ad hoc*. The Kenya Red Cross Society, local and international NGOs and CSOs, faith based groups and individual volunteers played an important role in alleviating the suffering of IDPs by offering refuge, food, shelter, security, education, medicine, counselling and other needs.

23. The Government initiated *"Operation Rudi Nyumbani"* in April 2008 aimed at removing IDPs from camps and where possible resettling them back to their homes. Due to constraints of time and resources, the Commission could not fully make an assessment of the efficacy of this programme but found the following inadequacies;

(i) The sum of Kshs. 10,000.00 was considered inadequate by the IDPs to meet their need once they left the camps.

(ii) The so called "integrated" IDPs (i.e. returnees who went to live within the community) felt neglected as the program concentrated mostly on those who were settled in camps.

(iii) Security for those who wish to return to their farms and homes, particularly in the Rift Valley, is not fully assured and is therefore a hindrance to resettlement.

24. The IDP problem is likely to persist phenomenon until the Government and people of Kenya address the political problems that led to eviction of men, women and children from their homes and businesses.

PART IV

Acts and Omissions of State Security Agencies and Impunity

CHAPTER ELEVEN

State Security Agencies

Introduction

The Commission was given a special role in relation to the State Security Agencies (SSAs) and their involvement in the Post Election Violence. Articulated clearly in the Terms of Reference (ToRs) it was mandated to *"investigate the actions or omissions of State security agencies during the course of the violence, and make recommendations as necessary."* A broad interpretation of this task was applied to include the actions of these agencies in the lead up to polling day was a necessary step to take in determining the level of preparation and planning undertaken. Also individual members, officers and employees of these agencies were considered to be within the scope of the investigation.

The investigation drew from a range of reports from international organisations and Kenyan civil society, independent witnesses and representatives of the agencies themselves in determining just what these entities did or did not do in discharging their various mandates in the months preceding the elections, during the election process, and of course during the time of Post Election Violence (PEV).

In discharging its mandate this Commission has been able to open doors previously closed and to hear from the most senior government officials both in public and in camera. Many Kenyans were hearing from these office holders for the first time and the nature of their work would have been a revelation to many.

Key witnesses who appeared included the Chief of General Staff of the Kenyan Armed Forces[290], the Commissioner of the Kenya Police Service[291], the

[290] CW 07, General Jeremiah Mutinda Kianga
[291] CW 01, Major General Hussein Ali

Commandant of the Administration Police[292], the Director General of the National Security Intelligence Service[293], the Permanent Secretary for the Ministry of State for Provincial Administration and Internal Security[294], the Commissioner of Prisons[295], a number of Provincial and District Administration officers and other Police personnel. The testimony of these witnesses has been complemented by that of independent citizens and civil society organisations.

This approach has enabled the Commission to examine and make findings on many aspects of SSA's work that will effectively carve out new territory for the Republic. Indeed the finding relating to preparatory arrangements was as insightful as those relating to the action and reaction of these agencies to the violence when it did occur.

This volume of the Commission's report is divided into three chapters dealing with Preparation, Responses and the aftermath and a Rationale for Recommended Action (including major recommendations).

Identifying the key issues

The investigation focused on three main timeframes. The pre-election period primarily looks at the preparedness of SSAs, the period of the post election violence itself to see just how agencies responded (between 27th December 2007 when the presidential results were announced and the 29th of February 2008) and the time since then in terms of how they have dealt with the aftermath.

The examination of these matters was guided by a number of key elements regarded as being minimum requirements for dealing with events of this type and magnitude. These include:

[292] CW 08, Kinuthia Mbugua
[293] CW 19, Major General Michael Gichangi
[294] CW 04, Francis T. Kimemia
[295] CW 09, Gilbert Mithune Omondi

- Information and intelligence – the methodology of information gathering, analysis and dissemination within agencies and across the security sector.
- Operational planning – The comprehensiveness of preparation including the use of intelligence, risk analysis, scenario development, desk top exercises, contingency building, the timing of overall preparation and communication. The execution of planning arrangements including specialist training and drills, and orders groups.
- Command and control structures – the development of specific arrangements to take account of the special nature of the 2007 elections operation and the clarity and decisiveness of lines of command and communication ensuring officers and staff understand and acknowledge their roles in the exercise.
- Use of force – the appropriateness of response tactics including the use of lethal force, tear gas and other methods of dealing with crowds
- Dealing with complaints – including the systems utilised to receive and respond to calls for service and sensitivity in dealing with traumatised citizens
- Investigations – the capability of police investigations including issues of dealing with the behaviour of police officers
- Resourcing – the level of resources acquired and applied to the operation, how resource management was handled during the crisis
- The utility of Police Statutes, Force Standing Orders, standard operating procedures (SOPs) and other guidelines
- The review processes, including de-briefings and a comprehensive written analysis and review of the overall operation.

How Prepared were the Agencies?

Our assessment of this aspect of the State Security Agencies activities falls into two principal categories. Firstly the activities, services and outturn of the intelligence machinery were examined including national, provincial and district components. Secondly the readiness of operational agencies was investigated in terms of their own state of preparedness.

Kenya Security Intelligence Machinery (KSIM)[296]

The KSIM consists of a number of committees that are designed to keep security issues in front of those who make the decisions at the top level through to frequent interaction between delivery agencies on the ground at the provincial and district level. The machinery is made up of the Cabinet Security Committee (CSC), the National Security Advisory Committee (NSAC), the Joint Security Intelligence Secretariat (JSIS), the Provincial Security and Intelligence Committee (PSIC) and the District Security and Intelligence Committee (DSIC). The respective roles and accountabilities are reproduced in appendix "B".

The KSIM largely discharges its role in ensuring the development and delivery of intelligence to inform an appreciation and understanding of the risks to internal security amongst other roles. At the national level the key committee is the NSAC. Consisting of senior officials from the security services and some ministries its main role is to advise the CSC on internal security issues and to provide direction and intelligence to the provincial and district intelligence committees.

[296] The Director General NSIS (CW19), presentation in public 17 July 2008 (organisation chart reproduced in appendix "A")

At the outset the Commission learned that there is no established National Security Policy to guide the development of operational strategies and tactics to prevent or at least prepare adequately for such events as the PEV.[297]

Despite the lack of a national policy base or a high level strategic framework the Commission heard evidence that the KSIM, especially the NSAC, had in its possession a wealth of knowledge and intelligence around the great potential for significant violence in and around the 2007 General Elections and that through its role this knowledge was shared between security agencies.

The Commission also received no evidence as to the use made of the material created and supplied to the members of the NSAC. It could not be established that this intelligence was shared in a timely or appropriate way with the government through the CSC or if it was, whether it influenced decision making at that level. Nor could it be established whether the NSAC disseminated the intelligence to the provincial and district committees.

Whilst it is clear that the Commissioner of Police was privy to this information it is less clear how full and detailed intelligence reports were or should have been provided to the provincial and district committees. The Commission was able to establish that communications in the form of facsimiles were forwarded from the Police Commissioner's office to Provincial Police Officers from time to time in the lead up to and after the general elections. These communications, sent between August 2007, and the end of January 2008 contained a mix of information relating to potential security issues.

Many Provincial Administration officers and police officers, however, stated to the Commission that they had not, for example, received special guidelines and directions on the PEV scenarios drawn up by the NSIS.[298]

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[297] The development of a National Security Policy is included in the agreed work programme as agreed through the Kenya National Dialogue and Reconciliation

[298] Including CW 45, former OCPD Nakuru 30 July 2008

Whilst the structure, roles and mandate of the KSIM is sound operationalising it in times of great need is the test of its robustness and in the case of the 2007 elections there was a definite breakdown in its operation in terms of a top down delivery of intelligence reports.

In the time it had, the Commission was able to review the discussions and minutes of some District Security and Intelligence Committees (DSIC) and Provincial Security and Intelligence Committees (PSIC). These quite clearly demonstrated knowledge and understanding of the security situation that was developing in their areas of responsibility. In Trans-Nzoia East and West the committee meeting of the 30th December noted a worrying security situation in the two Districts where Kikuyus were specifically being targeted and an observation that, "whichever way the (Presidential) results go Kalenjins (Pokots, Nandis, Kipsigis and Sabaots) are planning to attack Kikuyus and invade their farms." The same committee communicated to the PSIC that due to the fact that security officers had been deployed from their area to support Molo, Nairobi and elsewhere for security duties, local security was sorely compromised.

The Molo DSIC determined in its meeting of the 22 November 2008 that due to glaring irregularities in the party nomination process and "*blatant rigging*" the political atmosphere became charged leading to defections and acrimony. It commented that there was a strong need to strengthen security operations preceding the elections and recommended that five police posts be established and additional funding be allocated to support patrols and rapid deployment operations. There is no record of these initiatives being followed through.

Minutes of the 20th December meeting of the Molo DSIC recorded that following the period 22 November to 4 December when ethnic hostilities reached "*fever pitch*" resulting in clashes causing death, injuries and destruction of property, the entire PSIC led by PC Hassan Noor Hassan visited the area to assess the security situation. Appealing for peaceful co-existence between the communities a meeting between religious leaders, politicians and the PC was held on 5 December where peaceful resolutions were agreed upon and a document signed off. The same minutes, however, recorded some weaknesses in the existing

security arrangements noting a need to recruit credible and reliable informers, more transport, a requirement to properly vet officers sent to the district to ensure reliability and a strengthening of the operational command structure and communications arrangements.

There remains a question then around the utility of the machinery in its mandated role in terms of planning and preparing delivery agencies for key security tasks. Whilst there is evidence of good information gathering, intelligence preparation and understanding of the security issues both nationally and at a local level, there is a significant weakness in translating this into clear, demonstrable and useful operational interventions.

It appears that the entire security forces' approach to dealing with security issues relies almost exclusively upon the KSIM. This simply will not achieve anything on its own. This information and intelligence, assuming the smooth operation of the machinery, only serves to inform and advise on what delivery agencies need to do. The Commission received no evidence, for example, that there were any joint planning and/or operational arrangements between agencies. Further, no evidence was provided regarding the use of desktop scenarios, simulated emergencies and full joint exercises to ensure that each organ is able to play its role when real emergencies such as the PEV occur.

It would be expected that such arrangements would be in place and form part of the usual business of SSAs. Specific planning activities for the general elections would have been expected to commence some considerable time before they were to be held and at least one to two years in the case of the largest known recurring security event in Kenya.

National Security Intelligence Service (NSIS)

Of all the State Security Agencies the NSIS was, it seems, with the possible exception of the Military, best prepared. Evidence was received to the effect that not only did the Service gather information and data about what could potentially occur around the 2007 elections in terms of violence but developed a

range of reports highlighting the issues and provided them to senior government officials as well as the Police, Military, Prisons, and other agencies.

The NSIS produced both regular and special reports including Hotspots/Flash Points Up-dates, Situation Reports, weekly and fortnightly reports and briefs, security briefs at a provincial and district level as well as NSAC reports regularly throughout the months leading up to the General Elections[299]. As early as September 2007 these reports warned of impending election related violence in clearly specified areas and provided a continuing alert process through updated assessments of potential PEV.

In many instances these documents identified various individuals suspected of being involved in such activities as inciting, planning disruption and violence, threatening behaviour and other offences.

The Service went as far as recommending that operational agencies prepare specific contingency plans, take special and decisive action against inciters and financiers of criminal gangs and ensure staff refrained from exercising partisan behaviour.

The Commission heard and was provided with supporting evidence that the Service was in fact uncannily accurate in its forecasting of just what scenarios were likely to eventuate should either Odinga or Kibaki win the Presidential elections. The scenarios predicting possible 2007 election outcomes and consequences sounded a clear warning that security organs may well be overwhelmed by the high intensity and widespread nature of ensuing lawlessness[300].

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[299] For example a report entitled Flashpoints/Hotspots week ending 08.06.07 was forwarded under letter to Mr Cyrus T. Gituai, PS Provincial Administration and Internal Security and copied to Maj. Gen. Mohammed Hussein Ali, Commissioner of Police

[300] Director General NSIS, Major General Gichangi, CW 19, Nairobi 17 July 2008 (See appendix "C")

A special report entitled Critical Dates and Events – General Elections 2007, was forwarded on 6 December to Mr. Samuel M. Kivuitu, Chairman of ECK the contents of which had been presented to the NSAC. It, amongst other things, warned of "*increased political activity and attendant lawlessness are likely to overwhelm the security organs.*"[301] A further report dated 7 December addressed to the same person and copied to Amb. Francis K. Muthaura, PS to the Cabinet and Head of the Public Service and the Commissioner of Police warned further of issues likely to inflame an already volatile situation including, "*persisting claims of election irregularities...formation of anti-rigging squads by parties, and hiring and use of criminal gangs against opponents and persisting ethnic clashes/animosities in some parts of the country due to inflammatory political utterances..*" [302]

Given the extensiveness of the intelligence developed and distributed by the service it was disturbing to note that in the end there was an almost fatalistic realisation that no or insufficient preventive action would be taken to ameliorate the mayhem. In addition for many there is a case for believing that even with an Odinga win some areas of the country, especially North rift, may well have still seen high levels of violence due to the alleged level of Kalenjin organisation, capability and ambitions to drive so-called outsiders out of the area regardless of the results.

A question remains about the utility of some of the NSIS's systems. Many at the Provincial, District, and Division level were emphatic that they did not know of the likely magnitude of the violence that ultimately ensued. This seems strange since it is those very areas within which the NSIS operatives work and therefore where knowledge of the impending crisis should have originated.

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[301] Director General NSIS, Major General Gichangi, CW 19, Nairobi 21 July 2008

[302] Director General NSIS, Major General Gichangi, CW 19, Nairobi 21 July 2008

It can only be assumed that if this is the case then the information obtained was not shared with the PSICs or DSICs on the way up the chain. Perhaps the system that the Service utilises does not allow for this and insists that only well developed intelligence through the instrumentality of a formal report will be shared with fellow SSAs. Many Districts reported that they had no idea of the nature of the extent of violence to come and did not in fact receive full reports from their superiors.

If this is true then the failure to fully comprehend the situation could lie in both the failure to utilise key information at source and in a failure of agencies (especially the Police) to ensure that the formal intelligence reports of what was happening on the ground reached those who could do something about it.

The NSIS also warned of *"..emerging allegations that the government is planning to use some sections of government organs including the provincial Administration and the Administration Police (APs) to rig the forthcoming elections.."*[303] A particularly disturbing allegation considering that the same report (dated 25 December 2007) identified indicators of the alleged rigging schemes including, "*The revelation that APs are involved in marking ballot papers in advance and that some of them will be deployed in polling stations to disrupt elections and introduce fake ballot papers, particularly in Lang'ata.*"

Further, the intelligence agency in warning of the real potential for security organs to be overwhelmed by "*widespread lawlessness*" pointed to the following challenges;

- *An overstretched (capacity) and partly demoralised police force*
- *Lukewarm working relationships between the regular and administration police as a result of perception that the latter is politicised and favoured by the government.*
- *A partisan public service as well as the military*
- *A Provincial Administration perceived to be involved in campaigns.*[304]

[303] CW19, exh produced 17th July 2008

[304] CW19, exh (brief dated 17 December 2007) produced on 17th July 2008

The Commission did, however, have grave reservations about the involvement, and attempted involvement, of the NSIS in the elections process. This involvement was manifested in three specific instances. The first concerned an attempt by the NSIS Regional Intelligence Coordinator (RIC), Nairobi Region to secure ECK accreditation badges. The RIC wrote to the Chairman of ECK, Mr. Samuel Kivuitu in a letter dated 13 December 2007, requesting the issuing of no less than 50 accreditation badges to be issued to NSIS officers for the elections.[305]

Mr. Kivuitu responded in writing the very next day, refusing the request outright. In doing so he noted, "*It is the first time such a request was ever made by an intelligence agency.*" He also pointed out, "*The acceptance of your request would contravene all known and well established international norms on elections... there can be no basis for spying on its (ECK) electoral duties... for now your application is impossible to accept.*"

This issue also arose during the examination of the ECK Chairman[306] when he responded to a question about the matter;

> ***Harun Ndubi:*** *I see. Now, I'm asking that to reflect back on the question of NSIS. Did they also ask you in any of those correspondences to allow their officers either to disguise or to receive badges as officers or observers of the ECK?*
>
> ***Samuel Kivuitu:*** *They applied - now this did not come from the headquarters. This came from the Nairobi office. They applied to become observers, election observers and I wrote back and I said they are not qualified. They cannot be election observers and if they were to be taken it would be one of the biggest blows to the administration of elections.*

A second issue concerned what the NSIS described as a "*Socio-Economic Political Barometer field study report December 2007*" that it conducted (or caused to be

[305] Only two pages of the three page letter were received by the Commission.
[306] CW 135, 25th September, Nairobi

conducted) between 26th November and 2nd December 2007.[307] In a letter dated 24th December 2007, General Gichangi provided survey results indicating the relative position of the 3 presidential candidates in the polls. He also included an assessment as to the final results on 27th December 2007.

In addition, correspondence about the survey appeared to be arranged outside the KSIM framework. The Commission could find no reference to this work in any other document and the letter was addressed to Amb. Muthaura in his role as Secretary to the cabinet and Head of Public Service and not in his capacity as Chair of the NSAC.

The consistent message, frequently communicated by the NSIS, around the need for state organs and their officers to be neutral during the elections seemed farcical in the face of these revelations.

The third area of concern for the Commission also related to a written communication. Dated 6th December 2007, this letter from the Director General to the Chairman of the ECK was headed "*Critical dates and Events – General Elections 2007*".[308] The letter purported to be on behalf of the NSAC although it was not forwarded by the NSAC Chair. Amongst other things the communication identified counting, announcement and swearing in elements of the ECK's work that the NSIS felt necessary to comment upon. This advice included how certificates should be dealt with by agents and that ECK should meet with media house owners and editors and the candidates "*with a view to striking a deal on the modalities of transmission and announcement of results.*" The Commission discovered that this type of advice had been provided by the NSIS during the referendum of 2005 and was in fact welcomed by the ECK then and during the 2007 elections. Despite this the Commission finds that specific advice of this nature emanating from an intelligence agency is unwise and likely to be outside its stated mandate.

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[307] Evidence supplied by the NSIS in the form of a letter from the Director General to Amb. Francis K. Muthaura, PS Secretary to the Cabinet and Head of Public Service.

[308] CW19, part of his presentation in public on 21 July 2008, Nairobi

Further, this correspondence included a caution on the conduct of law enforcement and other agencies in and around the elections processes, "*The involvement of government officials and the use of public resources for campaign purposes could lead to accusations of rigging and provide grounds for violence and subsequent petitions*." Clearly the Director General and his officers failed to heed their own warnings.

The Military

Testimony was tendered by the Chief of General Staff of the Kenya Armed Forces, General Jeremiah Kianga[309] to the effect that the Military were well prepared for the PEV. By all accounts they not only took heed of the NSIS reports but conducted their own assessments, scanning and planning arrangements based upon their view that the 2007 elections would see a level of violence occur to at least levels seen at previous elections.

The military prepared contingency plans, anticipatory orders, trained troops and rehearsed in order to respond appropriately to likely scenarios, conducted barazas with staff around their need to remain apolitical in accordance with military values, and other work to ensure that should the need arise military support could be provided quickly and effectively.

The official mechanisms and formal procedures utilised for calling for Military assistance in aid of the civil power were, however, less clear. Section 3 (2) of the Armed Forces Act (Chapter 199 of the Laws of Kenya) provides: -

> *"The Kenya Army, The Kenya Air force and the Kenya Navy are charged with the defence of the Republic* ***and the support of the civil power in the maintenance of order****, and with such other duties as may from time to*

[309] CW 05, Nairobi 14 July 2008

time be assigned to them by the Minister after consultation with the Defence Council."

The Police Commissioner[310] testified that,

"In the context of the events after the 27th December 2007 elections, military resources were deployed for the limited purpose of supporting police in the restoration of transport infrastructure. The role of the military did not include quelling of riots."

This was acknowledged by General Kianga, the Chief of General Staff of the Kenya Armed Forces,[311] in his statement where he stated that the primary role of the Armed Forces is the defence of the Republic of Kenya against any external threat and the secondary role is the support of Civil Power in maintenance of order.[312]

It is notable that the Police Commissioner and the Chief of General Staff of the Kenya Armed Forces did not refer to any other basis for military aid to civil authority or elaborate on just what processes were used.

The Commission was provided with a copy of a Government of Kenya document entitled "Instructions on the Use of Armed Force in civil disturbances" issued by the Ministry of Defence in 1962.[313] This was also referred to by a senior police witness who referred to a number of publications that guide policing arrangements.[314] This document spells out that such requests should emanate from the Provincial Commissioner or District Commissioner in any "sudden or urgent emergency" after consultation with the local police commander. Some PSIC and DSIC minutes refer to these requests having taken place.

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[310] CW 01
[311] CW 07
[312] Exhibit 7A

[313] Exhibit 97C
[314] CW142

The Police

The Kenya Police Service and the Administration Police are generally referred to as the Police in this discussion except where issues touch specifically upon their individual mandate and/or responsibility.

In terms of preparedness for dealing with the Post Election Violence, the Police were simply too far off the mark. There was, and still is, a lack of understanding and reluctance to accept that a comprehensive exercise in planning and preparation for the elections were not only required but constitute a basic responsibility for the Police. This was reflected early in the proceedings.

The Commissioner of Police, Hussein Ali, stated to the Commission that the violence was unprecedented and indicated that it could not have been foreseen[315]. The Commissioner was asked by the Commission to provide copies of documents prepared by the Police for policing the 2007 General Elections and undertook to do so. By the time this report was written only two planning documents were received. The first was an operation plan from the Coast Province in the form of an undated presentation, and the second was a plan entitled "Operation Uchaguzi" from SSP Mwamburi former OCPD Migori/Rongo Districts.[316]

In assessing the Police preparedness overall the Commission determined that planning and preparation was scant, commenced far too close to the event, failed to take account of the intelligence received and information available on the ground, and did not encompass preventive activities designed to reduce and/or ameliorate the impact of violence around the 2007 General Elections. There was also no evidence provided that indicated the police were utilising their own intelligence sources and systems that should have informed planning as well as responses. These fundamental failures set the scene for police preparedness, and response, nationwide.

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[315] CW 01, exhibit 1b produced 09 July 2008 Nairobi
[316] CW94

The Commission sensed that the police approach to its task before, during and after the 2007 elections reflected a misplaced arrogance that they would always be able to control what came up. As we will see not only does this approach fail to grasp the fundamental policing tenet that preventing violence and criminal activity is the best means of protecting citizens and property, but further underscores the grave underestimation of what was to ultimately occur.

Evidence was tendered to the effect that indeed some planning did take place. The Commission was told that a process was in place whereby Provincial Police Officers (PPOs) planned for service delivery in their provinces for the elections and these plans were tested at national level, reviewed and ultimately implemented.[317] However, little evidence of planning was heard from mid-level police commanders.

The Commission heard from a number of officials including the former PPO who was in charge of police operations for the entire Rift Valley Province until 27 January 2008.[318] He stated that due to his assessment of the issues, he prepared "detailed operation plans" although the evidence suggests that in fact there were, "adequate security arrangements made" through the instrumentality of "detailed operation orders." These orders appear to consist merely of the application of officers to areas where more violence was expected than others.[319] There was no indication of initiatives and strategies designed to reduce and/or ameliorate the possibility of violence.

Planning here also seems to be predicated on the need to supply at least two officers to each polling station during the election process. In fact it could be said that the Police planned for dealing with the elections process and little else. It should be noted that the ECK counsel made much of the significant increase in polling stations for the 2007 elections. In the event some 27,555 polling stations were utilised meaning the impact on policing was at least 55,110

[317] CW 57, Nakuru 1 August 2008
[318] CW 57, Nakuru 1 August 2008
[319] The witness told the Commission that orders had been prepared complete with detailed resourcing requirements. These had been put into a presentation form and discussed in Nairobi with the Commissioner and other PPOs with a view to ensuring adequate policing overall during the elections.

officers assigned to these duties, albeit many were seconded from other services, at a time when there was little violence around the actual polling. The impact of this and other requirements are discussed in detail in a following section.

In fact one provincial CID Officer Patrick Muhuni, Kakamega[320], Western Province was one of the few police officers to state that he actually had a plan. Although not written, the plan did consist of some activities designed to reduce the effect of pre-election violence and deal with the election process itself. In addition the work involved focussed almost exclusively upon preparations for dealing with violence with little emphasis on prevention.

He told the Commission that "*In the month of October 2007, the provincial Police Headquarters directed/ advised the eight Divisional Police Officers (OCPDs) in the province to start preparing and curb any unlawful activities before and during the electioneering period (that is the pre-election and post election period).*"

He further said "*The preparation would involve the beefing up of security, deployment of police on patrol and beat duties, rehearsing police officers on the control of riot, lectures on providing security to presiding officers and clerks, manning of the polling centres, stations and tallying centres.*"[321]

Many however advised that their plans were not written and many seemed to be in the nature of an action or reaction to events as they unfolded on the ground.

The PC, Coast Province Mr Ernest G Munyi told the Commission that "*adequate measures were put in place during the political campaigns preceding the elections and during the election itself.*"[322] The Coast PPO, Deputy Commissioner King'ori Mwangi said that, "*In 2007 as part of my work, I directed all OCPDs in the Coast province to prepare operation plans covering the build up to the general Elections.*"[323] He also acknowledged that the general elections constituted one of

[320] CW 89, Kisumu 11 August 2008
[321] CW 89
[322] CW 140, Mombasa 1 September 2008
[323] CW 141, Mombasa 1 September 2008

the biggest security operations that the Police deal with at any one time in Kenya.[324]

The former OCPD Mombasa Wilfred Mbithi, now Assistant Commissioner Operations Nairobi testified that, "*Before the elections, we prepared adequately...and to our capacity.*"[325] He acknowledged that on the very first day violence erupted on the Coast he called for reinforcements, and also stated that no review of the police 2007 elections operations had ever been completed.

Despite assurances around preparedness the Police agencies have either not been able to provide copies of their planning documents[326], state clearly when planning commenced or provide evidence that they conducted a full de-briefing and review process post the 2007 operation.[327] These fundamental failures were indeed replicated all over Kenya.

There were also significant variations in the understanding of senior and mid range police as to their level of capability in dealing with the violence that occurred. In some cases the Commission was told that the SSAs were quite simply overwhelmed (even when heavily reinforced), in others views were expressed that the police were always able to control events and in fact did so (despite the fact that many days and weeks were taken to reduce the violence and heavy tactics were used).

The Commission takes the view that the Police in fact were poorly prepared to deal with the PEV. Even with the intelligence provided by the NSIS and the historical nature of elections in this country, police agencies quite simply failed, and failed badly, in this fundamental requirement of their mandate.

Findings in relation to planning and preparing for the 2007 General Elections

[324] CW 141, Mombasa 1 September 2008
[325] CW 142, Mombasa 1 September 2008
[326] Except for the Coast PPO and former OCPD Migori/Rongo Districts
[327] All police witnesses including Commissioner Ali stated that no formal review process has been completed

The Commission could find little or no evidence to indicate that the Government, either as an entity, or through individual politicians moved to prevent or ameliorate the tensions leading up to the elections. In fact there is strong evidence that indeed the actions of some senior duty bearers exacerbated tensions and violence through the misuse of executive power and authority. The decision to deploy hundreds of administration police officers in apparently clandestine circumstances to Nyanza just before the polling day confirmed for many that the elections processes were indeed suspect.

There is clear evidence that Kenya has a strong collective approach to gathering, processing and disseminating information and intelligence dealing with security issues that is principally demonstrated through the Kenya Security Intelligence Machinery (KSIM). The benefits of such a system were demonstrated through the preparedness of the NSIS and Military in understanding their roles, planning for the 2007 elections and executing their mandates in terms of preparedness and service delivery on the ground.

Weaknesses exposed by the very nature of the Post Election Violence however mitigated these positives. Key amongst these was the lack of leadership provided by the Cabinet Security Committee and its co-opted members. This committee is the highest level component of Kenya's Security Intelligence Machinery yet the Commission could find no evidence that it operated at all let alone effectively in the lead up to and during the elections. It is expected that these senior members of the government would demonstrate leadership and decisiveness in addressing the issues they must have been aware of during the build up to the 2007 general elections. The Commission can only speculate that individual members were more concerned about their personal political situation during the campaigning and polling periods.

The Commission found a number of examples of activities undertaken by the NSIS as extraordinarily poor judgement, constitute partisanship on the part of a state security organ and are examples of activities that clearly fall outside the

mandate of the agency. These included attempts to secure ECK accreditation for NSIS officers to be part of the elections process, a NSIS sponsored survey of how the 3 presidential candidates were polling prior to the elections and communicating this information to the Secretary to the Cabinet and Head of Public Service, and advising the ECK on electoral processes.

