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REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION



Volume III



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

Volume III

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

Nairobi

3 May 2013

LETTER OF TRANSMITTAL

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

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

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

Amb. Bethuel Kiplagat
Chairperson

B. A. Kiplagat

Tecla Namachanja Wanjala
(Vice Chairperson)

Tecla Namachanja Wanjala

Judge Gertrude Chawatama

Gertrude Chawatama

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Foreword

This volume builds upon the previous volumes analysis of the past to begin to point the way forward for national unity, healing and reconciliation. One cannot speak of national unity, healing and reconciliation without discussing ethnic tension. The causes of ethnic tension, and the problems raised by ethnic tension, have been discussed in other parts of this Report. In particular the chapter on ethnic tension should be read together with the chapter on Economic Marginalization and Violations of Socio-Economic Rights.

Ethnic tensions, particularly the tendency to view people who are different as ‘the other’ and thus not identify with, and either fear or scapegoat them, is unfortunately as old as human history. Tracing the origins of ethnic tension in Kenya to the beginning of history was beyond the scope of the Commission’s work. To understand the continued presence of ethnic tension today, and its evolution during our mandate period, we started with the colonial period, for it was under the colonial power that the political entity today known as Kenya was formed. In discussing ethnic tension since independence, we look at state and non-state actors, including the role of culture and stereotypes. Any discussion of ethnic tension in present-day Kenya would be incomplete without a discussion of the relationship between ethnicity and politics. It is an unfortunate fact that who joins a political party, and which politicians or parties form alliances, can be more often explained by ethnicity over any other factor. It is this potent, and at times volatile, combination of ethnicity and politics that has unfortunately spiralled into ethnic violence far too many times in our history.

While ethnicity and ethnic tension are discussed throughout the Report, we include here a case study on Mt. Elgon to provide a deeper analysis of the history of ethnicity in Kenya and its relationship to politics, land, and violence. The Mt. Elgon case study is unique because of the peculiar mix of ethnicity in the region, and the fact that ethnic tensions gave rise to a well-organized militia that terrorized the local population, which in turn led the state to engage in a military operation to stop the militia, but which also resulted in additional violations of the local population. Yet, the story of Mt. Elgon is typical in that it combines aspects of historical injustices that the Commission had seen in many other parts of the country. Firstly, the use of ethnicity to divide a local community and the combining of ethnic tension with disputes over land. Secondly, ethnic tension over land and identity spilling over into overt violence. Thirdly, the creation of organized militia groups to harden tensions based upon land and ethnicity. Fourthly, the influence of all of these forces on the political dynamics of the region, underscored by the role that

politicians have and continue to play with respect to ethnic tension, land, militias, and other violence. Finally, the intervention of the state to combat the militia groups and to protect the local population resulting in further violations.

While much of this volume is devoted to understanding the wide variety of historical injustices committed during the mandate period, we combined here a discussion of ethnicity and ethnic tension with national unity and reconciliation as, at the end of the day, they both involve a focus on the individual, the family and the community. It is, in short, a focus on the people of Kenya. And it is the people of Kenya, who have both committed and suffered these violations, who ultimately are the key to national unity and reconciliation.


National unity and reconciliation are properly understood as both a goal and a process. They are ideal states to which we as a nation must strive, and they require constant effort and attention. The same may be said of healing. An individual is never completely healed from a tragedy. If our expectation is complete healing, as though the tragedy had not occurred, then we are setting ourselves up for failure. Similarly, if we set national unity and reconciliation among all peoples as our benchmark of success, then we will never succeed. But if we set our benchmark as working towards and increasing national unity and reconciliation, just as we work to heal an individual who has suffered a tragedy, then we can set clear interim goals, plans, and other strategies by which we can then measure progress.

Efforts at national unity and reconciliation began before the Commission started its work, and will continue after this Report is issued. National unity and reconciliation were furthered by the National Accord that brought an immediate end to the violence arising from the 2007 election. But one can go back to the founding of the nation, in 1963, to find the first efforts to create a nation of people who view themselves first as Kenyan. It is a process that even after half a century is still incomplete. The Commission was under no illusion that it could achieve something that had not yet been achieved after fifty years of nationhood. We hope, however, that we are able to provide a more accurate and current picture of the state of national unity and reconciliation in Kenya today; that the efforts we undertook to further reconciliation in many communities across the nation will bear fruit as those communities continue to work through the legacy of historical injustices; and that the structures that are already in place to further reconciliation will gain strength, and perhaps hope, from the work we have done in furthering national unity and reconciliation.

List of Abbreviations

AFC	Agricultural Finance Corporation	KHRC	Kenya Human Rights Commission
AMPs	Adversely Mentioned Persons	MoSSP	Ministry of State for Special Programmes
CBO	Community Based Organization	NARC	National Rainbow Coalition
CID	Criminal Investigations Department	NCIC	National Cohesion and Integration Commission
CIPEV	Commission of Inquiry into the Post Election Violence	OCHA	United Nations Office for the Coordination of Humanitarian Affairs
DC	District Commissioner	OCS	Officer Commanding Station
DSIC	District Security Intelligence Committee	ODM	Orange Democratic Movement
DO	District Officer	ORN	Operation Rudi Nyumbani
GCG	Grand Coalition Government	PC	Provincial Commissioner
GSU	General Service Unit	PEV	Post-Election Violence
IDPs	Internally Displaced Persons	PNU	Party of National Unity
KADU	Kenya African Democratic Union	RBC	Regional Boundaries Commission
KANU	Kenya African National Union	SLDF	Sabaot Land Defence Force
KAU	Kenya African Union	TJRC	Truth, Justice and Reconciliation Commission
KPU	Kenya Peoples Union	UNDP	United Nations Development Programme
KCPE	Kenya Certificate of Primary School		
KNCHR	Kenya National Commission on Human Rights		





CHAPTER ONE

Ethnic Tension

We must work from the basis that Kenya is a garment of many colours, which is beautiful because each colour is present. We cannot be one colour because we would be dull. Some colours cannot run over others because we would be ugly. We must all stay in place and be bright. That is an ideal situation of where Kenya ought to be.¹

Wambugu Ngujiri, testimony before TJRC

I have only daughters and none of them has a boyfriend who is a Luo. I would want to sleep as a mother knowing that wherever they go, whichever part of this country they will eventually set up homes, they will be treated well.²

Pheobe Asiyo, testimony before TJRC

That we are born of different tribes we cannot change, but I refuse to believe that, because our tribes have different backgrounds and culture and customs we cannot create an African community or a nation.

Tom Mboya, *Freedom and After* (1963) 70

1. TJRC/Hansard/Thematic Hearing on Ethnic Tension and Violence/Nairobi/p. 35
2. TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 37

Introduction

1. A critical challenge that Kenya has faced since attaining independence in 1963 is the integration of its different ethnic groups or communities into a cohesive nation, without compromising the respective distinct identities of these ethnic groups. Over the years, ethnicity has become an instrument of division. Some parts of the country have experienced heightened levels of ethnic tension which have resulted in violence. The 2007/2008 Post-Election Violence (PEV) which prompted the creation of the Commission is perhaps the worst, but not the only, example of violence resulting from, amongst other reasons, long standing ethnic tension between ethnic groups in the country.
2. Although the problem of ethnic tension and violence has long been acknowledged, it was not until the aftermath of the 2007/2008 PEV that robust efforts to address the problem began to take shape. Earlier efforts to address the problem ended neither in fundamental changes in ethnic relations nor prevention of ethnic violence. For instance, in the aftermath of the 1991/1992 ethnic clashes, the National Assembly established a Parliamentary Select Committee to Investigate Ethnic Clashes in Western Kenya and Other Parts of Kenya. It was mandated to investigate the root cause of the clashes, identify persons who might have perpetrated or participated in the clashes and make recommendations that would help to avert such clashes in the future. The 13 member Committee, chaired by the then Changamwe Member of Parliament, Kennedy Kiliku, commenced its work on 14 May 1992 and submitted its report (commonly referred to as Kiliku report) to Parliament in September 1992. The recommendations of the Committee were ignored, and not surprisingly, ethnic clashes were again witnessed in the period running to and during the 1997 General Elections.
3. In response to the 1997 ethnic clashes, the government established the Judicial Commission of Inquiry into Tribal Clashes in Kenya (commonly referred to as Akiwumi Commission).³ It was mandated to investigate the tribal clashes that had occurred in various parts of the country from 1991, with a view of establishing or determining, *inter alia*, 'the origin, the probable, the immediate and the underlying causes of such clashes'. The Akiwumi Commission carried out investigations between 14 July 1998 and 11 June 1999. It submitted its report to the President in August 1999 but the report was not released to the public until towards the end of 2002, when the High Court ordered its release.⁴ Indeed, the government not only delayed the release of the Akiwumi Report for a span of around three years, but it also ignored and contested the findings of the Commission.

³ See Gazette Notice No. 3312 of 1 July 1998.

⁴ See *Roshanali v Republic*

4. Thus, although the government had as early as 1992 acknowledged that ethnic tension was rife in the country it did not take adequate measures to address the issue. The impact of this failure would, coupled with other factors, contribute to the vicious and large scale violence that took place in the country following the disputed presidential election of 27 December 2007. The violence had a distinct ethnic dimension. Therefore, with 1,133 people dead, and more than 350,000 internally displaced during the PEV, the phenomenon of ethnic tension could not be ignored anymore.
5. As such, addressing the question of ethnic tension and violence was top in the agenda of the Kenya National Dialogue and Reconciliation. The NCIC and this Commission were established with complementary roles in dealing with the problem of ethnic tension.
6. For this reason, section 6(s) of the TJR Act mandated the Commission to 'inquire into the causes of ethnic tension and make recommendations on the promotion of healing, reconciliation and coexistence among ethnic communities'.
7. This Chapter documents the main causes and effects of ethnic tension in Kenya. The chapter is based mainly on testimonies that the Commission heard during its hearings across the country. In addition to holding such hearings, the Commission also organized a thematic hearing on ethnic tension and violence on 2 February 2012 in Nairobi. During this thematic hearing the Commission heard presentations by experts and relevant institutions such as: the National Cohesion and Integration Commission (NCIC). The objective of the thematic hearing was well summarized by Commissioner Berhanu Dinka during the opening of the hearing. He said:

In the last ten months, the Commission has travelled the length and breadth of this country. We have listened to testimonies of victims and witnesses of ethnic clashes and political or electoral violence. The stories are sad and revealing. Today, the thematic hearing seeks to further interrogate the issue of ethnicity and its nexus with violence, governance, political transition and distribution of resources.⁵
8. This Chapter should be read together with two other Chapters contained in this Report: The Chapter on 'Economic Marginalisation and Violations of Socio-Economic Rights' which deals in great detail with the nexus between ethnic relations and economic marginalisation; and the Chapter on Land and conflict which deals in great details with the nexus between ethnic relations and land relate grievances. The next Chapter in this Volume focuses on a case study of the intersection between ethnic relations, land and politics.

5. TJRC/Hansard/Public Hearing/Thematic Hearing on Ethnic Tension and Violence/Nairobi/2 February 2012/p. 2

Definitions

9. In this Chapter, ethnic group refers to a group of person defined by reference to colour, race, religion, or ethnic or national origins.⁶ The term 'tribe' is also sometimes used in common parlance, but it is considered derogatory.⁷ The term has a connotation to colonialism and ideas of African traditionalism and backwardness in opposition to white or European civilization. Therefore, the Commission does not use this term, except when quoting witnesses verbatim.
10. Ethnicity may be used as a vehicle for positive group identification, or for negative exclusion including discrimination and, in extreme cases, ethnically-motivated violence. Kenya's history is replete with examples of ethnicity used for both positive and negative purposes. While this chapter focuses on the negative side of ethnicity as required by the Commission's mandate, it is important to acknowledge that ethnic affiliation is not, in and of itself, a bad thing. In fact, ethnicity is often at the core of an individual's sense of identity and belonging. In an environment of tolerance and celebration of diversity, ethnicity can strengthen national identity and purpose.
11. Ethnic tension refers to protracted social and political confrontations between ethnic groups.⁸ Such confrontations may be physical or non-physical in nature. Ethnic tension is also referred to as 'ethnic conflict', and both terms are used interchangeably in this Chapter. Such confrontations may either be physical or non-physical in nature. 'Ethnic violence or clashes', also a commonly used term in Kenya, refers to physical violence that arises from, or is motivated by, ethnic tension.
12. The terms 'ethnic violence', 'ethnic tension,' and 'ethnic conflict' are often used interchangeably. This Chapter distinguishes ethnic violence as an aggravated form of ethnic tension or conflict that results in physical violence or even armed conflict. Ordinarily, ethnic tension precedes the occurrence of ethnic violence. Ethnic tension may also continue in the aftermath of ethnic violence.
13. Ethnic tension does not result from the mere co-existence of multi-ethnic groups within a nation.⁹ Rather, ethnic conflict and ethnic violence often arise from socio-economic and political tension between or within the various ethnic communities which are then manipulated by politicians or other leaders to further a selfish political or economic agenda. In Kenya, ethnicity has become an instrument of division. Consequently, parts of the country have experienced heightened levels of

⁶ NCIC Act, sec 2

⁷ Draft Ethnic and Race Relations Policy, NCIC, 2012

⁸ S Kinyanjui & G Maina 'Ethnic conflict in Kenya: An analysis of the politicization of ethnicity and the impact of free markets on ethnic relations' in Kenya Section of the International Commission of Jurists *Ethnicity, Human Rights and Constitutionalism in Africa* (2008) 80.

⁹ O McOnyango 'The Jews, the Gentiles and the Grudge' *UNESCO seminar paper* (1995) 1.

ethnic tension which have resulted in ethnic violence. The 2007/2008 post-election violence that led to the creation of this Commission is perhaps the worst, but not the only, example of ethnic tension erupting into ethnic violence through political manipulation.

Ethnic Composition

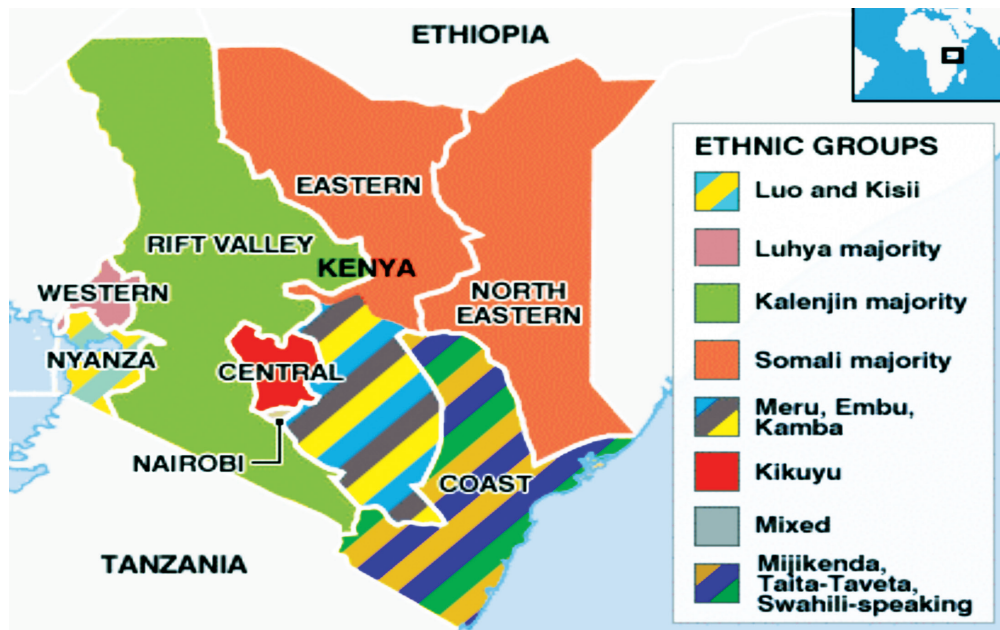
14. Kenya is a multi-ethnic country. Following the adoption of a new Constitution in August 2010, the country has been geographically and administratively divided into 47 counties. Previously the country was divided into eight provinces and 210 districts. With the current population of approximately 41 million people, the country is inhabited by more than 44 ethnic communities from the Bantu, Nilotic and Cushitic peoples. The country's population also comprises people of Arabic, Asian and European origin. The 2010 Population and Housing Census Report include the most recent data on ethnicity, which is set forth in Table 1 and Figure 1.

Table 1: Ethnic composition of Kenya as at 2009¹⁰

Ethnic group	Population
Kikuyu	6,622,576
Luhya	5,338,666
Kalenjin	4,967,328
Luo	4,044,440
Kamba	3,893,157
Kenya Somali	2,385,572
Kisii	2,205,669
Mijikenda	1,960,574
Meru	1,658,108
Turkana	988,592
Maasai	841,622
Teso	338,833
Embu	324,092
Taita	273,519
Kuria	260,401
Samburu	237,179
Tharaka	175,905
Mbeere	168,155
Borana	161,399
Basuba	139,271
Swahili	110,614
Gabra	89,515
Orma	66,275
Rendile	60,437

¹⁰ Government of Kenya 2009 Population and Housing Census Results (2010).

Figure 1: Distribution of Kenya's ethnic communities¹¹



Causes of Ethnic Tension

Colonial origins

15. The origin of Kenya as presently constituted can be traced back to 1895 when the British East Africa Protectorate was established.¹² Prior to that, every community that lived in the territory now called Kenya existed as a discrete unit according to its own respective socio-political arrangements, governing itself by its own customary laws and traditions.¹³ This is true not just of Kenya but of many pre-colonial societies in Africa.
16. Pre-colonial Africa consisted of two categories of societies. The first category had centralised authority, administrative machinery, and standing judicial institutions, while the second had communal and less intrusive governmental paraphernalia. These differences notwithstanding, the majority of pre-colonial African societies

¹¹ As above.

¹² See C Singh 'The republican constitution of Kenya: A historical background and analysis' (1965) 14 *International and Comparative Law Quarterly* 878.

¹³ On such arrangements, see generally A El-Obaid and K Appiagyei-Atua 'Human rights in Africa: A new perspective of linking the past to the present' (1996) 41 *McGill Law Journal* 821.

characteristically displayed ethnic, cultural, and linguistic homogeneity, as well as fundamental cohesion.

17. Foreign intrusion – notably slave trade and colonialism – led to the decline and subsequent demise of many of the social and communal values that had defined African societies. With the introduction of Arab slave traders and European colonialists, African customary practices that essentially promoted homogeneity no longer evolved according to African needs.
18. The weapons of Africans at the time (spears, bows, and arrows) were inadequate against the more destructive weapons of the foreign intruders. Consequently, African societies were easily dominated politically, economically, and socially and their social structures and cultures were either ignored or replaced with foreign ones. For the administrative convenience of the colonial rulers, the disparate traditional communities were forcibly cobbled together to form a single large territorial entity. It was in this fashion that most of the colonial African states, including Kenya, were formed and developed over the years.

Divide and rule policy

19. The colonial government pursued a policy of 'divide and rule' in order to consolidate their hold on the country, and to lessen the possibility that the African population would resist colonial rule. To that end, they magnified the differences between the various communities and regions, and stereotyped each community in a manner that would sow suspicion, hatred and the sense of 'otherness'.
20. In addition, colonial government created ethnically defined administrative boundaries. In determining such boundaries, no serious thought, if at all, was given to historical inter-ethnic interactions and relations. For instance, the people of what was known as Northern Frontier District were divided into two main groups: Somali and Galla with each group accorded its own territory. Sub-groups within these two main groups were further restricted within specific territorial boundaries. The arbitrary manner in which these boundaries were created and the arbitrary nature by which previously independent communities were brought within one administrative unit encouraged competition for resources and ethnic tension.
21. Moreover, the colonial government focused on developing infrastructure and social services in productive areas of the country (the so called 'White Highlands') at the expense of the rest of the country. The resulting inequality remained largely unaddressed in the policies and practices of independent Kenya.¹⁴ Areas were

¹⁴ As above.

defined productive if they contributed to the economic benefit of the colonial power. Thus, fertile agricultural land and areas important for transporting goods were singled out for infrastructure development. The preferential treatment given to some areas of the country because of their clear productivity thus led to differential treatment of ethnic communities that were patterned around the ethnic enclaves created by the colonial government.

22. It is therefore not surprising that underlying regional imbalances and the attendant inter-ethnic inequalities continue to inform the struggle for the Country's resources and access to public services. Competition over public resources often takes on an ethnic dimension and contributes to ethnic tension, conflict and violence.
23. The colonial land policy, particularly in the so-called 'white highlands' contributed enormously to regional and ethnic marginalisation from the economy. Colonial land policies resulted in displacement, the creation of 'native reserves', as well as the movement of masses of population from areas of their habitual residence to completely different regions and settling them on lands that traditionally belonged to other communities. The creation of native reserves ensured that rural areas outside the European domain were demarcated and administered largely as tribal units. The colonial government restricted trade and contact between administrative units
24. By the time Kenya attained independence on 12 December 1963 the colonial power had imposed elements of a modern state structure on communities that historically lacked inter-communal coherence. By forcing ethnic communities that previously lived independent of each other to live together, the British colonisers appeared to be indifferent to the resulting ethnic polarisation. Furthermore, through its policies that favoured the investment of resources only in 'productive areas', colonialism encouraged and created the foundation for discriminatory development in Kenya.¹⁵
25. During the Commission's hearings, a leading political science scholar, Professor Walter Oyugi, succinctly summarised this history:

Before the British settled in this country, [various ethnic] groups existed. They existed as neighbours and they interacted out of need because there were certain resources which were only available in certain areas. They accessed them through the exchange mechanism. There were also conflicting relationships depending on the culture of the neighbouring groups like cattle rustling especially between the Maasai and the Akamba, the Luo and the Nandis and so on. There was interaction and, therefore occasional rivalry over land, particularly over pasture and water, was common. Later on, this extended to agricultural

¹⁵ See African Peer Review Mechanism 'Country review report of the Republic of Kenya' available at <http://www.polity.org.za/article.php?a_id=99422> and <<http://www.nepad.org/aprm>> (last accessed 17 April 2010) 46.

activities. What would happen with the emergence of the colonial situation? Towards the end of 19th Century particularly after the consolidation of British authority around the time of World War I, what the British did which contributed to the emergence of consciousness of various ethnic groups was the idea of containment. Before colonialism, people were moving freely depending on their ability to conquer; but with colonialism, they were now confined to a territory. Administrative units were created and there was an association of people within an area. Over the years, a sense of feeling that “this is our area” or “this is our territory” or “this is our land” developed. Hence, the emergence of Nandi district, Kisii district, Kiambu district and so on. So, you are there because of colonial convenience but over the years, a consciousness of ownership of that particular asset called land began to emerge. Therefore, you begin to see the convergence of territory and ethnic groups. The association of certain ethnic groups emerged. For example, Central province belonged to Kikuyu, Nyanza for the Luos and Kisii, Western for Luhyas, Rift Valley for KAMATUSA; that is, Kalenjin, Maasai, Turkana and Samburu.¹⁶ “

26. As a result of the ethnic biases that coloured development and land policies of the colonial government, Kenya, like many other African countries, entered the era of independence with a heightened sense of ethnicity that continued to divide rather than unite the country. This ethnocentrism had manifold implications. It encouraged the politicisation and manipulation of ethnic identities, resulting in the exclusion of some communities from participating fully in the core social, economic and political activities of the country.¹⁷ Consequently, one of the most acute problems the country faces is the endless struggle to integrate its different communities into a democratic modern nation, without compromising their respective ethnic identities.¹⁸
27. The multiple contradictions left behind by colonial policies on the one hand, and the lack of political will and commitment on the part of the ruling political elite continued to impact negatively on all efforts at creating a truly democratic and prosperous Kenya for all its citizens.

Insider/Outsider dynamics

28. Related to the colonial origins of ethnic tensions discussed above is the phenomenon of ‘insiders’ and ‘outsiders’. Ethnic tension and violence occur when communities assert a superior claim over a territory at the expense of or to the exclusion of others. Such superior claims are based on the assumption that ownership or occupation at some point in the past created an exclusive claim for such ownership or occupation in the present. Often such claims are based on a selective reading of history or oral tradition and myths handed down from generation to generation.

16. TJRC/Hansard/Thematic Hearing on Ethnic Tension and Violence/Nairobi/2 February 2012/p. 5

17 African Peer Review Mechanism (n 8 above) 49.

18 As above.

39. Such exclusive claims to territory inevitably create classes of 'insiders' and 'outsiders'. This perception of people as outsiders as opposed to fellow citizens often lead to increased tension based on ethnicity which, in turn, create the potential for ethnic violence.
31. In the coastal region, members of the Mijikenda community, who regard themselves as indigenes of the coast, view non-Mijikenda individuals such as Kamba, Kikuyu, and Luo who have migrated or settled in the region as 'outsiders'. The 'outsiders' are regarded as 'wabara' and are viewed as a people who have unfairly appropriated to themselves local resources, particularly land.
32. There exist perceptions that while the coastal region as a whole has historically been economically marginalized, specific areas within the region that are predominantly occupied by non-Mijikenda are way better in terms of access to infrastructure and access to public services. The Commission heard such views in relation to Mpeketoni Settlement Scheme which is predominantly occupied by members of the Kikuyu ethnic group. According to a witness:

You heard about the Bonis. They do not have a road network. If you travel for a distance of less than 100 kilometres you can take 24 hours [...] The most hurting thing is that you go up to Kibaoni on the junction going to Mpeketoni settlement scheme the road is so wide and clean that if you are going to Tana River by road you go through Mpeketoni for the sake of you just knowing the terrain and see it for yourself. The bus was zooming as if it was an aircraft on the runway.¹⁹
33. A perception exists also that public resources allocated for 'insiders' are often diverted to 'outsiders' within the region. For instance, a witness testified that while he had lobbied for an ambulance to be allocated to Lamu District Hospital, the same was diverted to Mpeketoni sub-district hospital:

I went to the Provincial Director of Medical Health Services. We did everything right. However, when the ambulance came it was taken to Mpeketoni. It was shown as belonging to Lamu District Hospital, but it was sent to Mpeketoni sub-district hospital. I went to the PDA to inquire but I was told it was an order from Nairobi that it be taken to Mpeketoni. There is nothing we could do.²⁰
34. While the Commission could not verify this particular claim, the perception that areas occupied by individuals from outside the region enjoy better services is strongly held amongst coastal locals.

19. TJRC/Hansard/Public Hearing/Lamu/10 January 2012/p. 18

20. TJRC/Hansard/Public Hearing/Lamu/10 January 2012/p. 18

35. In the Rift Valley, members of the Kalenjin assert a superior claim over the region and view non-Kalenjins resident in the region as foreigners. Indeed, the region has been the site of violent ethnic clashes. In particular, during the 1992, 1997 and 2007 general elections, those considered foreigners were forcefully and violently evicted from their farms. This has been particularly the case in settlement schemes that were created in Rift Valley following independence. Non-Kalenjins living in these settlement schemes are regarded as foreigners or *bunot*. As explained by a member of the Kalenjin Council of Elders:

According to the Kalenjin culture, visitors are received in a special way. In the language of the Kalenjin we call those people *Bunot*. *Bunot* is not a derogatory name; it is a name that describes that you do not come from that area. There is a process that the Kalenjin people carry out to assimilate those people into a cohesive life. [...] So, the Kalenjin Community requires nothing but recognition by those who came that they are *Bunot* and the others are the indigenous people. To bring about healing, the Kalenjin Community would like to ask the other communities and particularly the Kikuyu Community because they are predominant, they are our neighbours, they own land and we have intermarried, to recognize that they are *Bunot*.²¹

36. Although it was claimed, as quoted above, that the term ‘bunot’ is not derogatory, non-Kalenjins in the region perceive this characterization both as derogatory and the source of ethnic tension and the violence and eviction that they have experienced in the past. According to a witness:

The word “bunot” was explained in detail here as a stranger or a person who has stayed in a place for a while. [...] So, the word “bunot” shows that we Kikuyus are still tagged as strangers and we have never been accepted as residents of this place.²²

37. And as described by another witness:

When you stay there for long with people from a certain community, you speak their language fluently, just like them, but the people there, though you have lived with them, know that you are not one of them. They just know you as a foreigner.²³

38. In addition to being referred to as *bunot*, non-Kalenjin communities who have settled in Rift Valley are generally referred to as *madoadoa*.²⁴ In areas predominantly occupied by Maasai, such as Narok and Kajiado, the Kikuyus in particular are referred to as *thabai*. According to a witness, who was brutally attacked and forcefully evicted from his farm in Narok during the 2007 PEV:

They [the Maasai] used to refer to us as spots and thabai, which is a thorny plant. Thabai is a Kikuyu name for that plant.

21. TJRC/Hansard/Public Hearing/Eldoret/3 October 2011/p. 3

22. TJRC/Hansard/Public Hearing/Eldoret/4 October 2011/p. 31

23. TJRC/Hansard/Public Hearing/Naivasha/26 September 2011/p. 30

24. Translates to English as ‘spots’.

Of names and their meaning

39. In Coast and Rift Valley alike, a thorny issue that is intricately tied to the notion of insiders and outsiders relates to names of places. In particular, local communities in these two regions are aggrieved that places occupied by those they consider outsiders have been given 'outside names'. In Lamu, a witness lamented before the Commission that a lake that was previously called Mkunguya had its names changed to Kenyatta:

There is a lake there [Mpeketoni] called Lake Kenyatta. How did it get to be called Lake Kenyatta in this area? How did the name Kenyatta find its way in this area? If we go back into our history and our culture, the lake was called the Mkunguya Lake. But now it has become Lake Kenyatta. There are names that have been brought in from central [...] Why is there this plot to even change the names of places that hold our history and our origin in this place?²⁵



²⁵ TJRC/Hansard/Public Hearing/Lamu/10 January 2012/p. 29.

40. The Commission heard a similar issue in Eldoret:

Finally, names have a meaning. When the Kalenjin Community came back to Uasin Gishu, they knew the names of particular areas. However, we have problems with names. When our brothers from Central or when the children of Mumbi came to Uasin Gishu, they came with their names. From the Kalenjin perspective, the soil is alive. The soil has its spirit. That is where languages clash. The soil is alive and it knows its owners and its name. However, when somebody else brings a name, there is a clash. The soil says, "What is this name? What is your totem? What is your clan?" I do not blame the Kikuyu Community. However, we would like to tell them that the names they have given the lands they have occupied continue to create conflict in the spiritual realm. For that reason, conflict demonstrates itself practically.²⁶

41. During electoral processes, the foregoing issues are often used to ignite violence against 'outsiders' who are required to vote for ostensibly the preferred political candidate of the local community. Writing in the Oxford Transitional Justice Research Working Paper Series, Dr. Lukoye Atwoli captured this notion succinctly:

A recurring theme in many marketplace and bar-room debates is the need for 'foreigners' who have settled in other people's 'territory' to learn to respect the 'indigenous' people. In this view, the 'foreigners' must not compete for political power with the 'locals', and whenever a national issue requires a vote, they must vote with the 'host' community or face dire consequences.²⁷

42. Thus in Rift Valley, for example, non-Kalenjins are generally expected to vote according to the preferred political candidate amongst the Kalenjin. A member of the Kalenjin Council of Elders testified as much before the Commission:

There is a process that the Kalenjin people carry out to assimilate those people into a cohesive life. In Uasin Gishu County, when the Kikuyu Community or other communities came to settle and live alongside the Kalenjin Community, that kind of process never took place. This, therefore, has left these people living parallel lives all along. They have worked together in business, intermarried and live side by side, but that spirit that brings people together was never developed. This is the root cause of conflict in this region. This is why during elections there is a weak spot in this delicate relationship. *It is primarily because the people from outside this region vote contrary to the voting pattern of the people within the area. So, our people take it that these are not our people and we cannot live with them.*²⁸

²⁶ TJRC/Hansard/Public Hearing/Eldoret/3 October 2011/p. 4.

²⁷ Dr. Lukoye Atwoli, A radical proposal to deal with our prejudices, 21 August 2009, Oxford Transitional Justice Research Working Paper Series

²⁸ TJRC/Hansard/Public Hearing/Eldoret/3 October 2011/p. 19.

Beyond ethnic divides: Stories of heroic roles during the 2007/2008 Post-Election Violence

The Commission also received many testimonies illustrating the often heroic role of some Kenyans who risked their lives to help members of other communities. As one illustrative example, the Commission was told of a Kalenjin who hid two Kikuyu families in his house during the 2007-2008 post-election violence. In another instance, a blind Kikuyu man was rescued by a young Kalenjin while fleeing the violence in Naivasha in 2008:

We met one Kalenjin who was a young man that I had known before who was an ex-chief. He agreed to hold my hand. He said that there were warriors within the bushes and that if they saw him holding my hand they would probably kill him as well. So we went through the bushes [TJRC/Hansard/Public Hearing/Naivasha/26 September 2011]

Another witness told the Commission how the Chief of Lumumba, who is a Nandi, saved the Kikuyu in his community in 2008:

He is called Samatei. He helped the people of Kamukunji. Nobody was killed. He is a man who loves God and people. He should be thanked. The other chiefs went against him. He transferred the APs [administrative police officers] who were Nandi. He said that he did not want them [TJRC/Hansard/In-Camera Hearing/Naivasha/27 September 2011]

Another witness was saved by his neighbour during the 2007-2008 post-election violence in Naivasha:

Now it was approaching 12:00 pm and attacks had started at 9:00 am. My neighbour, a Kikuyu woman, came to the window and told my wife: 'Let me escort you because women are not being attacked. Can I escort you with the children to the police station?' [...] [My wife] requested her to tell the police where we were. The lady came to our house and informed us that the police were outside. So we were rescued by the police [TJRC/Hansard/In-Camera Hearing/Naivasha/27 September 2011]

The Commission wishes to recognize these brave Kenyans and hopes that their examples will be used to foster reconciliation.