Omissions were also found in sub-optimal decision making, the absence of joint operational arrangements and the failure to translate good intelligence into demonstrable operational delivery. In the event much of the information and intelligence that the NSIS developed and forwarded to the other agencies, including police, simply did not get to those who could have used it most.

The Commission could find little evidence that delivery agencies were involved in joint planning and preparation leading up to the 2007 elections. This came as a surprise given the history of elections violence in Kenya, and the weight of knowledge agencies had about the likelihood of significant violence being a feature in 2007/8. Given that general elections constitute the most serious known security and safety issue in Kenya and that it recurs every five years, operational planning needs to begin a minimum of 18 months ahead of any date set for the next general election.

There was also no evidence that recognised preparatory arrangements such as the use of desk top scenarios, simulated emergencies and full joint operational exercises are a part of the SSAs' repertoire. These activities are a standard operating element of many similar jurisdictions, utilising peer review strategies where security specialists from similar agencies act as reviewers and umpires to independently assess current strengths and weaknesses in the preparedness and capability of SSAs.

Other issues that served to weaken the opportunity to reduce and/or ameliorate the violence were the lack of a national security policy and security plan, the failure to recognise the importance of utilising emergency management

components (including a national plan), and full recognition of the role that the military can play in dealing with these events.

One of the stronger findings of an omission on the part of State Security Agencies before the elections was the failure of the Police to engage in professional, timely and quality planning and preparation for the elections event. It was apparent to the Commission that there was a "we will be all right on the day" mentality emanating from the top to the bottom of the organisation. Planning and preparation appeared to be something that is done close to the event and on this occasion focussed on the wrong things. Plans seemed to consist of, where there was evidence of something written, simply an orders group focussing on the polling arrangements.

Examples on the ground of the lack of planning and preparation by police abound. This despite strong evidence suggesting there was at an element of planning and certainly organisation and facilitation in relation to much of the violence experienced during the post election period, especially in the Rift Valley Province.

Many citizens seemed to have known at least a few days in advance that there would be targeting by tribal and/or political affiliation although the police seemed either unaware or chose not to take the information seriously. In any event the Police were unprepared and failed to take the necessary proactive steps to reduce the opportunity for violence to eventuate.

This approach fails to take account of one of the most important roles of the Police and that is the protection of life and property, the prevention of offences and crimes and keeping the peace. Best practice in this area demands that quality, extensive and specialised planning arrangements should begin many months if not years before such an event.

Senior personnel, from the Commissioner and his key advisers to provincial and district commanders, must take full responsibility for this failure to perform in

what is a critical and fundamental element of policing. As a result many more people lost their lives, were injured, were displaced, their homes and personal property destroyed and ability to continue their livelihoods severed than would otherwise have been the case.

These factors combine to identify a further omission on the part of the police. Little or no evidence was adduced supporting the existence of a police intelligence capability. It is accepted that the intelligence committees provide a useful mechanism to collectively assess intelligence and utilise it for decision making, however Police organisations should and must have their own highly developed information gathering and intelligence systems. Had these systems been in place and operating effectively and the intelligence gained been acted upon in a timely and effective way then perhaps more preventive action would have been taken.

How Did State Security Agencies (SSAs) Respond to the PEV?

The operational delivery for SSAs primarily rests with the Police (Kenya Police Service and Administration Police), the provincial and district security and intelligence committees, the Kenya Prisons Service, the Provincial and District Administration and from time to time other services including the Kenya Wildlife Service, the National Youth Service, and the Kenya Forest Guards.

The National Security Intelligence service (NSIS) does not have a mandated role to deliver services other than to advise security agencies. The Military provides support to the civil authority when required to do so.

This chapter assesses the overall response by SSAs with a specific focus upon; interventions including use of force; the role played by various SSAs, the identification of some key incidents and issues arising from them; and chronicles some good work completed by individuals and agencies that is worthy of particular mention.

Responses by SSAs to the Post Election Violence proved to be inconsistent. They varied considerably. There were instances where individuals, and agencies performed well, many doing their very best to provide safety and security services to citizens. There were also many instances where agencies could have done much better as well as clear cases of neglect of duty, criminal offending and the use of overwhelming and lethal force on many defenceless citizens.

KSIM

At a national level and in the time available the Commission was unable to firmly establish just how well the CSC and NSAC operated. It would be expected that it is around events such as the crisis that developed after the presidential election results were announced that these important, high level components of the Security Machinery should operate best. It is understood that in fact the NSAC did not actually meet during the crisis period and communicated by other means and it can only be assumed that the CSC was not functional during this important period.

A special Nyanza PSIC meeting held on the 4th February 2008 specifically referred to NSAC directives that were issued and noted for necessary action.[328] The NSAC documents were described at directives to the PSIC contained in two letters from the Permanent Secretary dated 7th and 28th January 2008 with directions that: "PSIC and DSIC should arrest all criminals engaged in planning and execution of killings and destruction of property; PSIC and DSIC should provide security to targeted individuals who supported the Government and PNU; PSIC and DSICs should forthwith ensure that all major feeder roads are free of illegal barriers; The command and coordination relationships between Security Committees and Security Agents while on Security Operations should be streamlined. The Provincial Commissioner and District Commissioners will exercise their functions of giving overall and general directions as chairmen of

[328] Exhibit 97B.

the PSIC and DSICs respectively while the Provincial Police Officer and Officer Commanding Police Divisions remain Operational Commanders to execute committee decisions."

The performance of the Provincial and District Intelligence Committees appeared mixed. An examination of the Rift Valley PSIC minutes for example disclosed a functioning group demonstrating some leadership and decision-making throughout the crisis. A special meeting held on 31 December 2007 reviewed the situation all over the province, identified activities for priority action and agreed that officers should exercise restraint "*as killing was not the answer*." The committee resolved to meet frequently during this period meeting on four occasions during January 2008 and a number of times in February.

In contrast the Nairobi Provincial Intelligence Committee appears to have met less frequently (according to the minutes provided) and not at all during December 2007, January or February 2008. The Nairobi North District Committee met three times, during this period, Nairobi West not at all, and Nairobi East met on 13th December and not again until 13th February 2008.

There was also evidence of clear and concise decision making by Committees. A special PSIC meeting held at Kakamega in Western Province on 22nd January 2008 reported an agreement to allow planned peaceful demonstrations by ODM for 24th January 2008.[329]

NSIS

[329] Provincial Commissioner Abdul Mwasera (CW 87)

Evidence received by the Commission indicated that the NSIS did continue the process of information collection and intelligence gathering during the PEV period. Daily situation reports[330] were prepared outlining key areas of concern including, in some cases, the identification of specific people and events of interest. As stated earlier it is not clear, however, the extent to which these reports were disseminated to key enforcement agencies and other recipients.

Although some of what might be described as standard reports were discontinued partly in December 2007, throughout January and parts of February 2008 this is not surprising given the nature of the events confronting agencies throughout the Republic. Unfortunately even the daily situation reports were not produced during the critical period of 24th December 2007 and 2nd January 2008. The Commission believes however that in fact these events provided an opportunity for the Service to develop and circulate special reports focussing on perpetrators, planners and organisers of violence and possible tactics and strategies to reduce their effect. The NSIS did not take this opportunity but should do so in the future.

Military

The Commission has been unable to establish the exact timing and mechanism that triggered the involvement of the Military in the Post Election Violence. Although, for example, the Commission was informed that their support began on 27 December 2007 a schedule of action taken covers the period 6 January to 28 February 2008.[331]

In the event the military were involved in a number of supporting activities right across the country.

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[330] Commission exhibit 2A

[331] Commission exhibit 07B

These activities included[332];

- Transporting IDPs from flash points to safe areas;
- Guarding IDP camps;
- Clearing and securing blocked roads;
- Securing the rail line;
- Distributing food and medical supplies to IDPs;
- Escorting trucks from Mombasa destined for Rift valley, Western Kenya and neighbouring countries;
- Escorting passenger vehicles through unsafe insecure areas between Nairobi and Western Kenya

Apart from a demonstration of force both on the ground and from a helicopter in Naivasha there was never a requirement for the military to use force and none was used. "My lords, yes we fired in the air that is a demonstration of force. There were one or two occasions when we fired into the air to demonstrate force."[333]

The Commission's view is that the Military performed its duty well, a position that appeared to be shared with many commentators. What is surprising is that more military support was not initiated as the circumstances of the situation dictated that more resources of this nature applied quickly and judiciously, may have reduced the impact, extent and duration of the PEV.

Prison Service

[332] CW 07, 14 August 2008

[333] CW 07, 14 August 2008

The role of prison officers during the PEV period basically fell into three categories. Firstly very many officers were designated as police officers principally for duties in and around the polling stations.[334]

Secondly a number of officers were co-opted to support the Police in a number of enforcement roles, effectively as reinforcements, and carried out duties such as patrolling.[335] In some cases, such as in Naivasha, the Commission heard of allegations of improper conduct on the part of some officers. In this particular case it is alleged that due to pressure from the public, officers were withdrawn from service on 27 January 2008. Unfortunately this occurred at the very time Police were under severe pressure due to the retaliatory attacks that occurred in the town on the same day, a curious coincidence.

Further evidence was received by the Commission to the effect that prison officers did contribute well to the provision of a safe haven for IDPs. In Naivasha the Assistant Commissioner of Prisons, Duncan Okore[336] allowed victims of the violence to stay in the outer area of the prison whilst more appropriate arrangements were made. In the event, from a trickle of women and children arriving on 30th December 2007 the number of IDPs rose to around 10,000 on 3rd February 2008. By 8th February 2008 all but 20 IDPs remained. These IDPs were mainly women and children and were accommodated, supported and protected by prison officers until the Red Cross and other agencies arrived.[337]

Police

[334] Exhibit 09C (Gazette Notice 12325 appointing prison officers to take up these duties between 24th and 31st December 2007).
[335] CW 32, 28 July 2008 Naivasha
[336] CW 32, 28 July 2008 Naivasha
[337] Exhibit 32B

The Commission heard that the Police were in fact overwhelmed by the scope and nature of the PEV. One DSIC meeting held on the 1st of January 2008 reflected that *"in some cases especially in Cherangany and Saboti Divisions security forces were overwhelmed by the huge numbers of marauding gangs hence there is very serious need for the forces in the two Districts to be reinforced."* Further on 16th January 2008 the same committee recorded an appeal to the PSIC to urgently facilitate reinforcements of two special detachments of RDU[338] or GSU[339] and two platoons of Kenya Army personnel.

It is difficult to see how the Police could have coped without initiating and implementing preventive measures in the first place that may well have resulted in, with more support from the military, far fewer deaths, injuries and destruction of property. Simply put the incidents police were called upon to deal with were all too much, too often and too widespread. These events sorely tested police operating arrangements, systems, the training, ability and calibre of officers, equipment and decision making. The lack of planning resulted in effectively de-limiting available tactical options. Much was found wanting.

Policy Issues

There were a number of nationally initiated decrees and orders that may have had an effect on the way in which operations were managed. The Commissioner ordered a nationwide ban on political gatherings of any description.[340] Many felt this was a violation of the Constitution and contrary to law. Others such as ODM felt it was a direct attack on them and their members and supporters. Although there may have been some operational utility in the move in seeking to ensure the police could control large, mobile populations, it will always be linked

[338] Rapid Deployment Unit of the Administration Police
[339] General Service Unit of the Kenya Police Service
[340] Exhibit 1C schedule 2 undated press release in Kiswahili that appears to have been released about 1 week before election day (27th December 2007)

to the tactic of restraining people from moving out of the large informal settlements that exist in and around the major towns and cities.

There were also rumours, a reality to many, that the Police had a shoot to kill policy[341]. This rumour was heightened when it became apparent that the Police were firing live bullets at citizens and the reality set in that many were being killed. Whilst two witnesses[342] testified that there was no such policy and that there was no basis in law for there to be one, doubtless many will find this position difficult to accept.

A ban on live media broadcasts may well have had negative unintended results in terms of security issues[343]. Many citizens determined this act amounted to a further infringement of their rights, indicated that the government had something to hide and as a result heightened tensions that were already running at very high levels. The Attorney General in fact testified that in his view the ban was not legal. [344]

The Operational Environment

The Police faced extraordinary operational issues across much of Kenya. Ranging from individuals inciting and agitating for violence to occur, groups and gangs ravishing communities, large numbers of youth and other citizens damaging property and in some cases rioting, to attempts at organising and conducting demonstrations, these events sorely stretched and tested the police capability and responses. Ultimately 1133 people were killed, very many more injured, thousands of private and public properties destroyed, vehicles and equipment ruined and private possessions stolen.

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[341] Prof Anyang Nyongo' (CW138), 27 August 2008. Exhibit 138B

[342] Commissioner Ali (CW01) and Attorney General Wako (CW134)

[343] "Pursuant to section 88 the Kenya Communications Act ,1988, I am directed by the Minister of Internal Security, Hon. John Michuki, that in the interest of public safety and tranquility, that I order the immediate suspension of live broadcast until further notice" A statement signed by Bitange Ndemo, the Information and Broadcasting PS. The Standard, Monday December 31 2008

[344] CW 134, 25 August 2008 Nairobi

There were significant differences in the issues faced by the police around the country. For example those issues facing State Security Agencies in the Rift Valley Province were quite different from other areas in Kenya. Violence started in different areas at different times; Kuresoi on 4th December, Eldoret on 30th December, Nakuru on 24th January and Naivasha on 27th January and violence continued in one form or another until the signing of the accord on 28th February 2008.

There were also a number of different aspects to the violence ranging from the aim of expelling certain communities from areas including Uasin Gishu to the so-called "revenge attacks" at Nakuru and Naivasha to even up the score. It should be said on this point that these attacks were not only unlawful and criminal acts on defenceless men, women and children, but they did not in fact target the actual perpetrators of the original violence.

It should also be remembered that a number of police officers and provincial administrators lost their lives during this period some in the process of saving lives and/or keeping the peace[345].

It is against this backdrop that the following analysis was made.

Use of Force

Overall the Commission determined that a total of 1133 people died during the PEV period of whom 1048 were male, 74 female, 11 children; 119 remain unidentified. Of these 405 died from gunshot wounds. In addition 3,561 citizens sought medical treatment (many admitted to hospitals) and of these 557 were treated for gunshot wounds.

[345] 3 Kenya Police service officers, 3 Administration Police officers and 1 District Officer

Whilst the Commission acknowledges the possibility that some of those killed and wounded by gunshots may have been the victims of people other than the Police, no evidence to this effect was received.

It is also accepted that in fact these figures may not fully reflect totals of people killed (some may have been buried without the knowledge of officials) and the Commission heard from many witnesses that due to the PEV itself (road blocks, no available transport and too dangerous) that many people could not travel to medical facilities for treatment.

Both peaceful demonstrations and uncontrolled riots were significant events throughout the country and are relevant to the Commission's work for a number of reasons. They address the issues of the lawful rights of individuals to protest and the police interaction with peaceful demonstrators and their use of force. It also addresses the issue of police resources and their inability to protect the public.

The Commission investigations included an examination of several cases involving both police related shooting and cases involving citizen against citizen. It also examined the issue of the indiscriminate firing of live rounds of ammunition into peaceful crowds and in riot situations.

On many occasions when the police intervened, they resorted to lobbing tear gas and shooting into the air. Police themselves must have observed that this use of force saw limited success. Many witnesses to these events have confirmed that the police actions only dispersed crowds momentarily. The youth would simply regroup and attack others with impunity. Some witnesses described this police tactic as a game of hide and seek between the police and the gangs.

The evidence received included cases where there were good witness accounts and where police units or senior officers involved could be identified. On many occasions however further investigations will be necessary to identify officers utilising excess force and deal with them appropriately.

Of all the incidents of state agency responses none was more reported upon or roundly condemned by commentators and observers alike than that which occurred in Kisumu.[346] Despite evidence being provided by the former PPO to the contrary[347] the OCPD Kisumu, SSP Kiragu stated that the violence starting on 28 December 2007 came as a complete surprise to the police.[348] On this occasion police used tear gas to disperse a large crowd who had stormed the Provincial Works Offices, destroying much property.

However after unsuccessfully attempting to disperse even larger crowds the following day in the process of more significant acts of looting and property destruction, a decision was taken to use live ammunition.[349] Reinforced by both the GSU and Administration Police (Rapid Deployment Unit) further police action aimed at protecting the CBD was taken on 30 December. During that day 25 rioters were shot dead by police.

Further violence continued throughout until early February 2008 and when the violence finally subsided Police reported killing a total of 48 people through the use of firearms. This figure was revised by the hospital pathologist whose evidence was that there were in fact 50 people who died of gunshot wounds out of a total of 56 bodies examined.

The Commission was provided with armoury records relating to the issue of firearms and ammunition to police officers in Nyanza during this period. An analysis of these records showed that significant amounts of ammunition and tear gas were expended, some officers used far more ammunition than others, only one set of records recorded the issue and use of blanks (although these particular records appeared to be a reproduction where all entries were written by the same person), and in very many cases there is no record at all of

[346] Refer to HR Watch, ICG and KNCHR reports on the Election Violence
[347] CW 97, 12 August Kisumu 2008 (in camera)
[348] CW 95, 12 August 2008 Kisumu
[349] CW 95, 12 August 2008 Kisumu, exhibit 95A

ammunition expended. These records, and others, will form the basis of further investigations into the use of force by SSAs.[350]

The Commission heard from the Ministry of Medical Services that a total of 111 people died in Nyanza during the PEV period. Made up of 101 males, 9 females and one unidentified person the telling factor in causes of death were the 89 (80%) who died from gunshot wounds. In addition a total of 214 people were admitted to various hospitals throughout the province, of whom 48 had gunshot wounds.

One of the prime difficulties the police had in defending their use of lethal force in these circumstances became evident through questions asked by the Commissioners. In response to specific questions, the OCPD Kisumu clearly stated that unless there was a clear and present danger to life and/or property, then the use of lethal force was not justified[351]. He further testified that police should not use teargas or firearms when citizens were running away from the police. "*No my lordship, once they have run away we have achieved the objective of dispersing them.*"

This being the case it is difficult to rationalise the use of live bullets (or tear gas) on retreating crowds.

Evidence from the pathologist Dr Odour[352] revealed that of the 50 people shot by police in Kisumu 30 were shot from behind and a further 9 from the side. In addition 3 of the deceased were under the age of 14 years (one a 10 year old girl) and 3 were female. One of the children, a 12 year old boy, was shot twice in the back. Further a 45 year old woman was shot and killed whilst in her home just outside the CBD.

The Commission could find no legal or operational basis for justifying the shooting of civilians from behind at any time given the circumstances presented to it. These figures are complemented by other witnesses who told of

[350] Commission analysis is contained in the attached annexure
[351] CW 95, 12 August Kisumu
[352] CW 96, Kisumu 12 August 2008 (See Commission analysis for total numbers of victims who were shot)

circumstances indicating further indiscriminate use of firearms by the police in terms of people who were shot and injured.

One witness Mr Gregory Ngoche[353], a 53 year old volunteer social worker was sitting at his home in Kisumu at about 9am on 17 January 2008 with his mother and children. He heard shouting and saw youths throwing stones at police. The police were using bullets and he was hit by what is thought to be a stray bullet in the lower stomach and he was hospitalised for several days. He said that there were bullets flying everywhere and even hitting the trees. Mr Ngoche, who was paralysed in the right leg at a young age, was more than 200 metres from the police when he was hit and now suffers from sexual dysfunction. He and his family remain fearful living in their neighbourhood as a result of the police activity.

A further witness Ms Alice Atieno[354], a former security officer arrived home in Manyatta Estate, Kisumu town at about 6pm on 28 December 2007 from her work. Her six year old son was playing outside nearby when she saw youths breaking into a nearby shop. On hearing gunfire she gathered up her son and as they neared their house she was shot through the back of the head. The witness regained consciousness nearly two weeks later in hospital. She is unable to eat solid food, cannot now work, or afford to pay for an operation that would remedy much of her disability.

Mr John Apiyo[355] an Askari for the Kisumu Municipal Council testified that whilst working at the Kibuye wholesale market at about 11am on 6 January 2008 some people decided to torch a building near his duty station. A lorry full of armed GSU officers arrived and they ran towards the stall owners who wanted to torch the building. As the GSU ran past his duty station firing their guns they told him to, "*Close that gate quickly*" but while he was complying he was shot in the back of the legs and his private parts were damaged. He was admitted to Nyanza General Hospital.

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[353] CW 104, Kisumu 13 August 2008
[354] CW 105, Kisumu 13 August 2008
[355] CW 106, Kisumu 13 August 2008

The OCPD of Homa Bay, Jimmy J. Mnene declared that in his division rioting took place from 29th December 2007 and lasted a few days.[356] However despite telling the Commission that he, "*had to restrain my officers from shooting at people...*" and "*briefed the staff on each occasion not to use live ammunition, to use tear gas,*" the only 3 deaths recorded in the area died as a result of gunshot wounds. He also told the Commission that his staff were only issued with live rounds and not blanks or rubber bullets.

The former OCS of the combined Migori/Rongo police divisions, Edward Maghanga Mwamburi[357] told the Commission that he did not anticipate violence of the nature that unfolded although he prepared officers in riot training and used written materials in training activities.

In preparation he deployed static guards at vital installations and had standby riot parties at each of the police stations. He further said in addition to the 11 civilians who were shot by police during the PEV, a 54 year old APC was killed on duty and four others injured. It is not known if post mortems were conducted on all the deceased as he indicated that most of the bodies were collected from the mortuaries and buried without the knowledge of the Police.

The Commission found that Western Province was virtually forgotten in terms of Kenyans' understanding of the level of violence that occurred. Although there were no reports of rape, sodomy or forced circumcision from the health facilities, areas that bore the brunt of the violence included Mumias, Vihiga, Kakamega and Webuye. The Commission learned that no specific investigations had been commenced into police action.

Events unfolding in and around the general elections of 2007 saw the majority of casualties caused by the Police. With PEV starting in Mumias District on 27th December 2007 culminating in Lugari Division on 31st January 2008 a total of

[356] CW 93, 11 August at Kisumu
[357] CW 94, 11 August at Kisumu

98 people lost their lives with a further 129 people being treated in hospitals and medical centres.

Of those who were killed no less than three quarters (74) were found to have died as a result of gunshot wounds. Dr Onudi, Deputy Director of Medical services and Provincial Medical Officer, Western Province provided data showing that in some facilities, the dead were almost exclusively the result of gunshots.[358]

In Kakamega 26 of 31, Mumias all 11 of 12, Busia 8 of 9, Bungoma all 7, Vihiga 15 of 18 deaths occurred as a result of gunshots. Only the Webuye district hospital reported a different result with 7 of 21 deaths due to this cause.

In addition many victims of gunshots were treated in medical facilities. The pattern of injuries and their causes were similar in that virtually all injuries in Kakamega, Mumias and Vihiga were caused by gunshots.

Whilst these post mortem results were not examined by Commission investigators to determine how these victims were shot it is inconceivable that there would be sufficient justification for police to shoot dead so many people.

The Commission received aggregated data from the PS of the Ministry of Medical Services, Dr. Hezron O. Nyangito in mid August 2008. He stated that in the Rift Valley a total of 779[359] people died of which 170 were as a result of gunshot wounds. The gunshot deaths amounted to a staggering 31% of the total deaths that occurred and a careful analysis of the manner in which these people died needs to be undertaken. The report also indicated that "*the leading causes of injury; - were gunshots...*" In the Rift Valley this amounted to 189 of a total of 1324 – some 14.3%. A closer analysis of those admitted and/or treated at medical facilities also needs to be undertaken so that a complete picture of shooting victims is forthcoming.

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[358] CW 88, Kisumu 11 August 2008

[359] It is interesting to note that of these 42 remain unidentified. In fact Commission analysis indicates that a total of 119 bodies remain unidentified and this may account for some of the unsubstantiated rumours of many people being unaccounted for.

It is clear that not all deaths and injury patterns were the same across the Province. For example in Trans Nzoia West/East, Dr PK Too,[360] the District Medical Officer of Health Trans Nzoia West District gave evidence to the effect that a total of 105 people were killed in the two districts. Of these a total of 83 died of gunshot wounds – almost 80%. Whilst these victims were located all over the area some places suffered much more than others including; Matunda, Cherangany, Gitwamba, Kalaa and Munyaka.

As with other areas where many people were shot to death, closer and more exhaustive investigations are required to determine the reason and establish the operational utility of shooting victims by police and/or culpability where this is established by the facts.

Eldoret was also the site of the Police GSU action at the Moi Teaching and Referral Hospital that resulted in injuries to some hospital employees and medical staff. This illustrates the way in which police used indiscriminate and excessive force against innocent citizens. From the evidence of the Chief Security Officer and one of his security supervisors[361] it was reported that the police where 'chasing' a gang of youth through the streets who headed in the general direction of the hospital. Despite assurances by hospital security staff that none of the youths had entered the compound, police resorted to the use of live rounds and tear gas in what was a heavily populated operational hospital environment. This amounted to a serious case of responding dangerously without sufficient consideration for the safety of hospital staff, patients and others in the immediate area.

The violence in the Coast erupted on the evening of 30th December 2007 and continued until the 1 January 2008. During this time 5 people were shot and killed. Whilst there is some dispute whether the police killed all 5 or just 4

[360] CW 64, 5 August 2008 Eldoret
[361] CW 69 and CW 70, 06 August Eldoret

citizens Commission investigations nevertheless uncovered some disturbing evidence.

Dr. Anderson Kahindi, Provincial Director of Public Health and Deputy Director of Medical Services/Coast, produced evidence to the effect that out of the 5 people shot dead during this period four, including a woman, were shot in the back. In addition to this information he also tendered evidence to the effect that of the 22 patients admitted to hospital during the period where PEV was occurring, 12 suffered gunshot wounds.[362]

The Commission heard from the police that in respect of these casualties, inquest files were opened in respect of the five deaths, as well as 20 others, but there is no apparent follow up action being taken in respect of those wounded by gunshots.

The Commission heard from two further witnesses in respect of the shootings. The first, 56 year old Rose Gathoni Mathenge told the Commission that after the election results were announced on 30 December 2007 she and her husband were at home when they saw people passing nearby with looted goods. Her husband left the house at about 8pm and when she could not raise him on the mobile phone a short time later went out to look for him. Someone answered his phone when she called saying he had been shot by the police. He was lying dead a short distance away with bullet wounds.[363] The witness told the Commission that, "*No one else was shot during that period*," and "*The Police admitted later that they shot him as he was looting.*"[364] She said that this would not be possible due to the short time he was away and there was no evidence of looting near the body.

The second witness, Alistair Msusa Mbotela[365], told the Commission that he was at home with his wife and two children on the night of 31 December 2007. Hearing people making a commotion, he and his wife went to their fence and saw

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[362] CW 143, 01 September 2008 Mombasa
[363] Shaban Janol Mwangi (Moses) died as a result of a gunshot wound to the back (PM examination)
[364] CW 147, 02 September 2008 Mombasa
[365] CW 148, 02 September 2008 Mombasa

people running away from Mla Leo with looted items. They were running in the direction of his house and away from the police so they turned to go back into the house. He further said, "We heard a gunshot and as we turned to go to the main door of our house my wife said that she had been hurt and she then took two steps and fell on the floor as I was holding her. I saw blood on my hands and started calling for help." "We took her to Jocham Hospital but she was pronounced dead on arrival."[366]

The witness reported the matter to the police and made several follow up enquiries. He told the Commission, "The attitude of the Police has been most distressing. There has been little or no progress in the attempt to identify my wife's killer and bring them to book."

Police actions in respect of the use of lethal force in Mombasa replicate those in other parts of the country. Similarities including victims shot from behind, victims shot whilst in and around their own homes and the rationale for using lethal force at all in the circumstances require a close and thorough investigation by specialists who are independent of the police.

In Nairobi the Commission learned that there were a total of 125 who lost their lives during the clashes 23 of whom died from gunshot wounds. A further 342 victims were admitted to hospital during the period, 61 with gunshot wounds.[367]

In addition many denigrated the apparent heavy handed approach the Police took to dealing with demonstrations and what the police called riots, especially in the informal housing areas (slums) such as Kibera and Mathare.[368]

Commission investigations identified the extensive use of tear gas and firearms in support of what appeared to be a tactic to keep citizens inside these informal settlement areas. It also served to ensure that there were no demonstrations of any kind emanating from these and other areas in and around Nairobi.

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[366] Mrs Evaline Lubia died as a result of a gunshot wound to the back (PM examination)
[367] Commission analysis of data received
[368] Prof Anyang Nyong'o CW 138 ODM presentation to the Commission, 27 August 2008 Nairobi, and Dr Florence Jaoko CW 125 KNCHR presentation to the Commission 19 August 2008

Investigative Capability

The Commission was particularly disappointed with the lack of investigative work by the police even when provided with strong evidence identifying offenders. Witnesses told the Commission that, "many (complainants) identified the looters by name and address and gave definitive information to the police about the whereabouts of their property. In some cases police just told complainants that they should be grateful that they are alive and forget what happened."[369]

These sentiments were repeated to the Commission and its investigators all over the country.