State sanctions of outside/insider notions

43. The designation of a community as 'other' or as an outsider has sometimes found support in state policy. In the northern region of the country, particularly in those areas that made up the former North Eastern Province, the Government has institutionalised the disparate treatment of Kenyans based on ethnicity by requiring that Kenyans of Somali origin carry a special pass. While the Government claimed that requiring such passes assisted in distinguishing between Kenyans of Somali origin who are legally present in the region and non-Kenyans of Somali origin, often from Somalia, who may not be legally present, the local Kenyans attribute more sinister motives.
44. This theme is addressed in detail in this Report in Chapter Three of Volume 2C which documents the experiences of ethnic minorities and indigenous people.

Negative perceptions and stereotypes

44. Negative perceptions and stereotypes are a major cause of ethnic tension in the country. Labels have been put on certain communities, portraying them in broad, often negative terms that generalise certain traits and apply them to all individuals belonging to the described community, regardless of how individuals perceive themselves. For example, the Kikuyu are sometimes described as thieves, the Maasai as primitive, the Somali as terrorists, etc. The testimony of Commissioner Halakhe Wago of the National Cohesion and Integration Commission (NCIC) before the Commission during its thematic hearing on ethnic tension and violence is instructive in this regard:

There are negative attitudes towards individuals and social groups. For example, for so long there has been a kind of perception about the pastoralists like the Maasai as always being primitive. The same pastoralists, courtesy of the Somalis and their likes in the north, are seen as being warlike. The Kikuyu are thieves because a few people have picked things here and there or love money because they have been industrious or worked hard. The Luhya and the Kamba are at times referred to as liars and at times as very loyal. The Luos think so much about themselves when there is nothing much about them. We hear so many things about all these communities. The Coastals are deemed lazy people. So, this has really gone into the minds of many Kenyans to the extent that when they see me or you, they will definitely know where to place you as long as your name is clearly understood.²⁹

45. Wambugu Ngunjiri echoed Halake's sentiments and further pointed out that ethnic stereotypes have persisted because of the absence of efforts to debunk such stereotypes:

It is a problem of perceptions, myths and stereotypes about each other. However, nobody has tried to debunk this and so we have people growing in various communities who have been told that other communities behave in a certain way without taking time to find out if it is true. So, we heard conversations that Kikuyus were thieves because a number of members of government were involved in theft. For example, in Teso, even the small Kikuyu population is perceived as thieves even though there were no direct incidents of any of them stealing anything we have reached a point in this country where a lot of our conversations are not based on facts, but perceptions that have developed over years.³⁰

46. Most of the negative perceptions and stereotypes that are present today in Kenya were initially propagated by the colonial government. Besides employing the 'divide and rule' tactic, the colonialist government also perpetuated ethnic stereotyping. Ethnic stereotyping during the colonial period was a silent culture and is therefore not well documented. The writings of Kenyans who lived during this period, as well as the oral testimony of survivors, gave a general sense of the nature and extent of

29. TJRC/Hansard/Thematic Hearing on Ethnic Tension and Violence/2 February 2012/Nairobi/p. 24

30. TJRC/Hansard/Thematic Hearing on Ethnic Tension and Violence/2 February 2012/Nairobi/p. 35

the stereotyping. Generally, the colonialists praised groups out of which they were able to elicit collaborators, such as the Maasai, but denigrated those ethnic groups out of which many 'dissidents' came, such as the Kikuyu.³¹ JM Kariuki, while giving an account of his experiences at the Kowop camp in Samburu District, paints a picture of ethnic stereotyping during the colonial days:

The Turkana said that they had been told by the District Commissioner that we Kikuyu were very disgusting people whose custom it was to eat the breasts of our women and even the embryos of children in the womb. Any Turkana or Samburu who brought him the head of an escaped detainee would be rewarded with *posho* (food), sugar and tea.³²

47. The colonial government succeeded in creating a picture of the Kikuyu as barbaric and savage who should thus not be allowed to interact freely with others in society. In creating negative stereotypes of the Kikuyu and others, the colonial government furthered a policy of economic, social and political marginalisation of other communities.
48. The colonial government's response to the Mau Mau rebellion included perpetuating stereotypes and dividing Kenyans based upon ethnicity. For example, the colonial government hired large numbers of Luo to work on white farms to replace the 'untrustworthy' Kikuyu and included disproportionately large numbers of the Kamba community in the army. The country was thus easily balkanised in the early 1960s when the colonial government declared its intention to grant Kenya independence.

Culture and stereotypes

49. While the colonial government played an important role in cultivating ethnic stereotypes, the Commission also received evidence that some stereotypes are drawn from and driven by traditional cultural beliefs and practices. For instance, the Commission heard that men from communities that do not practice male circumcision have always been stigmatised and regarded as lesser or weaker men, and therefore, incapable of or unsuitable to take political leadership of the country. As one witness testified:

When it comes to issues of leadership, you will not be shocked to find that people who are supposed to be national leaders, saying that the Luo cannot ascend to offices of leadership because they are not circumcised. In the run-up to the 2007 elections, one much respected leader [...] did say publicly that Hon. Raila Odinga cannot be President of this country because he is not circumcised.³³

³¹ As above.

³² JM Kariuki *Mau Mau detainee: The Account by a Kenya African of His Experiences in Detention Camps, 1953-1960* (1973) 74-75.

³³ TJRC/Hansard/Public Hearing/Kisumu/19 July 2011/p. 14

50. Not only has this particular stereotype been used on the political arena to discredit politicians from communities that do not practice male circumcision, but it has also fuelled targeted and barbaric forms of violence against members of such communities. Such violence was meted out particularly against members of the Luo community during the 2007/2008 PEV. The Commission of Inquiry into the Post-Election Violence (CIPEV) recorded forceful circumcision and penile amputation of members of the Luo community, reportedly perpetrated by members of the Mungiki, particularly in Naivasha, Nairobi and Nakuru.³⁴ The Commission received similar evidence during its hearings in Kisumu.
51. Ethnic stereotyping has been extremely damaging to ethnic relations in Kenya. Indeed, some ethnic groups partly attribute their historical economic marginalization to stereotypes that have all along been perpetuated about them. The nexus between ethnic stereotyping and economic marginalization was well drawn by a witness in Kisumu:
- Our people [the Luo], because of persistent and consistent exposure to negativity, have come out to be stigmatized, isolated, uprooted and made hopeless. As a result of this, all the negative adjectives have been used to describe them, and which unfortunately, they have come to believe and even talk about. Among them is that they are lazy. This is diametrically opposed to their virtue of hard work. Two, they are lovers of good life, and thirdly, they are unenterprising. Fourthly, they are too cultural or too traditional. Fifth, they are immoral, proud, antagonistic, empty hero worshippers, backwards and wallowers in political adversity. They are too communal. All these have been summarized that a Luo should not even have a place in this society. They cannot even occupy leadership positions. Psychologically, this is what the people have believed and they live with it. Commissioners, this is closely related to the question of economic emasculation. If you have taken the mind and soul of a person, what remains is a hopeless shell.³⁵
52. A perception study conducted by the Institute of Economic Affairs in 2009 found that respondents had more positive than negative opinions of ethnic groups other than their own. The study also found that many of the negative comments by the respondents on their opinion of other ethnic groups were based on traditional stereotypes about the particular ethnic groups. The study also revealed that 79.1% of the respondents would marry a person from another ethnic group while 86% of them would be a business partner to person of another ethnicity. In essence, the study revealed that members of different ethnic groups do not necessarily have inherent hatred for each other. Rather, they are willing to and often co-exist together. The results of the study are shown in the Tables below.

³⁴ CIPEV Report, 107

³⁵ TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p. 22

Table 2: Perception/comments of members of other ethnic groups

Ethnic group	Positive comments	Negative comments
Luo	54.7%	18.5%
Kikuyu	37.2%	34.5%
Luhya	40.4%	8.1%
Kamba	32.6%	20.3%
Maasai	53%	6.9%
Mijikenda/Taita/Coastal ethnic groups	22.1%	15%
Kalenjin	23.7%	22.9%
Kisii	25.6%	13.5%
Somalis	13.1%	24.8%

Source: IEA perception study (2009)

Question	Yes	No
Would you marry a person from another ethnic group?	79.1%	20.9%
Would you be a business partner to a person of another ethnic group	86%	13.3%
Would you be best friends to a person of another ethnicity?	89.7%	9.2%
Would you share a house with a person of another ethnicity?	75.6%	23.1%

Source: IEA perception study (2009)

Ethnic tension amongst pastoralist communities

53. Ethnic tension and violence in specific parts of the country is influenced by the dynamics of cattle rustling and other resource-based conflicts. While electioneering and insider/outsider dynamics are factors that help to explain ethnic tension and violence among pastoralist communities, resource-based conflicts are equally important. This is not surprising as access to important resources such as grazing land and water has diminished over time with the increase in the pastoralist population and the encroachment into pastoralist areas by sedentary communities.
54. Reuben Kendagor testified before the Commission about cattle rustling between the Tugen Community of Baringo North and the Pokot. His testimony highlights the long history of such clashes, the intersection of ethnicity and resource-based conflicts, the escalation of violence with the introduction of high powered weapons, and the inability or unwillingness of the Government to provide security to these communities:

[W]e are a community that has been offended for a long time. History tells us that the first offence was committed in 1918 when our community was invited for a meeting in a place called Chepkesin in Ng'orora. During this incident, the meeting was expected to be a peace meeting but we are told that everyone in the meeting had a weapon. Our men were told to untie their bows. This is what happened and our people were massively killed. Down the line in 1977 to 1979, our neighbour community invaded our land causing a number of injuries and a large number of livestock were taken away. Most of us moved away. Up to date, I can tell you most of our people are living as far away as Nakuru, Eldoret, Trans Nzoia and so on because of the harsh raids by our neighbour. After 1987, the same problem emerged. That is when the sophisticated weapons were used. The AK47 was used and we began losing lives. This was serious because people were killed even on the wayside. People moved massively. It became more serious when we lost one of our great athletes, a standard six boy, in 2006 in a place called Sitegi in Kaptura Sub-Location, Ng'orora Location. This time round, it made so many families to leave their homes and so many children leave school. During the post-election violence of 2007, this became very serious. We identified one of the raids as a massacre because in a village called Kamwotyo we lost seven people at one time. A lot of animals were taken away. There were gunshots all over. Our people moved towards Kerio Valley. Today, we have people who are settled along River Kerio as IDPs. [...] We lament because ours is a community that will never counter-attack anybody at all. This community has been very bitter. Most of our people call upon the Government to come to their rescue when these incidents happen to them. Unfortunately, the Government has never shown any commitment let alone disarming our dangerous neighbours.³⁶

55. The Pokot have had similar encounters with the Turkana. The Commission was informed that since the 1960s, the Pokot and Turkana communities have engaged in endless wars over cattle, pasture and water.³⁷ Pastoralist communities in the north and north eastern regions of the country also have a long history of ethnically-based resource conflicts, including cattle rustling.³⁸ The practice, however, has become more dangerous due to proliferation of firearms and ammunition into the region from neighbouring Ethiopia and Somalia, leading to banditry and general insecurity.³⁹
56. According to the Akiwumi Report, the ethnic tension and violence in Northern Kenya involve "fighting between Somali clans and between Somali clans and the Borana tribe and their cousins such as the Orma, the Burji and the Garre."⁴⁰ In recent years, such clashes involved Borana and Degodia in Isiolo; Degodia and Ajuran in Wajir; Garre and Degodia in Wajir and Mandera; Borana and Degodia in Moyale; Degodia and Orma in Tana River; Ogaden and Munyoyaya, Pokomo and Malokote in Tana River; and Galjael, Orma and Sanye.⁴¹

36 TJRC/Hansard/Public Hearing/Kabarnet/ 24 October 2011/p. 37.

37 TJRC/Hansard/Public Hearing/Kabarnet/25 October 2011/p. 2-6. .

38 Akiwumi Report, p. 279. Kiliku report, p. 63.

39 Akiwumi Report, p. 279.

40 As above.

41 Akiwumi Report, p. 281.

57. Ethnic tension and violence among pastoralist communities are often caused by a number of factors, including:

- Frequent droughts and resultant inadequacy of water and grass. These recurrent droughts cause the drying up of dams, pans, springs and rivers leaving only a few that endure the severity of such vagaries of weather. Depending on the location of the water point or grazing areas, the indigenous communities more often than not, give very difficult conditions, which include cash payments or payments in form of animals for water or grass. This often generates into violent hostilities which can only be dealt with by the survival of the fittest, leading to skirmishes.
- Cattle rustling is one of the major causes of ethnic and clan animosity and violence as the victimized group engages in revenge missions which not only lead to theft of large herds of cattle and other livestock but to loss of human life and multiple injuries to many people.
- The proliferation of firearms from Somalia and Ethiopia has enabled tribes and clans in the region to establish formidable clandestine militia which increases the willingness to use violence to advance interests or solve disputes.
- Diminished access to important resources such as water and grazing land has led ethnic groups to increase their efforts to control resource rich territories, and has also led to election-related violence as ethnic groups and clans compete to increase areas controlled by members of their community.⁴²

58. The political dimension of ethnic tension in the northern region, and the complicated relationship among the factors contributing to such tensions and violence, was touched on by Commissioner Waqo of the NCIC in his testimony before the Commission:

Sometimes you cannot differentiate between peace, natural resource based and political interest based conflicts. For example, what is happening in Moyale today is not so easy for anybody to differentiate. The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) Report showed that it was based on water and pasture problems, whereas many others stood up and said that there is nothing to do with pasture and water. After all, they have received the highest rainfall in the last ten years in that region. So, it is not very easy to tell the differences in some of the instances, but we need a lot of reinforcement of security because of illicit arms. In most of the situations, without any provocation or struggle for resources, availability of firearms has also led to or promoted lawlessness, insecurity and violence [...].⁴³

⁴² As above, 280.

⁴³ TJRC/Hansard/Thematic Hearing on Ethnic Tension/Nairobi/2 February 2012/p. 23.

Ethnicity and politics

59. The first President of independent Kenya, Jomo Kenyatta, did little to counter the ethnic divisions created by the colonial government. During his tenure a small elite group popularly referred to as the “Kiambu Mafia” dominated Kenyan politics, resulting in the emergence of a class of capitalists who were mainly members of the Kikuyu community.⁴⁴ This class enjoyed huge economic prosperity and political influence and repressed any resistance against it. As a result, other ethnic groups as well as many non-conforming Kikuyus were alienated from government affairs.⁴⁵
60. President Kenyatta’s authoritarian style of leadership soon began to attract staunch opposition from some of his previous allies including the then Vice-President, Jaramogi Oginga Odinga, who later broke with KANU to form the Kenya Peoples’ Union (KPU). Although its main aim was to counter KANU’s ethno-politics, it is rather ironic that Odinga’s KPU was far from a model of ethnic diversity as it found support almost exclusively from people of Luo ethnicity.⁴⁶ The formation of KPU therefore enhanced, rather than reduced, the balkanization of the country along ethnic lines. In 1969, following the Kisumu Massacre, KPU was banned. A few months before KPU was banned, Tom Mboya had been assassinated. The assassination of Tom Mboya and subsequent banning of KPU poisoned ethnic relations in the country, especially the relationship between the Kikuyu and the Luo. It was believed that the state, headed by President Kenyatta, had assassinated Tom Mboya. This belief solidly united the Luo against the Kikuyu and vice versa.⁴⁷ The Kikuyu on their part began an oathing campaign to ensure that all Kikuyu’s owed allegiance to the President in particular and the ‘House of Mumbi’.⁴⁸ The Commission received evidence about the occurrence of the oathing ceremonies and the impact that these ceremonies had on ethnic relations:

I was removed from class in 1969. I was in Standard Four. There was tension but I could not understand whether it was in the whole country. Afterwards, I understood that it affected Central Province. We were taken through the rituals of the Kikuyu. It was called “oathing”. So, I have grown up knowing that Kenya is just for one tribe. I remember that I was in Standard Four. I could not understand, as the women of Central Province, why we were being told that we should not get married to men from other tribes, and especially the Luo community. In that ritual, my agemates did not want to speak about that particular issue. That is what caused confusion among us. We lived in a dilemma as we grew up and brought up our children. We were not free to speak to our children about the source of our differences with other people.⁴⁹

44 A Korwa and I Muniyae ‘Human rights abuses in Kenya under Daniel arap Moi 1978–2001’ (2001) 5/1 *African Studies Quarterly* available at: <http://web.africa.ufl.edu/asq/v5/v5i1a1.htm> (accessed on 15 April 2012).

45 As above.

46 R Morrock ‘Heritage of strife: The effects of colonialist “divide and rule” strategy upon the colonized peoples’ (1973) *Science and society* 135–137.

47 J Karimi and P Ochieng, *The Kenyatta Succession*, (1980) 18

48 J Karimi and P Ochieng, *The Kenyatta Succession*, (1980) 18

49 TJRC/Hansard/Women’s Hearing/Nyeri/8 November 2011/p. 15.

61. Another witness told the Commission the following story that confirms that oath-taking ceremonies did take place:

The oath-taking was done to maintain the presidency in the House of Mombasa. There were people denying it in Provincial Administration. But I want to tell you one thing: The Provincial Administration then was operating outside the law. It was guided by different rules. So, there were calls in the newspapers that oath-taking was going on and my Provincial Commissioner then, Mr. Koinange, denied that there were such activities going on. As innocent as I was, I thought it was true that the PC did not know. So, there was an inspector of police, an OCS who was working with me when I was a DC. I called him and said: "Do you think this oath-taking is going on because we can see people being transported in buses? Is it true?" Then he told me: "I tell you, the Government is behind it." I told him: "No, you cannot be serious because the PC told me it was not true." I believed PC, DC or DO was speaking on behalf of the Government. So, I said: "This is not true." So, he told me: "If you want to prove let us go to your chief's office tonight." I had a chief in Kiini Location in Kirinyaga District. I think that location is still there, but it has, probably been sub-divided. So, we took off with him and a few askaris and we found the oath-taking going on. When we found the oath-taking going on, we arrested one person and the chief ran away. So, I took the paraphernalia that was being used. When I came back to my house, I told my wife that I think the PC is going to like me because he was saying there was no oath-taking, but I have got this paraphernalia that they were using to administer it. My first car was a Volkswagen 1200. So, I just drove to Nyeri and went and told the PC that, "you were saying there is no oath-taking, but, probably, you do not know; it is going on. I have some things to prove to you that it is going on". Then I went and brought the things to his office. He told me: "Who told you to take the law in your hands and go to that place? Did I order you to do so?" I said: "No, Sir." He told me: "Go back." The same day, I was transferred from Kirinyaga to Murang'a. Before I reached, Mr. Koinange was there with his Mercedes Benz and askaris. He said: "Pack up and go." So, I was startled a little bit. That was when I learnt that in order for you to succeed in the provincial administration, there are only a few words that you should say: "Yes, sir, no sir, thank you, sir." That probably continues up to date. I do not know because I have been out of it for a long time.

62. The effects of these ceremonies continue to be felt today and electoral competitions in Kenya, have always had ethnic undertones.
63. In the period during which KANU enjoyed a political monopoly, ethnicity and sycophancy took a central place in the country's politics. When the President's health began to fail in the 1970s, his close allies and staunch supporters, mainly from the Kikuyu community, began to look for ways of installing a "friendly" president other than President Kenyatta's then Vice-President, Daniel arap Moi, a Kalenjin. The main fear of President Kenyatta's allies was that the presidency would go to someone from another ethnic group, thus depriving them of the trappings

of power. Although the effort to sideline Moi was unsuccessful, it underscored the continued ethnicization of Kenyan politics, and the perception that ethnic representation at the highest levels of government would translate into widespread benefits for members of that community.

64. Daniel arap Moi entered the presidency with the pledge that he would move the country away from the curse and blemish of ethno-politics.⁵⁰ The early years of his presidency showed promise, with his government initially including Kenyans from a wide variety of ethnic communities. Moi's first cabinet, for example, included 11 ethnic groups: eight Kikuyu, three Kalenjin, three Luhya, three Luo, two Kisii, and one Maasai, Taita, Kamba, Embu, Digo and Meru.⁵¹
65. President Moi quickly became preoccupied with suppressing his perceived opponents. This preoccupation with limiting dissent and consolidating power accelerated after the attempted coup in 1982. Campaigns to address corruption, ethnicity and human rights abuses fell aside as President Moi and his government centralized power and tackled dissent.⁵² To consolidate his political power President Moi filled the civil service and state-owned institutions with members of his ethnic group and those from ethnic communities that were viewed as supportive of the regime.⁵³
66. There is evidence that President Moi's administration took a page from the colonial government and used divide and rule tactics to pit ethnic communities against each other.⁵⁴ This policy became particularly evident after the re-introduction of multi-party politics in the country in the early 1990s. The introduction of multiparty politics and elections coincided with a wave of ethnic violence in parts of the country. The NCIC summarizes Moi's tenure as president in the following terms:

Despite the Nyayo philosophy of peace, love and unity, there was insufficient attention to past grievances among Kenyans in the 1980s through to the 1990s. Specifically, there was: (i) lack of decisive land reforms, and land-based conflicts persisted; (ii) little regard to Kenya's diversity in employing or appointing public sector employees; (iii) inequitable distribution of budgetary resources; (iv) mismanagement of public resources; and (v) autocratic governance; among other challenges⁵⁵

50 A Sjögren and P Karlsson 'Kenyan politics 1963–2007: A background to the elections' available at http://www.nai.uu.se/articles/sjogren_and_karlsson/background-1/index (accessed 15 April 2011).

51 *Weekly Review*, Nairobi 30 Nov 1979 as cited in DP Aluhwalia (1996)

52 'Human rights abuses in Kenya under Daniel arap Moi 1978–2001' (2001) 5/1 *African Studies Quarterly* available at: <http://web.africa.ufl.edu/asq/v5/v5i1a1.htm> (accessed on 15 April 2012).

53 Above.

54 DO Oricho 'Advocacy campaign design for interethnic violence reforms in Kenya' (2009) 1/2 *Journal of Law and Conflict Resolution* 50.

55 National Cohesion and Integration Commission (n 100 above) 11.



67. The re-introduction of multi-party politics in the early 1990s, and the demise of KANU's authoritarian rule in 2002 renewed hopes of national healing and reconciliation among the various ethnic communities in the country. There was earnest expectation that the government would create an enabling environment that would ensure equality and non-discrimination for its citizens. Contrary to this popular expectation, most of the 1990s were a continuation of the un-democratic practices birthed at independence. In fact, the re-introduction of multi-party politics in 1991 only increased ethnic identities and divisions as the country's political parties were mainly regional, ethnic-based and poorly institutionalised. The nature and composition of the political parties founded in 1992 and thereafter attest to this fact in that even the self-styled national parties have ethnic or regional undercurrents.
68. It may be argued that Kenya's third multi-party elections, held in December 2002, presented the best opportunity for the development of an ethnically integrated country. This was primarily because of the creation of the National Rainbow Coalition (NARC), and interethnic political party. This opportunity was nonetheless lost as NARC's promise to end ethnicity was not translated into actual policies and programs. In fact President Kibaki's administration has been viewed as no better than its predecessors in relation to instilling a sense of national identity stronger than a sense of ethnic identity.

Land

69. Land is a key factor in understanding ethnic tension and violence in Kenya. When the white settlers came to Kenya, they found some parts of the country unsuitable for their settlement, “either because of the climate or because it was infested by tsetse fly.”⁵⁶ However, the land between the Gikuyu escarpment and Lake Victoria was deemed potentially rich for agro-based development. Owing to its favourable climate and fertile soils and given that the Uganda Railway traversed the region, white settlers were determined to turn it into a “white man’s country.”⁵⁷ Thus, from the early-1900s, there was an influx of settlers from Britain and South Africa.⁵⁸ At the same time the colonial government began to impose restrictions access to land by the existing Kenyan residents. The NCIC recently summarized this restrictive and discriminatory history:

During the colonial era, there was extensive land expropriation and resettlement by the colonialists from the indigenous communities. Land expropriation was extensive, from 2 million hectares in 1914 to 3 million hectares on the eve of independence. The expropriation was achieved through various laws, ordinances and promulgations, including the Native Trust Bill of 1926 which restricted indigenous groups to the Native Reserves. These realities raised the profile of land ownership and required extensive attention into independence to reduce their adverse impact on national cohesion and integration in Kenya. Land-related issues continue to be a lingering source of conflict to date.⁵⁹

70. The European invasion of the White Highlands, as the region later came to be known, became the source of economic marginalization in the country. In the main, European occupation of the region meant displacement of Africans from their traditional homeland.⁶⁰
71. Kenyans displaced from their land by the colonial government were concentrated in reserves, something that considerably restricted their socio-economic life.⁶¹ Those who did not prefer to live in the reserves remained in European farms either as squatters or as labourers, or sought employment in urban areas.⁶²
72. The Mau Mau rebellion to colonial rule had a profound impact on the country since it forced the colonial government to rethink and reformulate its discriminatory

56 R Morrock 'Heritage of strife: The effects of colonialist 'divide and rule' strategy upon the colonized peoples' *Science and Society* (1973) 135.

57 K Shillington *History of Africa* (1995) 339.

58 As above.

59 National Cohesion and Integration Commission (n 100 above) 9.

60 DA Percox *Britain, Kenya and the cold war: Imperial defence, colonial security and decolonisation* (2004) 15.

61 DA Percox *Britain, Kenya and the cold war: Imperial defence, colonial security and decolonisation* (2004) 15.

62 As above.



A structure housing a family at Pipeline IDP camp in Nakuru

policies.⁶³ Politically, it provoked socio-economic and constitutional reforms “designed to alleviate the grievances of those Africans who had not yet chosen to resort to violence, and to stem support for those who had.”⁶⁴ While these policies were aimed at minimizing rebellion and dissent, they further divided Kenyans along ethnic lines.

73. Central to many of the ethnic tensions in post-independence Kenya is the issue of redistribution of the land formerly occupied by white settlers.⁶⁵ Due to the skewed post-colonial land redistribution policy that was deliberately designed to favour the ruling class and not the landless masses, it is now estimated that more than half of the arable land in the country is in the hands of only 20% of the population.⁶⁶ Politicians in successive governments used land to induce patronage and build political alliances.⁶⁷ Much of the most valuable and productive land has ended up in the hands of the political class, members of their families, and friends (often of the same ethnicity) rather than being returned to the communities from which the colonialists had taken it.⁶⁸

⁶³ K Shillington *History of Africa* (1995) 388.

⁶⁴ DA Percox *Britain, Kenya and the cold war: Imperial defence, colonial security and decolonisation* (2004) 16.

⁶⁵ WO Oyugi ‘Politicised Ethnic Conflict in Kenya: A Periodic Phenomenon’ (2000) 6 available at <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan010963.pdf> (accessed on 15 April 2012).

⁶⁶ See generally G Njuguna *The lie of the land evictions and Kenya’s crisis*, 2 *African Policy Brief* (2008).

⁶⁷ Kenya National Commission on Human Rights ‘Unjust enrichment’ (2004) 1.

⁶⁸. As above.

74. The practice of illegal allocation and distribution of land has led to a general feeling of marginalisation among some communities as well as the ethnicization of the land question. The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (the Ndung'u Commission) 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."⁶⁹ This became the foundation of ethnic tensions, and later violence, particularly in the Rift Valley and Coast Provinces.
75. Further, through its policies that favour the investment of resources in only high potential areas that have ample rainfall and fertile lands, the government has encouraged asymmetrical development in the country that, because of the ethnic dimension of land allocation and ownership, itself has ethnic consequences.⁷⁰ The relationship among land ownership, development, and ethnicity is summarized in a recent report by the NCIC:

The Sessional Paper No. 10 of 1965 on African Socialism and its Application to Development and Planning sought to empower Kenyan citizens of the new nation through the provision of services and expansion of economic opportunities. In doing so, the Government adopted the Africanization Policy to replace the departing European and Asian communities with educated or skilled Africans. Most jobs, firms and businesses were taken over by the African elite but in an ethnically biased manner that also led to the exclusion of Kenyan Asians and Europeans from citizenship and appointments in the civil service. In addition, Sessional Paper No. 10 dismissed the livestock-based pastoralist economy and in the process contributed to unequal development patterns and the marginalization of non-crop-farming communities. There are historical legislative frameworks and policies that facilitate undesirable ethnic and race divisions. Examples of these frameworks and policies are: the Stock and Produce Theft Act which came into operation on 5th May 1933 and is still in force; Sessional Paper No 10 of 1965 that highlighted the areas with potential for growth and relegated other areas to underdevelopment without regard to the people who live there; and The Indemnity Act of 1970 which gives immunity to perpetrators of state violence against its citizens in Northern Kenya. Legislative frameworks that would have enhanced harmonious ethnic and racial coexistence were largely ignored or subverted. In addition, poor and lopsided economic policies and planning have enhanced inequality and ethnic tensions.⁷¹

69 Republic of Kenya 'Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land' (hereafter the 'Ndungu Report') (2004) 8.

70 African Peer Review Mechanism 'Country review report of the Republic of Kenya' available at <http://www.polity.org.za/article.php?a_id=99422> and <<http://www.nepad.org/aprm>> (last accessed 17 April 2010).

71 National Cohesion and Integration Commission 'Kenya ethnic and Race Relations Policy' (2011)13.

76. Regional inequalities and imbalance in the country are still evident today (for a discussion of the impact of Sessional Paper No. 10 of 1965, see chapter on Marginalisation). The discrepancies between the various regions of the country are wide, while about 45 percent of the country's modern sector employment⁷² is concentrated in less than 15 towns.⁷³ Thus, the resultant disconnection between the various ethnic communities and regions of the country perpetuated by the colonial administration provided the ethno-regionalised basis for political and economic discrimination of some citizens in post-colonial Kenya. Explaining this phenomenon within the context of the ethnic tensions and violence in the Rift Valley and Central provinces, the KNCHR noted:

The colonial government alienated most of the agriculturally productive land for settler agriculture particularly in Rift Valley and Central. This alienation generated a large number of squatters especially among the Kikuyu. At independence, the Kenyatta government created a land market of 'willing seller willing buyer' with many of the landless being encouraged to join land-buying companies. Rift Valley Province was earmarked for settlement of the landless through this scheme. However, land did not necessarily revert to those who had lost it through colonialism. [...] Over the years, as the population of the Kalenjin who view Rift Valley as their 'ancestral home' increased, the perception also grew that the post-colonial land policies had disadvantaged the community. These grievances featured prominently in the 1990s violence as well as the 2002 elections that saw the election of President Mwai Kibaki and the National Rainbow Coalition (NARC) government.⁷⁴

77. Historical injustices related to land is thus one of the major causes of ethnic tensions and violence in the country. The Ministry of Justice, National Cohesion and Constitutional Affairs underscores this point:

Although there was need for massive land redistribution [at independence], this was not implemented effectively and equitably. Land redistribution initiatives were generally mismanaged and resulted in unequal access to land. The mismanagement heightened conflict between various societal groups, given the importance of land as a source of wealth.⁷⁵

78. Instead of redistributing land to those communities who had been displaced at independence, the government adopted a "willing buyer willing seller" program. Professor Walter Oyugi testified before the Commission about how the willing-buyer-willing-seller redistribution policy was abused, leading to ethnic tensions in the country:

⁷² Modern Sector Employment normally refers to urban, industrial formal sector employment. See UN Habitat, *Supporting the informal sector in low income settlements*, 2006

⁷³ African Peer Review Mechanism (n 8 above) 46.

⁷⁴ Kenya National Commission for Human Rights 'Unjust enrichment' (2004) 17.

⁷⁵ Ministry of Justice, National Cohesion and Constitutional Affairs 'Sessional Paper No. 2 of 2012 on National Cohesion and Integration' (March 2012) 10.

This policy of willing-buyer, willing-seller would benefit mainly people who could access financial resources. Somebody advised the people from Central Province that the best thing to do is to form land buying companies. The land buying companies were formed. They included the Ngwataniro, Nyakinyua and Mabati group. The Mabati Group meant a group of women helping one another to roof their houses and so on, but they also became land buying groups. They were assisted by the state and, therefore, the feeling of preferential access and the resentment that accompanied that. It continued under the leadership of the then Minister for Lands and Settlement, throughout the 1960s into the 1970s. But there would be a change in late 1970s, after Mzee died and Moi came into power. He inherited the Kenyatta infrastructure of governance and promised that he would follow his footsteps. He did by and large, but on the issue of land, which actually took place under his watch as the Vice-President, soon after he came into power, he completely disorganized the land buying companies and disbanded them, but I thought that it was too late at that time.⁷⁶

79. Land, particularly access to rich and productive land, was also a factor in ethnic violence in the Rift Valley during elections. Some scholars have noted:

In 1991, much of the violence was centred around farms which were formerly part of the so-called 'white highlands', land appropriated from those communities who customarily owned and occupied it by the colonial government for white settler farming. Mitetei farm in Tinderet Division, Nandi District, provides an example: purchased by members of the Kikuyu, Kamba, Luhya, Luo and Kisii communities, it is located in traditionally Kalenjin land. Some local Kalenjin argued that they should also receive shares in the farm, leading to a dispute in which the local authorities took the side of the Kalenjin, because of ethnic affiliations and party politics. This farm was the scene of attacks by Kalenjin on the 29th October, 1991, causing all non-Kalenjin occupiers to flee. In or about June, 1992, the farm was surveyed and shared among local Kalenjin people, and titles were issued to them to the exclusion of those who had been forcibly displaced. Those who took over the property refused to reimburse the IDPs for the cost of their shares, arguing that it was 'rent' for land which really belonged to Kalenjin. Owiro farm in Songhor location, Tinderet Division, is another property bought from a European by non-Kalenjin (Luo) individuals using bridging finance from the Agricultural Finance Corporation (AFC). The owners of this farm were also killed or forcibly displaced during the 1991 violence.⁷⁷

80. The finer details of the inter-section between grievances over land and ethnic relations have been dealt with in greater detail in the chapter on land and conflict.

⁷⁶ TJRC/Hansard/Thematic Hearing on Ethnic Tension/2 February 2012/p. 7.

⁷⁷ J Wakhungu, E Nyukuri and C Huggins *Land tenure and violent conflict in Kenya* (2008) 15.

Ethnicity and access to Public Office

81. The perception that ethnic representation in government results in direct economic and other benefits to the represented community is pervasive in Kenya. While the Commission acquired evidence that such benefits do not necessarily accrue to those communities who are represented - even in the highest offices of the land - the perception that they do leads to intense competition for such representation, and thus increases the likelihood of violence during elections. According to Prof. Walter Oyugi:

Ethnicity is an expression of ethnic consciousness in a competitive environment. When people feel that they are being marginalized in the competitive process, their consciousness is heightened. When they think there is exclusion in the structure of access, their consciousness is heightened and mobilization is very easy by the politicians.⁷⁸

82. Throughout Kenya's post-independence history the ethnicity of the president has influenced the composition of the cabinet. According to a study by KIPPRA "The tenure of first government of independent Kenya reflects the disproportionate presence of the president's ethnic Kikuyu group in the cabinet".⁷⁹ This pattern was repeated both in President Moi's and President Kibaki's administration as shown in the table below similarly an analysis of ethnic distribution of permanent secretaries show that the Kikuyus were over subscribed as permanent secretaries in the period 1966 to early 1980s.⁸⁰ From 1978 to 2001 the number of Kalenjin permanent secretaries grew to nearly three times their share of the national population.

Table 1: Ethnic percentage shares of Kenyan cabinet positions

Ethnic Group	Kenyatta (Kikuyu)		Moi (Kalenjin)		Kibaki (Kikuyu)			
	1966	1978	1979	2001	2003	2005	2007	2011
Kikuyu	28.6	28.6	30	4	16	18.1		19.5
Luhya	9.5	4.8	11	14	16	21.2		17.1
Luo	14.3	14.3	11	7	16	3.1		12.2
Kalenjin	4.8	4.8	11	17	7	6.1		9.8
Total	21	21	26	28	25	33		42

Source: Stewart (2008)

78. TJRC/Hansard/Thematic Hearing on Ethnic Tension and Violence/2 February 2012/Nairobi/p. 127.

79. KIPPRA Inequalities and Social Cohesion in Kenya Evidence and Policy Implications (2013).

80. KIPPRA Managing Kenya's Ethnic Diversity (2011) 36-37.

Table 2: Ethnic Distribution of permanent Secretaries, 1966 to 2005

	1966	1970	1978	1979	1982	1985	1988	1994	2008	2001	2003	2004	2005
Kikuyu	30.4	37.5	23.8	29.6	30.0	28.0	21.9	10.7	10.7	8.7	22.0	17.2	18.7
Luhya	13.0	8.0	4.8	11.1	13.3	12.0	6.3	14.3	10.7	13.0	7.0	6.8	9.3
Luo	13.0	12.5	9.5	3.7	6.7	8.0	12.5	3.6	7.1	8.7	15.0	10.3	9.3
Kamba	17.4	8.3	14.3	7.4	10.0	12.0	12.5	21.4	3.6	4.3	15.0	10.3	12.3
Kalenjin	4.3	8.3	4.8	11.1	10.0	20.0	21.9	25.0	28.6	34.8	15.0	10.3	6.2
Maasai, Turkana, Samburu												3.4	6.2
Kisii	4.3	8.3	0.0	7.4	3.3	4.0	3.1	3.6	7.1	4.3	4.0	6.8	9.3
Meru	4.3	8.3	14.3	11.1	10.0	8.0	3.1	3.6	7.1	8.7	15.0	17.2	6.2
Borana & Rendille											4.0	6.8	9.3
Miji Kenda	8.7	4.2	9.5	3.7	6.7	4.0	6.3	10.7	14.3	13.0	4.0	6.8	12.5
Taita													
Pokomo													
Bajun													
Embu													
Arab/Swahili													
European													
Asian													
Others	4.3	4.2	19.0	14.8	10.0	4.0	12.5	7.1	10.7	4.0		3.4	
Total PS	23	24	21	27	30	25	32	28	28	23	27	29	32

Source: Kanyinga (2006)

83. A survey conducted by the NCIC found that 50 percent of Kenya's ethnic groups are only marginally represented in the civil service. The study also found that five communities – Kikuyu, Kalenjin, Luhya, Kamba and Luo occupy nearly 70 percent of civil service employment. Other findings of the study include that the Kikuyu constitute the largest single dominant ethnic group in all ministries and departments, except in the Prisons Department, the Office of the Prime Minister and the Kenya Police and that the Kalenjin are the second largest group in the civil service.⁸¹
84. Another study by NCIC which focused on the ethnic diversity of public universities in Kenya found that these institutions are heavily ethnicised. According to the study:⁸²

81 National Cohesion and Integration Commission 'towards national cohesion and unity in Kenya: Ethnic diversity and audit of the Civil Service' (Volume 1, 2012) 5-7.

82 National Cohesion and Integration Commission *Briefs on ethnic diversity of public universities in Kenya* (2012).

- The percentages of employment in the universities and constituent colleges of the Kikuyu, Luhya, Kalenjin, Luo, Kisii, Embu, Kenyan Europeans, Kenyan Asians, Nubi and Taita communities are higher than their national population ratio (as per the 2009 population census).
- Some of the differences such as that of the Embu community are however negligible (0.13 percent) while others such as that of the Kikuyu community is significant .
- The communities whose representation in the universities' employment is less than their population ratio include the Somali (with the highest underrepresentation, at six percent), the Kamba, Mijikenda, Turkana and Maasai.
- There is a notable lack of some ethnic groups such as the Tharaka, Gabbra, Orma, Burji, Gosha, Dasnach and Njemps, among others.
- In the public universities and constituent colleges, the five largest communities - the Kikuyu, Luhya, Kalenjin, Luo and Kamba who together make up about 66% of the Kenyan population constitute over 81 percent of the total workforce. This severs opportunities to enhance the face of Kenya in these institutions thus excluding the other more than 37 ethnic communities. For example, in the six public universities analysed, the representation of the five big communities is over 86 percent.
- most of the staff in the public universities and constituent colleges come from the communities within which the institutions are located
- The spread of universities in Kenya excludes the northern part of the country with most of them located within Nairobi and its environs.
- Kenyans seem to perceive the university as a job creation enterprise for the community within which the university is located. It may be in this perspective that some regions agitate for the establishment of public universities in their areas.

The perception that ethnic representation in government results in direct economic and other benefits to the represented community is pervasive in Kenya. While the Commission acquired evidence that such benefits do not necessarily accrue to those communities who are represented - even in the highest offices of the land - the perception that they do leads to intense competition for such representation, and thus increases the likelihood of violence during election.

Table 3: Ethnic Composition of Employees in Higher Education in Kenya

Community	Number	Percentages	Population Ratio %
Kikuyu	4133	27.6	17.7
Luhya	2544	17.0	14.2
Kalenjin	2133	14.2	13.3
Luo	2086	13.9	10.8
Kisii	1253	8.4	5.6
Kamba	1041	6.9	10.4
Meru	644	4.3	4.4
Mijikenda	329	2.2	5.2
Taita	196	1.3	0.7
Embu	154	1.0	0.9
Others	87	0.6	-
Teso	60	0.4	0.9
Maasai	57	0.4	2.2
Somali	55	0.4	6.4
Borana	29	0.2	0.4
Mbeere	25	0.2	0.4
Turkana	23	0.2	2.6
Kuria	22	0.2	0.7
Suba	20	0.1	0.4
Other Africans	18	0.1	-
Asian	18	0.1	0.1
Samburu	17	0.1	0.6
Arab	14	0.1	0.1
Swahili	22	0.2	0.3
Nubi	4	0.03	-
Taveta	4	0.03	0.1
European	6	0.04	0.01
American	2	0.01	-
	14996	100	100

Source: NCIC Brief on Ethnic diversity of public universities in Kenya (2012)

Ethnicity and Displacement

85. The history of displacement in Kenya has been recounted elsewhere in this Report.⁸³ In a nutshell, recent years, especially after the advent of multi-party system of governance, has witnessed repeated waves of ethnic violence in Kenya. However, responses to this recurring problem have not been appropriately and effectively handled by the state. Throughout the 1990s IDPs were rarely assisted by the government. Indeed, the national government was in denial of the issues of IDPs. The absence of political and humanitarian responses have been attributed by human right organisation to a lack of an effective policy, legal or administrative framework to effectively deal with the IDPs crisis.⁸⁴
86. Various reports by human rights and humanitarians organisations have highlighted not just the plight of IDPs in camps but the lack of a coherent response from the various governmental agencies responsible for IDPs issues. This give an inclination of a serious absence of political will to effectively resolve the issues of displaced people. A report by the KNCHR/FIDH discusses how the National IDPs Network together with KHRC petitioned the office of the President, the Ministry of Justice and the Ministry of Lands which subsequently made the government to respond to their concerns especially from the security, land and governance perspective.⁸⁵ November 2004 President Kibaki set up a Task Force aiming at collecting data on IDPs, registering them and making recommendations for their assistance.⁸⁶ The registration of IDPs on behalf of the Task Force was meant to be carried out by the DCs and other provincial administrators offices which in actual fact were reluctant to support the process. This did not auger well with the KHRC and the National IDPs Network who deemed the figures and findings from Task Force work inaccurate. By the time the Task Force submitted the report to office of the President in September 2006 the KHRC and the National IDPs Network contested the findings with the view that it would mislead the policy formulation process.⁸⁷ According to KHRC and FIDH this report has not been made public.
87. The violence sparked by the disputed presidential results on 30th December 2007 led to a massive displacement, lose of lives and destruction of livelihoods. Report presented by local and international organisation indicated an estimated 500,000 persons were internally displaced and parties – Orange Democratic Movement (ODM) led by former Prime Minister Raila Odinga and the Party of

83 See Chapter on Gender and Gross Vioaltions of human rights: Focus on Women in Volume 2C of this Report.

84 FIDH & KHRC, *Massive Internal Displacements in Kenya Due to politically Instigated Ethnic Clashes* (2007) , 21

85 FIDH & KHRC, *Massive Internal Displacements in Kenya Due to politically Instigated Ethnic Clashes* (2007) , 22

86 *ibid*

87 *ibid*

National Unity (PNU) of former President Mwai Kibaki signed the National Accord and Reconciliation Agreement (hereafter the National Accord) on 28th February 2008. This led to the formation of a Grand Coalition Government (GCG) through the sharing of power. One of the commitments in the agreement is the restoration of stability and normalcy, including measures to restore fundamental rights and liberties, address the humanitarian crisis and promote healing, reconciliation and reconstruction.

88. One of the key priorities of the National Accord is the resettlement of IDPs languishing in camps and other places. Through the Ministry of State for Special Programmes (MoSSP) a resettlement programme dubbed 'Operation Rudi Nyumbani' (ORN) was launched on 5th May 2008. However, reports by human rights organisations revealed that the resettlement programmes were not working because they were not well thought out and their implementation was viewed as premature with poor coordination between government ministries, particularly with reporting mechanisms and accountability.⁸⁸ A report by KHRC shows there was evidence that registration of IDPs was haphazard, incoherent and marred with corruption.⁸⁹ This corroborates a testimony given to the Commission in a women's meeting in Agan Khan Hall Kisumu. A representative of a civil society organization told the Commission:

"There is a strong sentiment regularly expressed by some Government officials that IDPs do not exist here. We have heard Government officers constantly under-quotting the number of IDPs in this region. In certain places, they give figures as low as 20. When it is convenient for them, they are considered to be fake. To date, we have never been given a list of IDPs; for example, those who are considered fake and those who are considered genuine.⁹⁰

89. The Commission found out that although the government initiated assistance to provide kick start or stabilisation cash of Ksh 10,000 and another KES 25,000 to those whose houses were burnt, it was outrightly perceived by some as discriminatory. This instead of fostering reconciliation, it continued to inflame inter-community relations.⁹¹ A witness told the Commission in Kisumu,

"We also need to know who has been rehabilitated. We hear stories of people who are getting Kshs3 million but it remains a rumour because where there is no information, there is bound to be speculation and that only helps to fuel ethnic animosity that we are starting to see."⁹²

88 KHRC, *Out in the Cold, The Fate of Internally Displaced Persons in Kenya (2008-2009)*, 23

89 KHRC, *Out in the Cold, The Fate of Internally Displaced Persons in Kenya (2008-2009)*, 24

90 TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 5

91 United Nations Human Rights Kenya, *Durable Solutions to Internal Displacement, Reconciliation and Restoration of Human Dignity of IDPs in Kenya: A Situation Report (2011)*, 9

92 TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 8

90. The perception of bias and discrimination have also emerged in relation to financial assistance and housing. The Commission found a study by UNDP revealing on the unfortunate situation that faced IDPs that noted with alarm;

“Among the returnees to ancestral homes, reconciliation efforts have been compromised by governments’ compensation and resettlement approach. Most of the returnees to the ancestral homes were paid KES 10,000 to restart life. However, other victims of violence who lost property and houses were paid an additional KES 25,000. In Nyanza (Kisumu) where most of the returnees to ancestral homes are currently living, some ‘non-natives’ victims (Kikuyus and Kambas) were paid KES 10,000 and KES 25,000 for loss of property and houses. This has caused a feeling of discrimination against native Luos. There was a feeling among the Luos that the government was discriminating against them and favouring non-Luos particularly, the Kikuyus with regards to compensation. Other government efforts such as the resettlement programme are also perceived to be favouring non-Luos. Reconciliation is further constrained by the fact that the victims who lost their property to neighbours still see their property at their neighbours, yet they find themselves unable to reclaim it. Moreover, reconciliation efforts are rendered elusive owing to the fact that people who were violated continue to wait for justice.”⁹³

91. After displacement cases of discrimination of IDPs was also reported by those who testified before Commission in the public hearing forums. A lady who was in Kachibora IDPs camp around Kitale lamented in pain on how their children were not considered when stipends for bursary were given to children who were enrolling for secondary education after the primary exams. She said,

“Our children are suffering a great deal. For instance, this girl you see here passed her KCPE examinations and qualified to go to secondary school, but her life has been reduced to cooking in hotels. This girl was admitted to secondary school, but she is now in Kitale doing nothing. We do not get bursaries. It is like they belong to specific people.”⁹⁴

92. These sentiments of discrimination in other relief programmes that were carried out by the government were shared by victims of displacement else where in the country who testified before the Commission in Kisumu.

“While other regions are getting fertilizer, seeds, houses, medical aid and regular food supplies, victims in Nyanza, that is, those who were displaced from outside Nyanza and those who come from this area are confined to Kshs10,000 and not everybody got it. The assumption is that the people who came from outside did not own property and were not living any meaningful life but were just labourers and, therefore, all they lost was their wages.”⁹⁵

⁹³ *Ibid*, 17

⁹⁴ TJRC/Hansard/In-Camera Hearing/Men/Kitale/21 October 2011/p. 7-9.

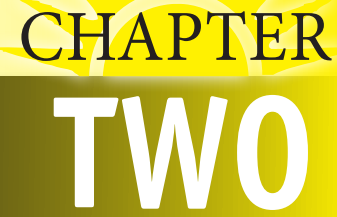
⁹⁵ TJRC/Hansard/Women's Hearing/Kisumu/16 July 2011/p. 6.

93. It appears the state has not had a genuine interest in resettling IDPs and the launching of programmes as *Operation Rudi Nyumbani (Return Home)*, *Operation Ujirani Mwema* (Good neighbourliness) and *Operation Tujenge Pamoja* (Let's Build Together) was primarily motivated by the fact that it only wanted to resettle the specific class of IDPs.

Conclusion

Ethnic tension, particularly the tendency to view people who are different as 'the other' and thus not identify with, and either fear or scapegoat them, is unfortunately as old as human history. To understand the continued presence of ethnic tension today, and its evolution during the mandate period, the Commission traced the roots of ethnic tension to the colonial period, for it was under the colonial power that the political entity today known as Kenya was formed. Any discussion of ethnic tension in present-day Kenya would be incomplete without a discussion of the relationship between ethnicity and politics. It is an unfortunate fact that who joins a political party, and which politicians or parties form alliances, can be more often explained by ethnicity over any other factor. It is this potent, and at times volatile, combination of ethnicity and politics that has unfortunately spiralled into ethnic violence far too many times in our history. In the end, it must be appreciated that tackling ethnic tension requires a multifaceted approach aimed at addressing the root causes, including long standing land grievances and economic and political marginalisation.



A yellow sunburst graphic with rays emanating from a central circle, positioned behind the chapter title.

CHAPTER TWO

Ethnic Tension, Land and Politics: A Case Study of the Mount Elgon Conflict

Introduction

1. Elgon is a 4000 metre high mountain that straddles Kenya and Uganda. Between 2006 and 2008, the mountain was wracked by violence that became the focus of much of the Commission's attentions and energies. Estimates place the number of people killed in the Mount Elgon conflict at 600.¹ The victims of sexual violence may run into the hundreds. Up to 45,000 people were displaced. The Commission presents the Mount Elgon conflict as a case study of a conflict that sits at the intersection of three volatile trends that dominated the mandate period. These trends are: ethnic identity and land and electoral politics. Individually these trends are disruptive. Collectively, however, they carry the potential for deep and sustained crisis with serious implications for the protection and violation of human rights. This is then the case study that Mount Elgon presents.

¹ Human Rights Watch, *All the Men Have Gone: War Crimes in Kenya's Mt. Elgon Conflict*, at 27 (July 2008), available at <http://www.hrw.org/sites/default/files/reports/kenya0708webwcover.pdf> [hereinafter *Human Rights Watch Report 2*].

“All these People belong to Mount Elgon”:² Identity on the Mountain

2. Mount Elgon presents a complex ethnic fabric made up of many different ideas and understandings about identity. These form the basis of much recent academic research that the Commission has found useful in its own consideration of ethnicity in Mount Elgon.³ A central identity dominates: the Sabaot. It is from this group that—obviously—the Sabaot Land Defence Force takes its name from. The Sabaot are best understood as a collection made up of four sub-groups known as the Sabiny (or the Sebei in Uganda), the Bongomek, the Kony and the Bok. The name Sabaot has a very specific, recent and traceable history. It emerged in 1949 as name that these four groups assigned to themselves as, it has been argued, to the creation of another supra-ethnic group in the region, the Luhya.⁴ Before that, colonial authorities referred to them simply as ‘Nandi-speakers’. The term ‘Nandi speakers’ was in turn supplanted the term ‘the Kalenjin’ which functioned as another catch-all for a culturally and linguistically connected collective. Each of the Sabaot sub-groups have own readings and understandings of their particular experiences. The Bongomek for instance presented the Commission with a memorandum emphasizing their sense of continued political marginalisation, loss of cultural identity and ethnic victimisation.⁵

3. The story of identity in Mount Elgon is further complicated by the existence of what are most commonly referred to as the Mosop and the Soy clans. Again, the Commission found this to be a somewhat confusing issue whose nuances may be lost on outsiders. The terms Mosop and Soy are above all geographical descriptions. They describe *where* people live and not necessarily *how* they live. The Soy are those from (and of) the lower reaches of the mountain. It includes the Sabaot but—technically—is not limited to them. Mosop refers to those from further up the mountain specifically from Chepkitale; the desolate moorlands that are found at about 3000 meters. The Mosop consists mainly of the Ogiek who are often considered as another Kalenjin sub-group altogether because of their unique cultural traditions.⁶ The Ogiek are primarily hunter-gatherers and cattle herders. An Ogiek elder explained them as:

² TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 14

³ For instance, David M. Anderson and Gabrielle Lynch, ‘The instrumentalization of confusion: the politics of belonging and violence on Mount Elgon, Kenya’, in J. Bertrand and O. Haklai (eds), *Nationalism and Ethnic Conflicts* (University of Pennsylvania Press: Philadelphia, 2011) {In press}

⁴ David M. Anderson and Gabrielle Lynch, ‘The instrumentalization of confusion: the politics of belonging and violence on Mount Elgon, Kenya’, p. 2.

⁵ *Memorandum to the TJRC relating to the plight of Bong’om/Mbong’omek Forced eviction from ancestral territory*, 9th July 2011.

⁶ The Ogiek are also sometimes referred to as the Dorobo or the Ndorobo. Certain misgivings surround this name with some calling for its total rejection because of its association with poverty and backwardness. See TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 2.

The Ndorobo community who live above the forest zone and below Mount Elgon. These people are cattle herders and beekeepers. There is no crop production. Since historical time, they have been feeding on milk, honey and meat and they also used to look for food from distant areas of the Soy community.⁷

4. The Ogiek lack of geographic cohesion as well as their tendency to adopt the language and customs of their neighbours baffled colonial administrators who tried to create specific reserves for them. They have also confounded post-colonial efforts to administer and manage them along conventional lines leading to recurrent concerns about marginalisation and even outright neglect.⁸ The result has been Mosop as a geographical descriptor means that some Sabaot—principally the Kony—also self-identify with this clan. Conversely, the argument has been made that the Ogiek are not a distinct Kalenjin sub-group and are instead Sabaots who happen to live further up the mountain.
5. The fluidity of these identities is reflected in the testimonies heard by the Commission. Some witnesses emphasize the idea of a single people divided only by the arrival of colonialism:

The Europeans, they said “This is Mosop and that is Soy”. It was that boundary that distinguished the Soy. So, the people were unable to distinguish between the Soy and the Mosop. That is why they called the people by the names “Soy” and “Ndorobo”.⁹

6. Other witnesses emphasized the different fractures and cleavages that divided Mount Elgon communities amongst themselves and from each other:

There is no clan called the Soy and there is no clan called the Ndorobo. We have several clans in Mount Elgon. The people from the moorland who are Ndorobo have a number of clans among them and they are not a clan themselves. The Soy have so many clans; almost 100. The word Ndorobo as far I know refers to people who were living in the forest.¹⁰

7. The various Sabaot (and affiliated) communities are the clear majority in Mount Elgon. There are also however two significant non-Sabaot minorities: the Bukusu and (less numerous) the Teso. The Bukusu and Teso presence on the mountain feature prominently in the evolution and unfolding of the SLDF. Their presence also stands at the heart of other episodes of ethnic violence over the past two decades.

⁷ TJRC/Hansard/Public Hearing/Kapsokwony/25th May 2011/p.2.

⁸ Issues surrounding the Ogiek as an ethnic minority are discussed elsewhere in this report.

⁹ TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 11

¹⁰ TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 2

“We are not Sharing Mount Elgon”:¹¹ Land and the Mountain

8. Many of Commission’s witnesses took a very long view and described their presence on the mountain as dating back several hundred years or—at the very least—several generations. All the Mount Elgon communities have their own particular understandings about belonging to the mountain. A representative from the Teso community spoke of pre-millennial migrations down the River Nile with eventual settlement in and around the mountain.¹² The Bukusu narrative is of a mountain that they refer to as Masaba.¹³ Sabaot elders expressed similar notions of longevity. Notwithstanding these very long histories, current settlement patterns in Mount Elgon are actually a very recent, colonial phenomenon.

9. Mount Elgon, like so many other parts of Kenya, was profoundly affected by the colonial administration’s decision to open up parts of the country to European settlement. In 1926, a branch of the railway reached Kitale. The region’s temperate climate and fertile soils proved irresistible and soon afterwards Uasin Gishu and Trans Nzoia were set aside exclusively for European use. Indigenes were evicted further westwards into the Kavirondo Native Reserve which included Mount Elgon. This was how many Sabaots found themselves on the mountain. Trans Nzoia and Uasin Gishu were entirely shut off to them except if they took up employment as labourers on European farms. In 1932, there was another critical development with the Carter Land Commission. The Carter Commission represented a seminal attempt to tackle land needs and tenure in colonial Kenya. In Mount Elgon, Carter made the critical decision to create another Native Reserve in the moorlands. The reserve consisted of 40 000 acres at altitude and above the forest belt in Chepkitale. Its occupants consisted of a community that colonialists referred to as the “El Gony” but who are more—as per the discussion above—are more properly described as the Ogiek with (possibly) Bok elements:

The Moorland area of Mount Elgon, comprising some 40,000 acres, should be added to the Kavirondo Native Reserve and set aside for the use of the El Gony, who should also be able to find accommodation in other parts of the Kavirondo Native Reserve, or to the extent that the Uganda Government may be willing to accommodate more El Gony in its territory, they should have an option of going there.¹⁴

¹¹ TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 14.

¹² TJRC/Hansard/Public Hearing/ Kapsokwony/23rd May 2011/p. 41.

¹³ TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/ p. 29.

¹⁴ Claire Medard, “Indigenous” Land Claims in Kenya: A Case Study of Chebyuk, Mount Elgon District’ in Ward Anseeuw and Chris Alden (eds), *The Struggle over Land in Africa: Conflicts, Politics and Change* (Cape Town, 2010), p. 22.

10. The residents of Mount Elgon are incredibly conversant with this history. They speak eloquently about events that took place nearly eight decades ago and add their own personal and pained feelings about the fate that befell them as a result of the Carter Commission:

I can summarize the problems of Mount Elgon in a very short manner. It is based on the arrival of the colonial government. Before that the Sabaot were able to look after themselves successfully. Unfortunately when the Europeans came, they removed them from their ancestral land which is currently known as Trans Nzoia and Bungoma including Mount Elgon itself. The Europeans removed Sabaot because they wanted to use their land to settle their own Europeans. To do that, they physically removed them. They were taken in Uganda as shown in our records. The Sabaots have been living under a lot of humiliation. They have been marginalized and persecuted. They were prosecuted and dispersed.¹⁵

11. The Commission also heard from another extraordinary 91 year old witness who had even more vivid memories about the demarcation of the Chepkitale reserve:

After the white settlers came, they said that we were living with animals. They tried to put the boundaries between the forest and the land. They took the soil to test it and establish where the boundary of the forest was. Those Europeans they put beacons to show the boundaries of the Soy and the Mosop. The name "Soy" shows where the boundary was. They called the other side "Reserve".¹⁶

12. And so Mount Elgon sat for most of the colonial period. The Ogiek were essentially marooned close to the top of the mountain in Chepkitale. The rest of the Mount Elgon populace—the Bukusu, the various other Sabaot sub-groups and the Teso—were scattered throughout the slopes and foothills. A representative of the Bukusu community painted a picture of a peaceful coexistence. As he described it, 'before 1963, we were staying happily with our neighbours.'¹⁷
13. Sabaot elders, however, tell a markedly different tale of increasing unhappiness at the apparent Bukusu dominance of the economic and, in particular, political life of Mount Elgon. It appears that the majority of chiefs during the colonial period were either by accident or design drawn from the Bukusu and larger Luhya community to which they belonged. Their administration was far from popular with the Sabaot who complained bitterly about corruption as well as forced road building and forest clearing campaigns. The powerful chief Murunga was particularly hated. Chaffing under Luhya domination, Sabaot elders and politicians began to champion the administrative separation of Mount Elgon from

15. TJRC Hansard/Kapsokwony/Public Hearing/23rd May 2011/ p. 4 – 5.

16. TJRC/Hansard/Public Hearing/Bungoma/12 July 2011/p. 11

17. TJRC/Hansard/Public Hearing/Kapsokwony/23 May 2011/p. 28.

Bungoma and its unification with “other Kalenjins” in Trans Nzoia. This was the recommendation made to the Regional Boundaries Commission(RBC) in 1962. The RBC was the body charged with laying the groundwork for independence and it travelled throughout the country taking opinions and recommendations on various administrative issues. The RBC eventually turned down Sabaot requests for separation. Elgon remained part of Bungoma.

14. The mountain approached Independence with trepidation. The decision to leave the boundaries unchanged was angrily received. Added to this was a heated political atmosphere occasioned by competition between the two main parties – KANU and KADU – and their ethnically defined constituents. In 1963, violence broke out on the mountain. While the violence went both ways (anti-Bukusu and anti-Sabaot), the Bukusu seemed particularly badly hit. Once again, this is something that current residents continue to remember and speak about with a great deal of pain:

In 1963 when we elected the first MP for Mount Elgon, we had clashes. Houses were burnt and cattle stolen, homes were destroyed...From 1961 to 1974, we had the infamous tribal clashes. Those really affected us very much. People were killed, cattle stolen and homes destroyed. During that period, about 556 Bukususes were killed across Mount Elgon and Trans Nzoia and 50 Bukususes displaced. During that time, land was taken by the Sabaots.¹⁸

15. It was, as the Commission discovered, an ominous start to the post-colonial history of Mount Elgon.

Chebyuk Settlement Scheme: Phases I, II and III

16. Identity and land provided the structural underpinnings to the SLDF. The actual catalyst, however, was the Chebyuk Settlement Scheme. Chebyuk has a long, complicated and ultimately unavoidable history that holds the keys to understanding the emergence of a complicated militia.
17. Technically, the story of Chebyuk begins in the mid-1960s when talk began to emerge a scheme to remove the people of Chepkitale from the moorlands and re-settle them on the lower slopes of the mountain. From the outset, however, there had been concerns about Chepkitale’s suitability for human inhabitation. Those concerns were expressed by some colonial administrators in the 1930s with the initial creation of the moorland reserve in the 1930s but they were either ignored or overruled. It would take another three decades for the broad consensus

¹⁸ The Commission has been unable to verify the accuracy of these numbers. TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/p. 28

to emerge that it was in everybody's interests that the move down-mountain be implemented. The government would then be able to supply security, health, education and roads; the previously unserved Chepkitale people would finally be able to access these services. Other priorities also came to the surface with wildlife officials pressing for the creation of a national park to showcase the mountain's unique wildlife and vegetation.

18. Most Ogiek agree that – attachment to the land aside – life in Chepkitale was difficult. An Ogiek elder sketched out an unhappy picture for the Commission:

These people did not have schools, before and even after Uhuru. When Kenya attained independence, these people were forgotten. They were not offered school education and from 1963, there were no primary schools in Chepkitale. If it was there, it was only one that went up to Standard Three. That was a big problem. There was no hospital, no security personnel and because of this, the animals were stolen by the Sebei of Uganda. These people had great suffering.¹⁹

19. Discussions began in 1965 with Ogiek leaders, local district officials and government authorities coming together to plan for the move. In 1968, a notice was published in Kenya Gazette. Implementation had to follow. A few hold-outs in Chepkitale opposed the relocation and spoke openly about 'not wanting to move' but the terms of the notice were unequivocal: the moors had been closed off.²⁰

Chebyuk Phase I

20. On the face of it, Chebyuk appeared straightforward: the relocation of a relatively small community for sound, legitimate and developmentally-oriented reasons. Indeed, the government had already deeply invested in resettling the landless, the displaced and many thousands of others washed up in the wake of colonialism. The reality of Chebyuk's implementation was, however, very far from straightforward. The whole scheme was ineptly and inexpertly handled from the very beginning. Both the wider research and Commission witnesses make this perfectly clear. Trouble started with a giant sized legal loophole. In 1971, about 460 families (3800 people) were moved from Chepkitale before and without official degazettement of Chebyuk which therefore remained part of the forest and unlicensed. In essence, people were moved into a settlement that did not actually exist.
21. Because degazettement had not taken place, plots could not be demarcated and title deeds could be issued. The result was an unruly free-for-all. People assigned themselves plots with each family apparently claiming 20 acre spreads as per government promises

¹⁹ TJRC/Hansard/Public Hearing/Kapsokwony/25th May 2011/p. 2.

²⁰ TJRC Hansard/Public Hearing/Kapsokwony/25th May 2011/ p. 5.

made when the scheme was first announced. Families with no titles then proceeded to sub-divide and re-sell their self-claimed allocations. The main recipients/beneficiaries of this redistribution were Soy locals and neighbours who had helped in the clearing of forest. Chebyuk also attracted huge numbers of people who had not been included in the original plans. Landless Soy families who had missed out on nearby settlement schemes in Trans Nzoia streamed into Chebyuk hoping to benefit from the lack of legal structure to install themselves on plots of land.

22. A Commission witness summarized the chaos of the entire exercise:

The movement of the Ndorobo to the Chebyuk Settlement Scheme did not take place when it was conceived in 1965 because of logistics. The Ndorobo as they were referred to were moved in 1971 by the then Government. Allow me now to say that the Government did not do its work because it never identified how much land out of the forest was going to be allocated to these Ndorobo. So the excision exercise did not take place. The Government did not appoint a Commission or a Committee which was credible to settle those people. The Government left those people to settle themselves.²¹

23. The witness elaborated on the unauthorized entrenchment of the Soy in Chebyuk:

What happened is that they invited their brothers the Soy to clear the forest because this was forest land. Some of them decided to sell certain pieces of land to facilitate themselves to till the land. The Government did not facilitate them. This is how the Soy came in. However, that is not the only way the Soy entered Mount Elgon. There are those who bought land in the so-called Mount Elgon Chebyuk Settlement Scheme from the Ndorobo. When Chebyuk Settlement Scheme was taking shape, there were pockets of land which were left as islands in the proposed scheme. Some of them are the current Cheptoror. The Soy people grabbed land and settled themselves. The current Cheptoror was then referred to as Shauri Yako. The reason for this was because they had not been allocated the land.²²

24. Degazettement eventually took place in 1974. Six thousand five hundred hectares were officially sliced out of the forest to create Chebyuk Settlement Scheme.