Even in accepting the pressures facing the Police during this period, the quality of investigative work as well as the quantity of it left much to be desired. The Commission heard on a number of occasions that no investigation would be undertaken unless there was a complaint. This is particularly true in relation to property offences and deaths by shooting. Even where there was clear evidence that a serious crime had taken place (as in the case of a building being burnt down) or where the circumstances demand a quality investigative effort (as in the case of a child being shot twice in the back) little or no follow up was evident.

An examination of some inquest files revealed that at best a superficial investigative effort was undertaken.[370] Standard investigative work such as a timely scene examination, gathering and submitting evidence secured during the examination, interviewing potential witnesses from the area and pursuing lines of inquiry to identify some of the likely suspects (marauding youth) were not completed.[371] On at least one occasion the investigation file was returned to the police from the office of the DPP for further work to be completed.

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[369] CW150 & CW151 heard by the Commission "in camera" 2 September, Mombasa
[370] Inquest files for Naivasha
[371] Evidence gathering was completed many days after the event

Other examples demonstrating the need to strengthen investigations work were provided by victims themselves. The two case studies reported in appendices "C" and "D" clearly indicate reluctance to follow-up on high level criminal offending to the standard expected of a functioning police agency.

The Commission also learned that the investigation files relating to homicides double as an inquest file. There is no separation of role and accountability for dealing with what are quite different aspects of these incidents. In dealing with arrangements relating to the actual death as well as a high level investigation and the need to work closely with the DPP in establishing evidential thresholds, the Police have found themselves managing a challenging environment that may well have the effect of detracting from their main focus.

Some of the issues relating to investigative capability were highlighted by the Attorney General, Mr Amos Wako[372] who testified that, *"On 21st June 2008, I appointed a joint team of senior officers from the department of Public Prosecutions in the State Law Office and the Police Department to review all cases on a case by case basis related to post-election violence including the following categories; Cases of persons charged and are in remand; cases of persons charged but are out on bail, cases pending arrest of known persons, cases of persons in police custody but are not yet charged. The joint team is to determine and make recommendations to the Attorney General through the Director of Public Prosecutions on the basis of sufficiency of evidence whether the case should proceed to full trial, be withdrawn or otherwise terminated. The team is yet to complete its task."*

The Commission has since noted reports in the media that some alleged offenders were released as a result of this examination and direction.

The Attorney General also alluded to some issues facing investigators that mitigate quality investigative work. He said in relation to the PEV, "*Most of the would-be witnesses were displaced following the violence and could not be easily*

[372] CW 134, 25 August Nairobi

located for recording of their statements [and that] some of those located have been reluctant to record statements, reluctant to participate in identification parades, unwilling to appear in court and give evidence for fear of reprisals."

> Relating to investigations into a former Commission's recommendations[373] he commented that there were, genuine difficulties in investigating and getting witnesses because of their fear of reprisals within the context of the ethnic clashes, a lack of capacity and resources on the part of the investigating authorities and self censorships or fear on the part of the investigators who are susceptible to pressure and manipulation.

These issues were also raised independently by two other senior public officials especially in respect of investigating individuals who could influence an investigator's work prospects or pose a personal threat.[374]

The Attorney General also told the Commission, "*As of now we are awaiting investigations. As of now we are awaiting the results of the Commission of Inquiry into all these issues because it comes within the mandate of this Commission of Inquiry to identify the perpetrators. But what you can rest assured that as the Attorney General we shall take the recommendations of this Commission of Inquiry together with any other investigations that have been carried out very seriously and if, my position is that if the offences are disclosed against any person, I'll prosecute."*

Criminal Conduct (by police) including killings and SGBV

In addition to the instances of excessive force used by the Police, there was credible evidence of criminal behaviour. Instances ranged from murder to gang rape and looting.

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[373] Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya 31st July, 1999 (The Akiwumi report)

[374] CW 134 and CW 80 (Both heard in camera)

Commission investigators obtained information that one police officer (from the Rift Valley Province) was responsible for fatally shooting citizens, said to be at least five and possibly more, during the unrest following the election at the end of 2007.[375] Further information was received by the Commission to the effect that another innocent citizen was shot in the back and is now paralysed as a result. Following information received from 'M' above investigators spoke to one of the victims who confirmed the information outlined.[376] Testimony also was received by the Commission in relation to this event from Professor Anyang' Nyong'o.[377]

Similar information was obtained by Commission investigators relating to an Administration Police officer in Nairobi. This officer, who is known to many witnesses, allegedly shot a number of citizens on 30th and 31st December 2007 many of whom were killed. More examples were related to investigators.

In the course of investigations, allegations were heard that Police committed acts of sexual violence. The Commission's investigators interviewed eight women whose evidence was that they were raped by Police[378]. With one exception, these were gang rapes, with women saying they were raped by up to seven men. In the one instance where a victim was raped by only one officer, there was a second officer present.

Of the eight women, five were attacked in their homes, two within their neighbourhoods or local environs and one whilst in flight from the violence. The women spoken to were attacked in Nairobi, Eldoret and Kisumu. Officers were variously described as being GSU, Kenya Police and Administration Police.

Sometimes the victims, on seeing the approach of state security agents, expressed initial relief at the arrival of Police who could afford them help and

[375] Informant 'M' interviewed 6 August, Eldoret.
[376] Interview 9 August 2008
[377] CW 138
[378] Including CWs 17, 18, 98 and 99

protection, only to be over-powered and gang-raped by them. At least one attack by Police was accompanied by theft from the house of the victim (CW17).[379]

Some of the officers expressed tribal/political motivation behind the attacks.[380] There was no attempt by the officers to disguise their identities and their behaviour implied a disturbing confidence in their impunity for these serious criminal acts. Perhaps this in part arose from the fact that these officers were not local men, but it nevertheless portrays an alarming attitude on the part of these officers.

Two female witnesses testified to various incidents of being raped by police officers (CWs 98 and 99)[381]. One, a 21 year old with 4 children, reported being raped by up to 6 police officers at around 10am on 10 February 2008 near the Ondiek Highway. The other, a 32 year old caring for 5 children, reported being raped and sexually assaulted by 2 police officers at about 9pm on 4 January 2008 near USAID estate. Her friend was also raped by 2 other police officers at the same time and was later found dead a kilometre or two from the scene.

The Commission received depositions from a number of citizens who related events concerning the criminal acts of police officers. Two of these deponents recounted an incident at Kabsoit Centre on 1st February 2008 when some GSU officers allegedly hacked a man's hand and then robbed him of a total of Ksh. 51,000.

Further evidence was received in statement form[382] to the effect that police officers failed to stop looting at the Ukwala Format Branch supermarket and others stated they would only protect the Ukwala Kenshop Branch if they were given KSH10,000 each.

Omissions and Misconduct (by police)

[379] Heard by the Commission "in camera" on 16 July 2008
[380] Statement of JK, 10/07/08, CIPEV Investigator Gladys Mwariri
[381] Heard by the Commission "in camera" on 12 August 2008
[382] Statement taken by Commission Investigators at Kisumu

The Commission heard a range of examples of police behaviour that fell into the general category of unprofessional behaviour or misconduct. These ranged from dereliction of duty, inconsistent or insensitive support arrangements for victims to failing to prevent offending especially property offences.

Sexual violence appeared not to be a high priority for Police during the PEV and arguably this is also the case during more peaceful times.

The testimony of many senior Police who gave evidence at the Commission's hearings was as interesting in what was not said, as to what *was* said. Some had not included figures relating to sexual violence in their statistics, apparently not deeming it important. Many, when asked, indicated that they had not received any (or many) formal reports of Sexual violence: The Provincial Commissioner, Rift Valley told the Commission: "*We have not received any cases of sexual assault throughout the one and half months of violence in Rift Valley*". [383]

However it would have been known to anyone living in Kenya at the time of the PEV that there were many allegations of sexual violence throughout the country, including allegations of Police officers being offenders. So to merely omit this category of offences, or to claim no formal reports of such, seems akin to burying ones head in the sand, and does not speak to a strong will to uphold the law as it relates to sexual offending.

It is a universal trend that Police figures in respect of sexual violence are lower than hospital figures. In some places the Commission went, Police reported having received no such cases, and yet hospitals and NGOs were busy attending to victims of sexual assaults and rapes.

Nairobi Women's Hospital (NWH) has submitted its reports, including statistics on sexual assault, to Police every year for the last 6-7 years. NWH's CEO noted

[383] PC Hassan Noor Hassan, CW 43, 30 July Nakuru

that the Police Commissioner has never questioned the hospital administrators about their figures or the vast discrepancy between the two sets of numbers.[384]

There was a variable response to sexual violence by Police and investigations indicated it was generally well below the standard of what can reasonably be expected.

A number of victims described a dismissive response when they reported to Police. Some victims were met with what could be described as an ineffectual/unresponsive policing effort (a Mathare victim of rape who reported to Police several weeks later did not have her complaint accepted, with the officer telling her - how was he to know if her allegation was true, given she had not attended a hospital on account of her rape). [385]

Still other responses could be characterized as cruel and indicative of a callous disregard for human safety (a Mathare victim of gang rape who presented bleeding and requesting help for her critically injured husband was waved away by Police who simply told her to run for her life).[386]

From victims spoken to who had reported, or attempted to report to Police, it was noted that many were arbitrarily discouraged or dismissed by Police if the victim could not immediately identify *by name* the perpetrator.

In a number of cases, victims who had gone to Police to make statements about serious crimes were turned away without so much as an OB (Occurrence Book) number. The victim's ability to name the offender should never be a prerequisite to the reporting and recording of a crime. It calls into question many aspects of the Police operation, including the training of frontline officers, the quality and capacity of criminal investigation, commitment to addressing sexual violence and the value that is placed on criminal intelligence.

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[384] Dr Samuel Thenya, CW 14, 15 July Nairobi
[385] Statement of JW, 10/07/08, CIPEV Investigator Gladys Mwariri
[386] Statement of RO, 10/07/08, CIPEV Investigator Melinda Rix

Many of these responses were given in the midst of the worst of the chaos and occurred at a time when Police were struggling to control an anarchic situation with multiple threats to life and property. However the Commission's investigators are not aware of any significant attempts by Police in the intervening, more peaceful period to follow up and investigate the serious offences which they must surely know took place and to which their initial response was inadequate.

It was predictable, and borne out by the work of the Commission's investigators, that when women suffered sexual violence and brutality at the hands of Police, they were unlikely to go to that same institution to lay complaints. However, one did attempt to make a report to Kilimani Police of being raped by an officer:

> *"I told them that my house had been burned down and a policeman had raped me. They asked me whether I knew the police who had raped me. I told them I did not. They told me to choose between the two either the issue of my house being burned or being raped"*
>
> *" I went back home and later went back, I reported and wrote statement that my house had been burned but I left out that I had been raped.... They told me I was to blame for the rape and I should look into the issue about house."* (CW18) [387]

However formal, first-hand complaints to Police are not the only way in which the commission of crime comes to the notice of Police. When Police became aware of allegations of these crimes, it would be expected that they would want to solicit these complaints and thoroughly investigate them. Police would have been aware of the allegations at the time of the PEV through the work of NGOs and media. In the course of this Commission, the allegations were once again put before the public and Police.

If Police do not act decisively in the face of allegations against their own, then any progress or credibility they have managed to achieve in this area of sexual violence is greatly undermined. Furthermore, there can be no confidence

[387] Heard by the Commission "in camera", 16 July Nairobi

developed in the Police when their own people stand accused of such things and the matters are not investigated comprehensively and transparently.

There was a report of women victims being taken into a Police station and cared for by the female Police officers. However despite this compassionate response to the plight of the women, no statement was taken from the victims or investigation commenced.[388]

There were indications that, at least in some places, improvements had been made to the manner in which complaints of sexual violence were received. Some of this derived from those primary agencies (often medical) most often dealing with victims embarking on some liaison/training with Police. Nairobi Women's Hospital was one agency which reported such developments.[389] On another positive note, Nairobi Women's Hospital CEO Dr Thenya pointed out that many of the victims (over 100) were actually brought to the hospital by Police.

However it seemed that it was only in the week or two prior to Dr Thenya's testimony before the Commission on 15th July 2008 that Police had attended the hospital seeking medical records. This raises questions in regard to the Police response to the many cases of sexual violence which they *knew,* from first-hand involvement, had taken place, and yet appeared to take little interest in following up. From evidence given at the public hearings, the number of active or completed/successful prosecutions in respect of sexual crimes is few.

Some Police stations have established gender desks at which sexual crimes can be reported. While this is a step in the right direction, the effort needs to be extended so that *all* Police officers (not just those manning the gender desk) should be aware of the particular needs and rights of victims at the time they present to Police.

And the presence of a gender desk at a Police station is in itself no guarantee of an appropriate Police response. A senior manager at a gender violence recovery

[388] Statement of EA, 11/08/08, CIPEV Investigator Melinda Rix
[389] Dr Samuel Thenya, CW 14

centre described incidences where women presented to Police stations with their medical report in order to make a complaint, only to have a Police officer peruse the report and pronounce that there was no evidence of rape and thereby dismiss the complaints as baseless.

Common themes seemed to be if the report contained evidence that the sexual offence did not comprise the first sexual experience for the victim – or if there were no lacerations (to the genital area) – or there was no evidence of presence of sperm reported (from swabs taken from the victim).[390] Clearly the medical report is but one piece of evidence to be considered and to dismiss victims in the way described represents poor police practice and is unacceptable.

Also, of course, reporting of sexual violence is only one step of the process. There needs to be a strong investigative response which follows and there was little evidence of this approach being taken during the PEV.

One NGO assisting victims of sexual violence told the Commission, "*The survivors felt that the police officers abdicated their role by taking sides during the post election violence and failed to protect them or record their statements when they reported the matters.*"[391]

It would have been ideal for the Police to engage in some proactive strategies aimed at the awareness and prevention of sexual violence and to increase the efficacy of their response to it. To do this prior to the violence breaking out would have required a degree of foresight, receipt of criminal intelligence and planning. However when the first violence broke out in some areas shortly after the elections, there may have been the opportunity to be proactive in other areas, with the thought that people in those areas may face similar risks. It could also have been apprehended that as IDP camps were established, there would be a risk of SGBV in those places and gender-sensitive Police posts and other strategies established there may have served both proactive and reactive functions for the IDPs.

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[390] Commission Job sheet "Nairobi Women's Hospital" 08/07/08, Investigator Melinda Rix
[391] Ms Ellyjoy Karimi Kithare, CW 103, 13 August 2008 Kisumu

As long as a substantial percentage of sexual violence remains underground, it will be a crime which is not properly addressed and its incidence cannot be expected to decrease. The higher the confidence the public has in the Police, the more likely it will be that these crimes will be reported and dealt with effectively.

Many of the issues identified above were not reported to the police and victims variously described their reasons as fear of the police, especially as they were the perpetrators, and a sense that nothing would be done in any event.

There appears to be good reasons for victims holding these fears. Police informed the Commission that apart from the ubiquitous inquest files, no internal investigations into the conduct of police officers were being undertaken or contemplated.[392] In addition no complaints of rape were recorded by the police during the period.

Commission witnesses gave evidence to the effect that the Police in and around Mombasa did not take preventive or remedial action against thieves and looters. One witness, Titus Tommy Gichangi Lucas[393], a businessman told of his three businesses being looted between the 30th December 2007 and 1st of January 2008. Informed by neighbours about the burglaries and looting, the witness called Changamwe, Nyali and Likoni Police respectively reporting the crimes. He was variously informed that the police, "already sent police officers to the area and that there was nothing to worry about." "*....their officers were on the ground." And "....that all officers were out quelling riots*."

However all the witness's property was looted and despite providing police with a video and photographs clearly showing numerous offenders looting, only one has been brought before the court.

[392] Apart from the one murder investigation
[393] CW 144, 2 September 2008 Mombasa

Commission witnesses heard in camera supported the premise that the police failed in their duty to protect property (CW 150 & CW 151)[394]. They informed the Commission that the Police "were indifferent to the loss of property and wealth…as they told looters to take what they wanted but not to harm anybody." They said that this message was a consistent theme all over Mombasa to the extent that it must have been a police strategy in dealing with the violence.

Unfortunately this approach had unintended consequences as, "*the failure of police to take serious action only led to larger numbers taking part in the looting. Word obviously spread that the police had taken an indifferent approach to the chaos. We ourselves witnessed women stealing household goods from their neighbours' homes in Mikindani as the police stood by and joked about it." "It was only on January 2nd with the arrival of the GSU that the looting subsided, but by then all of the properties of Kikuyus and Kambas had been looted.*"[395]

Communities used their own strategies to prevent further looting and violence including creating vigilante groups and spreading the rumour that, "Mungiki had arrived in town on a revenge mission."

Outside influence on police decisions

The Commission received evidence that on a number of occasions the decision making and behaviour of senior police officers was influenced by factors outside the formal operating arrangements, chain of command and in direct conflict with mandated duties.

Perhaps the most graphic example was depicted in evidence gained by Commission investigations of actions taken by the Administration Police a few days before polling day. The evidence is that around the 23rd of December a large number of officers, about 1600, were assembled at the Administration Police Training College at Embakasi to undertake training to act as agents for a

[394] Heard by the Commission "in camera" 2 September Mombasa
[395] CW 150 and CW 151

political party during elections polling. The training was conducted by a senior academic, and high ranking government officials including the hierarchy of the Administration Police. These officers were deployed on the 24th December 2008 to Luo-Nyanza. Ostensibly their role was to disrupt polling and where possible ensure that government supporters amongst the candidates and voters prevailed.[396]

All officers deployed were dressed in plain clothes, easily identified as they were not from the local community and travelled in large groups by more than 30 chartered buses.[397] In addition they received Kshs. 21,000 each for their duties.

The entire exercise was called off a day or so later after some officers were killed and many more injured by citizens.[398] Some senior officers from the districts called upon the senior command of Administration Police to cancel the enterprise as they could see there being more serious loss of life if it was allowed to continue.

Amb. Francis K. Muthaura, PS Secretary to the Cabinet and Head of the Public Service, told the Commission that this deployment was approved by the Government and was commissioned for security reasons.[399] He also stated that, "The *reason for sending those people under plainclothes is that the area was very unfriendly*." The explanation failed to resonate with Commissioners given that there was little or no security issue in Nyanza at the time (or certainly no worse than anywhere else), the exercise was clandestine in appearance and execution and fell outside the overall elections security command and control arrangements led by the Commissioner of Police.

A further concern to the Commission were reports of instructions from as high an office as the Commissioner of Police relating to the release of prisoners (CW

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[396] The Commission noted that indeed this activity by the Administration Police was identified by the NSIS and included in their 25th December 2007 briefing document.

[397] Witness interviewed in camera during October. The exercise was also captured by the media and broadcast at the time.

[398] The Commission was unable to establish accurate numbers.

[399] Interview conducted on the 9th October 2008, Nairobi

97).[400] These instructions arose on at least two occasions in Nyanza province. One related to the arrests of criminal gang members including Chinkororo, and Sungusungu who were intimidating citizens who intended to vote for a particular candidate or not to vote at all. After some arrests the Commissioner of Police gave instructions for them to be released. It is assumed that this directive was due to the fact that a senior politician was purported to be behind the Chinkororo.

On another occasion just after the violence broke out in Kisumu the Hon. Shakeel Shabir and the Hon. Olago Aluoch were leading a procession around Kondele without serving any notice to the authorities and they were arrested and taken to the Central Police station. The Commissioner of Police was informed but after two hours he instructed the local police to release the politicians and the incident was not pursued further.

Further examples of interference by senior police were provided by a witness (CW 80) who provided written testimony describing two serious incidents.[401]

Incident #1

> *On 28th November, 2007 the O.C.S. Tambach Police Station C.I Paul Karani received information from members of the public that there was a motor vehicle Reg. No.KAX 361X Toyota RV4 which was distributing hate campaign literature along Iten-Kabarnet road. The O.C.S. mobilized his officers who later managed to intercept the motor which had the following occupants:-*
>
> - *No. 970069003 AP Cpl. Patrick Ndatho of Harambee House Nairobi who also had with him a ceska pistol S/No. 59608 with twelve rounds of ammunition.*
> - *No. 2001005150 P.C. Kinyua Muriethi also of Harambee House Nairobi who had a ceska pistol S/No. 9338 with twelve rounds of ammunition.*
> - *Duncan Njagi Ndwiga of cell phone No. 0722-885876 – Businessman Kasarani.*
> - *Irungu Gilzu of mobile No. 0723-034111 Nairobi.*

[400] Heard by the Commission 'in camera" on 12 August 2008
[401] Heard by the Commission "in camera" on 07 August 2008

The detained motor vehicle was subsequently searched and the officers managed to recover several bundles of hate literature in the form of posters. The posters showed drawings of Hon. Raila armed with a pistol and hanging retired President Daniel Toroitich Arap Moi. Next on the hanging line were Ruto, Philip, Cheserem, Kosgei, Gedion, Kulei, Sumbeiyo, Biwott and Mark Too. The posters had also the following information written on them in both Kalenjin and English languages.

- *" Tetutiet Weo nebo Arap Mibei (Raila) en Biik at Kutt"*
- *"Kyojilil Kenyit ab tomonwok sisit ak aeng (1982), raini kokenamak*
- *"On 5th September, 2007, Raila Odinga held a meeting on the 17th floor of the J. Edgar Hoover building, 935 Pennsylvania Avenue. NW, Washington DC. In the meeting, which was taped by the FBI, Raila told American Officers that he would finish former President Moi, Ruto and other Kalenjins who had ruined Kenya as soon as he becomes President. The tapes are available.*

In view of the seriousness of the matter and the public anxiety it generated, the then P.P.O. Rift Valley Mr. Everett Wasige directed that the motor vehicle and all its occupants be immediately transferred to his Provincial Headquarters Nakuru for further investigations.

In response to a request for information relating to this incident the Commission received written advice from SSP F.M. Mwei of the Administration Police on 11 September 2008 saying, "*The Department is not aware of the APs arrested in connection with the alleged act said to have been committed in November last year.*"

This response combined with the testimony received from a further witness tended to confirm this interference.[402] This witness stated that these two incidents (#1 and #2) were both reported to the Commissioner and that even if the offenders were released at the time due to the volatility of the situation, investigations should still have continued. The Commission was not provided with such information.

[402] CW 57

Incident #2

On the 22nd day of November, 2008 police officers from Naivasha Police Station were manning Naivasha road block at Karai when they received information that there was motor vehicle Reg. No. GK A545H white in colour plying from Nairobi to Western Kenya and suspected to be ferrying some crude weapons. At around 6.15 a.m, the said vehicle appeared from Nairobi direction and was subsequently stopped by the officers. The vehicle had three occupants who identified themselves as (1) Dick Nyaga Kivuti, a driver with the Ministry of Water and Irrigation, (2) Livingstone Taabu Were, an official driver to former Assistant Minister of Water and Irrigation Hon Raphael Wanjala and (3) Fredrick Egesa Wasike a personal driver of the Assistant Minister. The Vehicle itself belonged to the Ministry of Water and Irrigation and was the official vehicle for the Assistant Minister.

The police officers conducted a search in the motor vehicle and managed to recover the following crude weapons;

- *Sixty (60) pieces of maasai rungus*
- *Forty (40) pieces of Arrows*
- *Three (3) pieces of bows*
- *Two (2) pieces of arrow sheath*
- *Fifty nine (59) pieces of maasai swords*
- *Eight (8) pieces of small maasai swords*
- *Two hundred and seven (207) pieces of whips (Nyahunyo)*

The vehicle and the exhibits together with the occupants were later escorted to Naivasha Police Station for further investigations. Mr. Maurice Amatta a S/ACP of CID Headquarters Nairobi later took over the conduct of matter.

A further curious situation relating to the Police and the election process was discovered by the Commission when it examined the Coast Province plan for policing the elections. Entitled "*Presentation on the 2007 General Election Operation within Coast Province*" the document included the following special tasking:

Mr. Hillary Birgen Ag. SP

- *Will deploy 1 IP, 6 constables at Provincial Radio Room.*

- *Task – to receive results of Presidential parliamentary and civic candidates from all districts and compile them and forward them to Police Headquarters.*
- *Limit of exploitation – within the area of deployment.*
- *Re-organization – at Provincial headquarters.*

It is not clear to the Commission why the police were receiving polling data relating to presidential, parliamentary and civic results. On the face of it the material appears to disclose activity that is clearly not within the role or responsibility of the Police and has disturbing connotations.

State Security Agencies and Systems Failures

It should be said that accounting for the exact numbers of people who died and were injured during the PEV has been problematic. Amongst the reasons for this include; antiquated and paper-based systems of recording; loose arrangements for the receipt, recording and disposal of bodies; methods of attributing cause of death to PEV; practical difficulties in getting to medical facilities during the hostilities; and the attempts of some to ensure that at least some confusion existed in the systems. This is particularly true of the Rift Valley where violence occurred over a greater area, included the most significant incidence of citizen to citizen confrontation, and where the facilities were not acting as a coordinated whole.

Examples of these issues abound but there was no more glaring instance than the issue of determining accurate figures relating to deaths, injuries and instances of SGBV resulting from PEV. The Commissioner of Police told the Commission that the Kenya Police service were the custodian of the facts. He further stated that no other person or institution would have the facts[403]. The

[403] He was supported in this assertion by M. Francis Kimemia (CW 04)

efficacy of these statements has been soundly brought into question as for example the Commission has established that a total of 1133 people were killed during the PEV when the Commissioner testified that there were 616[404]. The fact that the Police could only establish that around half of the actual number who were killed signifies a major problem in how incidents are recorded and published.

Further the Commissioner provided a table depicting the number of crimes committed during the PEV. When pressed under cross examination as to why there was no heading depicting sexual violence he stated that no such incident was reported to the Police. Given the testimony of many victims who stated that they in fact tried to report incidents but were discouraged and indications for medical facilities to the effect that there were at least 800-900 victims treated demonstrates a complete lack of leadership and interest in this insidious crime as well as very poor systems indeed.

The Police were also asked on a number of occasions by the Commission to produce figures relating to the PEV including annual crime statistics, copies of planning documentation, resource allocation arrangements, personnel records showing transfers and the reasons for them, total establishment as well as actual numbers of police available for service. Virtually none of these records were produced. The Commission understands that the Police do not in fact develop some of these documents in the first place and there are no systems in place to retrieve other data.

A further example of the inadequacy of some systems relates to the reporting of sexual violence. Commission investigators learned that in Nairobi, there is only one Police doctor who has the authority to sign the P3 form necessary for the reporting to Police of a sexual assault. This particular function is one of many which this doctor must perform – and so it is no simple matter for a victim to have the necessary paperwork completed – even if she has the will to report and

[404] He was supported by the PS Ministry of State for Provincial Administration and Internal Security (CW04) who said "*the exact numbers which can only be provided by the Kenya Police*."

the ability to travel to the hospital. She may be one of 50 victims waiting in line for the doctor to attend the location and sign her form, only to find, after waiting many hours, that as the 49th victim has her form signed, the doctor's working day is over and she is turned away – either to return and begin the process again the next day – or simply give up.

From enquiries performed at health facilities across the country there did not seem to be a consistent approach to the collection, storage and analysis of forensic samples from victims. It is also not usual practice to take samples for DNA analysis (and DNA analysis is expensive and its availability in Kenya is limited). These matters obviously have the potential to impact on the success of any prosecution.

Sometimes, victims found there was a fee charged in order to obtain a completed P3 form which they needed to make a complaint to Police[405]. In some cases this cost was prohibitive. Two of the possible conclusions which could be drawn from the fact that Police appeared to take little or no interest in sexual violence are that they did not regard it as serious crime and that they placed little importance on criminal intelligence.

Decision-making and systems relating to the appointment and transfer of staff, especially senior staff, in and around this period were also brought into question. In the time available to it the Commission learned that at least four senior police officers were transferred or retired from their area of responsibility during the violence and at the height of operations.[406] Although there may well have been an operational or organisational imperative for these staff movements it is difficult to see their efficacy given the timing.

Testimony was also received from Professor Anyang Nyongo' to the effect that "there were massive transfers of Police and APs, to especially ODM strongholds, of select individuals or people from Central Kenya to assist in affecting the vote

[405] CW 15

[406] Details are included in appendix "G"

manipulations and to violently suppress and attendant protests."[407] The Commission was not, however, provided with any supporting evidence by this witness nor did its own investigations reveal evidence of such transfers.

The pressure on Police resources was not helped by the requirement (the Commission was unable to establish by whom) that at least two police officers be stationed at each polling station. The Commission learned that indeed many more officers were so deployed placing even more pressure on tactical options available to the Police during the PEV.[408]

While the duration of this deployment was unclear doubtless it contributed to difficulties in the quick transfer of staff to pressure points (especially in the absence of contingency plans) with the result that many officers spent long hours on duty in some areas. NSIS reports indicated that in Nairobi some officers were down on morale due to lack of replacements.