Chebyuk Phase II

25. Chebyuk Phase One and the three year delay involved in its establishment left a lot of unhappy people in its wake. Nobody seemed entirely satisfied with the way that things had turned out. The biggest problem was a large constituency of people believed that they had been unfairly shut out of the scheme. The disgruntled included Soy who claimed that they had either been given or had bought land

²¹ TJRC Hansard/Public Hearing/Bungoma/11th July 2011/p. 3.

²² TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 3.

from the Mosop and had been wrongly overlooked and subsequently evicted by the committee that had decided on final allocations in Phase One. There were also those who had simply allocated themselves large tracts of land in Chebyuk; they had lived there for many years and wanted their squatter and user rights recognized.

26. While they were the primary beneficiaries of the scheme, the Mosop began to take a much harder line on Chebyuk land. The twenty acres per family apparently agreed upon when the scheme was first announced do not seem to have materialized with each household eventually receiving much less land than they had anticipated. Another of their main arguments became that the 6500 hectares that they had been allocated in Chebyuk was inadequate compensation for 35 000 hectares they had lost in Chepkitale. Indeed, some even tried to move back up into the moorlands even though Chepkitale had been turned into a game reserve in 1968 and thus not licensed for human activity and settlement. They were forcefully and violently evicted by administration police. The Mosop also turned their attention to the presence of Soy and other so-called outsiders within Chebyuk itself who had bought or otherwise acquired land in the scheme. They demanded this land back. The Soi (and to a lesser extent Bukusu and Teso) who had bought land from the Mosop counter-demanded their money back and, failing that, simply refused to move. A Commission witness described Mosop unhappiness with the situation that prevailed in the late 1970s and early 1980s:

In 1979, the Government went and chased those who had remained in Chepkitale. During this process some of the animals were shot and killed. In the 1980s when we were in Chebyuk, the rulers who were imposed on us ruled us ruthlessly. They were predominantly from the Soi community. We suffered greatly because we had no chief, no political leader and we were ruled ruthlessly.²³

27. Although the Commission has been unable to establish the specifics, a series of petitions and representations were made concerning the situation in Chebyuk. Eventually in 1979 President Moi set aside yet more land for additional settlement. This is what became known as Chebyuk Phase Two. It came as no surprise to the Commission that many of the same problems that bedevilled Phase One manifested in Phase Two. The legal framework required to anchor the settlement (degazettement) was entirely non-existent. There was also no clear understanding as to how the land would be divided amongst the many different claimants. The perennial issue of squatters and the apparent buyers of Mount Elgon also could not be addressed. As such, the 1980s were tense and difficult years in Chepyuk. Some Commission witnesses have spoken about

²³ TJRC/Hansard/Public Hearing/Kapsokwony/25th May 2011/ pp. 2 – 3.

sporadic outbreaks of violence (burning of huts and assaults) as threats flew back and forth the various communities.

28. In 1988, a delegation of Mosop elders met with President Moi and presented him with a memorandum outlining their many concerns about the land situation in Mount Elgon. They expressed deep anxieties about the adjudication and allocation in Chepyuk Phase Two accusing the local Member of Parliament, Mr. Wilberforce Kisiero and a local chief of corrupting the process for the benefit of their families, friends and associates.²⁴ The President responded by stripping Mr. Kiseiro of his Assistant Ministerial position at the Ministry of Education. He then announced the appointment of a team to re-evaluate and streamline the allocation of land in both Chepyuk Phase One and Phase Two. That team consisted of Mr. Lekoolool (who was at this point the Commissioner of Western Province), Mr. Changole (District Commissioner Bungoma) and a Mr. Muchumbet (a government surveyor). They began work in early 1989.
29. Twenty years on, Mr. Lekoolool is still regarded as a controversial and divisive figure amongst some sections of the Mount Elgon population. He was described by a Commission witness as one of the people responsible for the 'evil' of Chebyuk.²⁵ By most descriptions, anecdotal and academic, Lekoolool's intervention was dramatic. All the Chepyuk allocations and self-allocations were annulled. The entire process would begin all over again. A vetting committee was created and applications invited afresh. Predictably, the number of applicants far exceeded the amount of land available. Perennial claimants to Chebyuk land, the Mosop and the Soy, put in their claims. There was also a rush of interest from people from many other communities; their applications were based on long term settlement by virtue of having worked or having bought the land. With no other way to balance the amount of land available against the number of applicants, Lekoolool's committee introduced balloting which reduced the entire allocation process to a kind of raffle; those whose names and numbers came up counted themselves lucky. The Committee also capped land parcel sizes at 2 hectares as way of admitting larger numbers into the scheme. At the end of the exercise, a group of Mosop was settled mainly in the Cheptoror and Kaimugul areas of the scheme. The Soy received scattered plots throughout Chepyuk. The vast majority, however, could not prove ownership. They were evicted from their land along with those could prove ownership but had no luck in the balloting. Entire families were uprooted. Landless, people drifted to urban centres such as Kapsakwony, Cheptais and – further afield – Bungoma, Kitale and Webuye.

24 Mr. Kiseiro's testimony before the Commission was that he was 'quite happy to be out of Government'. He also accepted that there were many in Mount Elgon who regarded him as contributing to 'delays' in the regularization of the scheme. TJRC/Hansard/Public Hearing/Kapsakwony/23rd May 2011/ p. 9.

25 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p.12.

30. It was a violent and unsettled time on parts of Mount Elgon. Some residents blamed Mr. Lekoolol personally for both the fact and the manner of their eviction from Chebyuk:

PC Lekoolol chased away those people who had lived in the forest. When this happened, they burnt people's properties and brought people from Mosop and put them in Cheptoror. They closed every path and said it was a forest where trees would be planted. After they planted trees, we went there and cried wondering what had happened yet we happened to have been given the land by the Government.²⁶

31. The former Provincial Commissioner has a very different understanding of the part he played in Chebyuk. His story was of overseeing a relatively smooth, amicable and ultimately successful settlement process. Mr. Lekoolol rejected the claim that he controlled the notorious vetting committees that prepared the lists that in turn, determined eligibility for the ballot:

When I went there, I went for meetings with the committee and asked for the list. We went through the list in big organized barazas. It was not secretly done; it was publicly done. Therefore, to identify them we were using their own people. Of course, a person like me coming from another area would not know who is a Ndorobo and who is a Soy. So we used their own people to identify the genuine Ndorobo. They did exactly that and came up with that list. We then organized them in a way that they balloted in a transparent way. That is how we settled them.²⁷

32. He further rejected the idea of animosity between him and Mount Elgon people. If anything the former Provincial Commissioner spoke of a very friendly relationship rooted in a successful resettlement:

That was a clean job and if you went to the top that mountain, you will find children who have been born and named "Lekoolol". Can you give a child the name of an enemy? He must have been friendly. So, Lekoolol was a very friendly man who settled them properly and they appreciated it and named their children after me.²⁸

33. The only failing that Mr. Lekoolol would admit to was a delay in the issuance of title deeds and various other documents necessary to confirm ownership. Even then he would not accept personal blame for this in that such delays were inherent to government and that Chebyuk's difficult terrain made for difficult delineation:

Documentation is done by balloting and then records are set up for settlement and issuing of title deeds. It takes a bit of time to identify plots for individual settlers. It took a long time because it is a forested place and it was not easy to access the place and

26 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/ p. 12.

27 TJRC/Hansard/Public Hearing/Nairobi/15th September 2011/p. 19.

28 TJRC/Hansard/Public Hearing/Nairobi/15th September 2011/p. 25.

identify beacons. That is why the title deeds delayed because we had to show everybody but the process was on.²⁹

34. Mr. Lekool left Elgon before the title deeds were issued. Other than this, he was satisfied with the outcome of his intervention in the long-running Chebyuk saga. As far as was concerned, everyone was a 'winner' and he departed certain that the people of the mountain were finally enjoying the 'fruits' of independence.³⁰

Chebyuk Phase III

35. In January 1993 two minibuses full of elders and local notables motored out of Mount Elgon. Their destination and mission were familiar ones: an appointment with President Moi to discuss the perennially thorny issue of Chebyuk settlement scheme. The elders and notables represented an equally familiar group of petitioners. Chebyuk Phase Two had created a bad-tempered cocktail of losers easily recognized by the Commission. One ingredient in this cocktail consisted of the group of people who since the 1970s and the advent of Chebyuk I, had (often illegally) carved out sizeable farms for themselves and their families. Some of these farms were very large indeed (80 hectares); their owners were forced to downsize under Lekool's arrangement. Another ingredient was the group of people whose numbers did not come up in the balloting at all. They missed out completely on the chance to be settled in Chebyuk. All belonged to the very large group of hopefuls that had grown up around the successive attempts to redistribute and resettle Chebyuk. Once again, their petitions were well received by President Moi. The creation of Chebyuk Phase Three in the locales of Chepkurkur and Korng'otuny was announced.
36. The central problem with Chebyuk Phase Three was that as with Phase Two, the scheme was introduced into an area already characterized by different forms of land occupation. Moreover as soon as Phase Three was announced, it attracted a slew of newcomers intent upon formulating their own claims to the land. Typically, inertia, confusion and delays set in. At some point the District Commissioner, a Christopher Munguti, attempted to jump-start matters by apparently preparing residents for the infamous and much despised process of balloting. Some kind of preliminary survey was conducted. The Commission is unclear about Mr Munguti's actual role. Testimonies heard suggest that it was a high-handed one. One witness claimed that at some point in 1998, Mr. Munguti carried out 'balloting for Chebyuk III at Kapsakwony at the office'

²⁹ TJRC/Hansard/Public Hearing/Nairobi/15th September 2011/p. 22.

³⁰ TJRC/Hansard/Public Hearing/Nairobi/15th September 2011/p. 19.

and that was the means by which ‘so many people were issued with balloting papers for Chebyuk III.’³¹ Others described Munguti’s actions in even more sinister terms:

Another DC by the name Munguti returned evil again into Chebyuk. They brought the map and asked the people to ballot for their land using the map. The land they were asking people to ballot for was already occupied by other people. Once you had participated in the ballot, the surveyors were instructed to go and remove the person who was already on the farm.³²

37. These attempts at surveying and purported evictions inspired yet another visit to see President Moi in Eldoret. Mr. Munguti’s handling of Chepyuk Phase Three was apparently the main topic of discussion:

We met President Moi at Eldoret where we informed him about the problems we were facing. President Moi was so surprised. He said: “I had given you this land, who is this one that is again interfering with the map?” We told him it was DC Munguti. He asked us where DC Munguti came from. We told him we did not know. He said: “I have heard,” and we then came back.³³

38. Soon afterwards, District Commissioner Munguti was transferred out of Mount Elgon. Chebyuk residents attributed the transfer to intervention by the President. The process started again with a much clearer focus on the matter and task at hand: 1732 (mainly Soy) families to be settled on 3464 hectares of land.³⁴ This worked out to individual plot sizes of 2 hectares each.

39. In the early 2000s, government machinery finally moved into action. For many of the same reasons already explained, surveying was a slow and difficult process that ran into a number of headwinds including the emergence of a campaign known as *Nyumba kwa Nyumba*. The chief proponent of *Nyumba kwa Nyumba* was the then member of parliament, Mr. John Serut. *Nyumba kwa Nyumba* was a stand borne out the fiercely competitive politics of Mount Elgon which will be discussed shortly. It is best understood as a call for usufructuary rights to be recognised during the survey and allocation. In other words, people would be allocated whatever land they were using and had claimed as their own despite the fact that some of these plots were many times larger than the two hectares that the government intended. Serut is said to have advised people to sit tight and to regard that the survey as a mere formality

31 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 4

32 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 12.

33 TJRC/Hansard/Public Hearing/Nairobi/15th September 2011/p.12.

34 Chebyuk Phase Three is most often described as designed with the Soy in mind as they had been somewhat ignored by Chebyuk Phases One and Two. See Robert Romborah Simiyu, ‘Militianisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya’, ISS Pretoria Monograph No. 152, pp. 17 – 19.

that would eventually confirm their ownership of the land. Indeed, many of his constituents voted for him in the 2002 election on the basis that he had promised to ‘assist’ them to resolve the land issue.³⁵

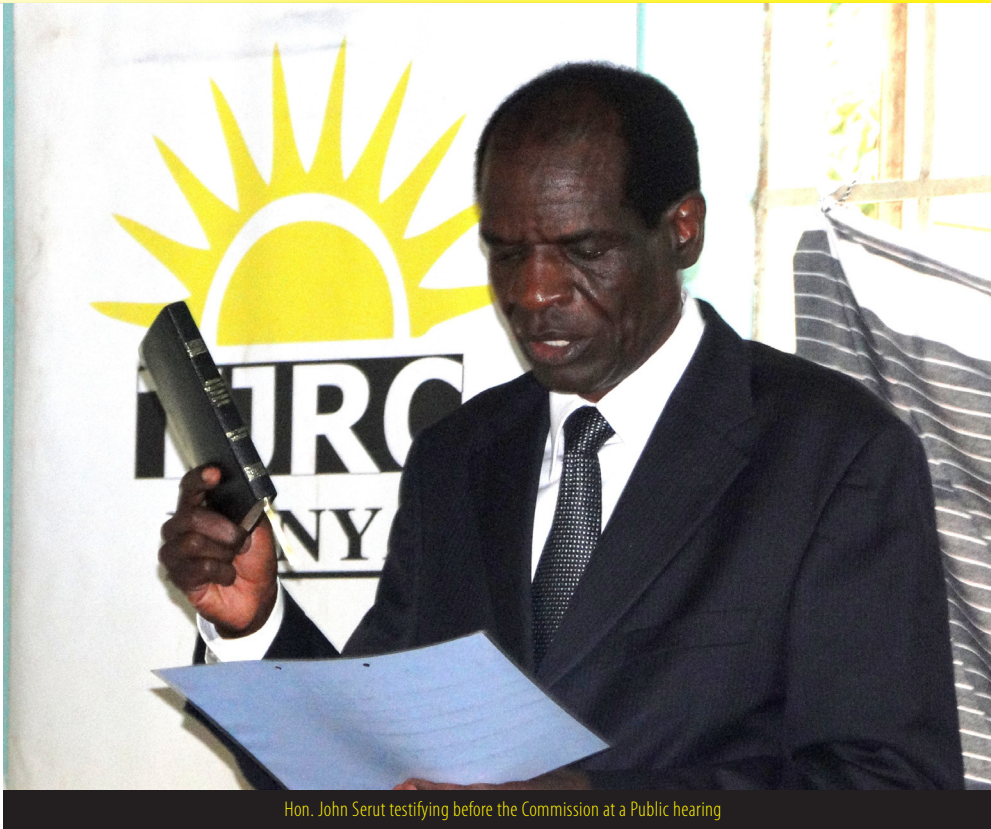
40. In his depositions on *Nyumba kwa Nyumba* before the Commission, Mr. Serut stepped back from his trenchant stand of a decade ago. *Nyumba kwa Nyumba*, was both misstated and misunderstood and that it was never his intention to suggest that each, any and all residents of Chebyuk would be allocated their particular patch of land. That, he argued would result in very small and unproductive plots: a ‘slum’ of little agricultural and economic value. Serut’s current explanations of *Nyumba kwa Nyumba* maintain that was meant only as a general call for a legitimate survey that respected the rights of ‘genuine’, long-term squatters:

So, what did I mean? I meant this: proper procedures were to be followed. Identification of the genuine people to be settled and; thereafter, those who were already on the ground, should be settled on the same piece of land, not to be moved. So, after vetting, the list should be re-vetted for the people on the ground. If you are already on the ground, it only made sense that you are returned to the same piece of land. That is what I called “Nyumba kwa Nyumba”. Not a man coming to squat on land and within two days and then you are told now you have ownership of land.³⁶

41. Misinterpreted or not, *Nyumba kwa Nyumba* was an immensely popular position that captured many residents’ aspirations. In 2005, however, there was a drastic re-drawing of Chebyuk Phase Two and two very important adjustments were made. Both these adjustments, as the Commission was told, would have stunning consequences. The first was that the size of the allocations would be halved from two hectares to just one. The second was that the allocations would be shared evenly between the Soy and the Mosop: 866 plots for the Soy and 866 for the Mosop.
42. The entire character of the settlement scheme changed very quickly. It is not entirely clear to the Commission *why* the changes were so rapidly introduced. The dominant view in Mount Elgon is that this was a purely political decision designed to reward and punish the Mosop and Soy respectively for positions they took during a constitutional referendum in November 2005. The referendum, a national one, had deeply local reverberations in Mount Elgon for reasons that will be discussed shortly. Mr. Serut’s evidence threw some

35. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 3

36. TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 21.



Hon. John Serut testifying before the Commission at a Public hearing

light on *how* the changes were brought about. They were apparently the product of discussions and planning between the Provincial Commissioner, Abdul Mwasserah, and various community leaders. Mr. Serut's representation was that initially, the process was a smooth and an inclusive one that produced a list of worthy, deserving and legitimate beneficiaries:

They were very patient. They went through the process peacefully and involved and engaged the community properly. When we identified the land, we agreed that to identify those who should be beneficiaries, we should use the panel of elders. The panel of elders did its work and in a priority manner. The Ndorobo were told to get 50 per cent and the Soy 50 per cent. We also agreed that those who would be identified as beneficiaries, the list to be held for one month for the public to ventilate and find out whether the people who had been undeserving. When this list had been hung for one month, nobody raised a finger against anybody to say that he or she did not deserve.³⁷

43. This list, uncontroversial in Serut's eyes, in effect sounded the clarion call. Long simmering elements finally consolidated into the fighting force that was the SLDF.

³⁷ TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/ p. 7 – 8.

The Politics of the Mountain

44. Land and ethnicity explained the underlying cause and eventual emergence of SLDF. They do not, however, fully explain the timing of the militia or provide a complete answer for why the group activated when it did. For an understanding of timing, the Commission turned to the politics, politicians and political cycles of Mount Elgon. The question of Mount Elgon land was deeply politicized. From the local to the national to the presidential, politicians of all hues were drawn into knotty issue that was Chebyuk settlement scheme. Parliamentary politics though have had the greatest impact.
45. Mount Elgon's politics conform to Kenyan politics in that—as is explained in another section of this report—they are broadly ethnic. Politicians and their parties mobilize primarily along ethnic lines. What this meant was that for many years Mount Elgon constituency has been represented by a member of parliament from the majority Sabaot community. In turn, Mount Elgon representatives have without exception aligned themselves with the larger Kalenjin bloc and whatever political party housed them. Daniel Moss of KANU was the first politician to represent the mountain in Independent Kenya. He was a trenchant supporter of Sabaot land rights and a prime mover behind the establishment of Chebyuk in the mid-1960s. The same can be said of his successor Wilberforce Kisiero who appeared before the Commission to make a lengthy and passionate submission about mistreatment of his people since 'time immemorial'.³⁸
46. Even after Kenya became a multi-party state in 1992, Mount Elgon continued to vote KANU. Again, the rationale was largely ethnic. Mount Elgon voters fed into the larger Kalenjin vote that supported KANU and President Moi. Despite the fact that Mount Elgon was a KANU zone the politics of the region were extremely competitive and were (until 2007) geared towards securing the KANU nomination; the winner of the KANU nomination was essentially guaranteed a trouble free journey to parliament. In 1997, Wilberforce Kisiero was succeeded by Joseph Kimkung. He was another Sabaot but from the less politically prolific Kony sub-group.
47. Without individualizing the Mount Elgon issue, the Commission has attributed much of the animosity, venom and degeneration of the region into a very difficult relationship between two competing politicians who have both represented the constituency in parliament: Fred Kapondi and John Serut.

38 TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/p. 7.

In 2002, John Serut rose to the pinnacle of Mount Elgon politics defeating the incumbent Joseph Kimkung. Mr. Serut came to politics from the Ministry of Lands where he used to work as a registrar. There was of course nothing accidental or coincidental about this. He presented himself to the electorate as someone with a technical understanding of land issues. The importance of land on the mountain means Elgon politicians structure their campaigns around promises to deliver farms into the waiting arms of the landless. One of the messages of his campaign was that allocations at Chepyuk III would finally be settled to the advantage of all concerned especially his supporters: the Sabaot. The *Nyumba kwa Nyumba* campaign was a reflection of this popular and populist stand. As the sitting Member of Parliament, Mr. Serut's sentiments carried great weight and some of the Commission's witnesses described their great pride in a leader who was finally standing up for the poor and landless of Mount Elgon.³⁹

48. Mount Elgon, however did not exist in a vacuum. It lay against the broader tableau of national politics. And in 2005, there was no more important issue in 2005 than the referendum on the adoption of a new constitution. Mr. Serut was awkwardly placed for this historic referendum. In February 2004, he had sensationally defected from KANU to FORD-Kenya, at that point a party of the opposition. At a rally attended by such FORD-Kenya big wigs as Mukhisa Kituyi, Musikari Kombo and Moses Wetangula described KANU as a vehicle that has 'stalled along the way'.⁴⁰ It was an extra-ordinary move given that FORD-Kenya was almost completely dominated by Bukusu politicians who were regarded as the long-term enemies of Sabaot ambitions. Predictably, Mr. Serut's flirtation with FORD-Kenya did not last very long. Within months, he was back in the KANU fold and took the lead in championing the "Yes" campaign for KANU and other government affiliated parties in the 2005 constitutional referendum.
49. Mr. Serut's support for the "Yes" camp (symbolized by a banana, "No" by an orange) was unabashed. He traversed Mount Elgon enthusiastically campaigning for a variety of social and ideological reasons:

I told them to vote for "Yes". The issue of women marrying women and men marrying men; these were allegations and did not exist in that draft. Whether it was called the Wako Draft or whatever draft, it was none of our business! That is what I told my people as a leader. I told them that they did not elect me to Parliament to go eat and forget them. I had to guide them.⁴¹

39 TJRC/Hansard/In-Camera/Bungoma/26th May 2011/p. 3.

40 Serut Ditches Kanu for Ford-Kenya, *Daily Nation*, 16th February 2004.

41 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 21.

50. But Mr. Serut had made a serious political miscalculation and had not read his constituents or the national mood correctly. He found himself on the wrong end of a number of powerful current and former KANU politicians who supported the “No” campaign and subsequently joined the Orange Democratic Movement that was birthed by opposition to this particular effort to revamp Kenya’s constitution. Mount Elgon, despite Mr. Serut’s best efforts, fell firmly in the “No” camp.
51. Mount Elgon’s “No” vote had fall out had lasting consequences for the open running sore that was Chebyuk. Mr. Serut explained his defence of proposed constitution in high-flowing moral and ethical terms such as opposition to same-sex marriage. The Commission, however, heard consistent evidence that in fact, he ran a hard-nosed and nakedly political campaign during which he linked the regularization of Chebyuk land to voting “Yes”. Ominously, he linked voting no with dire and unpleasant consequences. At a rally held in the wake of the referendum and Mount Elgon’s resounding “No” vote, Mr. Serut was heard chastising constituents for refusing to ‘follow bees for honey’ and instead choosing to ‘follow flies and [to] eat human waste.’⁴² On another occasion, he was said to have issued ominously crude threats to no campaigners: “*Wanaume mtakimbia mpaka uume wenu urudi ndani*” which translates as ‘men you will run until your manhood will disappear.’⁴³
52. Mr. Serut denied dangling settlement in Chebyuk in front of voters as an inducement for voting yes. His explanation was that he had tried to present a vote for the constitution as a vote for development and government in general:
- I told my people that, whether this referendum was going to succeed or not, we were to be on the right side so that we benefit. The right side was the child holding bread. That is the language we were using...What I was interested in was development. I told them; let us vote for “Yes”. I told them not to follow promises which would not work.⁴⁴
53. Mount Elgon, however, voted no. Almost immediately, drastic changes were introduced into Chebyuk Phase Three. As has been explained above, a scheme that was seen as being previously reserved for the Soy now had to admit the Mosop. The popular explanation in Mount Elgon for this redistribution was that, in Serut’s terms, the Mosop had chased the bees. In other words, the Mosop had supported the referendum and even though the cause was a losing one, they were still rewarded with—as it were--the honey. In the process, Mr. Serut began to emerge as a champion of sorts for the Mosop seeking to be considered and included in the allocation of land at Chepyuk. Serut’s co-option of Mosop causes would cost him the support of the majority Soy who gradually came

42 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 21.

43 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/ p. 45

44 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/ p. 22.

to believe that he no longer represented their interests. As one Commission witness bluntly put it, 'by that time, our MP, Honourable Serut, had become our enemy.'⁴⁵ And with a general election fast approaching in 2007, an alternative had to be found. This, roughly, was the *milieu* that Fred Chesebe Kapondi stepped into. It was a *milieu* in which land and specifically Chebyuk land had acquired an overtly political sheen.

54. Mr. Kapondi was no stranger either to Mr. Serut or to the rough and tumble world of Mount Elgon politics. Mr. Serut himself describes Mr. Kapondi as a relative through marriage to his first cousin and a kind of dependent for whom he paid rent and whom he had helped to find employment when he was younger.⁴⁶ At some point, Mr. Kapondi even campaigned on behalf of Mr. Serut. Fred Kapondi describes his own political career as stretching back over two decades in capacities and parties that typify the broad ebb and flow of Mount Elgon politics:

I was a force in Mount Elgon politics from 1992. As a young man in 1992 with a lot of energy and without resources, I believed in myself that I could make it to Parliament. I managed to crisscross Mount Elgon from Cheptais to Kaboiywo on foot. In fact, in 1992, I believed I won the election but was rigged out. Everybody believed I won the election but was rigged out. I have been having very faithful followers across Mount Elgon District from 1992. Again in 1997, I was a candidate and lost by a whisker. [In 2002]...I stood on a Ford People ticket. I was working then with Hon. Nyachae.⁴⁷

55. After losing yet again in the General Elections of 2002, (this time to Serut) Kapondi seemed to retreat somewhat. By his own admission, he accepted that he could not compete with Serut's popularity:

My message was not popular. The message by Hon. Serut of Nyumba kwa Nyumba was very appealing. I had played my part. The people had voted for Mr. Serut...I had played my part and the rest was up to Mr. Serut and the people. In any case, I did not have any elective post.⁴⁸

56. But Mr. Kapondi did not sit out for long. By 2005 he was back on the campaign trail for the constitutional referendum. Astutely, Kapondi did not loan his weight and influence to the sinking ship that was the Banana/"Yes" campaign. Instead, he hit the road on behalf of the "No" camp:

During the referendum, Mr. Serut was campaigning for banana camp while we were campaigning for the orange camp. He made it very clear particularly to the people of Phase III that if they were not going to vote for "banana camp", they would face the consequences.

45 TJRC/Hansard/ In-Camera Hearing/Bungoma/26th May 2011/p. 3.

46 Hon. Kapondi refutes Serut's portrayal of their relationship and insists that they only had a brief 'working relationship'. TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/ pp. 5 – 6.

47. TJRC/Hansard/In-Camera Hearing/Nairobi/14 September 2011/p. 14 & 18

48 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 52.

57. Unlike Mr. Serut, Mr. Kapondi was neatly placed with the triumph of the Orange/No vote against the proposed constitution. Two fortuitous trends seemed to combine. The first concerned the fall-out from the re-drawing of Chebyuk. There was a large group of Soy malcontents who had either been locked out of the scheme altogether or stood to lose huge swathes of land on account of the 2.5 hectares cap. Soy elders who were shell-shocked and disappointed in Mr. Serut's betrayal of their cause began to look around for someone else to represent them in the upcoming elections. This group of elders included Patrick Komon (Wilfred Matakwei's father) and Jason Psongoywo Manyiror who was one of the largest land owners in region. In Mr. Kapondi they found an ideal candidate. Quite apart from his recent break with the hated Serut, Mr. Kapondi had a long and documented history of working for Sabaot and particularly Soy land rights. The elders and those with long memories remembered that as KANU chairman, he had been part of a Sabaot delegation that had visited President Moi in 1989 and 1993 to present their claims for additional land.
58. The second trend was more political. After a few years in the political wilderness, Kapondi found himself as part of the "No" campaign that eventually transformed itself into a formal political party—the Orange Democratic Movement(ODM)—right in time for the electoral cycle of 2007. Mr. Kapondi became, as it were, the face of ODM in the region. As a Commission witness explained, it was a hugely popular move that catapulted Kapondi to new heights in Mount Elgon politics and more or less confirmed him as the next member of parliament for the constituency:
- When the people refused the Banana Camp, a second rally for ODM was held courtesy of Kapondi. People really supported ODM. They sang with him in joy. They decided that he is the one they were going to chose. If Serut came with his rally, Kapondi would do the same with his ODM supporters. Kapondi was not very popular, but when he got into ODM he became very popular.⁴⁹
59. Mr. Kapondi's campaign for the Mount Elgon seat in the General Election of 2007 was an extraordinary one. The reason for this was that on the 13 April 2007 he was arraigned in court on charges of robbery with violence for the killing of a Jackson Kaibei Matei on the 17 of August 2006 after robbing him of 55, 000 shillings in cash and one cow worth 10,000 shillings while armed with an AK47 rifle. He was also charged with the wilful destruction of property, and promotion of war-like activities. Kapondi's position was that the charges were false, trumped up and politically motivated. He accused the then area Member of Parliament, Serut, of capitalizing on insecurity in the district to harass his political opponents. He remained in police custody for seven months.

49. TJRC/Hansard/In-Camera Hearing/Kimilili/25 May 2011/p. 19

Kapondi found himself in the absolutely unusual position of running both his nomination and parliamentary campaign from Bungoma Prison where he was held for several months.

60. The Kenyan press was intrigued by the unusualness of Kapondi's situation and conducted a number of interviews. Kapondi portrayed himself as a young, self-made man only interested in the growth and development of a poor and marginalized area. He also touched on other issues such as improving the distribution of the Constituency Development Fund, Local Authorities Transfer and bursaries money. His campaign was progressive and forward looking. His slogan was *Uongonzi Bora ni Ufunguo wa Amani na Maendeleo* which translates as 'Good leadership is the key to peace and progress'.⁵⁰ With the help of his wife and various political operatives on the outside Kapondi produced posters and t-shirts and all the other paraphernalia that accompany campaigns in modern Kenya.
61. The Commission heard extensive testimonies harking to another much darker under-current to Mr. Kapondi's run for the parliamentary. The recurrent claim is of a campaign with close connections to the SLDF, its members and associates. Mr. Kapondi's eventual success in both for the ODM nomination and for the 2007 campaign has therefore been credited to the ruthless elimination and intimidation of his rivals by people who are believed to have been SLDF fighters. Mr. Sammy Chemwei who was also contesting the Mount Elgon seat felt the wrath of these SLDF elements. Mr. Chemwei's home was set on fire by a large group of masked men all armed with AK47 rifles; these were all interpreted as hallmarks of the SLDF. In a subsequent interview with the *Nation* newspaper, Chemwei said that he had been threatened by a man who was known and wanted by the police.⁵¹ He was threatened, apparently, after refusing to step down for Mr. Kapondi. Various ODM civic aspirants including Moses Makoit of Cheptais ward and Nathan Warsama of Sasur ward and Benson Chesiskaki of Emari ward were all said to have benefited from SLDF-orchestrated violence. Claims have also been made that SLDF elements contributed to help Mr. Kapondi raise 100 000 shilling nomination fees required for contesting the ODM ticket. Mr. Kapondi's legal proceedings in Webuye have also been described as an opportunity for the SLDF to demonstrate its support for him. Militiamen supposedly showed up almost every day to listen to the hearings. Mount Elgon women were also forced to attend and to sing, dance and ululate:

All the ladies would be picked up by force to go to Webuye to listen to Mheshimiwa's case. They would want you to sing and do all things on the road. We were being monitored by the SLDF. Matakwei would call and ask how we were performing.⁵²

⁵⁰ "Controversial Man vows to win seat from Prison", *Daily Nation*, 27th October 2007.

⁵¹ "Jailed Aspirant's Mother and Wife Arrested", *Daily Nation*, Daily Nation, 18th November 2007.

⁵² TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/ p. 20.