Evidence was adduced to the effect that the Kenya Police Service has the overall responsibility and accountability for dealing with all deaths occurring from sudden, violent or unnatural causes from start to finish. The mortuaries, pathologists, the Ministry of Health Services and other agencies merely provide assistance throughout the process. The Police determine interim cause of death, delivery bodies to the mortuary, sign the body in, initiate the inquest process, and investigate the circumstances of the death.

This process can be problematic for two main reasons. Firstly, the absence of a fully independent process impacts upon the transparency and professionalism that is required in finding not only the causes of such deaths but also ways to reduce or ameliorate them. Second the establishment of an independent Coronial service would free up police resources and reduce the burden of an important area of accountability.

Positive Responses by State Security Agencies

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[407] CW138

[408] On many occasions up to four officers (including seconded staff) were deployed to polling stations according to the Coast province 2007 General Election Operation plan and special Rift Valley PSIC meeting 20th November 2007

With investigations of this nature where reviewing activity and behaviours reveals weaknesses in many systems and personal culpability in some cases it is easy to overlook and/or dismiss interventions that were positive.

The Commission received evidence and heard of many instances where security agencies and individual officers responded well to citizens in need. These responses included (but were not restricted to) performing rescue operations where families and individuals were in danger of personal harm, providing a temporary refuge in/near police stations and administration premises, providing security for IDPs and others, demonstrating leadership in attempting to quell violence and in some cases, giving their lives for others.

The Commission received testimony[409] that on the morning of the 30th December 2007 after three houses had been set ablaze at Lelmolok farm in the Kesses Division the District Officer, Mr. Benedict Odhiambo Omollo, "*held a meeting with local communities in a effort to bring the tension down. He proposed for the Kikuyu community to elect 10 elders and the Kalenjin community to also elect the same number, who would work together to help reconcile the communities. The proposed meeting was to take place the following day at the Kesses DO's office. This was never to be because at around 6pm on the 30th December 2007, Kalenjin youths attacked Kikuyu homesteads, looted and burnt the houses*." Following these attacks as many as 1200 people sought refuge at the DO's office compound where security was provided. Unfortunately DO Omollo was killed on the afternoon of 1st January 2008 while on patrol with other officers.[410] This occurred in the Cheptiret area when the patrol came across an illegal roadblock where it was attacked by youths using poisoned arrows, pangas, axes and stones. The DO and AP C.I. Elias Wafula Wakhungu died whilst others on the patrol were injured. Despite this situation, the IDPs at the DO's compound, who were continually threatened and often surrounded by Kalenjin youth, were afforded security and the numbers of officers were reinforced on the 9th January 2008.

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[409] CW 85

The Provincial Commissioner, Coast Province told the Commission that a leaders' meeting was held at the Provincial Headquarters Board room to design peace and reconciliation measures. The attendees included the PPO, Chief Kadhi, Bishop of the Anglican Church, Chairman of the Hindu Council, and PC. Amongst other things they used five local FM radio stations appealing for calm, and held a series of peace meetings on many estates. Given that the meeting was only held on the 2nd January 2008 the Commission considered that although this was a good initiative such interventions would have been more effective had they been introduced well before the elections. This was acknowledged by the PPO.[411]

One hospital clinician from Nyanza reported a good working relationship with the local Police station whereby she worked in concert with Police officers whether cases were reported directly to the hospital or initially to police. She noted that when female Police officers from the local station were not available to deal with women victims, officers at the station would make efforts to get a Policewoman from the central Police station to assist.[412] Effective responses to sexual violence require liaison between Police, medical and judicial services – both "on the ground" and at the highest level to establish efficacious processes which are consistently applied across the country.

Reviewing performance

During the seven months since hostilities ceased, SSAs have in the main, been slow and/or resistant to reviewing their performance. The testimony of the Commissioner of Police[413] for example clearly indicated that an operational review of the Police had yet to be completed, "yes it is still going on my Lord. You must bear in mind that what occurred, occurred recently, a few months ago, and we as security services, we are not too quick to close chapters." Further, the

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[410] CW 75
[411] CW 141
[412] CIPEV Job sheet, "Pamela Olilo", 08/08/08, Investigator Gladys Mwariri
[413] CW01

evidence from the PS of the Ministry of State for Provincial Administration and Internal Security[414] was that he relied on his personal oversight saying, "*I could see what was happening*", and "*I was able to make that observation.*"

The Commission was also variously advised by many senior officers in the field that reviews were not a formal (or normal) part of business.

Formal, written de briefing and operational reviews are a critical part of overall performance management and developing new and improved ways of providing services. These processes should be a mandated part of every security agency's role, especially following significant operational events such as the PEV.

This mindset was evident in most officers within the SSAs with the Military and NSIS being the exception. Doubtless this state of affairs underpins the reasons why many of the planning arrangements, operating guidelines, standard operating procedures and standing orders fall short of the standard required for modern security organs.

Findings on Responses to the Post Election Violence

In determining its findings around the various responses by SSAs the Commission focussed primarily upon the delivery of services by the Police. Given that it is this organ of the state that has primacy over the delivery of security services within Kenya it is not surprising that it is here that much of the analysis and assessment is made. Findings relative to the performance of other agencies are also included.

The Police

[414] CW04

It is clear that the Police in Kenya face unique challenges in relation to policing large demonstrations and protests. The post election period saw numerous instances of both spontaneous and organised protests which in some cases developed into riots. Some of these demonstrations and protests occurred in rural towns and villages while others occurred in some of Africa's largest urban slums. Each situation was unique and required a different policing response.

Systems, functionality, operational and tactical option taking, command and control, communications, complaint taking processes, investigation capability, and the quality of the officers and their training are all sorely tested in situations like those facing the police between December 2007 and March 2008.

During this time however it is clear that the Police response ranged across the full gamut; from examples of heroism to abject failure in discharging even the most basic of its mandated roles.

Findings on the use of Force

The Commission determined that the Police response in relation to the management of protests and crowd control was inconsistent in its application, jeopardized the lives of citizens and was in many cases a grossly unjustified use of deadly force. Their actions resulted in the senseless death of scores of innocent citizens which is in direct contravention of the Constitution of Kenya and the mandate of the Police Service both of which clearly requires the police to preserve the peace and protect life.

The Commission found that there was a heavy-handed Police response whereby large numbers of citizens were shot – 405 fatally[415] – by Police in Kisumu, Kakamega, Trans Nzoia, Uasin Gishu, Kericho, Nakuru, Nairobi, and other places. Among the victims were some who were ostensibly going about their

[415] The Commission received no evidence that any fatality was due to being shot by persons other than the Police

lawful business when they were hit by bullets and many more whose wounds confirmed that they had been shot from behind.

Commission investigations also determined that in all the circumstances it is highly likely that very many citizens were unlawfully killed by police officers. An analysis of post mortem examinations provided to the Commission revealed too many instances of citizens being shot from behind, a number of instances of children being shot (some also from behind), and a further number of citizens being shot while sheltering in and around their own homes.[416]

The Commission found that Police used a variety of tactical options during the PEV. Tactical options included but were not limited to; the use of tear gas, the use of blank ammunition, the use of rubber bullets and finally the use of live ammunition. On many occasions police shot live ammunition into the air in an attempt to disperse protectors and thereby protect life and property. In other cases, police officers shot directly into groups of protestors and crowds of people thought to be involved in looting or property destruction and scores were seriously injured or killed as a result.

In the vast majority of cases, the force used by police occurred during lawful enforcement duties to protect life and property. This does not however mean that the force used was lawful, reasonable or desirable. In the absence of evidence to the contrary the Commission determined that in all probability all persons killed by firearms during the post election violence were the victims of police shootings.

This complete lack of consistency in the way in which police officers use force constitutes an immediate need to establish a reasonable, balanced and consistent national 'Use of Force' policy. This lack of consistency and at times confusion on the part of police officers is not assisted by the fact that some of the standard operating procedures utilised and laws guiding operations were

[416] Details from the analysis of Post Mortems and Commission Witnesses

promulgated during the colonial times. For example one of the guidelines is dated 1962 whilst another (undated) appears to emanate from the same era.[417]

There is a demonstrated need for police to evaluate all of their tactical options and the effectiveness of each option. A tactical options policy or framework would act as a decision support tool to assist front line Police members in making decisions relating to tactical options and use of force issues. A framework would clearly define the legal terms *reasonable*, *proportionate* and *necessary*. It would require officers to continuously assess a situation and should force be required, it would emphasize that the force should be *reasonable and necessary* in the circumstances. The design and subsequent implementation of a national 'Use of Force' strategy would have to be incorporated into the existing police training regime.

This can be achieved through the complete overhaul of Police Standing Orders and manuals of Best Practice in relation to the policing of demonstrations and protests. There are some basic principles to apply in the policing of demonstrations. Police must balance the need to maintain order against the rights of citizens. Among those rights are; freedom of speech, the right to peacefully demonstrate, the right to life and property and the freedom from intimidation or interference. These rights are expressly protected under the Constitution.

The Commission also found that the current Constitution provides for the authorisation and justification for using arms against citizens in circumstances other than when life is in jeopardy. The provision for such force to be used in the defence of property has little application in a contemporary society and such measures need to be addressed in the development of a new Constitution and review of the Police Act and the Administration Police Act.

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[417] Exhibits 97C (Booklet of instructions of the use of armed force in civil disturbances) and 97D (Riot Drill Training booklet for the Police Force)

The Commission determined that full, professional and independent investigations into the use of force by police officers must be commenced immediately.

Findings in relation to Investigations

The Police Service has a fundamental problem with its investigative capability and capacity. The Commission's own investigations found that there was an inability or reluctance to effectively investigate serious crimes and their perpetrators even when strong evidence existed. Of a total of 1133 deaths the police have initiated prosecutions for merely 19 homicides.[418]

The Commission found that for many other crimes, first hand evidence linking an offender or offenders to the crime existed and still exists. However for reasons known only to them the Police failed to fully discharge their duties in this respect. Police appeared unwilling or incapable of investigating and arresting politically powerful individuals implicated in the PEV instead concentrating on the lower level perpetrators.[419]

The Commission also established that the Police service has weak systems and approaches to investigating incidents where police officers are involved. Ranging from the use of lethal force to the deliberate killing of innocent citizens literally hundreds of incidents are not being investigated with the thoroughness needed or to the standards required. There is no professional standards capability within the Police structure nor an internal investigations group tasked with these roles.

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[418] CW 01, presentation to the Commission

[419] A position confirmed by two senior officials 'in camera" and reflected in the Akiwumi Report page 43

Findings relating to criminal offending by police officers

Credible evidence strongly linked a number of police officers with serious criminal offending. The offending ranged from murder and rape to theft and bribery.

The extent of offending was worrisome especially considering the lack of reporting on the part of victims (many determined that it would be a waste of time considering police officers were the perpetrators), the lack of recording on the part of the police (even when victims did go to the police they were often actively discouraged) and the apparent lack of concern on the part of senior officers.

To address issues of impunity, bringing to justice perpetrators of violence and restoring confidence in the Police, these officers must be thoroughly and professionally investigated and dealt with under the law.

Findings relating to partiality

Much evidence was received by the Commission relating to the activities of police officers being driven by their ethnicity, political leanings or both.

In some areas, especially in the Rift Valley Province the Commission saw evidence of an ethnic divide within the police who were reported to be primarily Kalenjin. Some witnesses provided statements saying that police stood by and watched as homes of the non-Kalenjin were being burned and looted. In some cases it would appear the police members watched as individuals were killed in their presence. In Naivasha one witness stated that the Kikuyu members of police were reluctant to assist and there was evidence of open defiance by some officers in relation to their seniors.

Findings relating to a lack of independence

Instances of inappropriate decision making due to outside interference and influence were discovered by the Commission. These included instructions from the Commissioner of Police to release arrested prisoners, the failure to continue with and finalise cases of police officers and government employees who were discovered committing offences, and the blatant use of administration police officers in electioneering activities.

The marshalling and deployment of up to 1600 Administration Police officers, in plain clothes, to act as agents of the government in disrupting or otherwise being involved in the elections processes, amounts to a gross abuse of power by those who initiated the exercise. This activity can have no legitimate explanation or legal basis and in all probability was unlawful.

The special assignment of a group of KPS officers during the election in the Coast Province in collating results and forwarding these to police headquarters recorded in the operation orders seriously concerned the Commission, can have no legitimate operational utility, and requires investigation and explanation.

Other issues surrounding the natural tensions between the role of provincial administrators and police surfaced during the Commission's investigation. Administration Police Officers are subjected, within current structures and operating arrangements, to multiple lines of command and control. For example the Administration Police Act requires, amongst other things that every officer shall assist chiefs and sub-chiefs when called upon, undergo training when the District Commissioner so orders, and act as a messenger in matters of administration or the public service.[420] AP officers are also required to be under the command of their Commandant who is the officer in charge of the Administration Police. In addition AP officers can be seconded to the KPS and act under that command structure when required to do so.

[420] See Powers and Duties of APs in appendix (B)

The Commission finds this situation untenable and constitutes a fractured and confused command and control structure that is not conducive to ensuring clear accountability for policing service delivery. This situation, if allowed to continue, will consistently reinforce the perception (and often reality) that the APs are not impartial due to the close control over them that the Provincial Administration system has.[421]

Findings relating to secrecy

The Commission found that the Police Agencies appeared to unnecessarily adopt a defensive position quoting the need for secrecy as a rationale for not providing some requested material. This situation is extraordinary given the full disclosures made by other agencies that are the repository of far more sensitive information.

In failing to provide the Commission with basic information such as the establishment and actual numbers of officers available for service, copies of national planning documents, and other data including success rates in investigations, the Police underscored an insular, introspective and uncooperative stance reminiscent of a bygone era.

In the final analysis it appeared to the Commission that the Police agencies regarded the term security as synonymous with secrecy. They failed to grasp the concept adopted by most contemporary law enforcement agencies that being open and interactive with communities is not only the right of citizens but fundamental to ensuring community support and in developing their trust and confidence. The provision of information should be a two-way street with Kenyans receiving timely and relevant information on safety and security issues from police about what is happening in their communities.

[421] A similar finding was articulated in the Akiwumi Report p 286

Findings relating to failure to respond

Many people testified and expressed concern that in numerous cases police officers failed to act to protect property and save lives. Evidence was collected suggesting that on a number of occasions the police simply watched as property was being destroyed and looting occurred.

In Coast Province in particular there was much concern over the failure on the part of the police to intervene when they were clearly available and present. A number of victims and witnesses expressed the belief that the police were condoning the looting and property destruction. There appeared to be a 'loot but don't kill' policy. This saw the emergence of citizens from the Kikuyu and Kamba communities banding together to protect their own property as there was no confidence they would receive protection from the police.

In many instances however police did seek to respond in the best way possible but were not always successful. The Uasin Gishu District for example was the site of the *Kiambaa* church burning that resulted in the loss of many lives. Police attempts to rescue the situation were thwarted through a combination of an inability to respond quickly enough and encountering delays through unlawful roadblocks.

Findings in relation to policies, systems and processes

The Commission found that some systems and policies, particularly relating to deployments and appointments, planning and review, dealing with deaths, operational policy and procedures are outdated and in need of urgent review.

Of particular concern was that operational planning arrangements, operating guidelines, standard operating procedures and standing orders fall short of the standards required for modern security organs. A full review of these arrangements needs to be conducted as a matter of urgency.

While it is acknowledged that some progress has been made in relation to dealing with victims of sexual violence (such as setting up gender desks in police stations), the events of the PEV period clearly demonstrated that there is a very long way to go.

The personal attitudes of officers, as well as systems to deal with the victims, need to dramatically improve as a matter of urgency.

Findings in relation to dealing with complaints

The Commission felt that the best example of how police officers deal with complaints is best illustrated by the approaches taken in relation to the victims of sexual offending. There were very many instances of victims attempting to report their cases to the police but being thwarted for a variety of reasons. Given the circumstances, scale of offending, the shortcomings which seem to have prevailed in regard to the investigation of these crimes and also the allegations against Police, it is likely that a separate entity would be best placed to investigate these matters.

With that underway, work can begin on building strategies which will achieve, into the future, the matters set out in the mandate. Central to these strategies will be an education/awareness component which will span public, medical, Police and legal domains. The approach must be coordinated and consistent so there is a common understanding of the best responses, from all parties, to sexual violence.

All parties, including Police need to understand their rights and their responsibilities with regard to sexual offending. This base then needs to be complemented by the training, logistics, and resources through which victims can be treated and supported and have those who offend against them dealt with effectively and in a timely fashion according to the law.

Sexual violence needs to be acknowledged by Police as a serious crime and responded to accordingly. Victims should be able to report crimes in an

environment which is secure and private and in a situation in which their dignity is maintained. Police should respond in a way that is non-partisan. Reports of this type of offending should *always* be recorded and properly investigated.

This investigation may include, among other phases, the examination of scene(s) and the proper collection, storage, analysis and evaluation of evidence. The investigation must be carried out by Police officers who are adequately trained and competent at investigating serious crime. Reports of sexual crimes should form part of a criminal intelligence process. Consideration needs also to be given to the safety of the victim when considering whether the accused person is released into the community pending the completion of the Police/judicial process.

Findings in relation to resourcing

The Commission was frustrated in its attempts to fully assess resourcing issues. Frequent use was made of raw numbers such as the ratio of police officers to population[422]. Given that the Police agencies themselves failed to provide the Commission with the actual numbers of officers or the establishment figure any such ratio provided is speculative.

It is clear that the police were in fact overwhelmed by the extent and intensity of the violence. One NSIS report commented on the fact that officers in Nairobi were fatigued after being on continuous duty for several days. However this aspect only presents part of the picture. Contributing factors to this situation include the requirement to provide more than 54,000 officers to be present at polling stations, the failure to plan properly and the low level involvement of the military.

[422] Mr. Francis Kimemia (CW 04) told the Commission that the current ratio was 1:850 while the recommended ration is 1:450

Merely focussing on the total numbers of police officers is problematic. Whilst there may be a case for an increase in police numbers, some basic imperatives must pre-exist. These include; recruiting and training the right people, ensuring the existing police culture is conducive to embracing reform, systems and processes must be of a high standard, and organisational leadership must be of the highest quality.

Other factors came to the Commission's attention during its examination of this area. The conditions that Police officers work under require close attention. Ranging from poor remuneration to often substandard living conditions these issues combine to impact negatively on the moral and incentives that impact personal performance. It is expected that any reform process will look carefully at these issues.

Findings in relation to review and improvement arrangements

A key aspect of the planning cycle found to be absent was any form of formal written de-briefing and operational review process. The Commissioner of Police told the Commission that one had not yet been completed albeit several months after the violence stopped.[423] Other senior police officers reinforced this approach by also confirming the absence of a formal, comprehensive and written review process.

Whilst the Commission observed throughout its work that the Police were not adequately resourced this does not detract from a finding that the absence of these processes amounts to a serious failure on their part.

[423] CW 01, Nairobi 9 July 2008

Findings in relation to other Security Agencies

There was little, if any, leadership displayed by government in dealing with the violence when it (inevitably) broke out. Although some evidence was provided to the Commission that a hastily formed Cabinet Security Committee (CSC) met early in January and the NSAC provided it a written briefing (dated 17th January), there was more effort assigned to dealing with the outcomes of the violence rather than any real effort to stop or reduce it.

Variable performances exhibited by the KSIM were also evident including an apparent absence of leadership and functionality at the executive level exhibited by the CSC.

Two of the directives communicated by the NSAC under the signature of the then PS, Ministry of State for Provincial Administration and Internal Security concerned the Commission.[424] The instruction that "*PSIC and DSIC should provide security to targeted individuals who supported the Government and PNU*" appears to indicate a bias around just who to protect. A further concern for the Commission was the advice that "*command and coordination relationships should be streamlined.*" Given that these communications were sent on 7th and 28th January 2008 it can only be assumed that these important functions and structures were not in good operating order prior to the elections of 2007.

The performance of Provincial and District Security and Intelligence Committees also varied from well organised entities that met often during the crisis, determined priority action and made key decisions, to others that did not engage at all when arguably they were needed most

The Commission is satisfied that the Military along with supporting agencies such as the Kenya Wildlife Service responded appropriately during the crisis. In discharging their role in backing up the prime security agencies the Commission heard nothing but positive commentary on these organs.

[424] These communications were referred to in the Nyanza PDIC minutes. It is not known if they were sent to all PSICs.

In most cases the Kenya Prisons Service also responded well and in the case of the Naivasha Prison opted to receive victims of the crisis on their property and provide basic necessities (including security) for a short period before relocation. Although there was mention of inappropriate behaviour on the part of some prison officers in Naivasha no firm supporting evidence was provided.

The NSIS also discharged its role reasonably well in that the daily situation reports, apart from a period of eight days, continued to be developed throughout January and February 2008. However the Commission felt that the NSIS could have exercised more influence on the situation especially in the area of developing special, focused reports aimed at assisting the police and others get to the heart of the violence.

Rationale for Recommended Action Regarding the Police

This part recognises that, in terms of the Police, a reform programme has been commenced and against that backdrop identifies a number of key areas that require immediate action. These should be approached in a planned, coordinated and integrated way to ensure that the very best value is gained from the resulting institutional strengthening.

Background

Like all large institutions, the Kenya Police Service is confronted with a host of challenges stemming from a dynamic and demanding environment. At times, fundamental change must be made to address new challenges and respond to the evolving and changing needs of Kenyan society.

Built over years of tradition and greatly influenced by British colonial convention, the entrenched mandate, principals and functions of the Kenya Police continue to influence its delivery of service and interactions with Kenyan society.

The experience of this Commission has shown that the Kenyan Police are not always in a position to identify and address problems regarding their service delivery. This is why an independent examination of policing police is critical and must be undertaken with some urgency.

In spite of the development and production of a strategic plan the Kenya police have been slow to accept that police reform is necessary and are reluctant to accept that the public and others outside the police have a role to play in shaping police policy and reforms. At the heart of the debate is deciding what philosophy of policing the Kenya Police and the public desire.

The Commission has been in the unique position of having heard from many members of the public, government officials, and from the police themselves. It therefore brings a much needed perspective to the public debate about the current status of the Kenya police and the issues and challenges it faces not only in relation to post election violence but its overall structure and ability to deliver day to day policing services to Kenya.

The Current Reform Programme

In determining key recommendations the Commission took account of a number of key pieces of work signalled by the Government as a priority for action in the medium and long term. Key amongst these is the Statement of Principles on Long-term issues and solutions developed through the Kenya National Dialogue and Reconciliation mediated by H.E. Kofi Annan, Chair of the Panel of Eminent African Personalities on 28th February 2008.

Specifically identified issues for the Police in agenda item 4 under Constitutional and Institutional reform are:

- Constitutional review to establish an independent police commission (12 months)
- Review and definition of the role of the Administration Police (6 months)

- Review laws and issues related to security and policing (including the independent complaints commission, citizen oversight of police services, enhanced information disclosures, human resource management and capacity building) to make them consistent with modern democratic norms (6 months)
- Finalisation and rollout of the National Security Policy to enable the relevant sectors to develop their sectoral policies
- Recruit and train more police officers to raise the police – to population ratio to UN standard (by 2012)

There are also definitive reforms of the State Security Agencies encompassed within the Kenya 2030 plan and specific targets articulated in the First Medium Term Plan 2008-2012[425] as well as the recently announced civilian oversight board.[426]

Informing these processes will be the overall constitutional reform that has the draft constitution (Bomas and Wako drafts) as its base.[427]

The Commission also recognised attempts to initiate reforms by the Kenya Police Service. In their strategic plan key shortcomings relating to service delivery, the absence of strong institutional mechanisms for holding police accountable to citizens and the law, and the overlapping functions of having two police agencies are identified as issues for resolution.

Dealing with perpetrators

Issues and aspects relating to dealing with impunity are fully canvassed in chapter two. It is, however, prudent that some focus is applied to this subject here especially relating to the actions of police officers during the PEV.

[425] Kenya Vision 2030
[426] Formed by way of Special Issue The Kenya Gazette Notice No 8144, 4 September 2008
[427] The Proposed New Constitution of Kenya, [Kenya Gazette Supplement, 2005] dated Nairobi August 2005

Given that more than nine months have passed since the start of the violence around the 2007 general elections it is unlikely that many more, if any, perpetrators will be held to account for their actions than have already been dealt with by the authorities. Very many victims of these actions and events have not been properly heard and many more not heard from at all. Some are constantly being re-victimised as they re-live their experiences every day through seeing their perpetrators living and prospering within their communities and some who have even occupied victims' land.

Large numbers of these perpetrators are known, considerable evidence is available to use as a strong investigative base and yet any such activity on the part of the authorities has ceased. It is unlikely that state authorities have the capability or the will to rigorously pursue offending parties.

Evidence of offending by police officers is not being actively pursued. The Commission believes that special arrangements are required to deal with these officers as well as to independently investigate reported excesses of force by the Police. It is this way that victims and witnesses alike will have the confidence to come forward to provide their evidence to an independent investigative entity.

Using a Reform Catalyst

The Commission has determined that there is a demonstrated need for major police reform that takes into account international best practices while recognising that policing in Kenya involves some unique challenges. In order to put in place the type of reforms considered necessary the Commission believes that the immediate establishment of specialised and independent Police Reform Group (PRG) is called for. Consisting of both national and international policing experts, this entity should be created and begin its work immediately. It is difficult to see such necessary and far reaching reform being implemented otherwise.

One consistent and unfortunate theme that emerged from the Commission's work was that many Kenyans simply do not have trust and confidence in their Police. This was borne out by the number of victims of violence, including sexual offending, who simply felt they could not report their situation to police officers. A variety of explanations were forthcoming ranging from the need on some occasions to pay for this service, a general suspicion of authorities to the fact that police officers were sometimes the perpetrators.

It is the view of the Commission that policing can in fact contribute to conflict situations such as that experienced in the PEV. In many cases police were seen as partisan in representing or favouring just one community and in some instances supporting one political side over the other.

International best practice recognizes that successful policing is based upon a number of broad principles. Those principles will doubtless guide the work of a PRG in determining priorities, processes and a timetable for key aspects of reform to be identified and addressed in the coming months. The five principles agreed upon by this Commission are briefly outlined here.

The Police should be representative: There is much value in paying close attention to the ethnic makeup of officers in the Districts and down to division and station level. While it is a rule of thumb that the police should reflect the community it serves, Kenya's multi ethnic makeup requires careful management of these arrangements.

The police should be impartial: To achieve the former, the Kenya Police need to exhibit impartiality in all aspects of their work. In fact impartiality is a requirement in achieving a representative police service. Of assistance to this process would be measures in cultural sensitivity training, a common oath of office where officers swear to respect all cultural differences and a rigorous code of conduct stressing the need for equal treatment of all Kenyans.

Policing should be decentralized: Currently policing in Kenya suffers from imprecise structural arrangements borne out of an antiquated policing model based on colonial times. Coupled with confused operational and executive command across two police agencies and a provincial administration structure this model manifests weaknesses in being sensitive to the needs of local communities. A single integrated command model based upon community policing elements could potentially form the basis for overall policing reform.

Policing should be based on respect for human rights: The basic tenet here is that police need to treat everyone equally and with respect. Heavy handed approaches to dealing with demonstrations and the liberal application of force (much of it lethal) currently applied will require further and careful assessment in determining the way ahead.

The police should be legally and politically accountable: The development and application of accountability mechanisms would seem to be an immediate priority for action. The current void could be filled by a number of reforms including the establishment of a Police Service Commission and the establishment of an Independent Police Complaints Authority (IPCA)[428] to deal with complaints against police conduct.

Integration of the Kenya Police Service and Administration Police

The Commission believes that developing a world class police service for Kenya would be best achieved through the creation of a single police agency. This means integrating the current two police organs. Given the revelations around the unlawful use of Administration Police (APs) around the elections, the fact that the current structure is inextricably linked to the provincial administration system, and many of the senior officers are not police professionals integrating the APs into the Kenya Police Service is a priority activity.

[428] Both initiatives are fully discussed below

It is recognised that there are difficulties in completing this important work (merging two cultures, ideals, systems and approaches) but the benefits will greatly outweigh these temporary obstacles.