62. On the 13th of December 2007, the state entered a *nolle prosequi*. It was just two weeks before the General Election. Mr. Kapondi portrays this timing as suspicious and indicative of his initial position that there had been a political motive behind his arrest: ‘The objective was one – just to keep me in until after elections.’⁵³ Riding the ODM wave, Mr. Kapondi easily won the elections, defeating the incumbent MP and ruling Party of National Unity (PNU) candidate, his arch rival Mr. Serut.
63. Kapondi has portrayed Serut as the force behind his legal woes as part of a longer campaign to discredit him in the face of mounting violence in Elgon. In one particularly bitter parliamentary exchange on the 4 April 2007, Mr. Serut accused William Ruto, Musa Sirma, Jebii Kilimo, Charles Keter and Franklin Bett of bankrolling Mr. Kapondi and his supporters as they killed and displaced Mount Elgon residents. Serut claimed in what one parliamentary writer described as ‘thunderous tones’ that he
- had evidence that Mr. Ruto, Bett, Kilimo and Sirma have been to Elgon to incite people to kill one another. In fact Mr Ruto told my people to reject the allocations in Chebyuk so that when ODM-K government comes into place, they will allocate them the whole forest.⁵⁴
64. There was uproar in the House. Mr. Raila Odinga and Mr. Charles Keter rose on points of order asking Mr. Serut to substantiate his utterances. Jebii Kilimo and Franklin Bett took issue with Serut’s comment noting that they had gone to the area to address the plight of suffering women and children. Mr. Ruto too was having none of it. He jumped to his feet to describe Mr. Serut as ‘a person who pretends.’⁵⁵ Mr. Ruto said that Serut was doing nothing about police beatings and burning of homes in Mount Elgon because inaction suited his political goals and that of the government he (Serut) was part of.
65. On the issue of SLDF support for his 2007 campaign, Mr. Kapondi was categorical that this was not the case. His claim is that while he knew some of the militia’s members by virtue of being a public figure in Mount Elgon, he had never benefitted from either SLDF money or violence as has so frequently been claimed:

It sounds very ridiculous and very unfortunate for somebody in his right sense to say that Kapondi was handed over the seat by the SLDF. The SLDF never created me. I was in politics before. I was a formidable force in politics in Mount Elgon without the SLDF. To allude to that is sheer nonsense.⁵⁶

⁵³ TJRC/Hansard/Public Hearing/11th July 2011/p. 50.

⁵⁴ This account of the parliamentary exchange between Serut and is taken from the Kenya Times’ parliamentary coverage which in turn was posted on an www.ogiek.org; a site that aggregates news and coverage of anything related to the Ogiek people.

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⁵⁶ TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 52.

Chepkurur and Korng'otuny Community Based Organization

66. The Commission took this small community based organization (CBO) as the final element responsible for the emergence of the SLDF. The CBO was formed in or around 2002 when intense discussions about the fate of Chebyuk III were being held. Its main goal of the organization has been explained as furthering Sabaot land rights at a time when arguments about rationalizing Chebyuk were gathering momentum:

The CBO was established to educate people about the problems encountered. The CBO was also supposed to tell the Government about the land problem in Chepkurur. It was one way of looking for money to enable the organization to go on with its programs and also to ask politicians from the area to help. The organization was also intended to go to court and seek redress.⁵⁷

67. The main members of this CBO were drawn from a very specific and distinctive group. Commission witnesses have described them as 'Soy elders' but what they were the men who had owned huge farms by virtue of having allegedly grabbed and settled upon land in the early 1970s when Chebyuk Phase One was first announced.⁵⁸ Men like Patrick Komon and Jason Psongoywo Manyiror Tirop a Soy *laibon* or ritual specialist were the long-term owners of 100 and 200 hectares of Chebyuk land and formed the core of group that stood to lose most from the successive attempts to regularize ownership of land in Mount Elgon. These men were unapologetic in their holding on to such vast spreads. As Mr. Manyiror explained, the land was theirs and had always been;

The farm belonged to my father. That is where I was born. It was not possible for anybody to go into that land because it was my grandfather's farm. I was on that farm together with my children and stayed there without any complaint. I had no problem with anybody. Nobody accused me and I did not have any boundary problems. It is jealousy which has brought animosity.⁵⁹

68. The CBO claimed to be entirely peaceful in its goals, methods and aspirations. The CBO seemed to concern itself mainly with the raising of monies to further their campaign and to file court cases meant to protect Sabaot land interests using legal and legitimate means. In 2004, members filed an injunction in Eldoret seeking to halt renewed surveying in Chebyuk Phase Three. What became of the case is unclear. Some witnesses claimed that it was thrown out; others that it collapsed. At any rate, disenchantment with Kenya's slow-moving and unresponsive judicial system had set in. Over the next couple of years, the CBO and its members gradually

57 TJRC/Hansard/In-Camera/Bungoma/26th May 2011/p. 3.

58. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 3

59 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/ p. 15.

became less civic-minded. Some of its members were engaged in violent crimes including robbery, murder, threats and intimidation against people who did not support Sabaoth claims. There is also some evidence that people were being coerced to contribute money to pay for the CBO's running and upkeep. Others have spoken of purchasing and stockpiling of weapons.⁶⁰

69. In 2005, the CBO was yet again spurred into action. The Mount Elgon District Commissioner, James Ole Serian, had announced the resumption of another round of surveying. Having exhausted all their legal options, CBO members decided to rush to Nairobi to seek audience with John Serut, their member of parliament. The reception they received was a frosty one no doubt because Mr. Serut may well have already been in the process of committing to the 50 – 50 split of Chebyuk:

We organized a delegation and visited him in Nairobi. When we got there, he dodged us. He gave us audience to only one old man called "Saso Laibon" and an elder by the name "Jason Manyuya Sanguywa".⁶¹

70. Defeated and desperate, the CBO members then remembered their 'son' in Nairobi, Fred Kapondi. They claimed to have spoken to him informally and to have received astonishing advice regarding the upcoming survey:

We approached Hon. Fred Chesebe Kapondi. Although Hon. Kapondi was not a member of parliament at the time, he was an active politician whom we recognized. So we talked to him several times. We talked to Hon. Kapondi, who was also in Nairobi. He was the one who gave us the idea of coming up with war – that maybe we could fight our neighbours, the Ndorobo.⁶²

71. There is no indication that Mr. Kapondi had any formal involvement with this CBO during initial months. But given their profile and position in the community as Soy elders, it is more than likely that Mr. Kapondi was well aware of them and their activism. According to this witness, in 2005 – 2006, the CBO sensed that their interests were being threatened by Mr. John Serut's political about-face and the adoption of the 50 per cent Soy and 50 per cent Mosop approach to Chepyuk III was looking more and more likely. At this point, the witness claimed, the members of the CBO approached Mr. Kapondi for advice and assistance. Mr. Kapondi is then supposed to have told them to 'take up arms' and to defend their lands.⁶³

60. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 10

61. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 3

62. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 3

63. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 3

72. Mr. Kapondi's rejection of these claims was vehement. He has completely denied any such contact and interactions with the CBO. His stand is that the claims were in essence fabricated as part of his sham trial and that CBO members have subsequently apologized for what they said:

Commissioner: Are you familiar with an organization allied to Chepkurur and Korng'otuny Community Based Organization?

Hon. Fred Kapondi Chesebe: That came in during my (trial?). Some of the witnesses who were giving evidence against me, who later came to me and apologized after I was elected member of Parliament, were part of this. What you are telling me was part of the statement by the witnesses against me. They later apologized to me.⁶⁴

73. In further testimony, Kapondi reiterated that the CBO witnesses had been untruthful and had confessed to the fallacy of their statements about him:

What they told me was: "Mheshimiwa, these things were set up. We came to testify but there was nothing we knew. We are sorry that we put you into the situation that you are in."⁶⁵

74. The General Election of 2013 saw yet another shift in Mount Elgon's political landscape. Running as an independent candidate, Mr. Serut defeated Mr. Kapondi to reoccupy the seat he had relinquished in 2007.

April 2006: A Call to Arms

75. April 2006 was a tense and difficult month in Mount Elgon. Much to the disgust of many Soy claimants, Chepyuk Phase Three had to be shared between them and the Mosop. Plots were capped at just two hectares. The grim news was confirmed when the list of beneficiaries was published and posted in the District Commissioner's office. The lucky ones were to await their letters of allocation. The unlucky ones faced a much less rosy future; dispossession and eviction was their fate. Those most bitter about these developments were a core group of very large land owners who had somehow over many years managed to avoid the Chebyuk dragnet. This time round however, things seemed quite different. Redistribution and eviction looked inevitable.
76. The Commission received testimony about a day in early April when, it seems, the decision was made to reject and protest the terms of Chebyuk Phase Three. A Mount Elgon resident was summoned to the home of Patrick Komon. Komon

⁶⁴ TJRC/Hansard/Public Hearing/ Bungoma/12th July 2011/p. 4.

⁶⁵ TJRC/Hansard/In-Camera Hearing/Nairobi/14 September 2011/p. 8

formed part of this coterie of large land owners. He was also Wycliffe Matakwei's father. Matakwei was the previously unremarkable and fairly average young man who became the commander of SLDF. Komon's home was hosting a meeting:

It was noon and the clock was ticking towards 1.00 p.m. I saw the son of Patrick Komon. He came to my home and told me: "There is a meeting at our place and my old man needs you." So I just accompanied him to their home. When I reached Mzee Patrick Komon's place, he welcomed me.⁶⁶

77. A meeting was underway as the witness arrived at and entered the Komon home:

When I arrived, I found that there was a meeting which was going on. The people I found there were known to me. I saw one of the sons of Patrick Komon, whose name was Matakwei. He was the chairperson of that meeting. In that meeting, I found people whom I could identify. I saw Patrick Komon. There was Hon. Fred Chesebe Kapondi. The others were Jacob Sawos, Benson Chesikak and Nathan Warsama.⁶⁷

78. The witness claimed that a Miss Komon, Mr. Maling'a and Titus Waikai were also present. Attendees were said to be holding discussions about what to do about next about the situation in Chebyuk. A solution was proposed:

Leader of Evidence: What did you hear them discuss or what did you see them do?

Witness: When Matakwei asked what we were supposed to do, Hon. Kapondi said that we had to protest about this, and that the only way to protest was by fighting so that our land could not be given to the other people. He said: "You must fight so that the Government can realize that your land should not be taken away from you. Then, finally you will be given your land."⁶⁸

79. Further allegations were made surrounding guns that were to be used in the fight for the land:

By the end of the meeting, many people had come and said that they would protest against the subdivision that was going on. Kapondi then said: "It is better if people had guns, so that you can protest and buy more guns." Then seven people came forward and said that they already had guns. The first person who said so was Nathan Warsama. We had Patrick Komon, who produced his gun. Baraza Ayub also produced his gun and Titus Weikai also produced his gun. So these people, produced guns, which amounted to eight guns.⁶⁹

66. TJRC/Hansard/In-Camera Hearing/Nairobi/14 September 2011/p. 30.

67. Nathan Warsama was a well known local politician in Mount Elgon. He stood and was elected unopposed as the councilor for Sasur Ward. From Robert Romborah Simiyu, 'Militianisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 33.

68. TJRC/Hansard/In-Camera Hearing/Nairobi/14 September 2011/p. 31.

69. TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/ p. 31

80. Soon afterwards, a second meeting was held at Warsama's residence. The witness did not give details. Those present, however, were described as undergoing an important ritual designed to bind them to each other and to their newfound cause. The ritual was overseen by Psongwoyo Manyiror, the Soy laibon who was also one of the largest land owners in Chebyuk:

After the guns were produced during the second meeting, Mzee Jason Psongwoyo said: "Bring one sheep outside." So, a male sheep was taken out and slaughtered. The dung was squeezed out of the intestines, which they used to smear the guns as they talked in tongues.

81. The Commission did not receive any additional evidence from any other witnesses on these two key meetings which supposedly took place in April 2006. There was no way for the Commission to verify what the witness saw and heard. Like Mr. Kapondi, Mr. Manyiror was arrested for promoting warlike activities and subsequently released.⁷⁰ The charges did not stick. And yet both men feature so prominently in narratives about the origin and emergence of the SLDF. It has made for a complex tableau of claims and counter-claims.

What the Commission can be certain about is that the publishing of the Chebyuk Phase III list in April 2006 marked a point of no return. Once that list was made public, there was no going back to a kinder, gentler time when differences might have been civilly discussed. As one witness put it, the list was an indication that 'blood would now flow' on Mount Elgon.⁷¹

The Onset of Violence

82. In August 2006, an assistant chief, Shem Cherowo Chemuny, who had been 'implicated in bribery to influence land allocation' was killed along with two guards and his daughter.⁷² This murder was followed by that of Cleophas Sonit, the chief of Kapkateny Location, who was related to [former MP] Serut and had refused to comply with SLDF demands. He was killed in his office in June 2006.⁷³ Ben Kipnusu, a councillor of Chepkube ward and a Serut supporter, was then murdered in January 2007.⁷⁴ Mr. Serut had complained to the police and high government structures on numerous occasions that his relatives were targeted by the SLDF and that no action was taken in response.⁷⁵

70 The arrest is described in TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/ p. 13

71 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/ p.18

72 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/ p. 12

73 See Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 23 and also TJRC/Hansard/Public Hearing/11th July 2011/p.10.

74 Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 23.

75 TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/pp. 11 – 12.

83. As has been explained above, the original and ostensible purpose of the protection of the Soy clan's land interests in Chebyuk Phase Three. Wycliffe Kirui Matakwei volunteered with other young men, mostly from the Soy tribe to take up arms against the evictions. Young people were mobilized by the community to defend them against the evictions:

The worst eviction was that of 2006. Most of these boys just went to the forest and formed the militia.⁷⁶

84. This group formed the fighting wing of the SLDF.⁷⁷ They initially called themselves Janja weed but later changed to SLDF, as that name was more telling of the nature of their fight⁷⁸. Initially, the group engaged in fairly low-scale skirmishes, mainly targeting the Mosop.⁷⁹ Full scale violence erupted after the publication of the final list of plot allocation for Chepyuk III in March 2006.

85. With time, the militia's ambitions changed somewhat with new rhetoric expanding to include taking back land not just in Mt. Elgon, but also those stretches of Trans-Nzoia which were forcefully taken from the community by the colonialists.⁸⁰ The expanded land interests echoed claims placed by the Sabaot before the Carter Commission in 1932. The SLDF concentrated its activities in Kopsiro division where Chepyuk settlement scheme is located and in Cheptais where most of the SLDF commanders (including Matakwei) and majority of land claimants in Chepyuk III originally came from.⁸¹

86. The militia became involved in a variety of human rights abuses, including rape, torture, murder, abductions, and assaults. In February 2007, Matakwei had threatened that the SLDF would attack neighbouring areas if the government did not move swiftly to resettle squatters.⁸² As one witness told the Commission:

In 2007/2008 during the past elections, the SLDF came into Kimama and picked out people. There is a family that had all its members killed.⁸³

76 TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/p. 22.

77 TJRC/Hansard/Public Hearing/Kapsokwony/23rd May 2011/p. 23

78 The group also used the name "ODM Boys" for a while but were told that they would embarrass the party. TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 13

79 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 23

80 Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 24

81 See Robert Romborah Simiyu, 'Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya', p. 23-24

82 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 24

83. TJRC/Hansard/Public Hearing/Kapsokwony/23 May 2011/p. 28

Membership, Leadership and Oath

87. The most prominent and widely-known member of the SLDF was Wycliffe Kirui Matakwei⁸⁴, the son of community elder Patrick Komon.⁸⁵ The militia included “within its ranks former army and police officers, such as David Sichei, who had been attached to the elite presidential security unit during President Moi’s administration and has been named by witnesses as the current leader of the militia. Sichei was reportedly responsible for military training for SLDF militiamen.”⁸⁶ Matakwei was killed in May 2008 in an operation carried out by the Kenyan army which apparently crushed the militia.⁸⁷
88. SLDF consisted of three distinct branches.⁸⁸ The first was a military wing headed by Matakwei. The second was a spiritual wing led by the Laibon (or spiritual leader), Jason Psongoywo Tirop, an 80-year old Soy. Psongoywo had the respect of locals and administered oaths⁸⁹. Psongoywo denies any involvement with the SLDF⁹⁰. The third was a political wing. This wing was the most difficult to pinpoint, and was also believed to be the source sustaining SLDF intellectually and financially. John Kanai acted as ‘its self-proclaimed spokesman’ but ‘many politicians have been linked to the militia.’⁹¹
89. Research emphasizes the prominent role that *laibons*—spiritual and ritual experts-- have played in war throughout the history of the Sabaot and other Kalenjin-speaking peoples.⁹² They are believed to possess extraordinary powers, though their influence has diminished in recent decades.⁹³ SLDF was no exception. Members of the militia took an oath of spiritual guidance administered by Jason Psongoywo the powerful and long-serving *laibon* who testified before the Commission. Mr. Psongoywo himself is somewhat reticent on his administration of the oath. Secondary literature has described him as being responsible for giving ‘combatants special charms, ostensibly to bind them to the SLDF cause and imbue them with supernatural powers that would protect them from authorities and

84 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/p. 20

85 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/p. 23

86 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/p. 28

87 The militia was neutralized by a joint police and military intervention known as “Operation Okoa Maisha” in March 2008. Nairobi Chronicle, “Kenya government celebrates death of rebel commander”, 18 May 2008, <http://nairobianchronicle.wordpress.com/2008/05/18/kenya-government-celebrates-death-of-rebel-commander/>

88 Ibid., p. 28

89 Ibid., p. 23 and 29

90 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 20

91 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 29

92 See for instance, P.K. Magut, “The Rise and Fall of the Nandi Orkoyoit, 1850 – 1957”, *Nairobi Historical Studies* 1 (1969), pp. 95 – 108.

93 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 27

enemy bullets during combat, making them invincible.⁹⁴ It has been speculated that belief in invincibility might explain why the group often informed its targets before strikes and also why it continued to gain young recruits despite prosecution by the state.⁹⁵

90. Most SLDF combatants seem to have operated from their own homes convening only when they had a specific operation to conduct. Upon completion of a particular mission, they melted back into the community which made it very difficult for security agents to track them down.⁹⁶ Only the leaders had defined bases of operation, 'such as caves on the forested mountain slopes.'⁹⁷ The combatants typically 'organized themselves in small groups of 10 to 12 people that made their movements difficult to detect.'⁹⁸
91. The SLDF was initially led by a single command structure but as the number of members grew bigger, it was subdivided into four camps each led by a commander.⁹⁹ Philip Tirot was the overall commander.¹⁰⁰ The Commission also received information that the SLDF established their own "courts" to judge and administer punishment of local area residents who failed to support the militia. One witness told the Commission of being taken before those courts several times; on one occasion, the court was presided by Matakwei himself.¹⁰¹
92. Membership in the group consisted mostly of boys and young men. Some of them were taken out schools.¹⁰² Others were abducted from their homes.¹⁰³ A number joined voluntarily, as they were told to defend their community.¹⁰⁴ Politicians were said to have supported the group and were involved in the political wing. Witnesses have told the Commission of a strong personal link between Wycliffe Matakwei and Fred Kapondi Chasebe. Several meetings have been reported to take place between Mr. Kapondi and important constituents of SLDF including initial founding meetings.¹⁰⁵ In subsequent meetings in 2005, planning allegedly took place for the murder of several people.¹⁰⁶

94 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 27

95 TJRC/Hansard/Public Hearing/Bungoma/12th July 2011/p. 27

96 See Simiyu, 'Militianisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya' p. 28

97 Simiyu, 'Militianisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya' p. 28

98 Simiyu, 'Militianisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya'. 28

99 Simba, Chui, Nyati and Headquarters camps headed by Fredrick Kituyi Chesaa, Kijiji Matia Itit, Samson Kanai and Philip Tirot respectively. See TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p.14

100 See TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p.14

101 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/pp. 7-8

102 TJRC/Hansard/Public Hearing/Kapsakwony/23rd May 2011/p. 10

103 TJRC/Hansard/Women's Hearing /24th May 2011/p. 9

104 TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011

105 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 31

106 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 12



Sammy Cherobe who was injured on the arm during the clashes.

95. Mr. Kapondi has also been described as using the SLDF to facilitate his election in 2007 through intimidation of opponents and voters. As one witness put it, ‘whoever opposed Kapondi would be killed or his house would be destroyed.’¹⁰⁷ The Commission received information on leaflets being distributed by SLDF on the eve of the election stating that any area that would register a high number of votes for PNU would be “dealt with”; an attack in which 18 people were killed in the Chesikaki area was allegedly in retaliation for voting for the ‘wrong’ candidate.¹⁰⁸ The house of a candidate for the Mt. Elgon seat, Mr. Sammy Chemwei, was set on fire by masked men armed with AK-47s, a hallmark of the SLDF. Mr. Chemwei told the *Daily Nation* that he had been attacked for refusing to step down for Kapondi.¹⁰⁹
94. As described above, Kapondi was incarcerated for nine months in 2007 managing to win the ODM nomination and the election from behind bars. It was reported to the Commission that Kapondi was allowed to remain in contact with the SLDF command while in prison and that senior ODM politicians such as Mr. Raila Odinga and Mr. William Ruto visited him on occasion and also may have sent him money. A witness told the Commission that Mr. Kapondi ordered the assassination of some people--including some members of Mr. Serut’s family--by mobile phone.¹¹⁰ The Commission was not able to corroborate that information.

¹⁰⁷ TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/pp. 20-21

¹⁰⁸ TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p.22

¹⁰⁹ “Controversial man vows to win seat from prison”, *Daily Nation*, 27 October 2007

¹¹⁰ TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 5

Financing and Connections with State Actors

95. SLDF has received financing from politicians,¹¹¹ but this financial assistance has been limited in its source, as the group largely sustained itself through looting, cattle rustling¹¹² and demanding taxes, food, and protection fees from local residents.¹¹³ The SLDF also created a taxation system for teachers.¹¹⁴
96. The Commission received information linking high ranking ODM party officials to Wycliffe Matakwei.¹¹⁵ There are allegations that John Bomet Serut, provided a small number of weapons to the SLDF in the initial stages of the creation of the militia,¹¹⁶ although he denies it. Fred Chesebe Kapondi, was also involved in the creation of the militia, although he also denies it.¹¹⁷
97. Mr. John Serut has also been linked to Moorland Defense Force and the Political Revenge Force, militias that were apparently established to respond to protect the Mosop and Serut's supporters respective against the SLDF onslaught and launch offensives against the SLDF.¹¹⁸ Mr. Serut is meant to have been close to members of the Sangulas; the family of a prominent Mosop *laibon* who provided spiritual inspiration and ritual protection for MDF fighters. The literature suggests that neither of these two groups seems have had much of an impact and any missions/operations that they launched were sporadic and limited in scope. Also, the witnesses may have erred in associating Mr. Serut with the Political Revenge Force. That was an entirely different group that did not feature in the Mount Elgon conflict. In March 2008 police raided the Kwanza farm of Mr. David Nakitare, the former Member of Parliament for Sabaoti.¹¹⁹ Two hundred young men calling themselves the Political Revenge Force were found training on the premises and a warrant was issued for Mr. Nakitare's arrest.
98. Serut has also been accused of trying to assassinate Kapondi and to have contributed, with the help of the Criminal Investigations Department (CID),¹²⁰ of fabricating charges for his arrest, in order to keep him out of the 2007 election campaign.¹²¹ Serut is reported acknowledging in public to have organised the killing of one of Kapondi's close collaborators, Absalom.¹²²

111. TJRC/Hansard/In-Camera Hearing/Bungoma/26 May 2011/p. 29. See also TJRC/Hansard/Women's Hearing/24 May 2011/p. 14

112. TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/p. 9-10

113. TJRC/Hansard/In-Camera Hearing/Kimilili/25th May 2011/p. 24 and 29. TJRC/Hansard/Women's Hearing /24th May 2011/p. 23

114. TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 13

115. TJRC/Hansard/In-Camera Hearing/Kimilili/25 May 2011/p. 32

116. Information was reported to the Commission that Matakwei announced the contribution from Hon. Serut in a public forum. See

TJRC/Hansard/In-Camera/Kimilili/25th May 2011/p. 13 and TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 25

117. TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p.20

118. Simiyu, *Militanisation*, p. 36.

119. "Police Sought Interpol's Help in Nakitare Hunt but he is still within". *Daily Nation*, 11th March 2008.

120. The DCIO Michael Kimiru has been named by witnesses before the Commission in relation to that incident.

121. TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 3 and p. 28

122. TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 32

99. The Commission received allegations of high ranking ODM officials¹²³ facilitating the purchase of food and a small number of weapons.¹²⁴ One witness told the Commission that an ODM official supported the SLDF as an instrument to attack political (PNU) opponents but that the support of ODM was gradually removed as the militia became more violent and unruly, and started killing civilians unrelated to the political fight.¹²⁵
100. Witnesses have also testified before the Commission on links between SLDF and the police. In several cases, informants have been killed after providing intelligence on SLDF, especially to the (Criminal Investigations Department)CID.¹²⁶

State Responses

101. As has been explained above, the descent into violence in Mount Elgon started in March and April of 2006 when the final list of Chepyuk Phase Three beneficiaries was published and posted at the District Commissioner's headquarters in Kapsakwony. Prior to this there had been isolated skirmishes and incidents. In June 2006 the SLDF announced itself with the splashy violent and brutal killing of a chief and assistant chief in the area. Mount Elgon then descended into the orgy of violence that the Commission has heard so much about in evidence and testimonies.
102. The security apparatus in Mount Elgon was very slow in getting to grips with the problem posed by the SLDF. The early characterization of the SLDF fighters as uneducated local thugs, hooligans and common criminals went some way to convincing the Kenya Government that the militia was first and foremost a security issue that could fairly easily be handled with the deployment of the regular police, administration police, general service unit officers and anti-stock theft officers. The Rapid Deployment Unit of the Administration Police unit was particularly prominent in these early operations.¹²⁷ These missions had limited and mixed results.
103. Prior to the inclusion of military personnel in the area in 2008, the police and the paramilitary police, the General Service Unit (GSU), launched several unsuccessful low-level security operations in Mt. Elgon targeting the SLDF forces.¹²⁸ These missions, however, were also riddled with allegations of human rights abuses, including beatings, looting and burning of houses and food granaries, raping of

123 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 35

124 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/pp. 15-16 and TJRC/Hansard/In-Camera/Kimilili/25th May 2011/p. 16

125 TJRC/Hansard/In-Camera Hearing/Bungoma/26th May 2011/p. 17

126 TJRC/Hansard/ In-Camera Hearing/Nairobi/14th September 2011/p. 8-9

127 For more on the Rapid Deployment Unit, <http://www.administrationpolice.go.ke/aptrdu.php>

128 Human Rights Watch, *All the Men Have Gone: War Crimes in Kenya's Mt. Elgon Conflict*, at 27 (July 2008), available at <http://www.hrw.org/sites/default/files/reports/kenya0708webwcover.pdf> [hereinafter *Human Rights Watch Report 2*].

women and girls, indiscriminate arrests, extortion, and killings at the hands of the police.¹²⁹ There was a further spike in the Mount Elgon violence following the 2007 General Election. It was at this point that a decision was made to adopt the more militarily aggressive approach of *Okoa Maisha*.

Operation Okoa Maisha: Saving Lives?

104. In March 2008, the army moved into Mount Elgon. Kapkota, which lies a few kilometers north of Cheptais, became the main base; smaller bases were set up elsewhere on the mountain. The military continues to maintain a presence in Kapkota.
105. The military personnel identified were drawn mainly from two units: the elite 20 Parachute Battalion¹³⁰ and 1 Kenya Rifles Battalion¹³¹. The Kenyan General Service Unit (GSU) and regular police officers offered support. The end result was a mission that has been described as an 'extremely heavy handed'.¹³² In an attempt to flush out hiding SLDF members and hidden illicit weapons, the joint coalition of military, GSU, and police visited every village in the Mt. Elgon area, rounding up thousands of men and boys aged from ten and above.¹³³ It is alleged that the joint forces then tortured and unlawfully detained the Mt. Elgon residents, and there are also reports that an undetermined number were killed or disappeared.
106. Despite the reports that human rights abuses had occurred, the government largely considered the operation a success in subduing SLDF. The Ministry of State for Defence stated that when the operation ended, large quantities of weapons had been recovered, the leaders and members of SLDF had been identified and arrested, and that the people of Mt. Elgon 'were appreciative of the efforts made by the Army to rid them of the menace of SLDF that had dogged them for so long.'¹³⁴

129 Kenya National Commission on Human Rights, *The Mountain of Terror: A Report on the Investigations of Torture by the Military at Mt. Elgon*, at 10 (May 2008), available at <http://www.scribd.com/doc/6337545/KNCHR-Report-on-the-Mt-Elgon-Violence> [hereinafter *KNCHR Report*].

130 20 Parachute Battalion is the only commando unit in the Kenya Army that is trained in counter-terrorism tactics by both the United States and the UK-based "Operation Monogram." Operation Monogram provides counter-terrorism training and equipment to foreign security forces in parts of the world that the British Government sees as threatening or breeding extremism. Because of its shared border with war-torn Somalia and its own experiences with terrorist attacks, particularly the US embassy bombing in 1998, Kenya was one of the first beneficiaries of this program. After the allegations of human rights abuses at Mt. Elgon came to light, Human Rights Watch specifically called on the British Government to stop training Kenyan security forces. Ben Rawlence, *Trained in Terror*, Human Rights Watch (July 30, 2008), available at <http://www.hrw.org/en/news/2008/07/29/trained-terror>.

131 There are conflicting reports with regard to the exact number of troops deployed on the mission. While the District Security and Intelligence Committee (DSIC) stated that the mission was composed of about 400 security force members, including 120 from the 20 Para Battalion, the Chief of General Staff and the Assistant Minister for Defence stated that they deployed approximately 300 soldiers from the Alpha Companies of both the 20 Parachute Battalion and the 1 Kenya Rifles Battalion. Special Rapporteur on extrajudicial, summary or arbitrary executions, *Addendum: Mission to Kenya*, ¶ 48, U.N. A/HRC/11/2/Add.6 (May 26, 2009) [hereinafter *Special Rapporteur Report*].

132 *Human Rights Watch Report*, (n 128 above) 2-3.

133 *Human Rights Watch Report* (n 128 above) 2.

134 Kenya Ministry of State for Defense, *Operation Okoa Maisha* (2010), available at http://www.mod.go.ke/army/?page_link=okoa%20maisha.

Military Accountability

107. Although government spokespeople have referred to *Okoa Maisha* Operation as a ‘joint police-military operation’—a term which has encouraged both the military and the police to attribute fault to one another—recent reports and interviews suggest that the military was in control of the operation.
108. In investigating the logistics of the operation and the chain of command, the Special Rapporteur on extrajudicial, summary or arbitrary executions questioned various Kenyan officials during a country visit in 2009. The Mt. Elgon District Security Intelligence Committee (DSIC) informed him that the operation was directed by the Western Province Provincial Police Officer, and that he directed both the police and the military.¹³⁵ They said that the police were responsible for arrests and interrogations, and that the military involvement was limited to providing vehicles to transport suspects and helping cordon areas in which the police carried out arrests.¹³⁶
109. Although the DSIC’s account, as well as that of the government, portrays the army’s role to primarily provide security to police units conducting search operations, witnesses and victims interviewed about the human rights abuses confirmed that those who passed through Kapkota were arrested by men in military uniform and transported in military trucks to Kapkota where soldiers were responsible for beatings and interrogations. Those interviewed specifically used the word “jeshi,” which is the Swahili word meaning army soldier, as opposed to “askari” meaning an armed guard.¹³⁷ Victims and witnesses also described the men who arrested them as dressed in full military fatigue, wearing the black and navy berets of the army rather than the red berets of the GSU.¹³⁸
110. The Special Rapporteur on extrajudicial killings was also provided with credible information from citizen informants who worked directly with the military that members of the army were involved in abuses at the search stage of the operation.¹³⁹ An intelligence officer working with the military at the camps also described a very different chain of command from that detailed by the Kenyan Government in an interview with Human Rights Watch. The intelligence officer said that while many police were present at the camp in Kapkota, they were all dressed in military uniforms and taking orders from the military commander. He described the military as “firmly in control” of operations at Kapkota and

135. Special Rapporteur Report (n 131 above) para 49.

136. *As above*.

137. Human Rights Watch (n 128 above) 41.

138. *As above*.

139. Special Rapporteur Report (n 131 above) para 459.



Moses Okoit weeps as he recounts how he was tortured by security forces during Operation Okoa Maisha in Mt. Elgon

Chepkube. He also stressed that while orders passed directly from Nairobi to the military commander, Col. Boiwo, or the Provincial Commission, Abdul Mwasserah, *it was always the military commander that acted as the effective head of the operation on the ground.*¹⁴⁰ Finally, the army had control over the everyday operations of the mission as “the one in charge of combat operations, and the principle supplier of logistics in terms of trucks, jeeps, arms, and helicopters.”¹⁴¹

111. In consideration of these reports and interviews, it is clear that the military was in operational command over the purportedly “joint” mission. This chain of command suggests that not only did the commander of the military, Col. Boiwo, know what was taking place during the round-up in the villages and later at the camps, but he also played an active role in allocating orders that led to the alleged human rights abuses.
112. Requests for answers from the Kenya Defence Forces by the Commission were never responded to.

¹⁴⁰ *As above* at 41 [emphasis added].

¹⁴¹ *Id.* at 42.

Human Rights Violations and Operation Okoa Maisha

113. In recent years, numerous human rights organizations have reported on Operation Okoa Maisha. The reports and interviews conducted by Médecins Sans Frontières, Human Rights Watch, Independent Medico-Legal Unit, the Kenya National Commission on Human Rights, Mwatikho Torture Survivors Organisation, and Western Kenyan Human Rights Watch all reveal similar human rights violations that occurred during the initial round-up, at the military camps, and in the aftermath of the operation.
114. Commission's hearings and statements received from residents of Mt. Elgon region confirmed most of the findings of these reports. Other chapters of this Report record the nature and extent of such violations in detail.