Integration will provide accountability, resourcing, service delivery and performance benefits many of which are listed here. Benefits include but are not limited to;

- Total independence from the provincial administration structure and separation from national government oversight
- Unified command and control
- Across the board consistency and uniformity in all facets of policing including; standardised policing service delivery, standard operating procedures (SOPs), improved investigations capability and intelligence gathering and dissemination
- Increased trust and confidence in the Police and policing
- A single and unified Police Services Board, one head of Police (Commissioner), one strategic plan and a single integrated and well understood service delivery offering
- A single piece of enabling legislation, Force Standing Orders, guidelines, practice and operational arrangements
- Standard systems of recruitment options, entry standards including lateral entry options, basic and specialised training, conditions of service including living conditions and remuneration, human resource management arrangements, promotion and advancement, and leadership development including command and control
- Significant efficiency gains from budgeting, purchasing, and utility of resources (capital, equipment and people)
- The elimination of inter-agency tension and conflicts that impact negatively on service delivery

Police Act

Existing legislation on the provision of policing services, and in particular the governance, organisation and administration of the Kenyan Police, is inadequate. Some of the key weaknesses of the present Police Act 1960 (revised 2002) and the Police Standing Orders 1962 (revised 2001) include –

- Unclear responsibilities and confused lines of accountability:
- Constraints around the ability to place the right people in the right jobs:
- An inadequate system for managing staff performance and discipline issues:
- Little guidance to work with partner agencies, domestically or internationally:
- Few supports to enable the use of modern policing tactics

New legislation is needed to overcome these inadequacies; removing constraints to the delivery of better policing services to the community, and setting a platform for more effective policing in the future.

Police Act reform would equip the Kenyan Police to provide the best policing services for Kenyans. In broad terms, reform would be undertaken to achieve two fundamental tasks: first, to confirm and strengthen Police governance, accountability and organisational arrangements in a way which is suitable for a contemporary age; and second, to improve the Police's effectiveness, and establish a clear framework for the exercise of policing powers.

Police Service Commission

The Police should be politically accountable to a Police Service Commission. Originally signalled in the 2005 Draft Constitution (the Wako draft) this structure would be somewhat different in that it would cover a single (amalgamated) Police agency. It could also oversee the amalgamation process

and be made up of representatives from elected political parties, civil society, business interests and NGOs (there is no shortage of precedents from other international jurisdictions). It is envisaged that the Commission would play a role in setting policing goals, budgets and appointing the Commissioner.

A modern Code of Conduct

The current Kenyan Police disciplinary rules and processes are contained within Chapter 20 of the Kenyan Police Standing Orders and are inadequate. The move to a new and modern Code of Conduct would see a transition from the current Para-military style of managing behavioural issues in Police to a more mainstream employment practice. It would establish the standards for behaviour across the Kenyan Police service and ensure consistent behaviour. A new Code of Conduct would have to be considered in conjunction with revised "Standing Orders", Regulations or Best Practices Manuals.

The simple truth is this: one of the essential components of a well-functioning civil society is an effective, well-disciplined police service, in which the citizens have implicit trust.

The purpose of a modern Police Code of Conduct is to establish the standards of behaviour expected of all Kenyan Police employees not just its sworn members. To be successful, a policing service must have the trust respect of the citizens it serves. The Kenyan Police will be judged by the way its employees represent it. It is therefore necessary to maintain a high standard of professional conduct. All Kenyan police personnel sworn and non-sworn, permanent, temporary and casual employees should be covered by the Code of Conduct.

The cornerstone of a modern Code of Conduct is that all employees of the Kenyan Police work to the highest ethical standard. A Code of Conduct should recognise and include the following basic principles: honesty and integrity, professionalism, fairness and impartiality, respect for people and confidentiality.

Strengthening Investigations

There was a general consensus that investigations per se require strengthening. The Commission supports the notion that quality investigations are the cornerstone of the justice system as far as bringing perpetrators to justice is concerned. An option to address current issues was offered by Attorney General Wako[429] was that "the Directorate of Criminal Investigations be created by an Act of Parliament as an independent and autonomous authority."

In addition to the development of workable and functioning independent civilian oversight arrangements[430], there should still be provisions for some *less serious* allegations to be investigated and resolved by police themselves. When an Authority accepts a complaint for investigation it should decide on the type of investigation to be adopted. The matter may be appropriate for a Police investigation and resolution. This means it would be investigated under the supervision of a senior Police Commander in the area where the matter arose and this would result in a speedier resolution of the complaint. At the conclusion of the investigation, the police should advise the Authority of the results of the investigation and the decision reached. If after a review of the police file, the matter has not been resolved to the satisfaction of the Authority, there should be provisions for the Authority to initiate its own investigation of the matter.

The Commission believes that structural changes alone can and will not address identified issues. Investigations capacity and capability are best addressed in a comprehensive review (as recommended) alongside other policing and justice related components to ensure the best solutions are identified.

Civilian Oversight of Police (Police Conduct)

The Commission is of the view that the hasty and presumptive creation of a Police Oversight Board (Kenya Gazette Notice 8144) on the 4th September 2008 ahead of the presentation of its report was unfortunate. An opportunity to get it

[429] CW 134
[430] See below

right has been missed. The new entity has few, if any, of the key foundation components or properly functioning arrangements necessary for the provision of quality civilian oversight of the police.

This Commission carefully considered the acts and omissions of state security agencies in the context of the PEV and determined that the establishment of a well researched, legally based, professional and independent Police Conduct Authority would serve Kenyans best.

Throughout both the public and private 'in camera' hearings, this Commission was presented with clear evidence that the police *use of force* during the post election violence period resulted in serious injury and death to many Kenyan citizens. Some of these actions may well have been in compliance with existing law. There is also a clear indication that police used excessive force in many instances and the actions of some individual officers may have reached the threshold of criminal conduct.

Under current legislation and convention, the police are the only state security agency with the legal mandate and authority to investigate the conduct of its own officers and for that matter the conduct of their service as an organization.[431]

Whether justified or not, there is a perception in the community that investigation by the police of complaints against the police is neither independent nor appropriate.

The evidence before this Commission of Inquiry has identified a real need for police oversight by an independent body, outside the police, with the legislative power and authority to investigate complaints against the police and police conduct.

[431] Despite the recent introduction of a civilian oversight board

Although from time to time there are complaints about the actions of the police and concerns as to the investigation of such complaints, the majority of Kenyan citizens have not been directly involved or been exposed to the process.

The actions of police following the December election have intensified the public's concern about police conduct and reinforced the belief that there are no systems in place for police accountability.

Kenyan society is such that the bulk of the law-abiding citizens do not come into any open conflict with members of the police. The post election violence period changed that completely. For the first time respected members of society found themselves in direct opposition to the police. The police were faced with the extremely difficult task of meeting their obligation to uphold the law and order in the face of overwhelming odds and in an environment where innocent law abiding people were 'in the mix' and therefore vulnerable to the police response and *use of force*.

In addition, the ethnic and tribal tensions increased during the pre and post election periods. These tribal loyalties and alliances were to be found within the Kenyan Police itself and there is evidence that the police were seen as agents of political parties and agendas and were therefore biased, complacent or outright hostile to certain sections of the community.

The actions which have occurred during the post election violence are so serious that an immediate remedy is essential.

It will be essential that any independent Authority to which complaints can be made and which can be dealt with be outside the police service itself.

There are advantages to the police in adopting an independent investigative procedure. The police would no longer be subject to the same criticisms, but more importantly, they would be less likely to be affected by doubtful complaints brought by suspected criminals, for ulterior motives. They would also be relieved of the uncomfortable obligation to investigate professional colleagues.

When the public complaint procedure for a policing service is discussed, there are diverse interests that must be acknowledged and taken into account. A public complaint procedure that favours the interest of a complainant at the expense of the member of the service is no more likely to provide satisfaction than a procedure which does the reverse. The interest of the general public and the Police service involved must be accorded due consideration.

This is based on the premise that a system whereby the Police investigate complaints against police members is fundamentally flawed because of the suspicion that inevitably remains in the minds of complainants. A complaints procedure generally acknowledged to be fair and impartial to the public and to the police is essential if the police are to enjoy the degree of public support they needed in order to discharge their own risky and necessary tasks.

International Police Oversight Entities

Many international jurisdictions have introduced police oversight arrangements to ensure the independent monitoring and scrutiny of police organisations and the actions of officers. Moreover, a number of commonwealth countries have embraced the concept including South Africa, New Zealand, Australia, Trinidad and Tobago, Canada, and the United Kingdom.

Although many of these institutions are differently constituted, the fundamental underpinnings are, in the main, similar.[432] These include:

- A legislative basis specific to the entity's establishment, functions and powers
- The operational independence from the Police
- Freedom from political interference
- The power to conduct its own investigations
- Transparent operating and reporting arrangements

[432] For example the Independent Complaints Directorate in South Africa is constituted under the South African Police Service Act, whilst in New Zealand the Independent Police Complaints Authority is constituted under its own enactment.

The Commission noted that the Independent Complaints Directorate (ICD) in South Africa was established as a result of the work of the Truth and Reconciliation Commission who recommended that;

- The Independent Complaints Directorate (ICD) be governed by new legislation, independent of general police legislation.
- The ICD be genuinely independent of the Ministry for Safety and Security.
- The ICD have powers to compel the SAPS and others to comply with its requests related to conducting an investigation, including powers of search and seizure.
- The ICD be given the authority to bring to the attention of relevant officials any failure on the part of the SAPS to respond to ICD recommendations to take disciplinary or legal action.
- The ICD be mandated to investigate corruption within the SAPS, rather than this task being allocated to a unit within the SAPS.
- The ICD be given the capacity, resources and authority to conduct proactive investigations and evaluations of overall policing policies and practice, as well as to respond to complaints.

Examples of enabling legislation, from both South Africa and New Zealand, are included in appendix “F”.

CHAPTER TWELVE

Impunity

Definition of Impunity

Impunity means "*exemption from punishment or loss*".[433] In the international law of human rights, it refers to the failure to bring perpetrators of human rights violation to justice and, as such, itself constitutes a denial of the victims' right to justice and redress. Impunity is especially common in countries that lack a tradition of the rule of law, suffer from corruption or that have entrenched systems of patronage, or where the judiciary is weak or members of the security forces are protected by special jurisdiction or immunities. The amended Set of Principles for the Protection and Promotion of Human Rights Through Action to combat Impunity, submitted to the United Nations Commission on Human Rights on 8 February 2005, defines impunity as:

> *"the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."*

The First Principle of that same document states that:

> *"Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and* to take other necessary steps to prevent a recurrence of violations."

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[433] See Black's Law Dictionary, (8th Ed).

Background

According to its terms of reference, this Commission is required to recommend –

- Measures to be taken to prevent, control and eradicate the occurrence of similar deeds in future;
- Measures with regard to bringing to justice those persons responsible for criminal acts;
- Measures to eradicate impunity and promote national reconciliation.

In making such requirements, we think, the framers of our TORs recognized that impunity lies at the heart of preventing the kind of violence that has been witnessed in this country time and time again. The eradication of impunity will therefore, not only blow off the cover for persons who break the law of the land but also deter others who may contemplate similar deeds in future. A firm foundation in the rule of law would also promote national reconciliation.

The elements of systemic and institutional deficiencies, corruption, and entrenched negative socio – political culture have, in our view, caused and promoted impunity in this country. Election related violence provides the best illustration of the malady where, in five-year cycles since 1992 when multiparty politics was introduced, pre- and post-election violence has rocked various parts of the country despite official inquiries and identification of the root causes being made. We shall examine the issues of investigation, prosecution and adjudication of crimes in an effort to understand why impunity thrives in this country.

Investigation, Prosecution and Adjudication of Guilt

The issue of impunity is directly related to the ability of the state to prosecute persons for criminal offences. It is our view that the Office of the Attorney General occupies an important and strategic position in dealing with the issue of impunity. With a view to shedding more light on that office, we invited the Hon. the Attorney General of the Republic of Kenya, Mr. Amos Sitswila Wako, who has been in office for the last 17 years, to testify before the Commission.

The power to undertake criminal prosecutions in Kenya is reposed in the Office of the Attorney General under section 26 of the Constitution, which provides that the Attorney General has the power to institute and undertake criminal proceedings against any person; take over and continue any prosecution commenced by any other person; and also takeover and discontinue proceedings at any stage before judgment is delivered. In practice, the power to prosecute some cases is delegated to other agencies of state like the Kenya Police and even where this done, it is done under the supervisory authority of the Attorney General. Under section 26(4) of the Constitution, the Attorney General also has the power to require the Commissioner of Police to investigate any matter which relates to any offence alleged or suspected. It is mandatory, once the request is made, that the Commissioner of Police shall comply with the request.

Mr. Wako,[434] testified before us and enumerated some attempts made by various institutions to investigate election related violence among them: -

- The National Assembly which set up a Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya 1992, otherwise known as *"the Kiliku Committee".*[435]
- The Standing Committee on Human Rights (Kenya), a government appointed committee to advise on human rights violations. The

[434] CW134

[435] Exhibit 136A.

Standing Committee investigated skirmishes occurring at the Coastal region in 1998 and released a report titled, *"Recent Disturbances at the Coast province: From 13th August to date."*

- The Law Society of Kenya, in exercise of its mandate under the Law Society of Kenya Act investigated and made a report on the Violence in Coast Province related to the attack on Likoni Police Station on 13th August 1998.
- The Judicial Commission of Inquiry on the Tribal Clashes that occurred in various parts of Kenya since 1991 otherwise known as the *"Akiwumi Commission."*

Various recommendations were made in those inquiries, but the Akiwumi commission, which considered the earlier reports on ethnic violence, was more comprehensive. How did the government deal with the report?

The Akiwumi Commission of Inquiry

The Akiwumi Commission was appointed on 1st July 1998 and its life was variously extended up to 31st July, 1999 when it completed its report and submitted it to President Daniel arap Moi on 19th August 1999. Its terms of reference, which were not dissimilar to those of this commission, were as follows;

A) To investigate the tribal clashes that have occurred in various parts of Kenya since 1991, with view of establishing and/or determining-

- *i. The origin, the probable, the immediate and the underlying causes of such clashes;*
- *ii. The action taken by the police and other law enforcement agencies with respect to any incidents of crime arising out of or committed in the course of the said tribal clashes and where such action was inadequate or insufficient, the reasons there for;*
- *iii. The level of preparedness and the effectiveness of law enforcement agencies in controlling the said tribal clashes and in preventing the occurrence of such tribal clashes in future;*

B) To recommend

- *i. Prosecution or further criminal investigations against any persons or persons who may have committed offences related to such tribal clashes;*
- *ii. Ways, means and measures that must be taken to prevent, control, or eradicate such clashes in future;*
- iii. *To do, inquire into or investigate any other matter that is incidental to or connected with the foregoing*

For three years, however, the contents of the report were not made public until considerable public pressure was brought to bear on the Government and it was released to the public in October 2002, but not without reservations. The Government rejected part of the report that related to the Rift Valley and especially, the Kalenjin and Maasai communities, and in support of that assertion it produced a 31 page undated document which had no author or signatory, entitled ***"Comments on Commission of Inquiry Report"***.[436] Pressed to identify the author, the Attorney General said it was authored by *"the Government"*, presumably the President at the time, at whose instance the Commission had been set up and to whom the report had been submitted. The reasons advanced for the partial rejection was that *"the report was not objective, it took extraneous matters into account, ignored some evidence, did not give due weight to some evidence and gave a lot of weight to some evidence more than warranted. Its findings and recommendations were biased and prejudiced."*

The commentary, which the *"Government"* directed should be read together with the Akiwumi Report concluded:

> *"….. the sad chapter of the clashes in the country's history should be brought to an end to give Kenyans a chance to <u>start afresh</u> as brothers and sisters in this multiparty era…..*
>
> *Accordingly, in the absence of evidence to form the basis for prosecution to recommend charges or prosecution against any person, (sic) but where there is evidence to show a lapse in the performance of administrative duties or misconduct,*

[436] Exhibit 134B.

recommendations can be made for other forms of condemnation including:

(i)(a) naming and
(ii)(b) admonishing."

Despite the position taken by *"the Government"*, the Attorney General testified that he had, in exercise of his independent constitutional mandate, acted on the report two years earlier. We quote the relevant part of his press release dated 1st October, 2002;

> *"The Attorney General by letter dated 14th March, 2000, in exercise of the constitutional powers under S.26(4) of the Constitution, directed that expeditious, diligent and expeditious investigations be carried out against all persons whom the Commission had recommended that they be investigated regarding their role in tribal clashes – and in particular those mentioned in paragraphs 526, 527 and 528 of the Akiwumi report.*
>
> *The Director of Criminal Investigations by his letter dated 19th February, 2001 forwarded to the Attorney General the relevant duplicate inquiry files 70 in number for my perusal and necessary action. Of those 70 files, the Attorney General ordered further investigations in 40 cases. Of these 40 files, 18 investigations files were returned to the Attorney General on 1st October, 2001 after further investigations. The Attorney General after further perusal ordered further investigations in a number of the cases.*
>
> *The investigations are therefore still continuing in a number of cases. I assure the public that when I get an investigation file with sufficient evidence, provable in a court of law which can establish a prima facie case prosecution will ensue as a matter of course."*[437]

What became of those investigations? Again we shall quote the Attorney General *verbatim* in his sworn testimony before the Commission on 25th August, 2008:

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[437] Exhibit 134C.

"In some cases investigations were carried out and files submitted to me with findings that no evidence was disclosed against named persons and with recommendations that the inquiry file to be closed.

In other cases the files submitted to me were found to be incomplete and deficient in critical aspects. In all such cases including some of the cases where closure was recommended, the inquiry files would be returned back to the police on my behalf by the Director of Public Prosecutions with directives to carry out further investigations. Some of those files would again be re-submitted to me often times after inordinate long periods and without significant evidence having been gathered. Many of the returned files would never be resubmitted again. Many reasons could be attributed for this unsatisfactory state of affairs including: -

(i) Genuine difficulties in investigating and getting witnesses because of their fear of reprisals within the context of the ethnic clashes.

(ii) Lack of capacity and resources on the part of the investigating authorities.

(iii) Self censorships or fear on the part of the investigators who are susceptible to pressure and manipulation.

It should be noted that although the Attorney General has power to request investigations to be carried out by the Commissioner of Police he has no enforcement mechanism to ensure compliance. Furthermore, the Police investigators are subject to discipline and control not by the Attorney General but the Commissioner of Police."

In passing, we express our doubts about the impotence expressed by the Attorney General in enforcing the directives given to the Commissioner of Police. As stated earlier, the Constitution makes it mandatory for the Commissioner to comply, and the consequences of breach should be obvious.

At the request of this Commission, the Attorney General forwarded further correspondence to confirm further follow up of investigations and a bundle of documents was placed before us.[438] Among them was the letter dated 14th

[438] Letter Ref: AG/CONF/6/D/121/ VOL 1 dated 25th August 2008.

March, 2000 when the Attorney General wrote to the Commissioner of Police in the following terms;

AG/CONF/6/D/69 *14th March 2000*

Mr. Philemon Abongo
Commissioner of Police
Police Headquarters
Nairobi

Dear

RE: REPORT OF THE JUDICIAL COMMISSION APPOINTED TO INQUIRE INTO TRIBAL CLASHES IN KENYA

By Gazette Notice No. 3312 of 1st July, 1998 H.E. the President appointed the above mentioned Commission under the chairmanship of the Hon. Mr. Justice A.M. Akiwumi to inquire into the tribal clashes that have occurred in various parts of Kenya since 1991. The Commission presented its report to the President in August 1999.

In CHAPTER FIVE of the said report, the Commission has made its RECOMMENDATIONS. I refer you particularly to paragraphs 526,527 and 528 where the Commission has recommended that certain persons be investigated regarding their role in the tribal clashes as recommended in the Report.

In terms of S.26 (4) of the Constitution of Kenya this is to require you to carry out comprehensive investigations on all persons as recommended in the Report. As and when you complete investigations on any persons, let me have the report. The investigations should be carried out diligently and expeditiously.

You are requested to make arrangements to come and collect the report and the voluminous attached documents.

With best regards.

Yours

S.Amos Wako, EGH, EBS, MP

ATTORNEY GENERAL

Cc. Mr. Francis Sang

Director of Criminal Investigations

Nairobi

Almost a year later the Director of Criminal Investigations Department responded as follows;

CID/SEC/2/2/12/10/VOL.111/87 *19th February,2001*
S.Amos Wako EGH, EBS, MP,
Hon. Attorney General,
Sheria House,
P.O.Box 40112,
NAIROBI.

Dear Amos,

INVESTIGATION INTO TRIBAL CLASHES IN KENYA AS RECOMMENDED BY AKIWUMI JUDICIAL COMMISSION

I acknowledge receipt of copy of your letter AG/CONF/6/D/69 dated 14th March, 2000 where you had, under the powers conferred to you by section 26(4) of the constitution, directed for expeditious and diligent. Investigations to be carried out against the persons named in para 526,527 and 528, of the Akiwumi Commissions Report. As a result of the instruction, I appointed Investigating Officer who visited the affected districts in Rift Valley, Western, Nyanza and Coast Province, scores of people mentioned in the Akiwumi Report were traced as hereunder. Relevant duplicate inquiry files 70 in number are attached herewith for your perusal and necessary action, please.

[The writer then analysed the allegations made, the evidence against the named persons and his findings on each, and continued]

GENERAL OBSERVATION

The investigation team in the course of its investigations toured the areas affected by tribal clashes, and having gone through the paraphernalia of gathering evidence noted the following:

X)• *The time lapse from the moment some of the incidences of the tribal clashes occurred and the time the inquiry was conducted, resulted into some witnesses not being traced, whilst some traced ones were unable to correctly remember the sequence of events of the clashes, hence lack of corroboration. On the other hand scores of witnesses, who volunteered their statements, were ostensibly upset with the re-collection of what happened and therefore ended up giving vindictive statements out of bitterness.*

Δ)• *A survey on the list of witnesses in the Commission's report show that, most if not all of them, are public servants, politicians and lawyers. These by all standards are administrative witnesses who were neither at the scene of clashes nor victims of the clashes and could not therefore adduce direct evidence in relation to the clashes.*

E)• *A more critical glance at the list of persons recommended by the Akiwumi Commission to be investigated, revealed that they were the same people who testified before the very Commission as witnesses, but on realizing that their testimony before the Akiwumi Commission had started impinging negatively on their well being, decided to assume defensive stand in recording of their statement with the Police, a situation which gave rise to the concealment of vital clash related information.*

Φ)• *Most of the politicians who recommended to be investigated was as a result of their divergent and inflammatory political views as reported in Local Newspapers produced as exhibits before the Akiwumi Commission of Inquiry. However, the evidence to support the veracity of such political views were obviously lacking, as the whole mill of allegations was only anchored on*

information captured by Local Newspapers without any fortification by the evidence of Independent Witnesses.

Please advice.

Yours

(F.K.A. SANG) CBS

DIRECTOR OF CRIMINAL INVESTIGATIONS

Encs. (70 Duplicate Inquiry Files)

Cc:

Philemon A. Abong'o MGH MBS
Commissioner of Police
Police Headquarters
P.O.Box 30083
NAIROBI.

That was seven years ago and the latest report from the Criminal Investigation Department dated 21st august, 2008, shows that 37 out of the 70 files were closed; 9 files are with the DPP having been re-submitted after further investigations; and 24 are with the police for further investigations. The reference made by the Attorney General in the press statement issued on 1st October, 2002 that 1324 persons had been charged for various offences ranging from murder, inciting violence and taking part in riots relating to the clashes which occurred between October 1991 and December 1992, was not related to the findings of the Akiwumi report. The figures were presented to Parliament on 27th April, 1993 in response to a question by Member of Parliament for Gichugu, Ms. Karua.

The same process of investigation in respect of the Kiliku Report and the report prepared by the Standing Committee was no different. The Attorney General would make the request under s. 26 of the Constitution and the Police investigators would dutifully report on the lack of evidence and difficulties associated with collection of it. In the end, the Attorney General testified that he had done all he could within his powers to fight impunity. To quote him verbatim in cross examination: -

> ***"Ahmednassir**: Now we've seen that impunity is a problem, for the benefit of this commission can you highlight your achievements of your 17 year tenure in your fight against impunity? What have you done to fight impunity for 17 years?*
>
> ***[.....]***
>
> ***Amos Wako**: No, within my constitutional mandate, what I've done is to do what I ought to have done and that is to direct the Commissioner of Police to investigate. And that I have done even in cases where politically I should not have done. Like the Akiwumi Report, if you read the Akiwumi report and the rebuttal, a weak Attorney General would not have directed the Commissioner of Police to investigate all the people mentioned there. He would have said these are politically correct I would not investigate them, nor direct investigation of them and so on. But I did direct even if those people were regarded as politically correct, I did direct investigations."*

In view of the lack of any visible prosecution against perpetrators of politically related violence, the perception has pervaded for sometime now that the Attorney General cannot act effectively or at all to deal with such perpetrators and this, in our view, has promoted the sense of impunity and emboldened those who peddle their trade of violence during the election periods, to continue doing so.

The Attorney General readily acknowledged that there was a gridlock in the criminal justice system and particularly at the investigative level. He proposed the establishment of an independent investigative arm of Government, through an Act of Parliament, for a Directorate of Criminal Investigations to match the currently independent prosecution and judicial functions of the Criminal Justice System. Curiously, we note that at the time the Attorney General made a request to the Commissioner of Police to investigate the persons named in the Akiwumi Report, the Department of Criminal Investigations was directly under the Office of the President. It follows, and we can safely conclude, that it was indeed very difficult for the officers working directly under the same President who had made strong reservations about the report, to come to a different view

from the President's. The Attorney General himself candidly accepted this reality;

> *"[.....] I think it is precisely for this reason that during the tenure of the first Attorney General in independent Kenya, the criminal investigation arm of the police was under the Attorney General and not under the Police Commissioner. This made the Police investigators answerable to the Attorney General and execution of the Attorney General's general directives was therefore prompt, effective and efficient, This arrangement also insulated the CID officers from interference and manipulation."*

A flawed investigative process is the very antithesis of a successful prosecution. In other words, the quality of investigation affects the outcome of both the prosecution and adjudication of the matter. And where there are no successful prosecutions the culture of impunity creeps in as people commit crimes with the knowledge that it is unlikely that a proper investigation will be carried out.

The sorry state of the criminal justice system continued to play itself out even as this Commission was in the middle of its hearings. On 21st June, 2008, the Attorney General appointed a joint team of his officers and police officers to review all cases related to post-election violence including: cases of persons charged and are in remand, cases of persons charged but are out on bail, cases pending arrest of known persons, cases of persons in police custody but are not yet charged. No results of such exercise were furnished to the Commission, despite requests and promises, up to the time of writing our report.

Other aspects of the Criminal Justice System

The other weakness in the criminal justice system as pointed out by the Attorney General is the lack of professional manpower in the department of Public Prosecutions where only 64 State Counsel serve the entire country against an establishment of 94. The ideal compliment would be 450 to replace 365 police prosecutors currently undertaking that vital function.

It was necessary, in the Attorney General's recommendation, to empower the prosecution department by granting security of tenure to the Director of Public Prosecutions and improving the terms and conditions for hiring and retaining staff. It is also necessary to revamp the capacity of the judicial function commensurately to complete a fully independent and efficient chain of administration of criminal justice.

Obstacles to Investigation of Post Election Violence (PEV)

This commission recognizes that there are real and genuine difficulties in investigating violence of such magnitude as took place after the 2007 elections. Some of these difficulties have been experienced by this commission in its work and we do not doubt that any investigating agency will experience some difficulty. Some of the practical problems any investigative agency would face in investigating PEV include the following;

- Most of the complainants and witnesses were victims of displacement hence it may be difficult trace them to carry out full and proper investigations.
- The nature of violence is one that invites expectation of retribution if a person gives evidence against a perpetrator. In most cases the perpetrators were persons known to the victim hence the fear for retribution is real.
- Where the perpetrator of violence is an agent of state or perceived to be associated with an agency of state, there is reluctance to co-operate with or give evidence to the state.

The Attorney General, in his testimony, lamented the lack of a witness protection programme as part of the frustrations faced by investigators. While it was difficult enough to trace would be witnesses who were displaced following the violence, those who were traceable were reluctant to record statements and actively participate in identification parades, or appear in court to testify, for fear of reprisals. Furthermore, the Witness Protection Act which became operational

on 2nd September, 2008, remains untested and has received a budgetary allocation of only Ksh.20 million this financial year.

Lack of political will and fear of the political establishment

The Akiwumi Report and the accompanying "Comments by the Government" were released in 2002. As this constituted an official inquiry into the endemic problem of ethnic clashes, one would have thought that the contents of the report would make compulsory reading for all government administrators particularly those working in clash prone areas. We were shocked, however, that such an endeavour which was funded from the public purse, would provide no lessons for those in positions of leadership. The Permanent Secretary in Charge of Provincial Administration and Internal Security[439] confirmed that he had not read the Akiwumi Commission Report and to us it did not come as a matter of surprise either that his subordinates, the PCs and DCs, had no knowledge of the report let alone the issues raised therein. For example, the DC Molo, who testified before us, confirmed that he had not read the Akiwumi and Kiliku Reports yet his district was at the epicentre of ethnic and land clashes. He stated that he had, *"intelligence reports in my office and these were sufficient."*[440]

Our view is that the lackadaisical manner in which the government dealt with the Akiwumi Report only goes to illustrate that the state was not particularly interested in resolving once and for all the issue of ethnic violence. Those who benefited from it were secure in the knowledge that the report, notwithstanding its deficiencies, would continue to gather dust and the issue of ethnic violence would be on the back burner to be resurrected when the next election came.