Silences

115. Operation Okoa Maisha has been placed behind a wall of silence. The Commission's interactions with military were difficult; requests for reports, documentation and appointments went largely unanswered. Part of the problem, the Commission believes is found in the profile of the lead Kenya Army Battalion involved in Okoa Maisha. The 20th Parachute Battalion is, by some distance, the best trained and supported unit of the Kenya Army. As has been mentioned above, 20th Para has for the past decade been the focus of British, American and Israeli efforts to improve the ability of the Kenya military to respond to terrorist activity.
116. The importance and the centrality of 20th Para to the Kenya Army and the Kenya Government made it difficult to fully expose the Battalion's activities in Mount Elgon. Inquiry was further complicated by diplomatic interventions. On the 8th of August 2008, a diplomatic cable originating in London was sent out to a number of top-level intelligence organisations such as the CIA.¹⁴² The contents of this cable (subsequently made public through the Wikileaks) suggest that because of allegations made about 20th Parachute Battalion, the United Kingdom was reconsidering the battalion's participation in Operation Donzel and Operation Monogram. The British considered a number of options. One suggestion was

¹⁴² London Wikileaks. Kenya/CT: UK Reconsiders Counterterrorism Training Program Following Accusations of Human Rights Violations, The Telegraph, 4th February 2011. <http://www.telegraph.co.uk/news/wikileaks-files/london-wikileaks/8304711/KENYACT-UK-RECONSIDERS-CT-TRAINING-PROGRAM-FOLLOWING-ACCUSATIONS-OF-HUMAN-RIGHTS-VIOLATIONS.html>

to include ‘human rights components’ in the training offered to the 20th Para.¹⁴³ Another suggestion was to wait to see how the Kenyan courts handled the cases filed by victims.

117. Especially interesting is the Government’s reaction to the concerns raised about 20th Para’s behaviour and conduct in Mount Elgon. Kenyan authorities assured the British—and this is critical—that 20th Parachute Battalion had *not* committed any human rights violations during their pursuit of SLDF fighters. The government blamed *another* unnamed unit based near 20th Para. The Kenyan Government then assured the British that the military was addressing the problems. This may have gone some way to leading the Kenya Desk at Operations Donzel and Monogram to observe that there was no ‘concrete evidence’ behind the allegations. The Commission has come to the conclusion that there have been high level tactical and strategic attempts to shield 20th Parachute Battalion from allegations of human rights violations.

Impact

118. It was difficult for community members to distinguish SLDF fighters from government security agents because they deliberately wore very similar uniforms. This enabled the group to invade homes, attack and harass individuals, and extort money and property.¹⁴⁴ Furthermore, because most SLDF combatants operated from their own homes, they remained integrated in the community.¹⁴⁵ This gave the militia a certain intimacy and closeness with the people that they violated and preyed upon. Residents were threatened and remained fearful of retribution if they revealed information regarding the identity of combatants and activities of the group.¹⁴⁶
119. Over 600 individuals had died as a result of the conflict, and roughly 66,000 had been displaced by 2008.¹⁴⁷ Families have been separated and the education of thousands of pupils disrupted.¹⁴⁸ Furthermore, the economy suffered greatly due to disruptions to the farming environment because of displacement. This caused a negative impact on “food security, food prices, and nutrition in the district and beyond.”¹⁴⁹

143 London Wikileaks. Kenya/CT: UK Reconsiders Counterterrorism Training Program Following Accusations of Human Rights Violations, The Telegraph, 4th February 2011

144 TJRC/Hansard/Public Hearing/Kapsakwony/25th May 2011/p. 18

145 Robert Romborah Simiyu, ‘Militanisation of Resource Conflicts: The case of land-based conflict in the Mt. Elgon Region of Western Kenya’, p. 28

146 TJRC/Hansard/Women’s Hearing/Kapsakwony/24th May 2011/p. 4

147 TJRC/Hansard/Women’s Hearing/Kapsakwony/24th May 2011/p. 3

148 TJRC/Hansard/Public Hearing/Kapsakwony/23rd May/2011/p. 47.

149 TJRC/Hansard/Public Hearing/Kapsakwony/23rd May/2011/p. 47.

120. The Commission has received many testimonies of victims of SLDF attacks. The violations committed included murders, torture and sexual abuse. Several witnesses also spoke of beheadings¹⁵⁰, forced circumcisions¹⁵¹ and cutting of ears¹⁵². As one witness told the Commission:

They came into the house, they took my husband away and slaughtered him outside. As they were slaughtering him, he was crying and yelling, then one person said my husband should pray since his last day had come. When he finished praying, they killed him and dumped him there.¹⁵³

121. A witness testified as follows concerning the killing of her aunt by SLDF:

It was on a Monday at 3:00 pm and I was sitting with my Auntie. About 15 men came. They started beating us and took us to Chebyuk Forest. They tied our hands behind us and beat us all the way to the forest. When we were about to reach the forest, they told me to sit down and made my Auntie lie down. They then slashed her.¹⁵⁴

122. Another witness talked about how she was gang-raped by SLDF men in 2007 on her way to her house:

We reached a place and then they started raping me. I can remember very well that they were four men. [...] After finishing they woke me up. [...] We went on. [...] They put me down again and started raping me again. I was really injured and traumatised.

123. She was unconscious for some time. When she woke up, the men came back and tried to get her to stand and walk:

When I fell down, another one came from nowhere and urinated on me. [...] He forced me to swallow the urine. I swallowed it.¹⁵⁵

124. She was later disowned by her husband on the perception that she had contracted HIV from the rapes. Another witness told the Commission that:

On Sunday, 17th September 2006, in the evening, the SLDF came to my door and knocked. They entered and pointed guns at me. [...] they beat my husband and children. They also beat me up. [...] They slaughtered my son. They went with my husband and shot him six times at the back. They cut his head, his private parts and hands.¹⁵⁶

125. That witness was later displaced and is now forced to provide alone for her ten children. Attacks on teachers and the imposition of the heavy taxation system

150 TJRC/Hansard/Women's Hearing/Kapsakwony/24th May 2011/p.11 and TJRC/Hansard/In-Camera/Kimiliili/25th May 2011/p. 7

151 TJRC/Hansard/Women's Hearing/Kapsakwony/24th May 2011/p. 13

152 TJRC/Hansard/Women's Hearing/Kapsakwony/24th May 2011/p. 18

153 TJRC/Hansard/Public Hearing/Kapsakwony/24th May 2011/p. 15

154 TJRC/Hansard/Public Hearing/Kapsakwony/24th May 2011/p. 53

155 TJRC/Hansard/Public Hearing/Kapsakwony/24th May 2011/page 28-30

156 TJRC/Hansard/Women's Hearing/Kapsakwony/24th May 2011/p. 4



A woman telling her story to the Commission during the Mt. Elgon site visit

by the SLDF have caused many to leave the Mt. Elgon area. This has resulted in shortage of teachers, as recounted to the Commission by a witness:

I buried eight teachers and 30 pupils. Many of my teachers were punished. Many of them were given 200 canes. Sometimes, six inch nails would be used to sew up lips. It made teachers to flee this land. Up to now they have not come back. The shortage you are seeing is a result of that. Six schools were closed down and up to this time, they are still closed.¹⁵⁷

128. Several witnesses have indicated to the Commission that individuals connected with the SLDF and former SLDF fighters still represent a threat to security in the Mt. Elgon area. For example, David Chemaimak Sichei has been reported to be the current commander of the SLDF and is allegedly currently located in

¹⁵⁷ TJRC/Hansard/Public Hearing/Kapsakwony/25th May 2011/p. 10

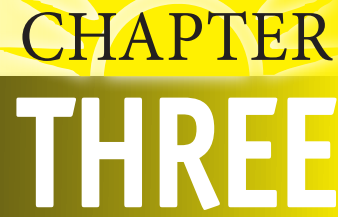
Uganda.¹⁵⁸ Witnesses were concerned about questions of re-formation and re-emergence of the militia because of continued failure to capture and try men like Sichei.

Conclusion

127. The Mount Elgon conflict is at once unique and typical. For the Commission its uniqueness comes from the fact that the region is home to a very particular mix of ethnicities, historical and contemporary experiences that cannot be reproduced. It is this unique combination that in turn gave rise to the Sabaoth Land Defence Force (SLDF). The militia and the state's attempts to quash it are unprecedented. For all its uniqueness, however, Mount Elgon sits within an identifiable trend in modern Kenyan history: the inherent instability and disruptive potential of issues surrounding ethnicity, land and politics. The forces that eventually pulled Elgon are by no means limited to the mountain. They feature throughout the country and carry with them the capacity to manifest with similar violence and chaos.

¹⁵⁸ TJRC/Hansard/Public Hearing/Bungoma/11th July 2011/p. 14 and p. 29





CHAPTER THREE

Healing and Reconciliation

Introduction

1. Kenya's history has been characterised by tragic episodes of gross violations of human rights. Most of these atrocities were committed between 1963 and 2002 during which Kenya African National Union (KANU) was at the helm of power. KANU, the independence party, and under the leadership of President Jomo Kenyatta and later President Daniel Arap Moi, created an authoritarian, oppressive and corrupt state. It created a traumatised nation of thousands of individuals living with physical and psychological wounds in a country that had no time or space for their experiences and stories. Indeed, for decades, Kenya has remained a nation in which communities stand divided along ethnic and regional lines suspicious and distrustful of one another. Over the decades feelings of inter-communities distrust, even hatred, have festered mainly because a myriad of issues which are at the core of nation building have largely remained unresolved. These issues include land problems, inequality and regional imbalances, and impunity combined with a lack of transparency and accountability. These issues have eroded a sense of belonging, nationhood, and public trust in political and governance institutions.
2. Since independence, successive governments have employed silence, denial and selective amnesia whenever individuals and agencies have raised the need to address these fundamental issues. Painful memories of have being passed from one generation to another, and as a consequence, present generations continue to hold grudges for violations and historical injustices meted against

their forefathers and mothers. Until now, the scale and impact of human rights violations and historical injustices have neither been fully acknowledged nor sufficiently addressed. This has in turn nurtured an atmosphere of latent tension, hatred and suspicion among individuals and communities. This tension flared up in December 2007 following the declaration of the results of the Presidential Election. The outcome was an unprecedented tragedy in Kenya's history: a violent conflict in which an estimated 1,133 people died while approximately 650,000 were displaced from their homes and property worth billions of shillings destroyed through arson and other forms of attacks.

3. In the aftermath of the 2007/2008 Post Election Violence, the Truth, Justice and Reconciliation Commission was established and mandated to 'promote peace, justice, national unity, healing and reconciliation among the people of Kenya'.¹ Upon establishment, the question that starkly confronted the Commission was this: how can healing, reconciliation and national unity be fostered so that all the Kenyan people can be mobilized towards a common vision and future; a future characterised by a shared national identity, and common values and aspirations as captured in the words of the National Anthem? This Chapter is a synthesis of the feelings of Kenyans concerning the critical issue of national unity, healing and reconciliation.

Mandate and Conceptual Issues

4. The Commission mandate relating to the promotion of national unity, healing and reconciliation was outlined in several provisions of the Truth, Justice and Reconciliation Act (TJR Act). Firstly, the Commission was required under section 5(g) of the Act to 'provide victims, perpetrators and the general public with a platform for non-retributive truth telling' in the hope that such a conversation 'would chart a new moral vision' and ultimately lead to reconciliation. Secondly, section 5(j) of the Act required the Commission to provide 'repentant perpetrators or participants in gross human rights violations with a forum to confess their actions as a way of bringing reconciliation'. Further, the Commission was mandated under section 6(s) of the TJR Act to 'inquire into the causes of ethnic tensions and to make recommendations on the promotion of healing, reconciliation and coexistence among ethnic communities'. Finally, under Section 6(j) of the Act, the Commission was mandated to 'investigate any other matter that it considers requires investigation in order to promote and achieve national reconciliation'.

¹ Truth, Justice and Reconciliation Act, sec 5 [Hereinafter TJR Act].

5. In the course of its work, two competing interpretations regarding the Commission's reconciliation work emerged. There are those who expected the Commission to actually reconcile warring communities and individuals. In this regard, the success of the Commission's work lied in the actual reconciliation between a perpetrator and a victim or between warring communities. Another view was that the Commission's role was to promote and contribute to reconciliation. In other words, the Commission's processes were seen as a platform for beginning the process of reconciliation between individuals and communities. The Commission inclined towards the second view. Although it was and is desirable to see actual reconciliation between individuals and communities, the Commission recognised that meaningful reconciliation is not an event, but rather a long process and that the decision to reconcile is a personal decision, aimed at setting the stage and establishing the basis for the beginning of a reconciliation process. Accordingly, the Commission worked towards ensuring that its activities in the course of its life and the result of its work would substantially contribute to the process of reconciliation.
6. In essence, reconciliation is a complex concept. As the South African Truth and Reconciliation Commission learnt in its work, reconciliation is not only a highly contested concept, but it also has no simple definition.² As such, it was satisfied, justifiably so, with outlining the essential elements of reconciliation rather than defining the term. The elements it identified include that: reconciliation is both a goal and a process; it is experienced at different levels (intra-personal, inter-personal, community and national); and that reconciliation has linkages to redistribution in terms of material reconstruction and the restoration of dignity. Similarly, the Sierra Leone Truth and Reconciliation Commission conducted its reconciliation work on the premise that 'there is no universal model of reconciliation that can apply to all countries'.³
7. The Commission took a similar approach which it spelt out in its Reconciliation Policy. The Commission understood reconciliation to be a process rather than an event. It is a process undertaken by individuals who have committed or suffered violations and as such can be intensely private and personal. It is also a process that can be encouraged and even undertaken at the community and national level. Thus, the Commission saw its role in relation to reconciliation as that of laying the foundation for a long-term process. This approach finds validity when one considers the products of the KNDR negotiations.

² *Report of the South African Truth and Reconciliation Commission, volume one* (1998) 106.

³ *Report of the Sierra Leone Truth and Reconciliation Commission, volume 3B* (2004) 433.



The late NCIC Vice-Chair, Ms. Mary Onyango addressing the Stakeholders Consultative Workshop in Naivasha

8. The KNDR team wisely laid the foundation for the creation of two institutions to further reconciliation: this temporary Commission and the permanent National Cohesion and Integration Commission (NCIC). Entrusting reconciliation in a permanent commission dedicated to national cohesion acknowledges that reconciliation is not only a process, but a continuous process. Reconciliation, like freedom, democracy, national unity and many other fundamental values to which modern Kenya aspires, must always be nurtured and cared for. This Commission, therefore, does not claim to have achieved reconciliation for the nation. Rather, the hope of the Commission is that by uncovering the truth, providing a forum for individuals to share their experiences and by providing some accountability, the Commission will have placed the nation on a path to further reconciliation and national cohesion and unity.
9. As discussed in detail in the Chapter on Interpretation of Mandate in Volume 1 of this Report, the Commission acknowledged that truth, justice and reconciliation are interconnected and interrelated. These three factors work towards mending relationships. As was well explained to a witness by Commissioner Ronald Slye during one of the Commission's hearings:

[y]our ultimate goal is peace, national unity and reconciliation. This Commission is dedicated to furthering the process of national unity and reconciliation. But it is so eloquently stated that in order to have reconciliation, one needs to have some form of justice. If her water bottle has been taken from her, it needs to be returned or some compensation or reparation needs to be provided, but, of course, in order to have justice, one needs to know the truth to understand what happened and why it happened, the context in which it happened and who was responsible for this happening.⁴

Policy on Reconciliation

WHEREAS, the objectives and mandate of the Truth, Justice and Reconciliation Commission (TJRC), are set out in sections 5 and 6 of the Truth, Justice and Reconciliation Act no 6 of 2008 (TJR Act) respectively; and

WHEREAS, section 5 of the TJRC Act identifies national unity, healing and reconciliation as two of the five objectives and goals to be pursued by the TJRC; and

WHEREAS, section 6 of the TJRC Act grants the TJRC all powers necessary to fulfil its mandate; and

WHEREAS, the TJRC is mandated specifically by section 6 (s) to inquire into the causes of ethnic tensions and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities; and

WHEREAS, TJRC is required to provide space to both victims and perpetrators of gross violations of human rights to tell their stories; and

WHEREAS, section 42 read together with sections 2, 5(2), 6(2) empower the Commission to investigate, receive information and propose policies, measures and ways to the government by which identified victims of gross human rights violations can be redressed; and

WHEREAS, the TJRC is required to create an accurate and complete historical record of gross violations of human rights;

WHEREAS, the TJRC will make recommendations in relation to memorialisation;

THE TJRC HEREBY DECLARES:

1. The limited peace and harmony, justice and unity among Kenyans are attributable in part to the gross violations of human rights including tortures, assassinations, detentions, marginalisation and other serious socio-economic violations suffered by sections of the Kenyan population.
2. Reconciliation, national unity and healing are critical components of the mandate and three of the five key goals of the work of the Commission. As suggested by the name of the Commission, reconciliation is one of three key tasks assigned to the TJRC.

⁴ TJRC/Hansard/Public Hearing/Kisii/St.Vincent Catholic Centre/20 July 2011/p. 15

3. The objectives of reconciliation, national unity and healing are integrated in various activities of the TJRC, including statement taking, hearings, community dialogues, amnesty process and the final report. Therefore, the work of the Reconciliation Committee cuts across several units, and committees.
4. The TJRC understands reconciliation as a complex term that includes several relationships, levels and actors. In the English language, 'reconciliation' can connote: understanding, bringing together, reunion, compromise or squaring off. The various levels or 'types' of reconciliation include: intra-personal reconciliation; inter-personal reconciliation; inter-community reconciliation; and national reconciliation.
 - 4.1. Intra-personal reconciliation refers to the situation where an individual arrives at an accommodation with their situation and circumstances after the violation. For a victim, knowing the truth can bring closure, and in some cases, the understanding that they find themselves with a new situation that they have to cope with and move forward (e.g. disability brought about by a violation).
 - 4.2. Interpersonal reconciliation relates to reconciliation between specific victims and perpetrators. Knowing the truth about who did what, the whereabouts of bodies etc., can be a critical first step to reconciliation.
 - 4.3. In a context where inter-ethnic rancour and disharmony triggered by the struggles for power, resources, identity etc., has underpinned or facilitated some gross violations of human rights, the mending of social relations is an important goal for the TJRC. Communities include ethnic, religious groups and other groups. The TJRC will facilitate dialogues and other activities that commence the process of inter-community reconciliation.
 - 4.4. Healing is closely linked to reconciliation. The idea of healing invokes the idea of remedy, restoration, repair, mending. National healing will entail attending to and restoring social relations in communities and inter-ethnic relations. At a personal level, healing will take various dimensions, but begins with acknowledgement, restoration of dignity (reparations, apology).
5. Reconciliation is both a goal and a process. As a goal, it is a long term goal. The TJRC should not be expected to reconcile Kenyans at the end of its term: it will initiate dialogue and lay the groundwork, together with other relevant bodies (e.g., NCIC) for long term processes of reconciliation. As a process, rather than an event, it will occur in various sites and activities. It will involve numerous actors, and the TJRC is but one of these.
6. Informed by comparative experience and our own context, the TJRC places emphasis on the conceptual and practical links between reconciliation & national healing and justice, which includes redistributive justice, retributive justice and reparative justice. The goal of reconciliation at various levels will remain elusive unless those who have suffered are restored and repaired; unless those who were excluded are included in meaningful ways; and unless those in dire want as a result of marginalization are materially enabled to move forward.

7. The TJRC recognises the complex relationship between reconciliation, national healing and truth. While closure for victims and the ability to address violations of the past and prevent repetition of gross violations begins with knowing the truth about past events, truth telling may open wounds in ways that slow or impede reconciliation and healing especially at a personal level. The TJRC will engage with this paradox constructively in various activities.
8. The notion of truth is complex, and includes versions or types of truth: personal or narrative truth (personal versions of truth by witnesses, including victims and perpetrators); factual or forensic truth (the product of investigations, verification and corroboration); social truth (the product of dialogue, interaction, discussion and debate; and healing and restorative truth.
9. To achieve the goal of reconciliation, the TJRC puts emphasis on facilitating and/or recommend the following things
 - a. Dialogues and spaces for exchanges by and around individuals, communities and institutions
 - b. Truth discovery through confessions and other means in order to establish an accurate and complete historical record
 - c. Public acknowledgement violations and responsibility coupled with contrition and apologies, by individuals but also institutional and national leaders
 - d. Forgiveness (inter-personal; inter-community; state-community; state-individuals)
 - e. Ensuring accountability of individuals and institutions through: reparations (including restitution, compensation, memorialisation); and prosecutions
 - f. Restoring dignity of victims, through public acknowledgement, reparations and prosecutions.
 - g. Institutional reforms

Reconciliation Activities

10. The Commission's reconciliation activities were spearheaded, at the Commissioners' level, by the Reconciliation Committee established in terms of section 22 of the TJR Act, and at the Secretariat level, by the Department of Civic Education and Outreach.
11. In preparation for rolling out reconciliation activities and particularly to ensure the participation of relevant stakeholders in such activities, the Commission convened two meetings in March 2011. On 3 March 2011, the Commission held a Consultative Prayer Breakfast with religious leaders in Nairobi. This was followed a week later by a three-day Stakeholders Consultative Workshop in Naivasha.
12. In February 2012, the Commission hosted a Reconciliation Consultative Meeting which brought together various stakeholders including experts, governmental



Participants attending a Reconciliation Consultative Meeting hosted by the Commission in Naivasha

bodies and civil society organizations working in the field of peacebuilding and reconciliation. The outcome of this meeting was the establishment of a Reconciliation Reference Group which worked together with the Commissioner in conducting its reconciliation activities, especially the countrywide reconciliation forums.⁵

13. The Commission also initiated working relations with both governmental and non-governmental organisations including with the National Cohesion and Integration Commission (NCIC) and the National Steering Committee on Peace Building and Conflict Management (established within the auspices of the Ministry of State for Provincial Administration and Internal Security). The Commission's working relationship with the NCIC resulted in the formation of a Joint Task force on National Healing and Reconciliation composed of Commissioners and staff from the two commissions. Unfortunately, activities which the Joint Taskforce had planned to carry out never took off.

⁵ The members of the Reconciliation Reference Group were drawn from, inter alia, the following organizations and institutions: Nairobi Peace Initiative –Africa; Change Agents for Peace International Initiative; COPTRE; Peacenet; Kenya Inter-religious Consortium; Prophetic prayers Network; Bunge la Mwanainchi Human Rights Group; Kenya Correspondents Association; Kibera Women for Peace & Fairness; Daystar University; Ministry of Justice; KIRAC; National Steering Committee; Chemi Chemi ya Ukweli; Coalition For Peace in Africa; Jesuit Hakimani Centre; National Cohesion and Integration Commission; SUPKEM; Positive Peace Initiative; Nairobi School of Theology; PACT Kenya; Catholic Peace and Justice Commission; National Council of Churches; Refugee Consortium of Kenya; Damietta; Usalama Forum; and Refugee Consortium of Kenya

14. In 2011 and 2012, the Commission supported and participated in several reconciliation activities organized by other stakeholders.

Countrywide Reconciliation Forums

15. From 9 to 20 March 2012, the Commission held a total of 10 reconciliation forums around the country. The forums were held in Mombasa, Garissa, Isiolo, Machakos, Nyeri, Eldoret, Nakuru, Kakamega, Kisumu and Nairobi. The forums served as avenues to:
 - Listen and understand the meaning of reconciliation for communities in different regions of the country;
 - Find out specific issues in each region that bring about tension, hostility, hatred and conflict.
16. The forums also gave communities the opportunity to suggest specific options and solutions to problems and issues affecting them. They were able to share their dreams about the Kenya they want and to recommend ways of promoting healing and reconciliation in their regions and ultimately in the whole of Kenya.

Workshops on Trauma Healing and Strategy Formulation

17. Between December 2012 and March 2013, the Commission organized a series of workshops on trauma healing and strategy formulation. The workshops were held in Cheptais, Eldoret, Mombasa, Kilifi, and Kwale. The objectives of these workshops were to: assess levels of healing and reconciliation in selected communities; identify local actors who could then spearhead trauma healing and reconciliation; and explore local mechanisms for healing and reconciliation.

Healing and Truth Telling

18. The Commission provided victims, perpetrators and the general public with a platform for non-retributive truth telling. In all its activities, particularly during its public hearings, the Commission appealed to the general public not only to be at peace with their neighbours but also to work towards national unity and reconciliations. Various commissioners, as demonstrated below, made extensive remarks in this regard:

What I am here to say as Mama has so eloquently said before is that, in order for people to start to think about reconciling, they need to know what happened. They need to know who did what and then they need some form of justice, some form

of reparation. So, all that I would like to humbly request here is that those of you who are familiar with these conflicts and are familiar with individuals, maybe some of whom are here in this room and were involved in that conflict, to reflect upon where we are today and to reflect upon the need expressed here by many of you for national unity and reconciliation and to take advantage of this Commission to come forward to us, either publicly or privately, talk to us about what you saw, what you experienced and what you did [...] Everybody needs to step up. Everybody needs to take the risk. One takes risks easily for conflict; one also needs to take risks for peace and so this is just a humble plea for those of you who are here. I know you are here because you want peace, because you want national unity and because you want reconciliation. We ask you to take advantage of this process and of this Commission because if you do so, I can assure you that we will do everything within our power and abilities to assist you to reach that goal.⁶

19. For the vast majority of victims and witnesses, the oral testimony they gave before the Commission marked the first time they had spoken publicly about their pain, anger and suffering. Many of these individuals said that the Commission was the first public agency to show concern for their situation. Calvin Okeyo Ogotu, former army officer accused of taking part in the 1982 attempted coup stated:

For 30 years we have kept mum and some people have been telling our story. This is the first time that we have been given an opportunity to say exactly what happened, and especially those things that affected us.⁷

20. Similar sentiments were shared by the family of the late J.M Kariuki. Anthony Kariuki, while testifying on the effect the assassination of their father, JM Kariuki, had on their family had the following to say:

But imagine for once we are finally being given a chance to address the public nearly 40 years of wrongs. How late can we learn that this one chance in the aforementioned 40 years for a family of the JM Kariuki to have a public sanction hearing.⁸

21. For some of the victims, they had been approached by many previous commissions but the Commission was the first to give them audience. While recounting the horrific accounts of violations that they or their relatives or friends suffered, one of the survivors of the Wagalla Massacre observed:

If you [the Commission] are taking statements, I have written ten statements before but nobody did anything for me. This is the first time I have been told to talk openly about it and I thank you very much for that.⁹

6 TJRC/Hansard/Public Hearing/Kisii/St.Vincent Catholic Centre/20 July 2011/p. 25

7 TJRC/Hansard/Thematic Hearing /Attempted Coup/21 March 2012/p.23

8 TJRC/Hansard/ Thematic Hearing/Political Assassinations/ 5 March 2012/p. 28

9. TJRC/Hansard/Women's Hearing/Wajir/19 April 2011/p. 4



Secondary victims of Wagalla massacre at NHIF auditorium for Wagalla massacre hearings.

22. The hearings also served as an opportunity for some of the victims to not only speak out about their experiences but also a chance to tell the younger generation, which were mostly unborn at the time of the violation, what the victims went through at the hand of government agencies. It was a chance to write/rewrite history. In his testimony, Mr. Samuel Nyang'au Nyanchiengo stated:
- I am very grateful because today I have been given a chance to speak the truth on how we were tortured in 1982. Most of you had not yet been born but it is good for you to know what happened.¹⁰
23. For other victims, it was an opportunity to relief their pains and shed off the social stigma that they had endured. As an example, Omar Qutara was arrested in 1982, detained, tortured and later sentenced to three years imprisonment for allegedly participating in the aborted army coup. For close to 30 years following his release from prison, he lived with the shame of being referred to as a 'rebel' or 'fugitive'. His children also suffered stigma as their father was publicly accused of being

¹⁰ TJRC/Hansard/Public Hearing/Kisii/20 July 2011/p. 57

'baba yao ni msaliti' (their father is a rebel). His eloquent and detailed testimony before the Commission was the first time that he had publicly spoken about his experience, and in conclusion, he was grateful for that opportunity. He said:

I can sleep today. I am a little relieved. That was the major problem. I wanted many people to come here because many of them call us fugitives or rebels here in town. I am sure they have heard it today with their own ears.¹¹

24. Not all of the victims who testified before the Commission experienced healing and reconciliation. For some of those victims, their experiences were too painful and grave that nothing, including narration and compensation, would make them feel better. Following the Commission's thematic workshop on the media, for instance, a survivor of the *Mwakenya* crackdown questioned not only 'the rationale of us as a nation re-living these horrors' but also 'the whole meaning' of the Commission. Another victim told the Commission that:

When I think about those issues, I feel so bad. I do not see the reason why we should talk over such issues, because it will not help me. I do not have any children. One of my ears cannot hear. I do not have any property. My son, who was a man, died because there was nobody who could take care of him when he was sick. I failed to get another person, who is a man, who will now inherit my wealth. Even if I talk from here, I do not know whether the Government that can really help somebody. What is the importance of all these discussions as we sit here?¹²

25. In most forums, it is the adult victims that usually got an opportunity to narrate their experiences. Some of them had suffered violations during their childhood and had carried painful memories into their adulthood. For instance, June Ndambuki, whose father was tortured and detained on allegation of his involvement in the 1982 attempted coup, narrated her struggles to come to terms with the torture, detention and dismissal from active service of his father. She had the following to say in relation to the subject of reconciliation:

We lost a lot of opportunities as children because my Dad had to balance to take care of us and to take us to school. Of course, he wanted us to go to the best schools in the nation but that was not possible because he went from one job to another, at one point, he had to start a business, which did not take off because he was not prepared for it. Just like the Swahili people would say: "*Maji yakimwagika, hayazoleki* or spilt milk can never be recovered." We cannot recover! Even if we asked for compensation as children, we cannot be compensated for the opportunities we lost. I am sure reconciliation can be reached, but who is to blame? Can they come into public and apologize and even explain to us why all these happened? [...] I believe reconciliation is a process. Can we start somewhere by understanding who is to blame and then move forward to the next level?¹³

11 TJRC/Hansard/public Hearing/Marsabit/4 May 2011/p.38

12 TJRC/Hansard/Public Hearing/Kapenguria/14 October 2011/p. 17

13 TJRC/Hansard/Thematic Hearing/Attempted Coup/12 March 2012/p. 34.

Reconciliation and Forgiveness

26. The process of truth telling is critical in the search for healing and reconciliation. As the individual narrative is shared collectively, a gradual process of re-humanizing the victim (and offender) begins. Therefore, a critical starting point is understanding the perspectives of victims on the subject of reconciliation.
27. As indicated elsewhere in this Chapter, the Commission presented the victims of violations with an opportunity to narrate their experiences. Most of those victims also used the opportunity to state what they felt about the people behind their suffering. While some of the victims were ready to forgive, absolutely or with some conditions attached, the persons alleged to have been responsible for their suffering, others categorically expressed resentment and unwillingness to forgive. For the latter group of victims, not even the thought of reparation would make them change their mind.