[439] CW 4.
[440] CW 56.

During the hearings, the Commission explored why a concerted effort had not been made by the government to arrest and prosecute those who are alleged to have incited, funded and promoted violence instead of concentrating on minor actors in the mayhem. Most administrators spoke of fear of the general population and also fear of the political leadership. Commission Witness No. 80 gave the example of three councillors who were arrested in Litein in Bureti District on account of inciting violence. He stated;[441]

> *"…… when you arrest the so-called politicians people don't look into the crime. They say that the police have arrested one of their own. We arrested some councillors in Buret and the crowd was so rowdy. They stormed the whole Buret Police Station so much so that we were compelled to release those councillors."*

There is of course, a symbiotic relationship between the politicians and their supporters which continues to fuel impunity. Politicians rely on their supporters to enforce immunity while their supporters, who are the hand maidens of the violence, get protection from the political god fathers. This interference normally comes in the form of *"orders from above."* A senior police officer testified to this.[442]

> ***Q***: *We have also noted that there was tension in Kisii/Luo border. It is a common phenomenal?*
>
> ***A:*** *My lord, this I found to be common and when I followed the genesis of this problem, even in 2002 and 1997, that is the area where the Luos were fighting the Kisii. So it was potentially charged area, My Lord. But what we were seeing is that the politicians were now working up the youth, so that the two sides, the Luo from the Rongo and Kisii South District, could now be at loggerheads.*
>
> ***Q:*** *Did you manage to find these people inciting and organizing the youths?*

[441] CW 97. We were informed that in fact the councillors were demonstrating against the alleged police shooting of two teachers.
[442] CW 97

A: *Well, we were able. We didn't really arrest them because we didn't want to create more tension than before. So what we were doing is that, we used to call the politicians and talk to them and say we know what you are up to and most of them, once they know we know, they sort of die down. So, actually there was no fighting at that border.*

Q: *And you talked about some criminal gangs called Chikororo. Did you monitor this gang?*

A: *We monitored Chikororo and My Lords, incidentally in that area, the criminal gangs are very many there. You find the Nchikororo, you find Sungusungu, and you find Amachuma. This is all in that area and Ochororo area. These are groups which are basically according to our investigations we found that these are men and not really boys, My Lord who are used specifically when the elections are near, to scare away potential voters who are against a particular candidate. So they are used every time there is an election.*

Q: *And you do anything about that?*

A: *We sort of arrested most of them, because most of them are known. We arrested most of the Nchikororo and Sungusungu; and we had a lot of problems.*

Q: *You had what?*

A: *A lot of problems, because there was a lot of tension. We arrest, pressure is put, I release them. That they should at least be released.*

Q: *When you talk about pressure, what kind of pressure was it?*

A: *You find that I get calls from Nairobi, my boss says, did you arrest these people? I say, yes for this and that. Then he says, well, warn them, let them go home. I comply.*

Q: *And you said your boss is the Police Commissioner.*

A: *My Lords, my boss is the Commissioner of Police.*

Q: *So they would get arrested and you have to release them.*

A: *Yes, we release them.*

Q: *And when you arrested them, there would be tension in all those areas, because you have arrested them of course?*

A: *Yes, My Lords, that is what we were noticing that now there will be a lot of tension even than before. So that is why I am saying these are just imaginations to play to the psychology of people or us, because they know that once we arrest them, they indicate everybody else so that now we can't even more or operate.*

Q: *Did you find any politicians who were either organizing or inciting these particular youths?*

A: *My Lords, for this particular Chinkororo Hon. Nyachae was behind.*

Q: *And when you say behind, what exactly do you mean?*

A: *He is the one who organize, financed. They were known as his people.*

Q: *And did you find any tangible evidence of this organization of financing?*

A: *That is where the problem is, My Lords, because to get tangible evidence was very difficult. But as we go along investigating, you come across some evidence that so and so we have arrested that person, that person is aligned to so and so. So you see a pattern. Of this group you arrest, you see which group now turns up, making a lot of noise or even calling my boss or whatever. But to get tangible evidence, you say yes, he paid them money.*

Q: *Do you know that whoever was organizing them has direct connections to your superiors, at least?*

A: *No, my Lords, not direct connection. I won't call it direct connection, My Lords.*

Q: *Or had connection to level above you.*

A: *What they were doing according to me is that, once we arrest, they couldn't call me direct, here in Kisumu. But there is a way of circumventing I don't know who and then they get my boss. So it would come from my boss when I report, because we kept on talking many times in the cause of the day. In the morning hours or even in the evening briefs. I will inform him I have all these people arrested, I have detained them in this Police station, may be after a day he will call me and say, you remember those people you arrested, give them unconditional release and I will comply and people will go.*

Q: *The issue I am putting to you obviously these people you were arresting have direct connections to persons who are higher up, who are able to talk or find their way to the Commissioner obviously, even if they were not financing. At least you can say they had some influential connections somewhere.*

A: *Yes, My Lord, I can say that."*

This symbiotic relationship between the politicians and their supporters creates a real and genuine fear among those who enforce the law. One Provincial Commissioner testified that he feared to order the arrest of senior politicians involved in the incitement of violence because his job would be at stake. The PC echoed the words of his police counterpart, Francis Gichuki, made 10 years ago before the Akiwumi Commission:

> *"My Lords, in a political Government, we have to be cautious. This is a political Government."*[443]

There must be an end to this cowardice and pious sense of self preservation in public service if impunity will be eradicated in this country!

The Judicial Function

In order to seek further clarification on and find solutions to the gridlock in the criminal justice system, we also invited the Registrar of the High court to shed some light on the measures the Judiciary has taken to address the situation. The Registrar was unable to testify in person but forwarded a statement dated 28th August, 2008.

For a long time now, the judiciary has been vilified for failure to play its pivotal role in the democratic governance of this country. Of the three arms of Government, it is the least understood and has therefore acquired the notoriety of losing the confidence and trust of those it must serve because of the perception that it is not independent as an institution even if some individual

[443] Akiwumi Report, Pg. 284, para 523.

members of it were. That is why, for example, the leadership and members of the ODM refused to submit to the jurisdiction of the courts to resolve the dispute that arose after the 2007 general elections in relation to the Presidential results. The institution has also been accused of delays in the administration of justice and for non-transparency in its functions.

In response to those accusations the Registrar stated that there has been major reform initiatives made by the judiciary so far, and they continue to be made. Some interventions for speedy delivery of justice effected so far include: recruitment of more magistrates and expansion of the capacity to appoint more Judges, establishment of Court Users Committees where all actors in the criminal justice system meet and resolve operational difficulties; customer care desks to address public concerns; mobile courts for remote areas; construction of new courts around the country; annual open day sessions for interaction with consumers of justice; publicizing judicial service charter for education of the public; introduction of continuous legal education for judicial officers through the Judicial Training Institute; comprehensive review and simplification of Rules of Procedure, both civil and criminal; and the establishment of the Expeditious Disposal of Cases Committee which has devised modalities for reducing backlog of cases.

In our view, while the administrative reform initiatives so far undertaken are commendable, nothing short of comprehensive constitutional reforms will restore the desired confidence and trust in the judiciary. The non-contentious provisions in the draft new constitution provided a new hope in the institution, but there is no certainty as to when it will become law. Proposals for the enactment of the Judicial Service Bill which would guarantee financial and operational independence; appointment, discipline and removal of judicial officers, independence and autonomy of the Judicial service Commission, amongst other provisions, are yet to be considered by Parliament.

In the context of the post-election violence the police arrested numerous suspected offenders in more than 13,000 incidents and 1337 cases were taken to court. The Registrar was unable to confirm the progress in the hearing and adjudication of those cases. Many more are pending under investigations; others are pending arrest of known persons. The influx of post-election violence cases, in our view, poses a big challenge to the judiciary considering the special nature of those cases, and desirability of expeditious disposal.

Amnesty

Meaning

We undertook in our various briefs to address the so-called "amnesty debate" in our final report. It is "so-called" because both sides of the debate have varying definitions for "amnesty" and consequently how it can be applied in the context of post-election violence. The difficulty is not misplaced as indeed controversy has dogged the term since the Greeks gave it to the world from "*amnestia*", the same root word for "amnesia". In common parlance, amnesty is the act of an authority (e.g. parliament or government) by which the State restores those who may have been guilty of an offence against it to the positions of innocent persons. It includes more than pardon, in as much as it obliterates all legal remembrance of the offence.[444] The dictionary meaning is *"a general pardon, especially for political offences."*[445]

Amnesty may be extended when the authority decides that bringing citizens into compliance with the law is more important than punishing them for past offences. Some advantages cited for using amnesty include avoiding expensive prosecutions, especially when massive numbers of violators are involved; prompting violators to come forward who might otherwise have eluded authorities; and promoting reconciliation between offenders and society. The application of amnesty nevertheless raises issues of justice. It implies impunity,

[444] Research under TOR 2 (a) (iii)
[445] The Concise Oxford Dictionary.

that people can commit atrocities and say that they will only stop it if they are given amnesty.[446]

The debate

Simply put, the proponents of amnesty contend, and passionately so, that the thousands of youth who were arrested and detained in the post-election violence were exercising their democratic right to demonstrate against a stolen election and therefore committed no offence. It was the reaction of the police to the peaceful demonstrators which caused violence. Indeed, if it was not for the youth, there would be no coalition Government. The release of arrested youth has also been tied up with resettlement of IDPs as a *quid pro quo*. We take it from the Secretary General of ODM party, Prof. Anyang' Nyong'o [447] thus:

> *"The youth who were arrested should be set free as they were exercising their democratic right to express themselves when police procured violence."*

On the other hand, the opponents contend, equally passionately, that human rights violations and crimes of unprecedented gravity with serious ramifications for the future of this country were committed and the perpetrators at all levels must face the full force of the law. Amnesty would encourage impunity.

The numbers

Intertwined with the issue of amnesty in principle, was the issue of the number of "youths" arrested and detained in police custody and once again the parties on both sides of the debate were unhelpful. In our effort to establish the exact number and identities of those who were arrested and were still in police custody

[446] Submissions from Civil Society and research under TOR 2 (a)(iii)

[447] CW 138

we invited several witnesses to shed some light on it. One was Prof. Nyong'o who stated:

> **"Q:***.....you made an allegation that there are youths still being held in police custody, first and foremost who are these youths, how many are they and would you know where they are being held in police custody?*
>
> **Anyang' Nyong'o:** *Mr. Chairman, the Attorney General has details on these youths and indeed I do believe that he has made presentations to the Commission, but Mr. Chairman if you want more details we are quite prepared to do so but I do know that the Attorney General has made presentations to this Commission and although some of his figures can be doubted. But I think that is for further examination by the Commission to prove how many youths are still in custody.*
>
> **Chairman:** *Unfortunately, the Attorney General did not give us anything; he says the police have the information. So if you have the information we would like to have it.*
>
> **Anyang' Nyong'o:** *Okay, Chairman, I could do so; not now, but I know that the evidence exists.*
>
> **Chairman:** *That's alright. If you undertake to produce it, we will be happy to have it. Thank you."*

Despite the promise to shore up the claim, no further information was received by the time we made our report. The other example was the Chairman of the Luo Council of Elders, Ker Riaga Ogallo, who responded thus:

> "**Protas:** *Yes. On the issue of the Luo Youth who have been arrested as a consequence of the violence that erupted in Kisumu, I was wondering if the Luo Council of Elders or any other institution of the Luo community that you are aware of, if there are any keeping of any records kept somewhere, either with your organization the Luo Council of Elders or any other Luo or Kisumu-based community organization that you know of that have kept records, the number and the names, if possible of all the youth who were arrested at that time.*
>
> **Riaga Ogallo:** *The, I think even Police Commissioner, issue those who were arrested in Kisumu; they issue them. I think if you were here and yourself if you were able to listen to radios and papers, they issue them – not their name, but the number. Though the number was small but those who were arrested were bigger than the number which was given out by the police spokesman. And those who were killed were also, the number police gave out were small, but those who even Kisumu Mortuary were full of those people who were killed by – they were over 46 people and they say 15 people.*

Protas: *Yes, that's the reason why I was hoping that may be sources other than police and I was hoping that may be the Luo Council of Elders or any other community-based organization could have kept some non-official records of these arrests and the reason is because you allude to, you obviously support their release and you must be aware of the debate that surrounds this issue whereby some in government and elsewhere argue as you do that these youths should be left free and others oppose this. And a related issue on that debate concerns the number of these youths arrested. Some people put the number figure to thousands and even more, and I think the number that police – the police have given has been strongly disputed by some people including some in the government.*

So there is obviously a problem with number, with number of youths who were arrested and I was hoping that may be we could have in addition to figures that have been provided to us by police, I was hoping that you may be aware of some other sources where we could get other figures.

Riaga Ogallo: *You know this thing when it happened, police were all over Nyanza. In every district, they were there and demonstrations were being carried out all over. IN my area, or in Oyugis, in front of my home they killed one boy when I am seeing like this one. I am seeing like this and then they shot at him and in the town of Oyugis alone over 100 boys were gunned down and those who were arrested, because police cells were full, with those people who were arrested. We could not know the number, but what we know, they were arrested."*

The Ker continued:

"**Chairman:** *… and that is why we are talking about the amnesty debate, because it is an important aspect of our investigations which we must address; are there youths who were arrested, If so, how many; are there youths who were charged in courts, if so, how many; are there still youths who were detained in some place and nobody knows how many they are; are there some who were killed; are there some who disappeared? And we would suspect that your Council would have information of that nature this is why I revert to the question my brother asked. You don't have that information as a Council?*

Riaga Ogallo: *No. We don't have the number but the information we're still having there are some youths who participated in this election violence who have not been seen in their respective areas. Though some were killed and those who were killed, their families took them for burial, so they knew that so-and-so is killed and those who disappeared they were there they were arrested until now they have not been captured where they are.*

Chairman: *that is the question.*

Riaga Ogallo: *We're still also asking that question.*

Chairman: *That is the question, because if my family was affected assuming that I was in Luo Nyanza and my family was affected my son was – went out that day we suspect he got involved, we never found him in the mortuary, he was nowhere in any hospital, we have never found him for the last six months I would come to the Council of Elders to assist me if I was helpless. Are you saying no one has ever come to complaint about any missing person?*

Riaga Ogallo: *No, no, no, sir.*

Chairman: *Any* missing young person?

Riaga Ogallo: *Your honour sir, no they have come. When we also go to the police station they told us that we don't have them you know where they are. That is the answer we're getting from police.*

Chairman: *Yes, that is so but you have the list of those who are missing?*

Riaga Ogallo: *No the list we have not compiled yet.*

Chairman: *Is it possible to compile that list so that we can address that issue instead of hearing there are young people who are missing? Somebody has that list or can compile one and nobody is giving it to anybody that we'll never find any solution unless we address that issue.*

Riaga Ogallo: *No but this time at the moment, I cannot commit that one because I don't have funds for going round because it is a wide area. When I commit myself I will avail the list. Now that, I cannot do that one, you honour."*

As for the definition of "youth" Ker Ogallo said *"When I refer to youths; these young people who still have – hot tempered people …these young people from 30 coming to 18, they are high tempered people. To control them is becoming a problem when something comes abruptly."* It did not matter whether they were in school, work, business or just idle.

The flipside was the police version and the Commissioner of Police categorically denied the accusation that the police had arrested any youths, who were still in their custody as at the time he testified on 9th July, 2008. The police, he said, had received complaints on 13,416 cases which they were investigating. They had taken all the people arrested to court in accordance with the law and their

release was no longer in the hands of the police. When the Attorney General testified before the Commission on 21st August, 2008, he alluded to an audit of all cases before the courts but did not disclose any figures as the matter was before the Cabinet. He said in part:

> *"I may here mention that I received very many complaints that there are some people who are being charged or who are in custody and there is no sufficient evidence. Some have not even been charged and so on although they are in remand. Actually very many complaints from all over the country. So I set up in – towards the end of June, beginning of July, a joint team of two senior officers from my office and from the police to carry out an audit of those cases which are before the court and look at the files and to see where there is evidence, to recommend continuation and where these is no evidence, termination.*
>
> *But purely from the point of view of evidence or no evidence. So that this allegation that there are some people who are being charged, who were charged, there is no evidence, and the State is deliberately delaying the hearing of those cases for a long time so as to delay those people in custody is not there. So there is a team now which is carrying out what I would call an audit of the cases which are before the court."*

In sum, there was no evidence before us which we could evaluate to determine the number of youths, if any, arrested and still being detained by police.

The law

It would be against the Constitution to arrest and hold any person suspected of committing a crime for more than 24 hours or 14 days if the offence is punishable by death.[448] The amnesty debate would therefore be misplaced if it makes reference to persons arrested and detained beyond such periods since they would not be lawfully held. There is further protection of the law under **section 77** of the Constitution. The power to prosecute any offence or not also

[448] Section 72 (3) (b) of the Constitution.

lies exclusively in the office of the Attorney General under **section 26** of the Constitution as discussed earlier. When the amnesty debate was put to him, the Hon. the Attorney General stated:

> "**Pascal Kambale:** *There is this issue about the so called amnesty debate. And what we understand is that this is being discussed within the Cabinet and you obviously are a member of the government. What can you tell us about where this debate is now?*
>
> **Attorney General:** *I cannot of course mention anything that is discussed in cabinet. I have prescribed to a constitutional oath of secrecy. In fact that's a top secret you see, so I cannot even mention what is there. But what I can tell you is the position of the Attorney General now is that all cases where there is evidence must be prosecuted to the logical end, and all cases where there is no sufficient evidence should be terminated. That is the position of the Attorney General. There are some people who will say that oh no everything should be. The debate is going on, it is in the public domain, I am not part of that debate."*

The law also provides in **section 27** of the Constitution that the President has the prerogative of mercy on various categories of persons listed under that section. He also has the liberty to consult with an advisory committee set up under the same constitution in **sections 28** and **29**.

Apart from relevant legal provisions in municipal law, we are also guided by International Criminal Law which does not recognise amnesty for gross human rights violators.

Conclusion

From our own analysis of the amnesty debate we think it has been unduly politicized on both sides. It is imperative to guard against further encouragement of the culture of impunity by granting blanket amnesty to all and sundry in the post-election mayhem. There were obvious and serious criminal offences committed under the laws of this country as well as breaches of human rights under international law. The victims of the violence and international

human rights defenders would be devastated if such amnesty was granted. It is incumbent on the Attorney General therefore to apply the law firmly and equitably for as long as it takes to bring to justice those persons who were culpable.

Having said that, we realize, and we have stated it above, that there are special challenges in terms of investigations and prosecution of post-election violence offences. It may be necessary to consider an offer of amnesty to some minor offenders in exchange for truthful confession and assistance in the arrest and prosecution of the planners, organizers, financiers and, in the case of security agencies, the perpetrators of the post-election violence. Other creative initiatives must also be devised to aid in investigations and prosecution of the offenders. Most importantly the provisions of the new Witness Protection Act 2008 should be fully utilized in aid of PEV related investigations and prosecutions.

Findings

We find in our assessment that the chain of criminal justice system is generally weak and the weakest link is the investigative function. The weakness in the system impacts on the rule of law and therefore promotes impunity. Urgent corrective measures must therefore be taken.

PART V

Recommendations

CHAPTER THIRTEEN

Recommendations

This chapter contains the Commission's recommendations that relate to the State Security Agencies and to issues of impunity. The discussion, findings and conclusions that the recommendations are based upon are fully laid out in the preceding chapters.

In accordance with the established Terms of Reference regarding recommendations for measures to eradicate impunity, legal and administrative measures and following an investigation into the actions and omissions of the State Security Agencies, the Commission makes the recommends appearing below. These recommendations should be implemented under the auspices of the Panel of Eminent African Personalities acting in consultation with the President and the Prime Minister of Kenya, with the full co-operation of Parliament, the Judiciary and the office of the Attorney General as more specifically described below.

1. A special tribunal, to be known as the Special Tribunal for Kenya be set up as a court that will sit within the territorial boundaries of the Republic of Kenya and seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya. The Special Tribunal shall achieve this through the investigation, prosecution and adjudication of such crimes.

2. The Special Tribunal shall apply Kenyan law and also the International Crimes Bill, once this is enacted, and shall have Kenyan and international judges, as well as Kenyan and international staff to be appointed as provided hereunder.

3. In order to fully give effect to the establishment of the Special Tribunal, an agreement for its establishment shall be signed by representatives of the parties to the Agreement on National Accord and Reconciliation within 60 days of the presentation of the Report of the Commission of Inquiry into the Post-Election Violence to the Panel of Eminent African Personalities, or the Panel's representative. A statute (to be known as "the Statute for the Special Tribunal") shall be enacted into law and come into force within a further 45 days after the signing of the agreement.

4. The date of commencement of the functioning of the Special Tribunal shall be determined by the President, in consultation with the Prime Minister, the Chief Justice, the Minister for Justice, National Cohesion and Constitutional Affairs and the Attorney-General, within 30 days after the giving of Presidential Assent to the Bill enacting the Statute.

5. If either an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted, or the Special Tribunal fails to commence functioning as contemplated above, or having commenced operating its purposes are subverted, a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court. The Special Prosecutor shall be requested to analyze the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons.

6. The Bill establishing the Special Tribunal shall ensure that the Special Tribunal is insulated against objections on constitutionality and to that end, it shall be anchored in the Constitution of Kenya.

7. The Bill establishing the Special Tribunal shall provide that the Special Tribunal shall consist of four organs: the Chambers (including an Appeals Chamber) and the Prosecutor, which shall be independent of each other, the Registry, and the Defence Office.

8. The Bill establishing the Tribunal shall provide that Chambers shall be composed of 6 independent judges, three in the Trial Chamber, and three in the Appeals Chamber. The Presiding Judge of each Chamber shall be a Kenyan while the other two judges in each chamber shall be non-Kenyan and drawn from member states of the Commonwealth.

9. The Bill establishing the Special Tribunal shall provide for the following procedure for the appointment of the judges for each chamber and the Prosecutor of the Special Tribunal:

    i. The President shall appoint the Chair of the Trial Chamber in consultation with the Prime Minister, both acting on the advice of the Chief Justice, from among persons qualified to be appointed judge of the High Court of Kenya.
    ii. The Panel of Eminent African Personalities shall identify the other two members who will be appointed by the President, in consultation with the Prime Minister, from among persons qualified to serve as judge of a superior court of record in any part of the Commonwealth.
    iii. The same procedure shall be applied for the appointment of the Chair and members of the Appeals Chamber.
    iv. The Prosecutor of the Tribunal shall be appointed by the President in consultation with the Prime Minister from among persons qualified to serve as judge in a superior court of record in any part of the Commonwealth, from a list provided by the Panel of Eminent African Personalities.

10. The Bill establishing the Special Tribunal shall further provide for:

    i. The jurisdiction of the Tribunal which shall include the jurisdiction to adjudicate over the criminal cases brought against persons bearing greatest responsibility for serious crimes, particularly crimes against humanity, related to the 2007 post election violence.

    ii. The right of appeal from the decisions of the Trial Chamber to the Appeals Chamber of the Special Tribunal.

    iii. The ouster of the Jurisdiction of ordinary courts from the in relation to the proceedings of the Special Tribunal.

12. The Bill establishing the Tribunal shall provide for sufficient authority and independence to the Special Tribunal to conduct investigations and shall in particular provide that:

- The Special Tribunal shall have authority to recruit and control its own staff, including such staff, working under the Prosecutor, as will be necessary to conduct prosecutions;

- The head of investigations and not less than three other members of the investigation team shall be non-Kenyan so as to provide an independent approach to the investigation function of the Tribunal.

- The investigations team shall report to and work under the general direction of the Prosecutor.

13. The Special Tribunal shall take custody of all investigative material and witness statements and testimony collected and recorded by this Commission.

Other Recommendations

The Commission makes the following further recommendations:

1. The International Crimes Bill 2008 be fast-tracked for enactment by Parliament to facilitate investigation and prosecution of crimes against humanity.
2. The Witness Protection Act 2008 be fully utilized in the protection of all witnesses who will need such protection in the course of investigation, prosecution and adjudication of PEV cases.

3. The Freedom of Information Bill be enacted forthwith to enable state and non-state actors to have full access to information which may lead to arrest, detention and prosecution of persons responsible for gross violations.

4. All persons holding public office and public servants charged with criminal offences related to post-election violence be suspended from duty until the matter is fully adjudicated upon.

5. Upon conviction of any person charged with post-election violence offences of any nature, such persons shall be barred from holding any public office or contesting any electoral position.

In relation to overall operational and service delivery issues emanating from the 2007 elections period in Kenya.

The development and application of the National Security Policy, as articulated in the Kenya National Dialogue and Reconciliation Agenda Item 4 and the First Medium Term Plan (2008-2012), be finalised as a matter of urgency, and

The Conflict and Disaster Early Warning and Response systems, articulated in the First Medium Term Plan (2008-2012), are developed and implemented as a matter of priority, and

The State Security Agencies develop, under the oversight of the NSAC, joint operational preparedness arrangements (to be conducted at least once every two years) including desk top scenarios and full operational exercises to assist in their readiness for dealing with high level security and emergency situations, and

The joint security operational preparedness arrangements comprise all key participants including, in the case of elections, the ECK, the Ministry of Health, and the Ministry of State for Special Programmes (Disaster Management), and

The NSAC take a greater leadership role in determining security priorities, focusing on preventive strategies and actions, and providing clear direction to State Security Agencies, and

The NSAC develop and implement security review arrangements to ensure that agencies' performance in security events such as the PEV are assessed, lessons learned and appropriate improvements and modifications to standard operating procedures are completed, and

The NSAC immediately conduct a full review of the functionality of the committees that make up the KSIM to determine their relative performance during the Post Election Violence, and

Where improvements are identified they are implemented immediately, and

The results of the review are made public within 14 days of completion, and

Immediate steps are taken to put in place independent oversight arrangements of the operation of the NSIS, and

The NSIS shall be required to report annually to parliament and the annual report to be made public.

Specific Recommendations for the Police

1. **A comprehensive reform of the Kenya Police Service and Administration Police be undertaken. This reform shall be initiated immediately and shall:**

    a. Involve a complete audit of the current police management, structures, policies, practices and procedures.
    b. Include extensive consultation with a wide variety of national and international stakeholders.
    c. Undertake extensive and comprehensive public consultations
    d. Include an examination and consideration of applicable international law and best practices
    e. Include a thorough examination, review and revision of all tactics, weapons and 'Use of Force' employed by the Kenyan Police.
    f. Explore international capacity building possibilities for policing in general with a specific focus on criminal investigations, community based policing and information collection analysis and dissemination.
    g. Include the creation of a modern Code of Conduct
    h. Include a complete revision of the Police Act
    i. Incorporate a review of issues relating to the ethnic and tribal balance and deployment within the Kenya Police Service.
    j. Include an examination of the structures of the police including the Senior Executive
    k. Include the establishment of a Police Services Commission for the Kenya Police.
    l. Investigate and make recommendations relating to any other areas of policing and law enforcement that are, in the opinion of the Police Reform Group (PRG), relevant to the improvement of policing services in Kenya.

2. **An 'Independent Police Conduct Authority' is established with the legislative powers and authority to investigate police conduct and provide civilian oversight. Establishment will be undertaken in the following way:**

   a. Enactment of an Independent Police Conduct Authority Act
   b. Involve a complete review of the current police complaints and disciplinary processes within the Kenya Police Service.
   c. Include an examination and consideration of applicable international law and best practices
   d. Report directly to parliament through the Minister responsible
   e. Work under the authority of its own Act and have sufficient powers to properly investigate all police conduct issues.
   f. The 'Authority' is to be a person qualified to be a judge of the High Court Kenya
   g. The 'Authority' is to have the power to investigate public complaints against police and 'own motion' conduct issues.
   h. Legislation will require that some, more serious policing actions 'must' be reported to the Authority i.e. allegations of corruption, deaths in custody, serious injury and police related shootings.
   i. Have the legislative power to make recommendations for change to policing policy, practices and procedures.
   j. The 'Authority' is to have retrospective powers to deal with historical serious misconduct.

3. **The Administration Police is integrated into the Kenya Police Service creating a single police entity. The integration shall:**

   a. Commence with the command, responsibility and accountability for every aspect of the Administration Police transferring to the Commissioner of Police with immediate effect.
   b. Effectively uncouple policing from the Provincial Administration structure.

c. Enable a combined police organ to function in an unencumbered fashion exercising constabulary independence in performing its functions.
d. Ensure that all police services adopt an operational role independent of executive influence.
e. Ensure that a new and contemporary police entity is led by professional police officers.