Perspectives of victims

28. The Commission encountered individuals with a remarkable willingness to forgive the people responsible for their suffering. The Commission learnt that the victims desire to forgive was influenced by various factors key among them being: the victims' religious beliefs that called upon them to forgive those who wronged them; lapse of time since the violations took place with some of the victims healing as the years went by; as well as a sense of helplessness and the sheer desire to 'move on.'
29. Fundamentally because of their faith, some victims were willing to forgive and to co-exist with those who had wronged them. Indeed, some stated that they would not wish their perpetrators to go through what they went through. Such were the sentiments of Pastor Peterkins James Ogola, who, when testifying about the killing of his nephew by a named police officer, stated as follows:

Allow me to state one thing that it is important as a family to team up with the TJRC in forgiving and in reconciling with the perpetrator. It is not the wish that the perpetrator should pass through the pain that we have passed through. So, let Mr. Njogu and his employer know very well that the family's heart is open to forgive. We are ready to sit and reconcile because you never know what life has in store for him and for us. You never know the son of Njogu might become a DC or a prominent person in this place and we will meet with him. This is the main purpose of reconciliation. Friendship comes from out of the pain. So, let the family of Njogu be encouraged. If they are ready to receive this token and the employer which is the Government of Kenya and come out and face our family we are very ready. Please, give that information to the parties concerned. God bless you.¹⁴

¹⁴ TJRC/Hansard/Public Hearing/Busia/1 July 2011/p. 32

30. When asked whether he would like to meet the police officer who had shot his nephew dead, Pastor Peterkins Ogola responded:

Of course, I would like even to see how he looks like, even shake his hand and even say something in his language, but it will also take the hand of God for me to bring him together with the young little widow and my eldest brother, who is the father. It is going to be a process but I will be very glad if you make that effort to bring us together. Let also the employer come out and tell us why he is hiding Njogu. Thank you.¹⁵

31. The same was the feeling of Gregory Onyuro, who, when asked what he would tell the police officer who shot and left him paralysed, he stated:

I am a Christian and I am a person who understands. I can only ask for forgiveness but if I can know the person, I want to tell him that if he is shot like he did for me, how could he feel? I forgive him.¹⁶

32. There were instances where even the victims showed sympathy for their perpetrators acknowledging that they too were victims of a bad system. While testifying about the torture he went through at the Nyayo Chambers, Mr. Wafula Buke stated the following on a question whether he thought his torturers enjoyed doing it:

When I was free to move around, I think I was an angry man with the torturers. I remember going to the reception of Nyati House and camping there to identify those who beat me. I stuck there from 8.00 a.m. to 1.00 p.m. and saw three. One I now know is called Wachira and he is my friend. That was the most violent. I also saw Opiyo who I think had retired. He did not look like money. I also saw another one whom I do not know. But I can say that in retrospect, I think we were all just in trouble. I remember when I was in Nyayo House I had just been beaten up there. So, when I came out, I was locked in the cell. I knocked to be taken to the toilets and when that fellow came, the guy asked me: "Why did you not do it earlier?" He gave me a hard blow and I fell down. Later on, when I reported him up to the *wazees* (elders), I think they talked to him. He told me: "I am sorry. You know these old men are stressing us. They are giving us a lot of problems and so, we are also just frustrated. So, I want to apologize." It is from him that I got information that students had rioted. I did not even know. I think the chain goes up to the torturers. They also must have had their problems; being pushed to beat other people's beautiful children. I think the people who take the ultimate responsibility and may have some enjoyment out of it are those who make lots of money and control power. Those are the only people who enjoy. But I think having lived through that experience I can say that Kenya was just a country of people suffering in various capacities. If you were in charge of agriculture, you had your problems. You were delivering qualitatively you were just like a police officer who was also delivering bad services. A medical officer was not any better. He was just a perpetrator like any other. So, my outlook these days is that I think we were victims of a system and that system needs to be dismantled.¹⁷

15 TJRC/Hansard/Public Hearing/Busia/1 July 2011/p. 33

16 TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.50-51

17 TJRC/Hansard /Thematic Hearing/Torture/7 March 2012/p. 36



Wafula Buke narrating his horrid ordeal to the Commission in one of the cells during a tour of Nyayo House Torture Chambers

33. While some of the victims talked of absolute forgiveness, others indicated their willingness to forgive subject to some conditions being met by the perpetrators as well as the government. These conditions ranged from the demand for the alleged perpetrators to confess their action and acknowledge their wrong doing, a demand for justice where perpetrators paid for their wrong, a demand for compensation; a demand for the alleged perpetrators to sincerely seek forgiveness on their own behalf; to a demand of meeting with the alleged perpetrators and having a conversation. For some of the victims, meeting of one demand was enough while others wanted more than conditions met by the alleged perpetrators as a prerequisite for forgiveness and reconciliation.
34. Ms. Nyarinda Moikobu's testimony is a clear indication of the conditions that some of the victims attached to forgiveness and ultimately reconciliation. While testifying on how her property had, on many occasions that coincides with the general elections, been looted, Ms. Nyarinda Moikobu stated as follows:

In conclusion, I would want to say that while people are going round asking for forgiveness, justice and reconciliation, if at all somebody is coming to say that "Nyarinda, I apologise", he or she must confess what he did before I forgive him. If they tell me that they took my property, I am ready to forgive them. We are very ready to forgive but we

do not want blanket forgiveness and reconciliation. Why are you asking for forgiveness? What have you done? Come out and say what you did, that is when we can see how we can forgive each other.¹⁸

35. While some of the victims were categorical that the individual perpetrators should seek forgiveness or offer an apology, others like Mr. Gregory Onyuro, extended the demand for an apology to the government and various government departments, for their inability to protect the victims from violations when the same occurred.

There should be proper civic education conducted to all our communities so that they understand issues. Secondly, parliamentarians should sit down and apologize to Kenyans. Thirdly, we need to look for a donor who will empower the youth and all those who were affected during the violence [...] We would like the President and the Prime Minister to come to Nyanza Province and talk to the IDPs in this region. They need to tell us that they are in power because of us. They need to apologize to us. This is because they are earning while we are suffering. Look at me here. I urinate here. I smell urine just because of post-election violence and I cannot perform sexually because of the post-election violence. How do you think my family feels? My children cannot go to school. They will now turn into thieves because I cannot help them. Women are becoming prostitutes! I want the President to come to Nyanza Province and apologize because my vote made him to be the President!¹⁹

36. This was also the case for Maj. (Rtd.) Maxwell Kivihya, a former Kenya Air Force Officer, who suffered for his alleged involvement in the 1982 attempted coup. In his testimony, below, he mentioned a list of government officials, including the former President Moi that he felt ought to apologize.

We would also pray that the Government publicly apologizes to these victims and all the others in Kenya. That, perhaps, might improve our morale. President Moi, General Mulinge and General Kariuki knew about this as expressed by Lieutenant Mwambura. We pray that these officers should be investigated by the International Criminal Court, so that we can get some justice because to date, we have got none. General Mulinge and General Kariuki had prior knowledge of this attempted coup d'état and they did not institute measures to prevent it. General Kariuki confessed it in my presence and discouraged Lieutenant Mwambura from discussing it. I am concerned that I was punished when I had been ordered to keep quiet.²⁰

37. For some victims, justice was key.²¹ Unfortunately, even when the alleged perpetrators had gone through the court system and 'paid for their sins', their respective communities were not ready to accept them back and indication that justice would not necessarily amount to reconciliation.

18. TJRC/Hansard/Public Hearing/Kisii/20 July 2011/p. 12

19. TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.43

20. TJRC/Hansard/ Public Hearing/ Bungoma/8 July 2011/p. 13

21. TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.31

There are those who are imprisoned, yet they did not commit a crime. After prison, some of them are able to continue with their lives. There are those who die in prison. I used to see that. They would die of starvation and disease. Many people have suffered. When these people leave prison, they should be accepted as human beings instead of being viewed as criminals.²²

38. In cases, where there had been no explanation as to the causes and the reasons for violations, the victims demanded to know the truth. Like the rest of the public, they were curious to know why they were attacked and the persons behind their violations. According to Gregory Onyuro:

Justice is to know how this thing happened and who caused it. Something cannot happen without a cause. Even a disease has a cause and if you want to treat it, you have to know the cause.²³

39. Some of the victims indicated to the Commission that it was necessary for them to meet the alleged perpetrators. They urged the Commission to organise for a meeting where they would get to their alleged perpetrators and hopefully forgive each other. As one witness noted 'that would be good medicine.'²⁴ This is also demonstrated by the testimony of Bernard Orinda Ndege, whose whole family of eleven were burnt to death during the 2007/2008 post elections violence. Bernard Orinda Ndege informed the Commission that it was his desire to meet the people that killed his family members and shared some of the questions that he planned to ask them, should the meeting materialize.

After seeing them and confirming that they are the ones who did this to me and my family, I will, first and foremost, ask them to identify me. Who am I? What did I do to deserve this kind of treatment? Why was my whole family burnt like charcoal? Why was I not taken to court and a legal process instituted and I be convicted? Why did you have to do this to me? Why have you done all this to me? So, between me and you, what is the next move? What are your views on this? What is the way forward for us all? So, therefore, I really feel I should go to court and face those people. If God grants me this opportunity, I feel I should not miss it. I want to face the people who did this to me and ask them a few questions. I would like us to meet face to face. Instead of them seeing me on television or listening to my voice over the radio, I would like to meet them. That is why I requested Ocampo, and I am also requesting this Commission now, to make sure that those who the Waki Commission listed as the culprits are taken to court. Let me be given chance to ask them a few questions. They are the only ones who can answer some of these questions. I look forward for the day I will ask them those questions.²⁵

22 TJRC/Hansard/In-Camera Hearing/Murang'a/10 November 2011.

23 TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.48

24 TJRC/Hansard/In-Camera Hearing/Murang'a/10 November 2011/p. 29.

25 TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.15.

40. There are victims who strongly felt that perpetrators do not deserve forgiveness and as such they should be held accountable. Even when they claim they were acting on behalf of someone else of merely 'obeying commands' they still needed to be held personally accountable and punished.

Perspectives of Adversely Mentioned Persons

41. As indicated at the beginning of this Chapter, the Commission was required to provide 'repentant perpetrators or participants in gross human rights violations with a forum to confess their actions as a way of reconciliation'. The Commission sent out invitations to persons who had been adversely mentioned requiring them to not only record their statements and submit memoranda, but also to respond to the allegations made against them.
42. Many of the adversely mentioned persons opted to respond to allegations of their involvements to violations as opposed to recording statements and submitting memorandum when the statement taking exercise was opened. Their response to allegations were characterised by denial of involvement and knowledge of violations. For instance, when asked whether he was either present in a security meeting that is said to have taken place in North Eastern Kenya to discuss 'a security operation' just days before the Wagalla Massacre took place, Ambassador Bethuel Kiplagat denied ever attending any meeting in the region and it was only after he was confronted with evidence that he accepted attending the meeting but refuted that 'security operations' was discussed in that meeting.
43. Even when some admitted knowing the existence of the violations, they defended and justified their action and at times blamed others for the violations.
44. While some of the adversely mentioned persons showed remorse to the victims for what had taken place and even tendered an apology, others demonstrated indifference and unwillingness to apologise. The difference reactions and responses to allegations by AMPs are discussed below.
45. Some of the AMPS who testified before the Commission showed some semblance of apology and may be remorse but not before they justified their actions. The testimony of Mr. Manasseh Tiema, while responding to question on the security operation that resulted in the Wagalla Massacre demonstrated this:

Commissioner: So you would be the person to answer anything involving whatever went wrong during the operation. Do you in your view think this operation was successful in getting firearms from the communities?

Mr. Manasseh Tiema: It was successful because according to the firearms that were surrendered physically, the response was okay. I saw the firearms at the police station and I think it improved the situation to some extent.

Commissioner: Mr. Tiema, that is despite the loss of lives?

Mr. Manasseh Tiema: I cannot account for the loss of lives precisely.

Commissioner: Look at page 5 of your statement.

Mr. Manasseh Tiema: Let me cut you short there. I am very sorry for the loss of lives despite the fact that we were able to get most of these firearms from the wrong hands.

Commissioner: [...] Mr. Tiema, many people died in this operation. You do not know the exact number and yet you were the head of the District Security Committee. Is that right?

Mr. Manasseh Tiema: I was given a figure.

Commissioner Ojienda: What figure?

Mr. Manasseh Tiema: I was given a figure by the District Special Branch Officer who had collected it from various sources. It said 57 people lost their lives which I am very sorry.

Commissioner Ojienda: You are very sorry for the loss of 57 lives?

Mr. Manasseh Tiema: Yes, I am.²⁶

46. Similarly, Benson Kaaria, the Provincial Commissioner in North Eastern Province when the Wagalla massacre took place, defended the security operation that resulted in the massacre as successful. This was despite the fact that it had been officially acknowledged that more than 57 people were killed and only four guns recovered.

Commissioner: Mr. Kaaria, did I hear you say it was a success?

Kaaria: After what they did, it was a success. Other than the incident of people dying, it was a success.

Commissioner: So, the operation was a success and the death of the people was an incident?

Kaaria: It was a success according to us. They had achieved what they wanted. The other one was unfortunate.

²⁶ T.JRC/Hansard/Public Hearing/Nairobi/16 May 2012/p. 23-24

47. Kaaria expressed sympathy for the overall loss of life during the Wagalla operation but he would not be drawn into issuing an apology. The former Provincial Commissioner was absolutely categorical on this: he would not apologise because he had nothing to apologise for. In this Kaaria returned to the underlying theme of all his submissions and representations to the Commission. Responsibility for the operation belonged not with the Provincial Security Committee but with the District Security Committee:

Commissioner: Would you take full responsibility for the wrong things that occurred during operation?

Benson Kaaria: I cannot. Everybody has to carry his own cross.

Commissioner: In this case, who should carry the cross, Mr. Kaaria?

Benson Kaaria: The DSC Wajir.

48. The exchange continued and Kaaria consolidated his position as sympathetic but unapologetic:

Commissioner: You have no apologies about the deaths; do you have any Mr. Kaaria?

Mr. Benson Kaaria: Even if I do, I cannot revive...

Commissioner: No! Do you have any?

Benson Kaaria: I sympathise, it was very sad.

Commissioner: You have no apologies as a member of the PSC for having authorised an operation in which people died?

Benson Kaaria: I cannot apologise.

Commissioner: You cannot!

Benson Kaaria: On behalf of the DC, I cannot.

49. Similarly, another AMP, Ambassador Bethuel Kiplagat, could not be easily convinced that the government should apologize for the wrongs committed during the Wagalla security operation despite the fact that he described the incidence as tragic. This was evident from his responses to questions posed to him by three separate Commissioners on this particular subject. Here are his responses to questions posed by one of the Commissioners:²⁷

Commissioner: Do you think at the institutional level, the government should officially apologize because I believe they have not done so to date?

²⁷ TJRC/Hansard/Public Hearing/Nairobi/6 June 2011/p. 77-78.

Amb Bethuel Kiplagat: It is good to look at the total picture to see what kind of response the government can make in that whole situation. We have to be very careful in what we do, so that we do not cause more problems. So, I think it is important to see the bigger picture.

Commissioner: So, do I understand that you are not sure whether the government should apologize? We will need to have a better understanding or a more sophisticated understanding of what the effect of that apology would be.

Amb Bethuel Kiplagat: Not necessarily; I have not said so. However, we need to gather more information which will inform us on what we need to do.

Commissioner: Let me ask that question in another way. What sort of information to your mind, would be sufficient to say that the government should apologize?

Amb Bethuel Kiplagat: Let us continue receiving a lot of these documents so that we determine the truth and the facts as they happened. It is possible that we will discover other documents which can throw greater light into this incident and know exactly what happened. So, I am being cautious. Let us gather all the information and then with all the wisdom, we see what is it that we can do in order to heal all the people and to heal Northern Kenya.

Commissioner: I apologize. Maybe, I am beating this horse a little harder, but let me ask a similar question in a different way. Let us take this as hypothetical. If we find that 57 people died and seven weapons were recovered...let us leave aside people harmed, people raped, people kept outside for five days in the heat and so on. So, let us just say what we know; that, 57 people died and seven weapons were recovered. That was done by the government. We may not know exactly who from the government did it, but it was done by the government. Given that situation, would you suggest that the government should apologize for the loss of lives?

Amb Bethuel Kiplagat: It was a terrible loss of lives. The first thing is to determine who made the decision to carry out that operation. So far, we have not yet done so. I think it is absolutely essential to know which individual made that decision.

Commissioner: I think we all agree with you on that point. Assuming that, that body was a governmental.

Amb Bethuel Kiplagat: Then the government should apologize. First and foremost, we should ask ourselves: Who made the decision to carry out that operation?

Commissioner: So, I understand that if it was a government body that ordered the operation, then obviously, the individuals, the body involved and also the government should apologize? To your mind we do not really understand yet who did order it or who was responsible. We need to keep our minds open with respect to where that specific apology at a lower level should come from. But at the government level, which the question is and particularly where...

Amb Bethuel Kiplagat: For this case, let us wait. Collect more information and with hindsight, let us look at it and see what specifically we need to do. Something needs to be done; I am very clear in my own mind. As I said here, that was a terrible tragedy.

50. In general, remorse, sorrow and regret were in short supply among many of the AMPs who appeared before the Commission because of the association of these sentiments with responsibility, guilt and culpability.

Efforts Towards Reconciliation

51. The Commission was not the first institution to work towards national unity, healing and reconciliation. Indeed, there have been other reconciliation efforts carried about by various organisations, governmental as well as non-governmental.
52. The Commission learnt that nearly all the reconciliation efforts were initiated following prolonged massive violence that affected large ethnic populations. As a result, many of such interventions exist primarily in those parts of the country that are referred to as conflict prone areas, the 'hot spots'. The approaches employed have differed depending on the nature of the conflict. Further, their durations have been dependent on availability of funds to finance them. Most of the reconciliation efforts, until recently, focused more on violence prevention and humanitarian interventions and very little after the violence stopped.
53. The government efforts towards reconciliation have taken various forms including the establishment of commissions of inquiries and task forces in the hope that their findings would lead to reconciliation; the constitutional reform processes; introduction of community policing as well as peace committees;



Commissioner Gertrude Chawatama addressing women at a reconciliation forum.

disarmament exercises; establishment of conflict early warning mechanism; prosecution of alleged to have taken part in actual violations or contributed to heightened tensions among communities to act as a deterrence.

54. The government was also responsible for the establishment of the National Steering Committee on Peace building and Conflict Management (NSC), a multi-agency Committee housed within the Office of the President, Ministry of State for Provincial Administration and Internal Security for purposes of coordinating peace building and conflict management programmes countrywide. The NSC also doubles up as Kenya's Conflict Early Warning and Response Unit (CEWERU) that implements the IGAD-CEWARN Mechanism as provided for in the Protocol on the Establishment of Conflict Early Warning and Response Mechanism signed in Khartoum in January 2002. NSC has facilitated the establishment of Local Peace Committees that have continued to conduct peace building and conflict management initiatives across the country.
55. Civil society interventions have focused on reconciliation and building new relationships amongst the warring communities. Such activities include dialogue, negotiations, and problem solving workshops, information, education and communication. These have set precedence to the coexistence in places where violence was the norm. Several initiatives including conflict early warning have played a central role in facilitating a negotiated end to violent conflict among various warring communities.

Challenges

56. While acknowledging that there had been many efforts towards national unity, healing and reconciliation, the Commission sought information, from the people who appeared before it, on the possible reasons why such efforts have been unsuccessful in bringing cohesion and integration among the people of Kenya. The following were some of the main challenges that such persons highlighted.

Lack of political will

57. Promoting national unity and reconciliation requires strong political support. Such strong political support and leadership has not been available in Kenya even in the aftermath of the 2007/2008 PEV. In January 2009, about a year after the National Accord was signed bringing to a halt the PEV, the Kenya National Dialogue and Reconciliation Monitoring Project observed that:

Healing and reconciliation is yet to take place. Political leaders have not been at the centre of healing and reconciliation initiatives. The two principals will have to provide leadership and direction; the two principals should constitute groups to mobilise for national cohesion from the national level to the grassroots.²⁸

58. Two years later, the KNDR Monitoring Project had similar concerns:

The Truth, Justice and Reconciliation Commission (TJRC) and the National Cohesion and Integration Commission (NCIC) have continued their efforts to inquire into human rights violations and prevent future violence, respectively. *However, without political support for the work of these commissions, their impact on ethnic relations and deterrence capacity for future dissonance remains uncertain.*²⁹

59. In a nutshell, although there is a clear need for healing and reconciliation in Kenya, the political leadership has never really genuinely committed to pursuing these goals. On the contrary, political leaders have often undermined reconciliation and peace building efforts because of vested and other interests.³⁰

Reconciliation and access to social goods

60. Change of attitude and acceptance between former hostile groups in itself cannot amount to reconciliation. There is need for the government to put in place social processes and structures, as well as institutions to ensure reconciliation

²⁸ KNDR Monitoring Project *Project context and summary findings* (January 2009) 6.

²⁹ KNDR Monitoring Project *Progress in implementation of the constitution and preparedness for 2012: First draft review report* (January 2012) 8-9.

³⁰ See also TJRC/Hansard/Thematic Hearing/Ethnicity/2 February 2012/p.25-26.

processes are not only promoted, but also, where they exist, are solidified and maintained. The absence of such structures and institutions has meant that the reconciliation efforts in the country have not born any meaningful fruits.

61. Various stakeholders that appeared before the Commission during its hearings stated that it was not possible for reconciliation to take place when people lived under conditions that continuously reminded them of the suffering they went through. Accordingly, many victims stated that they wanted some form of compensation that would help them come out of destitution.

My expectations are that the Government will remember the victims, not just those who are living in tents, but also those who are integrated with the rest of the community that is trying to assist them. That is what I am recommending. I am also requesting that the victims be paid some kind of compensation so that they can look for another place where they can stay because going back to where they were before would not give them peace due to what they went through. When they remember what they went through, they still live in anxiety. They should be given some form of compensation so that they can see where they want to go and live in peace and settle. So, I would like to recommend that. If the victims think that they can be resettled in an area of their own choice that would be good. That is what I request the Government.³¹

62. While testifying about the destruction of property experienced in 2007/2008 post election violence, Hon. Samuel Omweri Kibwage wondered how people were expected to reconcile when they were still struggling to earn a livelihood:

How do you reconcile such cases? How do you help? So we feel the Commission should help us. Even if we are seeking peace, some of these people should be compensated just to comfort them and wipe their tears.³²

63. While addressing the question of cattle rustling, Hon. Samuel Omweri Kibwage reiterated his earlier stand by stating as follows:

So we would like to appeal that some compensation to these particular cases be given. Even those who lost animals, some of them have lost the entire herd, some maybe a few. But if they want to be compensated, they should be compensated. It is true we want peace and reconciliation, we want to trust each other but when these people suffer, even if you tell them to keep quiet and their animals will be recovered, it is like telling a hungry person to stay on and that the hunger will pass on. He will never forget.³³

31 Oral submissions made to the truth, TJRC on Thursday, 10th November, 2011, at Fortune Green hotel, Murang'a (in-camera sitting).

32 TJRC/Hansard/Public Hearing/Kisii/St. Vincent Catholic Centre/ 20 July 2011/p.7-8.

33 TJRC/Hansard/Public Hearing/Kisii/ St. Vincent Catholic Centre/ 20 July 2011/p. 8

Victim Participation and Follow-up Mechanism

64. Witnesses at the Commission's hearings noted that despite the various efforts by both governmental and non-government organisations towards reconciliation, nothing much seems to change. Communities remain polarised and tension continues to be heightened. Many of the witnesses felt that the conflicting communities and in other cases, the concerned individuals, have not been involved in such efforts/processes. They indicated there was need for a 'bottom top' approach to ensure that reconciliation efforts are not only home-grown but are also sustainable.
65. Other witnesses stated that there has been a failure to follow up such reconciliation processes and to evaluate them from time to time to guarantee success. The result has been that many reconciliation efforts have collapsed as soon as they were initiated. The Commission learnt that there has been duplication of efforts which unfortunately are uncoordinated and not harmonized.

Root causes and priorities

66. While speaking of the possible solutions to the conflict in the Tana Delta region between the farmers and the pastoralists, witnesses informed the Commission of how Government agencies were keen on apprehending perceived perpetrators of the violence as opposed to addressing the root causes of the violence and reconciling the warring communities. The result has been recurrence of the violence as soon as such agencies leave the area. In this regard, Mr. Mohamed Doyo Maro stated as follows:

These attacks have happened three times. The first time up to the second time it was a problem. By the third time, it had spread to the entire Tana River from Mbalambala up to Kipini. We have had a problem for nearly one year. When the Government would come all they would do would be to apprehend people, but I told them that as elders we must intervene. I was one of the members of the committee who tried to negotiate with the Orma elders, the Wardei elders and the Pokomo elders. I took 21 elders from our side and 21 from their side and we sat down and discussed until the issue abated slowly by slowly until there was no longer any conflict and now we eat together.³⁴

67. He further accused the Government of taking sides and therefore seen as an unfair arbiter in the conflict further complicating the situation and making it difficult for lasting peace to be achieved. He explained the situation thus:

There is one other issue which has come up which I should mention before I forget. This is the issue of security which has led to our not living in harmony. We have always had

³⁴. TJRC/Hansard/Public Hearing/Hola/12 January 2012/p. 7

problems regarding security with our neighbours because we are farmers and they are pastoralists. They are the ones who are usually the aggressors because they bring their livestock into our farms. In 2001, there was a conflict between us and the others, but instead of the Government being neutral to ensure security in a fair way, we realized that the Kenya Police Reservists had been deployed in so many areas. The weapons being held by the Pokomos were withdrawn by the Government. This left us exposed and led to the problem that we have had. Such issues are the ones which lead us to believe that it is a deliberate plot by the Government against us as a community to marginalise us and deny us our rights.³⁵

68. The Commission learnt that whereas victims of violations have been willing to forgive, persons alleged to have participated or facilitated violations have been reluctant to not only admit their involvement but also to seek forgiveness. The perpetrators reluctance to apologise or show remorse for their action has further complicated the search for reconciliation in the country. It is unfortunate that most of the victims of violations have died without having their suffering acknowledged.

Opportunities

69. During the Commission's mandate, there were various initiatives and reform processes that took place which had direct impact on and provided an opportunity to foster national unity, healing and reconciliation in the country. Key among them were the promulgation of the Constitution of Kenya 2010, the enactment of various legislation, establishment of institutions, as well as various reforms in various sectors especially the judiciary and the police service.
70. As part of the National Accord, which restored order after Kenya's post-2007 election violence, Parliament enacted the National Cohesion and Integration Act (2008). The Act outlaws discrimination on ethnic and other social grounds, and provides for the establishment of the National Cohesion and Integration Commission (NCIC) whose mandate is to: "facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof." The Act is the most explicit mechanism that has been set up to encourage national cohesion and integration by outlawing discrimination on "ethnic grounds", where ethnicity is defined to include race, religion, tribe and culture.

35. TJRC/Hansard/Public Hearing/Hola/12 January 2012/p. 10

71. The Act also criminalise harassment, hate speech, threatening, abusive or insulting conduct, and discrimination in employment based on ethnicity. In outlawing the distribution of resources by a public officer in an ethnically inequitable manner, the Act sets 30 per cent as the maximum share of employees of a public office that may come from one ethnic group. The Act and the NCIC present a mechanism to effectively manage the effects of hate speech, skewed employment in the public service, and discrimination on ethnic grounds, which have presented significant challenges to the achievement of national cohesion and integration in Kenya since the attainment of independence in 1963.
72. The Constitution of Kenya promulgated in 2010 has a number of provisions that touch specifically on national cohesion and integration. Article 10 of the Constitution emphasises the national values and principles of governance, including national unity, social justice, inclusiveness, and equity. Its Bill of Rights provides for equality and freedom from discrimination, guaranteeing the basic economic and social rights of all, while encouraging respect for diversity and fostering a sense of belonging. Further, the provisions on devolution means that all communities will access services and this is likely, if managed well, to restore a sense of belonging. Indeed, witnesses expressed new hope in the Constitution, as seen in the testimony of Mr. Charles Omondi Oyaya:
- But coming back to your question, our Constitution in the preamble says: “PROUD of our ethnic, cultural and religious diversity---”. It does not presuppose that one Kenya means a faceless Kenya, but Kenya that is united by core values that bring all of them together as they celebrate their diversity. Again, I would like to say that we have a lot of hope in the Constitution; that it has created structures that celebrate diversity but also unite Kenyans on the things that unite them, and education is one of them. So, it is not by default that two key institutions are not devolved; education and the Judiciary, and I think this is key. We cannot afford to be a divided Kenya. I would like my child to be proud of who he is as much as he is proud of being a Kenyan. At the moment, if you ask any Kenyan “Why are you a Kenyan?” he or she will say that either because he or she has an identity card or, by accident, he or she was born in Kenya.³⁶
73. There exist a number of legislation which if implemented to the fullest would foster not just national reconciliation, but also integration and cohesion. Key among them include: National Cohesion and Integration Act No. 12 of 2008; the Political Parties Act No. 11 of 2011; Ethics and Anti-Corruption Commission Act No. 22 of 2011; National Gender and Equality Act No. 15 of 2011; Persons with Disabilities Act No. 14 of 2003 among other...The foregoing frameworks give rise to policies that have the ability for promoting national unity and reconciliation.

³⁶ TJRC/Hansard/Public Hearing/Kisumu/14 July 2011/p.36

Conclusion

74. Healing and reconciliation requires political leadership; it cannot be left to faith based and other civil society organisations at the grassroots. The government should provide national direction especially by making clear policies on reconciliation followed by a commitment to implement those policies.

Now, on recommendations on how to address these conflicts, I think the most critical thing and the first step is the policy approach. We really have to take very decisive and brave steps in enacting and developing policies that we also implement with the same strength and commitment. Peace and reconciliation need to really have sound political and policy on which you can hinge them, and the rest of the initiatives. These have to be clear, concise and focused and really strong guidelines supported by firm commitment especially through implementing decisions. If we are faltering weak or kigeugeu, as many people say around nowadays, we will not reach far. Two, we really need to take a very open, robust and strong reconciliation and integration approach on a long term basis. Our problems are historical and deep rooted. We cannot afford to come up with a wishy washy short term project based one off initiatives. We really have to come up with a robust reconciliation process that is enshrined in cohesion, integration and peace building and other related mechanisms, linking with an institution like the National Cohesion and Integrity Commission, which has a long term mandate in engaging in this area and various other institutions. If possible, create other institutions to support those that are existing or in existence and strengthen them. The education and skill development approach is a very important one. It is actually a lifelong business and we really need to invest in education and skill enhancement for personal and societal growth. We can only achieve most of the changes that we desire through this approach.³⁷

75. There is need for inter-community dialogue facilitated by the communities under conflict. While commenting on how the conflict along the Tana River between farmers and pastoralists would be resolved, Mr. Wilson Sinema Timothy Komora stated as follows:

I know that there are committees that are trying to bring all the communities together in security issues. The important thing that we would want is that these committees should go on sensitizing both areas, so that each community will respect the other. We, as pastoralists, know that farming or agriculture is what the farmer depends on and it is just as important as his livestock so that every person respects the property of the other person. If we have that respect there will be no problem.³⁸

37 TJRC/Hansard/Thematic Hearing/Ethnicity/2 February 2012/p.26

38. TJRC/Hansard/Public Hearing/Hola/12 January 2012/p. 12

76. Answering to a similar question posed by a Commissioner on the ability of the community peace committee to foster reconciliation, Mr. Samuel Omweri stated as follows:

When they [elders] sit, they will address all injustices on both sides. They will also look into the origin of these problems and involve the Government and probably come up with a lasting peace in the region. I believe they will be able to reconcile all the communities living along border. With involvement of the political leadership, they will succeed.³⁹

77. To make this reconciliation sustainable, it is necessary to build confidence among the various parties to the conflict, through working together towards interdependence by reconstructing the social, economic and cultural life of the community, as well as by building a shared common future. Confidence will help to open channels for dialogue about the past, without obstruction from negative emotions. Embracing the past and the future is important in shaping the present.⁴⁰

³⁹ TJRC/Hansard/Public Hearing/Kisii/St.Vincent Catholic Centre/20 July 2011/p. 18.

⁴⁰ Chicuecue NM 'Reconciliation: The role of truth commissions and alternative ways of healing' 7 (4)(1997) *Development in Practice* 484.

Appendices

Appendix 1

NCIC Study on Ethnic composition of Public Service in Kenya



By Mzalendo Kibunjia

Parliament set up the National Cohesion and Integration Commission with a clear mandate to work towards the elimination of ethnic, religious and racial discrimination. In the time that this Commission has been in office, we have sought to promote equality of opportunity, good relations, harmony and peaceful co-existence between the various ethnicities, races and religious persuasions. By speaking boldly and frequently about the need for tolerance, we have helped to deepen public understanding of the need to manage our diversity. It is a role we are committed to, and shall continue to pursue with enthusiasm and verve.

We have taken another step in executing our mandate under the law.

The National Cohesion and Integration Act 2008 requires public entities to seek representation in the diversity of their staff. At no time should members of a single community occupy more than a third of employment positions in any Government body.

Sometime last year, we began to audit how public entities were complying with this requirement. We analysed the Integrated Personnel and Payroll Data System for March 2010 against the population census report of 2009, as well as other official documents. This exercise, the first of its kind in Kenya, is important because it establishes a baseline for monitoring diversity in future.

The results are an honest picture of where we stand. And the verdict is that Kenya has a crisis of exclusion.

Over 20 communities hold less than 1 per cent of the jobs in the Civil Service. In fact, seven of these communities each have less than 100 of their members working in the Civil Service.

In contrast, just seven communities each have between 5 per cent and 22 per cent of all Civil Service jobs. Although using the population size of a community to measure how represented it is in the Civil Service will likely miss the fact that not everybody is employable, it is a useful benchmark. Six communities' share of Civil Service jobs exceeds their population size by between 1 and 4 percentage points. Another five communities are under-represented by similar margins.

Up to eight Government departments are in clear breach of the law because more than 33 per cent of their staff are from one ethnic community. Two communities alone have a combined presence of 40 per cent of Civil Service jobs. Another seven communities are close to breaching the law because they each have members of one ethnic community holding 30 per cent of the jobs. Only one department does not have more than one community occupying at least 20 per cent of the staff positions. Even this position, though permissible under the law, is untenable. These statistics are worrisome in the way they point to a crisis of ethnic exclusion in the Civil Service. The bulk of Civil Service jobs are in the Office of the President, thus underlining the overweening influence this office has enjoyed in the past and the patronage attendant to it. This study indicts the personality-based leadership system Kenya has had and signals the need to strengthen institutions that check the creeping effects of patronage. The numbers in this study represent Kenya's present and past. They do not have to be its future.

There are many explanations for the current state of affairs. None of them can, however, change the fact that we have been insular and inward-looking in staffing the public service. That behaviour needs to change. Difficult as this task is, we delight in it because it is the public's agenda.

The composition of the Civil Service is important not only because it is the face of the Government and can speak volumes about inclusivity, but also because salaries from jobs are an important source of income for many people. Salaries form the initial bases for wealth accumulation. Furthermore, Government jobs also come with the responsibility to manage public resources.

Skewed composition of the Civil Service does not only distort incomes, but also excludes large populations from driving policy about the things that matter to them. Kenya must not allow itself to operate an informal apartheid system that could perpetuate an intergenerational transmission of inequality.

The information used for this study was willingly provided by the Government. The findings should not mislead officials to think it was a mistake to provide it. Some would rather these findings were hidden from public view. Others might fear that they could validate long-held suspicions that may further divide a fractious nation. Yet others will go into denial.

We must not shy away from a candid debate of the issues because in it shall be found the solutions to our problems. We have faith in the ability of the Kenyan people and their love for their country.

In the coming days, we shall ask the Head of the Civil Service and the President to take administrative actions that bring those departments with more than a third of their staff from one community back within the margins of the law. Additionally, we shall ask Parliament to exercise its powers of oversight to ensure that this is done.

Members of Parliament also have a duty to re-examine the law with a view to setting a less arbitrary measure for ensuring diversity in the public service.