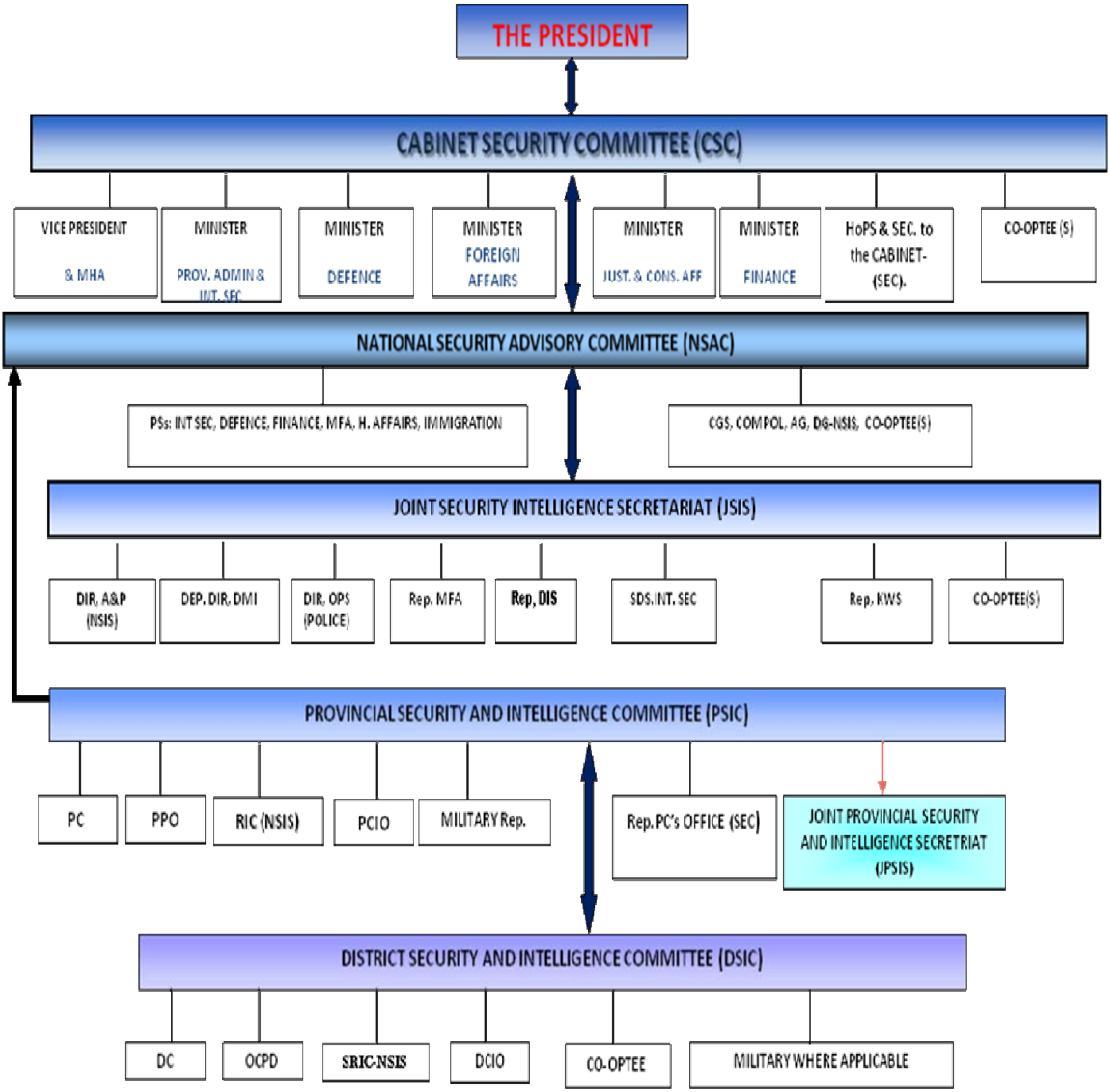
4. All of the reforms articulated in the recommendations immediately above relating to the Police be initiated immediately and shall:

a. Be undertaken and completed by a panel of policing experts (Policing Reform Group - PRG) who will work completely independent of but alongside the Kenya Police Service and Administration Police.
b. Be comprised of a team of four experts including Kenyan and international specialists in transformational change, strategic auditing and policing.
c. Source the international experts from likeminded common law countries.
d. Have the PRG established and begin their work immediately with a mandated duration of 6 months.
e. Have the PRG report directly to the Minister of Justice
f. Furnish progress reports to the Government of Kenya and the African Union, regarding the conduct and findings of the PRG and to provide a final report within two (2) months of the end of the mandated period, unless otherwise agreed.
g. Ensure that the PRG identify, early in the process, appropriate 'milestones' or 'check points', at which time meaningful interim reports may also be generated.

h. Provide that the PRG be able to make interim and immediate recommendations for reform and change at any stage during the six months process.

APPENDIXES

Appendix "A"


THE PRESIDENT
CABINET SECURITY COMMITTEE (CSC)
VICE PRESIDENT & MHA
MINISTER PROV. ADMIN & INT. SEC
MINISTER DEFENCE
MINISTER FOREIGN AFFAIRS
MINISTER JUST. & CONS. AFF
MINISTER FINANCE
HoPS & SEC. to the CABINET-(SEC).
CO-OPTEE (S)
NATIONAL SECURITY ADVISORY COMMITTEE (NSAC)
PSs: INT SEC, DEFENCE, FINANCE, MFA, H. AFFAIRS, IMMIGRATION
CGS, COMPOL, AG, DG-NSIS, CO-OPTEE(S)
JOINT SECURITY INTELLIGENCE SECRETARIAT (JSIS)
DIR, A&P (NSIS)
DEP. DIR. DMI
DIR, OPS (POLICE)
Rep. MFA
Rep, DIS
SDS. INT. SEC
Rep, KWS
CO-OPTEE(S)
PROVINCIAL SECURITY AND INTELLIGENCE COMMITTEE (PSIC)
PC
PPO
RIC (NSIS)
PCIO
MILITARY Rep.
Rep. PC's OFFICE (SEC)
JOINT PROVINCIAL SECURITY AND INTELLIGENCE SECRETRIAT (JPSIS)
DISTRICT SECURITY AND INTELLIGENCE COMMITTEE (DSIC)
DC
OCPD
SRIC-NSIS
DCIO
CO-OPTEE
MILITARY WHERE APPLICABLE

Appendix "B"

Roles and Functions of SSAs

In examining the various aspects of how SSAs performed during the PEV period the Commission found it necessary to familiarise itself with the roles and accountabilities of the key agencies involved within the overall security structure.

NSAC

Officials at the highest level participate within the NSAC. Chaired by the Head of the Public Service and Secretary to the Cabinet and meeting monthly or on an ad hoc basis its role includes:

- Monitoring and advising the Cabinet Security Committee and the President
- Keeping threats to security under constant review
- Designing and preparing a national security strategy and contingency plans
- Guiding and directing PSICs and DSICs in dealing with issues posing threats to law and order
- Reviewing the effectiveness of security agencies in consultation with existing machinery

JSIS

Chaired by Director A&P (NSIS), meets once a month and is responsible for:

- Collating and deliberating on operational reports from security agencies and established operational and communication centers.
- Preparing and circulating reports and agenda for NSAC meetings.

- Following up implementation of NSAC decisions.

PSIC

Chaired by the Provincial Commissioner and meets monthly or on ad hoc basis and is responsible for

- Coordinating and directing security intelligence matters, including efforts against terrorism and serious crimes.
- Reviewing the internal security situation in the Province
- Directing and initiating actions on issues highlighted in DSIC minutes

DSIC

Chaired by the District Commissioner, meets monthly or on ad hoc basis and is responsible for:

- Reviewing the internal security situation in the district.
- Liaising with relevant departments on issues of security and intelligence interest

NSIS

The Service's mandate is spelt out in the NSIS Act as follows:

Collect, analyze and disseminate information for the purposes of:

- Detecting and identifying any threat or potential threat to the security of Kenya;
- Advising the President and the Government of any threat or potential threat to the security of Kenya;
- Taking steps to protect the national security interests of Kenya whether political, military or economic.

Gather Ministerial Intelligence at the request of any Government Ministry or Department, evaluate and transmit as appropriate

Coordinate in cooperation with other Government departments a steady flow of intelligence

Carry out security vetting

Make recommendations to the Government in connection with:-

- Policies concerning security intelligence
- Security intelligence priorities
- Security measures in Government Ministries, Departments or Agencies

Perform such other functions as may be determined by the President to be in the national interest

Military

In relation to the situation around the PEV the Military provides support to the civil authority when called upon to do so.

Section 3 (2) of the Armed Forces Act (Chapter 199 of the Laws of Kenya) provides: -

> *"The Kenya Army, The Kenya Air force and the Kenya Navy are charged with the defence of the Republic* ***and the support of the civil power in the maintenance of order****, and with such other duties as may from time to time be assigned to them by the Minister after consultation with the Defence Council."*

The Armed Forces Act therefore allows for military aid to civil authority limited to the maintenance of order. However it also provides that other duties may be assigned by the Minister after consultation with the Defence Council.

Police

This applies to the regular police and special units such as the General Service Unit (GSU) and Anti stock theft Unit (ASTU).

Section 14(1) of the Police Act sets out the functions of the Kenya Police as: -

- Maintenance of Law and Order
- The preservation of peace
- The protection of life and property
- The prevention and detection of crime
- The apprehension of offenders
- The enforcement of all laws and regulations with which it is charged.

The duties of a police officer are set out under section 15 of the Police Act and they include:-

- Obedience of all lawful orders from his superiors.
- Obedience of all orders and warrants issued to him.
- Collect and communicate intelligence affecting Law and Order
- Take all steps necessary to prevent the commission of offences and public nuisance.
- Detect offenders and bring them to justice
- To apprehend all persons who he is legally authorised to apprehend and for whose apprehension sufficient ground exists.

Administration Police

The Administration Police Force is established under the provisions of section 3 the Administration Police Act, Chapter 85 of the Laws of Kenya under the command of the Commandant appointed under the provisions of that Act.

The Administration Police Act was enacted to commence on 20th June 1958. Various sections of the Act have since been amended over the years and a revised edition was published in 1986. The latest amendments to some of the sections were done in 2000.

Powers and Duties (Part III 8)

- Every officer shall –
  When called upon by any chief or sub-chief assist him in the exercise of his lawful duties;

  Obey and execute promptly all orders and warrants lawfully issued to him by any competent authority;

  Preserve the public peace, prevent the commission of offences and apprehend all persons in respect of whom he holds a valid warrant of arrest;

  Undergo such training as may be ordered by the District Commissioner;

  Act as messenger in any matter connected with the administration or the public service.

Other Enforcement Agencies

Under the provisions of Section 48 of the Kenya Police Act, the Commissioner of Police is empowered to co-opt members into the police force, in the capacity of special police officers. The section provides: -

> *"The Commissioner may at any time, if it appears to him to be expedient in the interests of public order and safety so to do, appoint persons to be special police officers for such period and within such area as he may consider necessary, and every such officer shall during the period of his service as a special police officer be deemed to be a police officer."*

Under those provisions the various co-opted officers form part of the human resource available to the Kenyan Police in execution of its mandate. In practice, members of other disciplined forces and other government agencies can and have in the past been co-opted into the police force under the provisions of the Kenya Police Act including: -

- Kenya Prisons Service Officers
- Kenya Wildlife Service Personnel
- Kenya Forests Guards personnel
- National Youth Service

This aspect is important in that the time when most of these officers are co-opted as police officers during the general elections. Many are simply allocated duties at polling stations, of which there was a significant increase in the 2007 elections, whilst others (such as prison officers) can be deployed with firearms and occupy positions usually the preserve of police officers.[449]

[449] CW 34, Sup Willy Lugusa, OCPD Naivasha 29 July 2008

Appendix "C"

Possible 2007 Presidential Election Outcomes and Consequences

Scenario 1: A Kibaki win

A combined Opposition likely to dispute the results, leading to;

- Resorting to legal redress and possible attempts to form a parallel government,
- Incitement of their supporters to violence especially in major towns such as Nairobi, Mombasa, Kisumu, Eldoret and Kakamega and other urban areas where criminal elements could capitalize on the shaky environment to perpetuate crime.
- Spontaneous explosion/intensity of ethnic clashes mostly in traditional hotspot areas and heightened activities by criminal gangs like Mungiki, Taliban, Kamjesh, Chinkororo, SLDF and RRC.

Scenario 2: A Raila win

- Unlikely to generate the kind of violence associated with an ODM loss, more so if PNU concedes defeat.
- Overzealous ODM supporters may engage in celebration related violence in Nairobi, Luo Nyanza and in other major urban centers
- Blame game and acrimony within PNU and its affiliate parties, leading to possible disintegration of the party
- Kibaki diehard supporters reject result, putting the President under siege not to hand over power. This may lead to civil strife.

Appendix "D"

Case Study #1[450]

The witness is a 49 year old farmer and mother of 12 children of whom seven remain alive. She lives in Kisumu. This study demonstrates the desperate personal situation that some victims have found themselves in as a result of the PEV. There also seems little follow-up or contact with the victim on the part of authorities. Identifying material has been removed from the original statement. She told the Commission that,

"I have lived there throughout my married life. My neighbours were Luos and Kisiis, the majority of them being the Luos. Before the violence, we used to live well with our Kisii neighbours. We were good friends. Things changed during the voting. The Luos would say that all Kisiis will leave our Kisumu. On 29 December 2007, Luos were screaming and heading to town.

On 10 January, 2008, at around 8 am in the morning, my husband and I went to our shamba, in Nyamthoi. I wanted to get some vegetables for the family and my husband had accompanied me there. At around 1 pm, my son came running to where we were. I asked her what he wanted. He told me that our house was on fire. My husband boarded his bicycle and left to check. My son and I walked home on foot. On arriving at my house, I found that everything had been burnt but the house was still on fire. The fire began at the bedroom area. I found people trying to put the fire out using water. The fire was then at the roof and had started burning the iron sheet. I do not know who burnt my house and why.

I do not think is had anything to do with politics because none of my children were vying for the civic seats. I did not report to the police then because people were demonstrating in town and the police were shooting regardless whether or not you

[450] Commission Witness 100 heard by the Commission "in camera" 12 August 2008

were on the wrong. The roads toward town were impassable. I however was able to report 7 June 2008. They police officers gave me an OB number. I also registered the number of things burnt in my house. The police have done nothing from the date when I reported till now.

> *On 15 January, 2008, I went to the same shamba, but this time I was alone. I went there to get vegetables for the family. It was about 11 am in the morning. As soon as I started plucking the vegetables, on turning I saw 5 men coming towards me. They were young men, dressed in trousers and vests. The conspicuous thing about them is that they had 'rastas-dreadlocks.' They said to me 'Ooh wewe ndio unasikia mzuri, unachuna mboga na sisi tunasikia mbaya…sasa tumepata- oh you are the person feeling good…you are still plucking vegetables when we are feeling bad..now we have found you. They were speaking in Kiswahili. I was not able to tell their tribes because they were all speaking in Kiswahili and they all had dreadlocks.*

One of the men held me on the waist, lifted me and threw me on the ground. Another man tore my panties and they started raping. One held my mouth so that I do not scream. I was trying to keep my legs together but one man held one of my legs while another held my other leg and kept my legs apart. There were no houses nearby. They raped me in turns. All the men raped me. Once they were done with me, they headed to a bush that on the way to Nyalenda. The bushes are near a river, Nyamasaria.

I was not even able to pluck the vegetables that I had gone to cut. I just picked my basket and headed home. I was walking slowly. I was under a lot of pain; my hips were paining very much. I got to my house at around 4 pm. I told my husband, who was at home by then, of what had happened to me. I did not go to the hospital then because as I had started, the roads were impassable. I still haven't gone to the hospital to seek medical advice. I fear that since I have taken long before going to the hospital, the people at the hospital may never understand my predicament. I also did not report this to the police.

I still live in my burnt house and I fear that should it be very windy, the wind is going to blow off the roof. I have not been able to repair my house and when it rain, water get into my house.

My husband passed on 23 February 2008 at his place of work where he had been employed as a watchman. He was employed at the Wandiege Primary School. On the night of 23 February, 2008, my husband was attacked by unknown people, killed and placed in a classroom. His body was picked by the police officers from Kondele Police station on 24 February 2008. They still have not done any investigation to ascertain who killed my husband.

I have been affected by post election violence. My life has changed since I was raped, my house was burnt and the death of my husband. I do not have a livelihood. My husband is dead and there is no income. I do not even know who will rebuild my house. I rely on people to help me. The clothes that my children wear, those that I wear, beddings have all come from people. Food has been a problem. I have to sell some vegetables to get some flour."

Appendix "E"

Case Study #2

This male witness is a 70 year old who gave evidence of multiple murderers killing seven members of his family, being evicted from his home, being currently an IDP and that at least one of the original perpetrators is now occupying his land.[451]

He reported a full account to the Police but there has only been partial follow-up. It appears that in spite of compelling evidence only one perpetrator has been charged with murder. Identifying material has been removed from the original statement.

The witnesses recounted that,

"During the referendum campaigns of 2005, I was asked by my Kalenjin neighbours, where I would go if the Orange/No vote carried the day, because Majimbo would be implemented and I am not of their jimbo. I also asked them where they would go, because they are Keiyo and we were in Uasin Gishu.

A councillor, while campaigning for the No vote, used to state that whether Banana/yes vote or Orange/No vote won, all Kikuyus must vacate the area.

Having lived in the area since 1970, the local community used to invite me to their get-togethers. Previously, I was a senior headman. From 1982, I was a village elder of a sub-location, where a majority of the residents are Kalenjins followed by Kikuyus and Kisiis.

[451] Commission Witness 86 heard by the Commission "in camera" 7 August 2008

During the 2007 campaigns, the Kalenjin politicians used to make utterances that, "….you 'kimirio' or 'bunyot' (both meaning enemy) must leave the area whether Kibaki wins or loses in the General elections."

On the 27th of December, 2007, I and my family members woke up very early to go and vote. The Kalenjin PNU agents had been denied entry into the polling station and were not even allowed to vote, though the ODM agents were allowed into the polling stations.

At about 6 am, the Kalenjins started voting and this was on until about 9 p.m. The Kalenjins were allowed to vote up to six times. Vote counting then continued throughout the evening, until the morning of 28th December, 2007. Tension started building up from the 28th and the 29th, and when a certain Councillor won, it exacerbated.

On the 30th of December, after a church service within my compound, I noticed that whereas ordinarily after the service the Kalenjins would join us in my home, on this day, they declined. We felt that all was not well.

On the 31st of December, I was in my home with my wife, four sons, daughter and two grandchildren. At about 5 p.m., while we were discussing family matters in the compound, my neighbour visited us and told me that some youth wanted to cause violence, but that the elders were against it. He assured me that the elders would not allow the violence to take place and I was consoled.

I went and got charcoal from a neighbour and then and headed toward my house. When I got there, my wife informed me that there could be trouble, and further, that two people had visited us and told her that is the youth intending to cause violence came to our compound, she should scream and they would come to our rescue. At the time, my sons were in the men's house.

When I went outside, I saw about 40 armed youths at the end of my farm. The said armed youth were talking with two neighbours so I alerted my wife that there was trouble.

The said armed youths ran into my compound screaming and my sons got out of their houses. I asked one of the attacking youth, why they were attacking us. I told him that is it was land they wanted, they should just let my family leave. All this time, they were shooting arrows at us and throwing stones, while they made sounds like dogs. He then replied that they wanted five heads from my compound.

My sons asked me to get back into the house and my wife and I retreated to the bedroom, where I continued pleading with the attackers through the window. The attackers had torched all the houses. While I was still at the window, I saw one of my sons being hit with a club on the chest and he screamed. I called to him to get into the house. I got under a bed with my grandson. My wife also got under another the bed, but on the side facing the door. The attackers gained entry into the house by forcing the door open. They got hold of my grandsons whom they threw out of the door where they were murdered. My wife screamed and the attackers pulled her out from under the bed and hit her on the head with a club before they slit her throat with a knife. Before they killed her, she was screaming, "brother, why are you attacking us?' He replied telling her that the time for brotherhood was over and she had better pray.

While I was at the window pleading with them to allow us safe passage out of the village, I recognized 14 people who I knew to be amongst the attackers. Four of them killed members of my family including my wife, three sons, my daughter and two grandchildren. One carried petrol, one was and elder, one was the leader and carried a gun, one was a teacher and there were others. Only one has been arrested.

One son escaped through the window and was pursued by the attackers for over two kilometres. My daughter-in-law who was also hiding under the bed with her daughter and another granddaughter, escaped after the attackers pursued my son and hid under some bushes near the fence.

I also ran out of the burning house and hid under some bushes. At about 10 p.m., I heard wailing as of a child, and on going to investigate, I found a grandson of mine (2 years), injured but still alive. I took him and we went to hide in the bush. We stayed in the bush until the morning of 1st January, 2008, when I went to the Administration Police Post. There were a lot of people camping there already. Upon arrival at the camp, I fainted. I came to three hours thereafter. An Administration Police Officer took my grandson and cleaned and bandaged his wounds.

My neighbour led other neighbours in burying my family in a shallow grave, 3 days after the attack, with the assistance of the AP officer giving guard services.

The AP officer advised that our security was not good and that we should move to St. Muge Secondary School in Subukia, where we moved to, on or about the 4th of January, 2008.

I know the details of the motor vehicles that were used to transport the armed youth from to my village. They are owned by a village resident.

On the 7th of January, my son-in-law came and picked me up from the camp and took me home to Njambini.

On the 28th of April, 2008, the bodies of my family were exhumed and we gave them a decent burial.

It is my prayer that the perpetrators of these heinous crimes are brought to book. I have been informed that one of the perpetrators has started building a house on my parcel of land.

That is all I wish to say."

Appendix "F"

Civilian oversight of police

(Police Conduct)

South African Police Service Act, No. 68 of 1995

CHAPTER 10
INDEPENDENT COMPLAINTS DIRECTORATE

50. Establishment and independence

50.1

a. The independent Complaint Directorate, which shall be structured at both national and provincial levels, is hereby established.
b. The date on which the provincial structures of the directorate will come into operation, shall be determined by the Executive Director in consultation with the Minster.

50.2
The directorate shall function independently from the service.

50.3

a. No organ of state and no member or employee of an organ of state nor any other person shall interfere with the Executive Director or a member of the personnel of the directorate in the exercise and performance of his of power and functions.
b. Any person who wilfully interferes with the Executive Director or a member of the personnel of the directorate in the exercise or performance of his or her powers or functions shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

50.4
All organs of state shall accord such assistance as may be reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the directorate in the exercise and performance of its powers and functions.

51. Appointment of Executive Director –

51.1
The Minister shall nominate a suitably qualified person for appointment to the office of Executive Director to head the directorate in accordance with a procedure to be determined by the Minster in consultation with the Parliamentary Committees.

51.2
The Parliamentary Committees shall, within a period of 30 parliamentary working days of the nomination in terms of sub-section (1) confirm or reject such nomination.

51.3
In the event of the nomination being confirmed

a. Such person shall be appointment to the office of Executive Director subject to the laws governing the public service with effect from a date agreed upon by such person and the Minister; and
b. Such appointment shall be for a period not exceeding five years: Provided that such person shall be eligible for consecutive appointment in accordance with this section.

51.4
The Executive Director may be removed from his or her office under the circumstances and in the manner prescribed by the Minister in consultation with the Parliamentary Committees.

52. Personnel and expenditure

52.1
The personnel of the directorates shall consist of persons appointed by the Executive Director in consultation with the Minister subject to the laws governing the public service and such other persons as may be seconded or transferred to the directorate.

52.2
The terms and conditions of service of the personnel of the directorate shall be determined by the Minister in consultation with the Executive Director and the Public Service Commission.

52.3
The functions of the directorate shall be funded by money appropriated by Parliament for that purpose.

52.4
The Executive Director shall, subject to the Exchequer Act. 1997 (Act No. 66 of 1974)

a. be the accounting officer charged with the responsibility of accounting for all money appropriated by Parliament for the purpose of the performance of the functions of the directorate and the utilisation thereof; and
b. cause the necessary accounting and other related records to be kept.

53. Function of directorate

53.1

a. The principal function of the directorate shall be the achievement of the object contemplated in section 222 of the Constitution.
b. The Executive Director shall be responsible for –

a.i. the performance of the functions of the directorate; and
b.ii. the management and administration of the directorate.

53.2 In order to achieve its objects, the directorate –

a. may *mero motu* or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by any member, and may, where appropriate, refer such investigation to the police action; and
b. shall mero motu or upon receipt of a complaint, investigate any death in police custody or as a result of police action; and
c. may investigate any matter referred to the directorate by the Minister or the member of the Executive Council.

52.3

a. The Minister may, upon the request of and in consultation with Executive Director, authorise those members of the personnel of the directorate identified by the Executive Director, to exercise those powers and perform those duties conferred on or assigned to any member by or under this Act or any other law.
b. The members of the personnel referred to in paragraph (a) shall have such immunities and privileges as may be conferred by the law on a member in order to ensure the independent and effective exercise and performance if their powers and duties.

52.4
A document, in the prescribed form, certifying that a person is a member of the personnel of the directorate and has been authorised to exercise the powers and

perform the duties of a member, shall be prima facie proof that such member has been authorised as contemplated in subsection (3).

52.5
Any member of the personnel of the directorate who wilfully discloses any information in circumstances in which he or she knows or could reasonably be expected to know that such disclosure would or may prejudicially affect the performance by the directorate or the Service of its functions, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a periods not exceeding two years.

52.6 The Executive Director may –

a. at any time withdraw any referral made under subsection (2) (a);
b. request and obtain information from any Commissioner or police official as may be necessary for conducting any investigation:
c.

d.i. monitor the progress of;
e.ii. set guidelines regarding ; and
f.iii. request and obtain information regarding an investigation referred to a Commissioner under subsection (2) (a);

d. request and obtain the co-operation of any member as may be necessary to achieve the object of the directorate;
e. commence an investigation on any matter notwithstanding the fact that an investigation regarding the same matter has been referred under subsection (2) a pending or has been closed by the Service, or the docket regarding the matter has been submitted to the attorney-general for decision; Provided that in the case of a –

f.i. referred or pending investigation, directorate shall act after consultation with the member heading the investigation; or
g.ii. docket regarding a matter having been submitted to the attorney-general for decision, the directorate shall act in consultation with the attorney – general;

f. request and obtain information from the attorney – general's office in so as it may be necessary for the directorate to conduct an investigation: Provided that the attorney – general may on reasonable grounds refuse to accede to such request;
g. submit the results of an investigation to the attorney – general for his or her decision;
h. in consultation with the Minister and with the concurrence of the Minister of Finance, obtain the necessary resources and logistical support or engage the services of experts, or other suitable persons to enable the directorate to achieve its object;

i. make recommendations to the Commissioner concerned;
j. make any recommendation to the Minister or a member of the Executive Council which he or she deems necessary regarding any matter investigated by the directorate or relating to the performance of the directorate's functions: Provided that in the event of a recommendation made to a member of the Executive Council, a copy thereof shall be forwarded to the Minister; and
k. subject to the Exchequer Act, 1975 (Act no 66 of 1975), delegate any of his or her powers to any member of the personnel of the directorate.

52.7
The Executive Director shall, in consultation with the Minister, issue instructions to be complied with by the directorate which shall *inter alia* include instructions regarding –

a. the lodging, receiving and processing of complaints;
b. recording and safe-guarding of information and evidence;
c. disclosure of information;
d. the making of findings and recommendations; and
e. all matters incidental to the matters referred to in paragraphs (a) to (c)

52.8
The National or Provincial Commissioner shall notify the directorate of all cases of death in police custody or as a result of police action.

52.9
The Minister may prescribe procedures regarding –

a. protecting the identify and integrity of complaints; and
b. witness protection programmes.

54. Reporting. – The Executive Director shall –

a. within three months after the end of each financial year, submit to the Minister a written report on activities of the directorate during that financial year, which report shall be tabled in Parliament by the Minister within14 days after receipt thereof or if Parliament is not then in session, within 14 days after the commencement of the next ensuing session; and
b. at any time when requested to do so by the Minister or either the Parliamentary Committees, submit a report on the activities of the Directorate to the Minister or that Committee.

The Independent Police Complaints Authority Act (New Zealand)

12. Functions of Authority

(1) The functions of the Authority shall be:

(a) To receive complaints

(i) Alleging any misconduct or neglect of duty by any member of the Police; or

(ii) Concerning any practice, policy, or procedure of the Police affecting the person or body of persons making the complaint in a personal capacity:

(b) To investigate of its own motion, where it is satisfied that there are reasonable grounds to carry out an investigation in the public interest, any incident involving death or serious bodily harm notified to the Authority by the Commissioner under section 13 of this Act:

(c) To take such action in respect of complaints, incidents, and other matters as is contemplated by this Act.

(2) In the course of taking action in respect of any complaint the Authority may investigate any apparent misconduct or neglect of duty by a member of the Police, or any Police practice, policy, or procedure, which appears to the Authority to relate to the complaint, notwithstanding that the complaint itself does not refer to that misconduct, neglect, practice, policy, or procedure.

Nothing in subsection (1) of this section shall authorize the Authority to investigate any matter relating to the terms and conditions of service of any person as a member of the Police.

17. Action upon receipt of complaint

(1) On receiving or being notified of a complaint under this Act, the Authority may do all or any of the following:

(a) Investigate the complaint itself, whether or not the Police have commenced a Police investigation:

(b) Defer action until the receipt of a report from the Commissioner on a Police investigation of the complaint:

(c) Oversee a Police investigation of the complaint:

(d) Decide, in accordance with section 18 of this Act, to take no action on the complaint.

[(2) Subject to subsection (2A) of this section, the Authority shall, as soon as practicable, advise the Commissioner and the complainant of the procedure it proposes to adopt under subsection (1) of this section.

[(2A) Where—

(a) A complaint is made to the Police; and

(b) The Authority decides to adopt the procedure provided for in paragraph (a) or paragraph (b) or paragraph (c) of subsection (1) of this section; and

(c) The Authority is satisfied that the Police will inform the complainant of the procedure to be followed,
the Authority is not required to inform the complainant in accordance with subsection (2) of this section of the procedure it proposes to follow.]

Where any complaint appears to the Authority to be capable of resolution by conciliation in accordance with any conciliation procedure established by or under the Police Act 1958, it may indicate that view to the Commissioner.

The Authority may decide to take no further action in certain circumstances.

19. Subsequent powers in relation to complaint

The Authority may at any time

(a) Review a Police investigation of a complaint:

(b) Decide to investigate a complaint itself:

(c) Where it oversees a Police investigation, give such directions to the Police concerning the investigation as it thinks fit:

(d) Direct the Police to re-open an investigation, and thereafter oversee the investigation:

(e) Direct the Police to reconsider their proposals for action on a complaint:

(f) Decide, in accordance with section 18 of this Act, to take no further action on the complaint:

(g) Decide that no action by the Authority is required on the ground that it considers that the outcome of a Police investigation is satisfactory.

20. Duty of Commissioner to report to Authority on Police investigation of complaint—

(1) The Commissioner shall as soon as practicable, and in no case later than 2 months, after the completion of a Police investigation of a complaint, report to the Authority—

(a) Whether the complaint has been upheld and, if so, what action has been taken or is proposed to be taken to rectify the matter:

(b) Whether the complaint has been settled by conciliation.

(2) When reporting to the Authority under this section, the Commissioner shall supply to the Authority accompanying material sufficient to enable the Authority to assess the adequacy of the Police investigation.

The Commissioner may consult the Authority on any Police proposals for action on a complaint before reporting to the Authority under this section.

21. Commissioner to provide information and assistance at request of Authority—

(1) The Commissioner shall, whenever the Authority so requests, provide to the Authority all such information and assistance as is necessary for the proper

performance by the Authority of its functions in relation to its investigation of any complaint, incident, or other matter under this Act.

(2) Where the Authority oversees a Police investigation of a complaint, the Commissioner shall, whenever the Authority so requests, provide to the Authority—

(a) Any or all information in the possession or under the control of the Police that is relevant to the complaint:

(b) A report on the progress of the investigation.

23. Proceedings of Authority—

(1) Before proceeding to investigate any matter under this Act the Authority shall inform the Commissioner, the complainant (if any), and, unless the interests of justice otherwise require, any person alleged to be aggrieved (if not the complainant) of its intentions to make the investigation.

(2) Every investigation by the Authority under this Act shall be conducted in private.

(3) Subject to section 31 of this Act,—

(a) The Authority may hear or obtain information from such persons as it thinks fit, including, where it considers that cultural matters are a factor relevant to a complaint or investigation, information from such persons as the Authority thinks have knowledge or experience in those matters:

(b) It shall not be necessary for the Authority to hold any hearing:

(c) No person shall be entitled as of right to be heard by the Authority.

[(4) Subject to the provisions of this Act, the Authority may regulate its procedure in such manner as it thinks fit.]

24. Powers of Authority in relation to investigations—

(1) The Authority may require any person who in its opinion is able to give information relating to any matter under investigation by the Authority to furnish such information, and to produce such documents or things in the possession or under the control of that person, as in the opinion of the Authority are relevant to the subject-matter of the investigation.

(2) The Authority may summon before it and examine on oath any person who in its opinion is able to give any information relating to the matter under investigation, and may for the purpose administer an oath to any person so summoned. Every such examination by the Authority shall be deemed to be a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury).

29. Implementation of recommendations of Authority—

(1) The Commissioner shall, as soon as reasonably practicable after receiving any recommendation of the Authority under section 27(2) or section 28(2) of this Act,—

(a) Notify the Authority of the action (if any) proposed to be taken to give effect to the recommendation; and

(b) Give reasons for any proposal to depart from, or not to implement, any such recommendation.

(2) If, within a reasonable time after a recommendation is made, no action is taken which seems to the Authority to be adequate and appropriate, the Authority may, after considering any comments made by the Commissioner,—

(a) Send a copy of its opinion and recommendations on the matter, together with the comments of the Commissioner, to the Attorney-General and the Minister of Police; and

(b) Where it considers it appropriate, transmit to the Attorney-General for tabling in the House of Representatives such report on the matter as it thinks fit.

The Attorney-General shall, as soon as practicable after receiving a report under subsection (2) (b) of this section, lay the report before the House of Representatives.

APPENDIX G

SENIOR POLICE OFFICERS MOVED DURING OR IMMEDIATELY AFTER POST ELECTION VIOLENCE

NO.	NAME	POSTING IN JANUARY	CURRENT POSTING	POSTING AND TRANSFER DATES	OTHER NOTES/ COMMENTS
1.	ANGELUS KARURU	OCPD ELDORET	OCPD ITEN	Posted to Eldoret on 18th November 2006 until 17th January 2008 when he was transferred to Keiyo Division.	The transfer was in the middle of the post election violence
2.	STEPHEN MUNGUTI	OCPD NAKURU	STAFFING OFFICER AT POLICE HEADQUARTERS	Posted to Nakuru on 16th April 2007 until 25th January 2008 when he was transferred to Police headquarters.	The transfer was in the middle of the post election violence.
3.	EVERETT WASIGE	PPO NAKURU/RIFT VALLEY	RETIRED	Posted to Rift Valley on 15th November 2005 until 27th January 2008 when he was retired.	He was not due for retirement until 23rd February 2008. He was called to Nairobi on 27th January 2008 by the Commissioner of Police and told that he would be retired a month earlier than scheduled.
4.	GRACE KAINDI	PPO NYANZA	DIRECTOR OF COMPLAINTS AND CUSTOMER CARE AT POLICE HEADQUARTERS	Posted to Nyanza on 18th April 2006 until 28th January 2008 when she was transferred to Police Headquarters.	The transfer was in the middle of the post election violence.

APPENDIX H

NYANZA PROVINCE
SAMPLE ANALYSIS OF ARMS MOVEMENT REGISTERS SHOWING USAGE OF ARMS AND AMMUNITION FOR THE PERIOD BETWEEN 27/12/2007 AND 17/01/2008

1. KISUMU POLICE STATION

NOTE: -
a) The armoury records for the period between 28th December and 30th December 2007 were not provided.
b) The armoury records for the other dates do not show any usage apart from the two appearing below.

NO	DATE OF ISSUE	NAME OF OFFICER AND RANK	WEAPON ISSUED	AMMUNITION ISSUED	AMMUNITION USED	ANY OTHER COMMENTS
1.	27/12/2007	E. MONGERE CHIEF INSPECTOR		20TEAR GAS CANNISTERS	ALL 20 TEAR GAS CANNISTERS	
2.	29/1/2008	MAOSA INSPECTOR	AK47	20 ROUNDS OF 7.62 SP	NINE (9) ROUNDS	

2. KISUMU DIVISIONAL REGISTRY

NO.	DATE OF ISSUE	NAME OF OFFICER AND RANK	WEAPON ISSUED	AMMUNITION ISSUED	AMMUNITION USED	ANY OTHER COMMENTS
1.	29/12/2007	WINSTON SHIKORI POLICE CONSTABLE	G3	20 ROUNDS OF 7.62M	SIX (6) ROUNDS	
2.	29/12/2007	ROSE MWANJE CORPORAL	G3	20 ROUNDS OF 7.62 SP	TWELVE (12) ROUNDS	
3.	29/12/2007	JOHN MBURU POLICE CONSTABLE	G3	20 ROUNDS	TWO (2) ROUNDS	
4.	29/12/2007	T. OLABIRO POLICE CONSTABLE	G3	20 ROUNDS	SEVEN (7) ROUNDS	
5.	29/12/2007	L. MUNGAI POLICE CONSTABLE	G3	20 ROUNDS OF 7.62	SEVEN (7) ROUNDS	
6.	29/12/2007	D. LITHANDA POLICE CONSTABLE	FN	20 ROUNDS OF 7.62	TWENTY (20) ROUNDS	
7.	29/12/2007	F. AMUGUNE SERGEANT	FN	20 ROUNDS OF 7.62	SEVEN (7) ROUNDS	
8.	29/12/2007	MACHOKA POLICE CONSTABLE	FN	20 ROUNDS OF 7.62	SIX (6) ROUNDS	
9.	29/12/2007	ENOCH ASANDE CORPORAL	FN	20 ROUNDS OF 7.62MM	SIX (6) ROUNDS	
10.	29/12/2007	DAVID LANGAT CORPORAL	MPS	9MM	THIRTY (30) ROUNDS	

11.	29/12/2007	LUKA BUNGEI POLICE CONSTABLE	AK 47	90 ROUNDS OF 7.62MM	TWENTY ONE (21)ROUNDS	THE RECORD APPEARS TO HAVE BEEN ALTERED SEVERAL TIMES
12.	30/12/2007	A. ABDI SENIOR SERGEANT	WESTERN	64 ROUNDS OF 9MM	ONE (1) ROUND	
13.	30/12/2007	B. KABITI POLICE CONSTABLE	G3	40 ROUNDS OF 7.62MM	TWENTY (20) ROUNDS	
14.	30/12/2007	J. ROTICH POLICE CONSTABLE	MP	64 ROUNDS OF 9MM	THIRTEEN (13) ROUNDS	

The following entries from the divisional registry are incomplete in that they do not have any entries on the remarks as to whether any rounds were used or not

NO	DATE OF ISSUE	NAME OF OFFICER AND RANK	WEAPON ISSUED	AMMUNITION ISSUED	AMMUNITION USED	ANY OTHER COMMENTS
1.	29/12/2007	I. A. NOOR POLICE CONSTABLE	FN	20 ROUNDS OF 7.62M	NO ENTRY	
2.	29/12/2007	I. BETT POLICE CONSTABLE	NO ENTRY	3 ROUNDS OF 7.62SP	NO ENTRY	
3.	30/12/2007	DAVID LANGAT CORPORAL	NO ENTRY	6 ROUNDS OF 9MM	NO ENTRY	
4.	30/12/2007	E. ASANDE CORPORAL	NO ENTRY	6 ROUNDS OF 7.62MM	NO ENTRY	
5.	30/12/207	E. NATIYWA	NO ENTRY	40 ROUNDS	NO ENTRY	
6.	31/12/2007	S. MBOGO CORPORAL	NO ENTRY	100 ROUNDS OF 9MM	NO ENTRY	THE OFFICER PICKED A TOTAL OF 1,200 ROUNDS ON THE SAME DAY AS THE FOLLOWING TWO ENTRIES RELATE TO HIM AND THERE WAS NO ACCOUNT FOR ALL ENTRIES
7.	31/12/2007	S. MBOGO CORPORAL	NO ENTRY	100 ROUNDS OF 7.62SP	NO ENTRY	
8.	31/12/2007	S. MBOGO CORPORAL	NO ENTRY	1000 ROUNDS OF 7.62SP	NO ENTRY	
9.	31/12/2007	LUKA BUNGEI POLICE CONSTABLE	NO ENTRY	13 ROUNDS OF 7.62SP	NO ENTRY	
10.	31/12/2007	A. LIHANDA POLICE CONSTABLE	NO ENTRY	20 ROUNDS OF 7.62	NO ENTRY	

11.	31/12/2007	LUKA BUNGEI POLICE CONSTABLE	CESKA	60 ROUNDS OF 7.62SP	NO ENTRY	

3. HOMA BAY POLICE STATION

The entries in the arms movement register show that no ammunition was used in the period between 28th December 2007 and 28th February 2008.

However according to a letter dated 24th June 2008 from Homabay Police Divisional Headquarters the OCS Homabay Police Station is given authority to strike off ammunition used between the dates 29th December 2007 and 15th January 2008. The ammunition is listed in the application as follows: -

a) 993 rounds of 7.62x51mm
b) 303 rounds of 7.62 x 51mm blanks
c) 231 rounds of 7.62x39mm
d) 191 rounds of 9x19mm
e) 76 rounds of .38 special
f) 245 rounds tear gas canisters
g) 182 bore cartouche propulsive

4. KISUMU EAST DISTRICT STATION

NOTE: -

1.a) Most of the officers issued with arms and ammunition from this station are administration police officers.

2.b) This is the only record viewed by the Commission that shows issue and use of blank ammunition.

3.c) The records appear to have been reconstructed from the original records (they appear to have been hand written by the same person.

NO	DATE OF ISSUE	NAME OF OFFICER AND RANK	WEAPON ISSUED	AMMUNITION ISSUED	AMMUNITION USED	ANY OTHER COMMENTS
1.	28/12/2007	AUSTINE ONITI ADMIN POLICE CONSTABLE	G3	20 ROUNDS	THREE (3) ROUNDS	
2.	29/12/2007	JACOB EKETA ADMINISTRATION POLICE CONSTABLE	G3	40 LIVE ROUNDS 20 BLANK ROUNDS	SIX (6) ROUNDS	THERE IS NO INDICATION WHETHER THE ROUNDS USED WERE LIVE OR BLANKS
3.	29/12/2007	SYPRIANO SUNA ADMIN POLICE CONSTABLE	G3	20 BLANK ROUNDS	THREE (3) ROUNDS	
4.	29/12/2007	MICAH KITETU ADMIN POLICE CONSTABLE	SMG	40 ROUNDS	ONE (1) ROUND	
5.	29/12/2007	JOTHAM OJUMBO ADMIN POLICE CONSTABLE	G3	20 ROUNDS	FOURTEEN (14) ROUNDS	
6.	29/12/2007	JACOB OSANO ADMIN POLICE CONSTABLE	G3	20 ROUNDS	TEN (10) ROUNDS	
7.	29/12/2007	PETER NYAMWANGE ADMIN POLICE CONSTABLE	G3	40 ROUNDS	TWENTY (20) ROUNDS	
8.	29/12/2007	SAMUEL NDOLO ADMIN POLICE CONSTABLE	G3	60 ROUNDS	THIRTEEN (13) ROUNDS	
9.	29/12/2007	LAMECK MACHARIAH ADMIN POLICE CONSTABLE	BROWNING	20 BLANK ROUNDS	EIGHT (8) ROUNDS	
10.	29/12/2007	JOHN MOHERAJ ADMIN POLICE CONSTABLE	G3	40 ROUNDS	TWENTY (20) ROUNDS	
11.	29/12/2007	DANIEL TOO CORPORAL	G3	20 BLANK ROUNDS	FIFTEEN (15) ROUNDS	
12.	29/12/2007	WELLINGTON ODHIAMBO CORPORAL	G3	20 BLANK ROUNDS	SIXTEEN (16) ROUNDS	
13.	29/12/2007	RONALD MATAKA CORPORAL	G3	20 BLANK ROUNDS	FOUR (4) ROUNDS	
14.	29/12/2007	OBEDI MISATI SENIOR SERGEANT	G3	40 ROUNDS	ONE (1) ROUND	

NO	DATE OF ISSUE	NAME OF OFFICER AND RANK	WEAPON ISSUED	AMMUNITION ISSUED	AMMUNITION USED	ANY OTHER COMMENTS
15.	29/12/2007	JOHN NGOCHO ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	NINETEEN (19) ROUNDS	
16.	29/12/2007	KIBET NYANGWEI ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	TEN (10) ROUNDS	
17.	29/12/2007	MASAI K. RONO ADMIN POLICE CONSTABLE	G3	20 BLANK ROUNDS	ONE (1) ROUND	
18.	29/12/2007	BENSON SAWE ADMIN POLICE CONSTABLE	G3	60 ROUNDS	SIX (6) ROUNDS	
19.	29/12/2007	THOMAS TORIEBE ADMIN POLICE CONSTABLE	G3	20 ROUNDS	ONE (1) ROUND	
20.	29/12/2007	MARTIN RIONGO ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	SIX (6) ROUNDS	
21.	29/12/2007	MOHAMMED HASSAN ADMIN POLICE CONSTABLE	G3	20 BLANK ROUNDS	THIRTEEN (13) ROUNDS	
22.	29/12/2007	MAURICE OTIENO CORPORAL	G3	40 BLANK ROUNDS	EIGHT (8) ROUNDS	
23.	29/12/2007	NEHEMUEL NYANGAU SERGEANT	SMG	20 ROUNDS	FIVE (5) ROUNDS	
24.	29/12/2007	STANLEY CHEROTICH ADMIN POLICE CONSTABLE	G3	60 ROUNDS	SIXTEEN (16) ROUNDS	
25.	29/12/2007	LOCHIAN CHEPCHOI SENIOR SERGEANT	G3	40 ROUNDS	THREE (3) ROUNDS	
26.	29/12/2007	PAUL ATOTO ADMIN POLICE CONSTABLE	G3	20 BLANK ROUNDS	SIX (6) ROUNDS	
27.	29/12/2007	CLISTUS WANYAMA CORPORAL	G3	49 BLANK ROUNDS	FIVE (5) ROUNDS	
28.	29/12/2007	BENARD OCHOLLA ADMIN POLICE CONSTABLE	G3	40 ROUNDS	EIGHTEEN (18) ROUNDS	
29.	29/12/2007	VINCENT SAMBU ADMIN POLICE CONSTABLE	G3	60 BLANK ROUNDS	TWENTY (20) ROUNDS	
30.	29/12/2007	NICHOLAS MASWAI ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	TWO (2) ROUNDS	
31.	29/12/2007	PHILIP OBUOLA ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	TWENTY (20) ROUNDS	
32.	29/12/2007	PAUL MAGUT ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	EIGHT (8) ROUNDS	
33.	29/12/2007	MAURICE ONDUTO ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	THREE (3) ROUNDS	

NO	DATE OF ISSUE	NAME OF OFFICER AND RANK	WEAPON ISSUED	AMMUNITION ISSUED	AMMUNITION USED	ANY OTHER COMMENTS
34.	29/12/2007	HARDSON ONUONGA ADMIN POLICE CONSTABLE	G3	20 BLANK ROUNDS	TWENTY (20) ROUNDS	
35.	29/12/2007	WELLINGTON ODHIAMBO ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	ONE (1) ROUND	
36.	29/12/2007	JACOB OSANO ADMIN POLICE CONSTABLE	G3	71 ROUNDS	TWENTY SIX (26) ROUNDS	
37.	29/12/2007	DANIEL TOO ADMIN POLICE CONSTABLE	G3	20 BLANK ROUNDS	NINE (9) ROUNDS	
38.	29/12/2007	JOTHAM OJUMBO ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	FORTY (40) ROUNDS	
39.	29/12/2007	JOHN NGOCHO ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	NINE (9) ROUNDS	
40.	29/12/2007	MAURICE OTIENO CORPORAL	G3	40 BLANK ROUNDS	SIX (6) ROUNDS	
41.	29/12/2007	DANIEL ONDURO CORPORAL	G3	40 BLANK ROUNDS	TWO (2) ROUNDS	
42.	30/12/2007 DAY TIME	MAURICE ONDUTO ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	FIVE (5) ROUNDS	
43.	30/12/2007 DAY TIME	STEPHEN MBUVI ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	SEVEN (7) ROUNDS	
44.	30/12/2007 DAY TIME	JOEL ONDIEK ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	SIX (6) ROUNDS	
45.	30/12/2007 DAY TIME	JOASH NYABERI ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	ONE (1) ROUND	
46.	30/12/2007 DAY TIME	JOSEPHAT OKETCH ADMIN POLICE CONSTABLE	G3	60 BLANK ROUNDS	ELEVEN (11) ROUNDS	
47.	30/12/2007 DAY TIME	PIUS KIMAIYO ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	NINETEEN (19) ROUNDS	
50.	30/12/2007 DAY TIME	JOSEPHAT RONO ADMIN POLICE CONSTABLE	G3	40 ROUNDS	TWENTY (20) ROUNDS	
51.	30/12/2007 DAY TIME	ONESMUS ODUOR CORPORAL	G3	20 BLANK ROUNDS	TWO (2) ROUNDS	
52.	30/12/2007 DAY TIME	ISMAEL KIRUI ADMIN POLICE CONSTABLE	G3	20 BLANK ROUNDS	EIGHT (8) ROUNDS	
53.	30/12/2007 DAY TIME	NICHOLAS KOOME CORPORAL	G3	20 BLANK ROUNDS	THREE (3) ROUNDS	
54.	30/12/2007 DAY TIME	JAVAN CHEMANGARI CORPORAL	G3	60 BLANK ROUNDS	TEN (10) ROUNDS	
55.	31/12/2007 DAY TIME	STANLEY VOYEGA CORPORAL	G3	40 ROUNDS	THREE (3) ROUNDS	
56.	31/12/2007 DAY TIME	DUNCAN KAVUO ADMIN POLICE	G3	40 BLANK ROUNDS	TWENTY (20) ROUNDS	

NO	DATE OF ISSUE	NAME OF OFFICER AND RANK	WEAPON ISSUED	AMMUNITION ISSUED	AMMUNITION USED	ANY OTHER COMMENTS
		CONSTABLE				
57.	31/12/2007 DAY TIME	DAVID WAFULA ADMIN POLICE CONSTABLE	G3	40 BLANK ROUNDS	SIX (6) ROUNDS	
58.	31/12/2007 DAY TIME	CHRISTINE ONYANGO ADMIN POLICE CONSTABLE	G3	20 ROUNDS	TEN (10) ROUNDS	
59.	31/12/2007 DAY TIME	WILFRED MAGATI ADMIN POLICE CONSTABLE	G3	40 ROUNDS	THREE (3) ROUNDS	
60.	31/12/2007 DAY TIME	AUGUSTINE TERER ADMIN POLICE CONSTABLE	G3	40 ROUNDS	EIGHT (8) ROUNDS	
61.	2/01/2008 DAY TIME	KOBIA BARIU INSPECTOR	G3	40 BLANK ROUNDS	TWENTY (20) ROUNDS	THE HEADING FOR THIS DAY ERRONEOUSLY READS 2ND DECEMBER 2007
62.	3/01/2008 DAY TIME	PHILIP OBUOLA ADMIN POLICE CONSTABLE	G3	20 ROUNDS	TWENTY (20) ROUNDS	
63.	3/01/2008 DAY TIME	EVANS OTANDO ADMIN POLICE CONSTABLE	G3	20 ROUNDS	TEN (10) ROUNDS	
64.	3/01/2008 DAY TIME	PAUL MAGOT ADMIN POLICE CONSTABLE	G3	40 ROUNDS	FIVE (5) ROUNDS	
65.	3/01/2008 DAY TIME	WILFRED MAGATI ADMIN POLICE CONSTABLE	G3	40 ROUNDS	FIVE (5) ROUNDS	
66.	3/01/2008 DAY TIME	KIBET NYANGUSEI ADMIN POLICE CONSTABLE	G3	40 ROUNDS	SEVEN (7) ROUNDS	
67.	3/01/2008 DAY TIME	JOTHAM OJUMBO ADMIN POLICE CONSTABLE	G3	40 ROUNDS	SIXTEEN (16) ROUNDS	
68.	3/01/2008	AUGUSTINE TERER ADMIN POLICE CONSTABLE	G3	40 ROUNDS	EIGHT (8) ROUNDS	
69	3/01/2008	KOBIA BARIU ADMIN POLICE CONSTABLE	G3	40 ROUNDS	TEN (10) ROUNDS	
70.	3/01/2008	THOMAS MAKORI ADMIN POLICE CONSTABLE	G3	40 ROUNDS	THREE (3) ROUNDS	
71.	3/01/2008	BENARD OLOO ADMIN POLICE CONSTABLE	G3	20 ROUNDS	TWO (2) ROUNDS	
72.	3/01/2008	DANIEL TOO CORPORAL	BROWNING	6 ROUNDS	SIX (6) ROUNDS	
73.	3/01/2008	GEORGE MAGETO ADMIN POLICE CONSTABLE	G3	40 ROUNDS	THIRTEEN (13) ROUNDS	

NO	DATE OF ISSUE	NAME OF OFFICER AND RANK	WEAPON ISSUED	AMMUNITION ISSUED	AMMUNITION USED	ANY OTHER COMMENTS
74.	04/01/2008	PHILIP OBUOLA ADMIN POLICE CONSTABLE	G3	40 ROUNDS	SEVEN (7) ROUNDS	
75.	04/01/2008	KIBET NYANGOSE ADMIN POLICE CONSTABLE	G3	40 ROUNDS	FOUR (4) ROUNDS	
76.	04/01/2008	WILFRED MAGATI ADMIN POLICE CONSTABLE	G3	40 ROUNDS	THREE (3) ROUNDS	
77.	04/01/2008	PAUL MAGOT ADMIN POLICE CONSTABLE	G3	40 ROUNDS	THREE (3) ROUNDS	
78.	04/01/2008	MASAI K. RONO ADMIN POLICE CONSTABLE	G3	40 ROUNDS	ONE (1) ROUND	
79.	04/01/2008	BENARD OCHOLLA ADMIN POLICE CONSTABLE	G3	40 ROUNDS	FOURTEEN (14) ROUNDS	
80.	04/01/2008	CHRISPINE OCHIENG ADMIN POLICE CONSTABLE	G3	20 ROUNDS	ONE (1) ROUND	
81.	04/01/2008	MASAI K. RONO ADMIN POLICE CONSTABLE	G3	40 ROUNDS	TEN (10) ROUNDS	
82.	15/01/2008	PHILIP OBUORA ADMIN POLICE CONSTABLE	G3	20 ROUNDS	TWO (2) ROUNDS	
83.	16/01/2008	JAPHETH MUTUNGA CORPORAL	G3	60 ROUNDS	SIX (6) ROUNDS	
84.	16/01/2008	NAVIGATOR ABERE ADMIN POLICE CONSTABLE	G3	60 ROUNDS	FOUR (4) ROUNDS	
85.	16/01/2008	EVANS OLANDO ADMIN POLICE CONSTABLE	G3	40 ROUNDS	TWO (2) ROUNDS	
86.	16/01/2008	KIBET NYANGUSEI ADMIN POLICE CONSTABLE	G3	20 ROUNDS	SIX (6) ROUNDS	
87.	16/01/2008	FRANCIS NYACHIRO ADMIN POLICE CONSTABLE	G3	20 ROUNDS	FOUR (4) ROUNDS	
88.	16/01/2008	EFFY VIDOLO ADMIN POLICE CONSTABLE	G3	20 ROUNDS	TWO(2) ROUNDS	
89.	16/01/2008	DUNCAN KAUVO ADMIN POLICE CONSTABLE	G3	40 ROUNDS	FIVE (5) ROUNDS	
90.	16/01/2008	JOHN MAHERAI ADMIN POLICE CONSTABLE	G3	40 ROUNDS	FIVE (5) ROUNDS	
91.	16/01/2008	KOBIA BARIU ADMIN POLICE CONSTABLE	G3	40 ROUNDS	TWELVE (12) ROUNDS	
92.	16/01/2008	JAPHETH MUTUNGA CORPORAL	G3	40 ROUNDS	FOUR (4) ROUNDS	

NO	DATE OF ISSUE	NAME OF OFFICER AND RANK	WEAPON ISSUED	AMMUNITION ISSUED	AMMUNITION USED	ANY OTHER COMMENTS
93.	16/01/2008	GEORGE MAGETO	G3	60 ROUNDS	SIX (6) ROUNDS	
94.	16/01/2008	NAVIGATOR ABERE ADMIN POLICE CONSTABLE	G3	20 ROUNDS	FOUR (4) ROUNDS	
95.	17/01/2008	FRANCIS NYACHIRO ADMIN POLICE CONSTABLE	G3	20 ROUNDS	TWELVE (12) ROUNDS	

c)5. MIGORI POLICE STATION

There are no entries from this station for the period between 3rd December 2007 and 3rd January 2008

For the entries available there was no usage of arms or ammunitions.