The importance of this study has become even more pronounced after the promulgation of the Constitution of Kenya, 2010, which sets out the values and principles of the public service as, among others, diversity and equal opportunity across gender, ethnicity and ability.

The Constitution seeks to correct the errors emerging from an all-powerful presidency. This study demonstrates the need for urgency in making the new dispensation work while drawing lessons from the errors of the past. As Kenya prepares to devolve power, authority and resources to the counties, these findings should be a warning that the mistakes made nationally before could easily be replicated at the local level. In future, we hope that diversity can become a criterion for qualifying how money from the Equalisation Fund, as well as allocations to the county governments should be portioned out. We encourage the private sector to undertake similar audits, because it is not unlikely that diversity should also be a criterion for qualifying firms with which the Government should do business.

Dr Kibunjia is the chairman of the National Cohesion and Integration Commission

Brief #1: Research Methodology

The research was based on the Integrated Personnel and Payroll Data System. This is the Civil service payroll. The payroll is based on several variables:

1. Name
2. Job designation
3. Education level
4. Job group
5. Sex
6. Home district
7. Work district
8. Date of employment
9. Date of promotion for current position
10. Ministry or department

This is not a primary survey. No census was undertaken as the Civil Service does its own staff count. The data used is official, and the categories are as provided by the Government. The data is accurate because there is no opportunity for error in payroll administration.

The population and housing census which had been concluded in 2009 provided a useful reference point for comparative purposes.

Brief #2: A profile of exclusion

Over 50 per cent of Kenya's ethnic groups are only marginally represented in the Civil Service – the country's largest employer. Only 20 out of over 40 listed Kenyan communities are statistically visible in the Civil Service. Some 23 communities have less than 1 per cent presence in the Civil Service.

Civil Service by Ethnicity: Communities with Limited Presence		
Tribe	Numbers	Percentage
Teso	2,029	0.961%
Samburu	1,457	0.690%
Pokomo	1,303	0.617%
Kuria	1,207	0.572%
Mbere	1,062	0.503%
Gabra	648	0.307%
Bajun	579	0.274%
Basuba	462	0.219%
Other Kenyan	368	0.174%
Tharaka	365	0.173%
Orma	349	0.165%
Rendille	301	0.143%
Burji	288	0.136%
Taveta	237	0.112%
Njemps	220	0.104%
Swahili-Shirazi	122	0.058%
Dorobo	119	0.056%
Kenya Arab	90	0.043%
Kenyan Asian	74	0.035%
Boni-Sanye	44	0.021%
Elmolo	24	0.011%
Unknown	21	0.010%
Gosha	19	0.009%
Dasnach-Shangil	10	0.005%
Kenyan European	2	0.000%

Further, there are groups that are missing out or grossly under-represented in absolute terms. None of them has 100 of their number with jobs in the Civil Service.

Least represented communities in the Civil Service		
Tribe	Number	Percentage
Kenya Arabs	90	0.04%
Kenyan Asians	74	0.04%
Boni-Sanye	44	0.02%
Elmolo	24	0.01%
Unknown	21	0.01%
Gosha	19	0.01%
Dasnach-Shangil	10	0.00%
Kenyan Europeans	2	0.00%

There are racial and ethnic inequalities in the way the Civil Service is currently constituted.

Least represented communities in the Civil Service		
Tribe	Number	Percentage
Kenya Arabs	90	0.04%
Kenyan Asians	74	0.04%
Boni-Sanye	44	0.02%
Elmolo	24	0.01%
Unknown	21	0.01%
Gosha	19	0.01%
Dasnach-Shangil	10	0.00%
Kenyan Europeans	2	0.00%

There are racial and ethnic inequalities in the way the Civil Service is currently constituted.

Briefing Note #3: Ministries/ departments exceeding the legal limit

The staff composition in more than 10 Government departments defies the law. The National Cohesion and Integration Act requires that no single ethnic community should constitute more than one third of the staff in any ministry or Government department.

The ministries and departments with more than a third of staff from a single community include State House, the ministries of Transport, Public Works, Tourism, Local Government, Higher Education and Nairobi Metropolitan.

Ministry/Department	Total	Single community share
Higher Education	386	33.70
Local Government	272	34.19
Nairobi Metropolitan Dev	92	33.70
Public Works	1903	34.63
Tourism	226	34.96
Transport	241	39.00
State House	373	45.31

Another nine Government ministries and departments are close to breaching the law. They have over 30 per cent of their staff from one community.

Ministry/Department	Total	Single community share
Cooperatives	1088	30.42
Energy	342	31.58
Environ/ Natural Resources	1255	31.2
Finance	3176	32.27
Labour/ Human Res. Dev	945	32.38
Livestock Dev	6415	32.46
Roads	3229	31.56
Water/ Irrigation	4672	31.23
State Law Office	941	32.62

A total of 22 departments and ministries have more than 25 per cent of their staff from one community. These are the Public Service Commission, the Cabinet Office, the Office of the Vice President and Ministry of Home Affairs, Youth Affairs and Sports, Trade, Special Programmes, Regional Development, Public Health and Sanitation, Planning and National Development, National Heritage, Medical Services, Land, Information and Communication, Justice, national Cohesion and Constitutional affairs, Housing, Forestry and Wildlife, Gender and Children, East African Cooperation, Foreign affairs, Department of Defence (civilian), Northern Kenya and arid Lands, Agriculture and Education.

Eight departments and ministries have over 20 per cent of their staff from one community: These are the Ministries of Fisheries, Immigration and Registration of Persons, Public Service, Office of the Prime Minister, Administration Police, and the Kenya Police.

Only the Provincial Administration, which hires district officers, chiefs, assistant chiefs and support staff had 16.84 per cent of staff from one community.

Briefing Note #4: Dominance, over-representation and under-representation

Only seven communities have a representation above 5 per cent in the Civil Service. The Kikuyu, Kalenjin, Luhya, Kamba, Luo, Kisii and Meru have a representation of above 5 per cent in the Civil Service. All the other communities' representation is below 5 per cent.

Five communities -- the Kikuyu, Kalenjin, Luhya, Kamba and Luo -- occupy nearly 70 per cent of Civil Service employment. Although they are the most populous, their numbers in the Civil Service are at variance with their population size. The seven communities have a combined population share of 76.7 per cent against a Civil Service presence of 81.7 per cent, a significant 5 percentage points.

Ethnic Group	Population (Census 2009)	Population %	Number in the civil service	Percentage in the civil service
Kikuyu	6,622,576	17.7%	47,146	22.3%
Kalenjin	4,967,328	13.3%	35,282	16.7%
Luhya	5,338,666	14.2%	23,863	11.3%
Kamba	3,893,157	10.4%	20,490	9.7%
Luo	4,044,440	10.8%	19,025	9.0%
Kisii	2,205,669	5.9%	14,287	6.8%
Meru	1,658,108	4.4%	12,517	5.9%
Mijikenda	1,960,574	5.2%	7,924	3.8%
Kenya Somali	2,385,572	6.4%	5,619	2.7%
Embu	324,092	0.9%	4,118	2.0%
Masai	841,622	2.2%	3,090	1.5%
Taita	273,519	0.7%	3,074	1.5%
Boran	161,399	0.4%	2,587	1.2%
Turkana		2.6%	2,112	1.0%

	988,592			
Teso	338,833	0.9%	2,029	1.0%

It is apparent that there is a variance between a community's share of population and share of civil service posts. Where some communities have a greater share of civil service jobs than their population, others have a lesser one. The Kikuyu and the Kalenjin have a disproportionate share of civil service posts compared to their population. Their proportion in the Civil Service exceeds the size of their share in the national population.

Ethnicity	Population (%)	Civil Service presence	Variance
Kikuyu	17.7%	22.3%	4.7%
Kalenjin	13.3%	16.7%	3.5%
Meru	4.4%	5.9%	1.5%
Kisii	5.9%	6.8%	0.9%
Boran	0.4%	1.2%	0.8%
Embu	0.9%	2.0%	1.1%

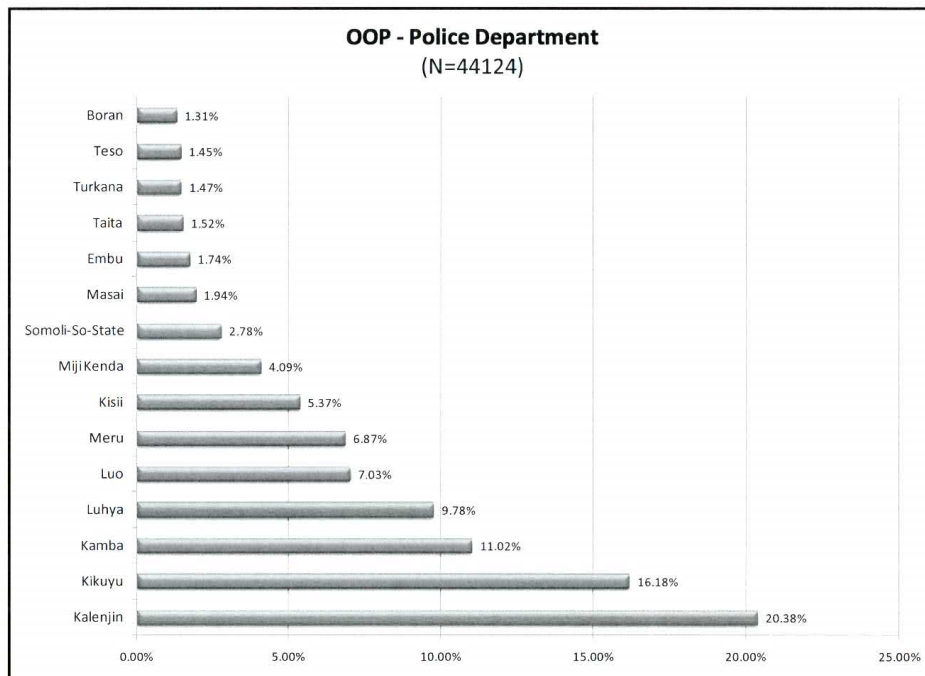
There are also communities whose presence in the civil service is lower than their share of the population. These are the Luo, Luhya, Somali, Kamba, Turkana and Maasai.

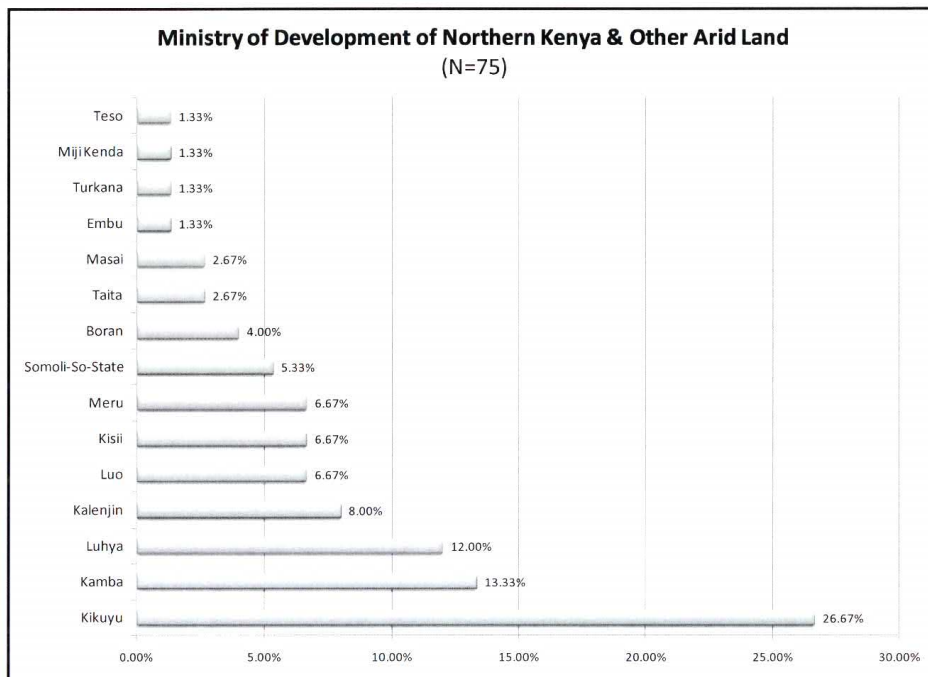
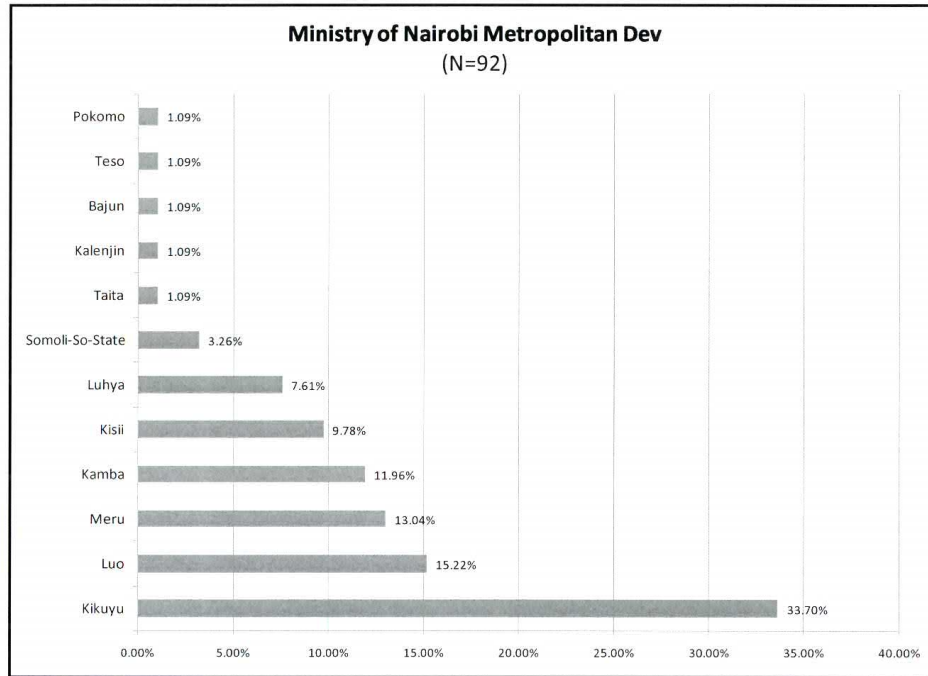
Ethnicity	Population (%)	Civil Service presence	Variance
Kenya Somali	6.4%	2.7%	3.7%
Luhya	14.2%	11.3%	2.9%
Miji Kenda	5.2%	3.8%	1.4%
Luo	10.8%	9.0%	1.8%
Turkana	2.6%	1.0%	1.6%

There are many explanations for these variances, including disparities in access to education, proximity to the location of Government offices as well as willingness to seek employment in the public service. Be that as it may, it is remarkable that a service once dominated by Europeans and Asians has so dramatically changed in its composition over 40 years. The emerging patterns of staffing suggest that power and leadership influenced the ethnic composition of the public service.

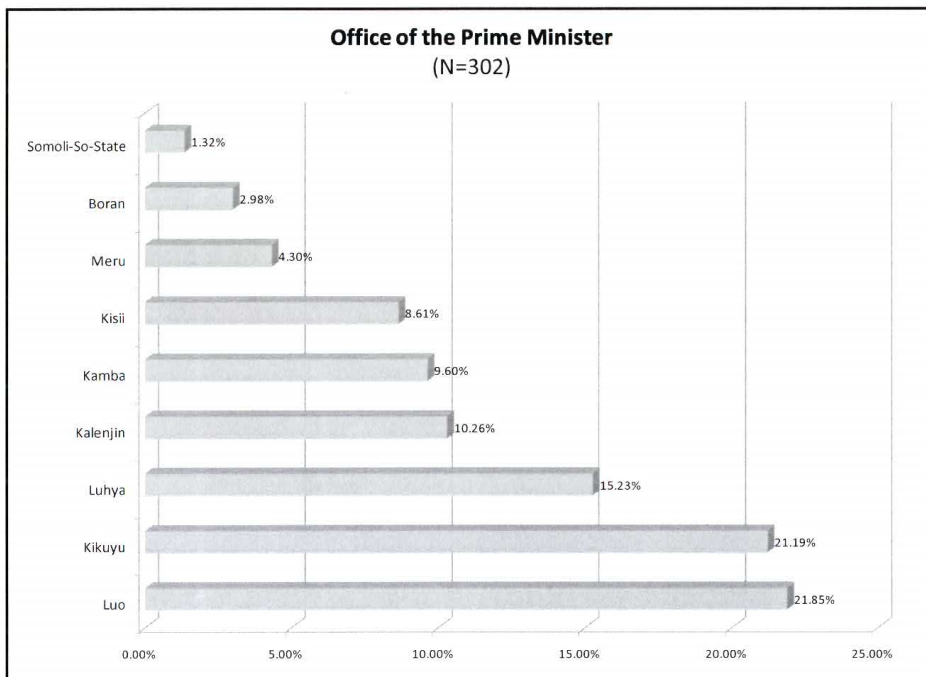
Brief #5: Patronage in hiring

The Kikuyu constitute the largest single dominant ethnic group in all ministries and departments, except in the Prisons Department, the Office of the Prime Minister and the Kenya Police. The Kalenjin are the second largest group in the Civil Service. They are also the most dominant group in the Prisons Department, and the Police Force. These two groups alone make up close to 40 per cent of the entire Civil Service. Their numbers in the Civil Service suggest a direct relationship with the tenure of the presidency, in that they have both had a member as President for over 20 years. It is also curious that in the newly constituted ministries, these patterns of ethnic patronage are still evident.





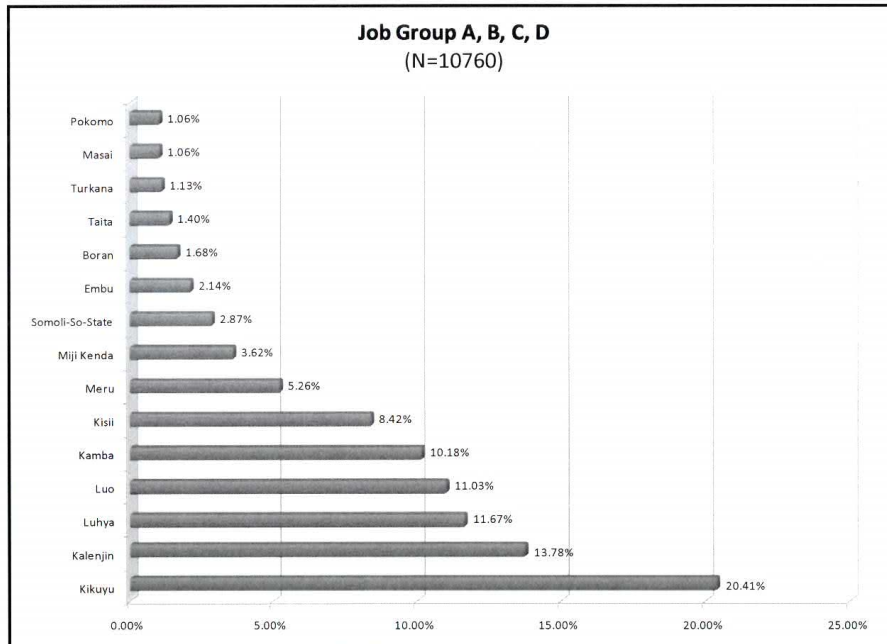
The new ministries are not doing anything differently. Nairobi Metropolitan has 33 per cent staff from one community, while the Ministry of Northern Kenya has 26.27 per cent. The Office of the Prime Minister has 21.87 per cent Luo staff and 21.19 per cent Kikuyu.



Brief #6: Exclusion at the lowest levels

Lack of access to education has been cited as undermining equitable hiring for the Civil Service across communities. Yet, the skewed recruitment into the Civil Service cuts across all job groups, including those that do not require high educational qualifications. In the lowest job groups – ABCD – the same seven major communities account for over 80 per cent of Civil Service jobs. Again, the number of those hired from each community is at variance with their population size. The communities that statistically insignificant remain outside this Civil Service group.

Ethnic community	Literacy rate (KIHBS, 2005/6)
Kisii	83.4
Kikuyu	83.0
Embu	82.4
Luo	80.8
Kamba	79.4
Luhya	71.9
Kalenjin	71.6
Meru	68.2
Mijikenda	55.0
Maasai	31.8
Somali	20.9



Brief #7: Conclusions and Recommendations

The Constitution calls for ethnic diversity in the Civil Service.

- Article 232 (1) (h) requires ‘representation of Kenya’s diverse communities’ as one of the **values and principles** of the public service.
- Article 232 (1) (i)(ii) requires ‘affording adequate and equal opportunities for appointment, training, advancement, at all levels of the public service of ... the members of all ethnic groups’.

A recruitment policy based purely on merit or competition may not give Kenyans a public service that represents the face of the country. Disparities in education infrastructure and imbalances in development generally mean that some communities are more likely to produce highly skilled people than others. It is these disparities in regional development and basic services that the country should have addressed in the past 50 years of independence.

The disparities noted point to the country’s failure to identify ethnic inequalities as a challenge to national cohesion. There is a need to develop and implement policies that can reduce these inequalities. In particular, there should be:

- a. Administrative action should be taken to ensure that all ministries and departments remain within the limit of one-third of all appointments being held by members of one community.
- b. A new criterion for representation, which recognised the need to urgently include the under-represented groups, needs to be negotiated and enacted into law. Affirmative action should be adopted for communities that are missing from the Civil Service. The current 33 per cent ceiling is too high. A figure between 15 per cent and 20 per cent would be closer to population realities.
- c. Regular reviews of how each ministry and department is addressing the problem of ethnic inequality. Performance contracts should include entrenching diversity as a major indicator of performance.
- d. Efforts to prevent a certain constellation of ministries, based on their strategic importance or resource base, from being staffed by one ethnic community beyond a certain limit.
- e. Accelerated affirmative action to build the human capital stock in areas historically marginalised -- by establishing schools, improving communication and infrastructure and offering training.
- f. A deliberate head hunting policy – similar to what the government does with Kenyans in international organisations that are occasionally recruited to the Civil Service. Because of long periods of marginalization, some communities have internalised logic of self exclusion, even when they are qualified. A headhunting policy for every employing opportunity should be adopted.

The Constitution has the potential to address some of these problems:

- i. For appointments requiring parliamentary approval, the submission of names should be accompanied by a memorandum stating how these new

appointments have affected the ethnic composition in the Civil Service. This should be one of the considerations Parliament should make in rejecting or accepting the nominee.

- ii. The relevant law should require that once every quarter, the Head of Civil Service should make a report on ethnic composition in the Civil Service (or whenever a wave of employment occurs, this report should be made).
- iii. Devolution should be turned into a space for integration. Incentives should be created for county governments and private sector to embrace diversity by making it a criterion for qualifying for the Equalization Fund or Government contracts.

Lastly, there is still need to reduce pressure on the Civil Service as one of the largest employer by creating jobs in the private sector. As those in Government make efforts to embrace diversity, so too must citizens desist from pressurizing people from their communities – be they politicians or officials – to secure them jobs in the public sector.

In the near future, we undertake to provide further analysis of diversity in other public sector positions in parastatal and other Government bodies.

Appendix 2

NCIC Study on Ethnic Diversity of Universities in Kenya



NATIONAL COHESION AND INTEGRATION COMMISSION

BRIEFS ON ETHNIC DIVERSITY OF PUBLIC UNIVERSITIES IN KENYA

VOLUME THREE

FEBRUARY, 2012

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Introduction

- ❖ One key mandate of the Commission is to ensure ethnic diversity in public employment. For example, Section 7 of the National Cohesion and Integration Act, 2008 that States in Part; “All public establishments shall seek to represent the diversity of the people of Kenya in the employment of staff. No public establishment shall have more than one third of its staff from the same ethnic community”.

Objectives

- ❖ Highlight the need to promote equality of opportunity for all staff and eliminate discrimination on ethnic and racial basis.
- ❖ Provide information that will be used to develop inclusive employment policy in the public (and private sector in Kenya).

Rationale

- ❖ Freedom from discrimination is a fundamental right espoused in the NCI Act, 2008 and other international legislations such as the UN Declaration on the elimination of all forms of discrimination
- ❖ Bringing equality and equity to the workplace has significant economic benefits, too. Employers who practice equality and equity have access to a larger and more diverse workforce.
- ❖ Diversity in workplace promotes understanding & appreciation of socio-cultural differences → unity.

Method

- ❖ Letters and questionnaire were sent to all the public Universities and Constituent Colleges and copied to the Ministry of Higher Education asking them to provide details of their employees covering date of employment, district of origin, ethnic affiliation, among others.
- ❖ Currently, Kenya has seven public universities and sixteen constituent colleges (including Rongo University College which has been gazetted but has neither admitted students nor employed staff). This ethnic audit covered the public universities and the constituent colleges.
- ❖ Six Public Universities and 9 Constituent Colleges responded and were analysed. Some universities and university colleges submitted both analysed and raw data.

Universities in Kenya

The distribution of public universities and their constituent colleges clearly shows the North/ South divide in Kenya which has gradually increased since the pre-colonial times and has been reinforced in the post independence era. For example, there is not a single university or constituent college above 2^o North. Attempts to place satellite campuses in the 'North' have been marred by difficulties in infrastructural development among other problems. For instance Moi University Northern Kenya Campus was opened on 1st September 2009 in Garissa. Nevertheless, the campus experienced a lot of challenges in its operationalization and has never picked up.

Kenyatta University on the other hand opened an Institute of Open, Distance and e-Learning located in Garissa Town. The Garissa Regional Centre serves all the Districts of North Eastern Province as well as Mwingi District in Eastern Province and Tana River District in Coast Province.

Brief One: General Representation of Communities in Public Universities

- The total number of employees working in the six public universities and the thirteen constituent colleges that responded to the study is 14,996.

Table 1: Ethnic Composition of Employees in Higher Education in Kenya

Community	Number	Percentages	Population ratio %
Kikuyu	4133	27.6	17.7
Luhya	2544	17.0	14.2
Kalenjin	2133	14.2	13.3
Luo	2086	13.9	10.8
Kisii	1253	8.4	5.6
Kamba	1041	6.9	10.4
Meru	644	4.3	4.4
Mijikenda	329	2.2	5.2
Taita	196	1.3	0.7
Embu	154	1.0	0.9
Others	87	0.6	-
Teso	60	0.4	0.9
Maasai	57	0.4	2.2
Somali	55	0.4	6.4
Borana	29	0.2	0.4
Mbeere	25	0.2	0.4
Turkana	23	0.2	2.6
Kuria	22	0.2	0.7
Suba	20	0.1	0.4
Other Africans	18	0.1	-
Asian	18	0.1	0.1
Samburu	17	0.1	0.6
Arab	14	0.1	0.1
Swahili	22	0.2	0.3
Nubi	4	0.03	-
Taveta	4	0.03	0.1
European	6	0.04	0.01
Americans	2	0.01	-
	14996	100	100

- ❖ The percentages of employment in the universities and constituent colleges of the Kikuyu, Luhya, Kalenjin, Luo, Kisii, Embu, Kenyan Europeans, Kenyan Asians, Nubi and Taita communities are higher than their national population ratio (as per the 2009 population census). Some of the differences such as that of the Embu community are however negligible (0.13%) while others such as that of the Kikuyu community is significant (about 11%).
- ❖ The communities whose representation in the universities' employment is less than their population ratio include the Somali (with the highest underrepresentation, at six percent), the Kamba, Mijikenda, Turkana and Maasai.

NB. We note that the population of the Somali community as per the 2009 population census has since been revised downwards by the Ministry of Planning and National Development

- ❖ There is a notable lack of some ethnic groups such as the Tharaka, Gabbra, Orma, Burji, Gosha, Dasnach and Njemps, among others.

Brief Two: Representation of the 'big five' communities

- ❖ In the public universities and constituent colleges, the five largest communities - the Kikuyu, Luhya, Kalenjin, Luo and Kamba who together make up about 66% of the Kenyan population constitute over 81% of the total workforce. This severs opportunities to enhance the face of Kenya in these institutions thus excluding the other more than 37 ethnic communities. For example, in the six public universities analysed, the representation of the five big communities is over 86% (see Table 2).

Table 2: 'Big Five' Ethnic Communities in Public Universities in Kenya

	University	Percentage of first five communities (%)
1	Masinde Muliro University	93
2	Moi University	89.8
3	Egerton University	87.3
4	Jomo Kenyatta University	86
5	University of Nairobi	82.3
6	Kenyatta University	81.7

Brief Three: The Relationship between Location and Ethnic Composition of Employees

- ❖ This audit reveals that most of the staff in the public universities and constituent colleges come from the communities within which the institutions are located – see Table 3.
- ❖ The spread of universities in Kenya excludes the northern part of the country with most of them located within Nairobi and its environs.
- ❖ Kenyans seem to perceive the university as a job creation enterprise for the community within which the university is located. It may be in this perspective that some regions agitate for the establishment of public universities in their areas.
- ❖ However, we note that despite the fact that Universities are national, drawing their students from all parts of the country and, in spite of the fact that their recruitment for regular programmes are national as well, locals can be employed mostly to undertake subordinate duties as part of the extension services of the university to the surrounding communities.
- ❖ The other universities located within ethnically mixed areas elicit assorted symptoms with some kind of ‘informal’ balance between two or three communities. For instance, Egerton University located in Njoro, Nakuru has 28.9% from the Kikuyu community and 25.8% from the Kalenjin Community. On the other hand, Multimedia University which is located in Ongata Rongai has 25% of its employees from the Kikuyu community, 21% from the Luhya community and 20% from the Luo community.

Table 3: Representation of ‘Local Community’ in the Employment of Universities

University	Local Community	Percentage
Bondo University College	Luo	84.3
Meru University College	Meru	83.0
Kisii University College	Kisii	79.1
Pwani University College	Mijikenda	71.0
Masinde Muliro University of Science and Technology	Luhya	68.9
South Eastern University College	Kamba	67.5
Kabianga University College	Kalenjin	57.6
Moi University	Kalenjin	55.0
Jomo Kenyatta University of Science and Technology	Kikuyu	49.7
Kenyatta University	Kikuyu	38.0
Laikipia University College	Kikuyu	36.7
Mombasa Polytechnic University College	Mijikenda	28.2
Egerton University	Kikuyu/Kalenjin	25.9/25.8

Brief Four: The Relationship between Vice Chancellors'/Principals' Ethnic Groups and the Majority of Employees

- ❖ Out of the 15 universities audited, 10 had the majority of their employees from the same ethnic group as the vice chancellor/principal.
- ❖ The remaining five institutions whose majority employees were not from the same ethnic group as the institution's chief executive drew the majority of their employees from the Kikuyu community.
- ❖ **NB.** It should however be noted that some of the Vice-Chancellors/principals have only recently been appointed to their positions.

Table 4: Vice Chancellor's/Principals' Ethnic Group and the Ethnic Group of Majority of the Employees

University	Ethnic Group of Vice Chancellor/Principal	Ethnic Group of Majority of the Employees	%
Kenyatta University	Kikuyu	Kikuyu	38.0
University of Nairobi	Luo	Kikuyu	38.0
Jomo Kenyatta University	Luhya	Kikuyu	49.7
Egerton University	Kalenjin	Kikuyu	25.9
Moi University	Kalenjin	Kalenjin	55.0
Masinde Muliro University	Luhya	Luhya	68.9
South Eastern Univ. College Kitui	Kamba	Kamba	67.5
Pwani University College	Swahili	Mijikenda	41.2
Kabianga University College	Kalenjin	Kalenjin	57.6
Kisii university college	Kisii	Kisii	79.1
Laikipia University college	Kamba	Kikuyu	37.0
Bondo University College	Luo	Luo	84.2
Multimedia University College of Kenya	Luhya	Kikuyu	20.0
Meru University College of Science and Technology	Meru	Meru	83.0
Mombasa Polytechnic University College	Mijikenda	Mijikenda	28.1

HERE**Brief Five: Senior Staff at Public Universities**

Table 5: Senior Staff at Public Universities and Constituent Colleges

University	Ethnic Group of Vice Chancellor/Principal	The Majority Ethnic Group	% of the Majority Ethnic Group	% of the Majority Ethnic Group among Senior Staff
Kenyatta University	Kikuyu	Kikuyu	38.0	42.2
University of Nairobi	Luo	Kikuyu	38.0	-
Jomo Kenyatta University	Luhya	Kikuyu	49.7	46.4
Egerton University	Kalenjin	Kikuyu	25.9	27.7
Moi University	Kalenjin	Kalenjin	55	36.2
Masinde Muliro University	Luhya	Luhya	68.9	68.7
South Eastern Univ. College Kitui	Kamba	Kamba	67.5	57.5
Pwani University College	Swahili	Mijikenda	41.2	-
Kabianga University College	Kalenjin	Kalenjin	57.6	-
Kisii university college	Kisii	Kisii	79.1	67.8
Laikipia University college	Kamba	Kikuyu	37	34
Bondo University College	Luo	Luo	84	-
Multimedia University College of Kenya	Luhya	Kikuyu	20	24.1
Meru University College of Science and Technology	Meru	Meru	83	-
Mombasa Polytechnic University College	Mijikenda	Mijikenda	28	-

- The data reveals that the representation of the majority of senior staff at the universities and constituent colleges is consistent with the representation of majority ethnic community at the institutions.
- Out of the nine institutions that submitted the grades of their employees, five have the percentages of the highest ethnic community in their employment reduce among the senior staff. Notably, while the general employment in Moi University has 55% from the Kalenjin community, this reduces to 36.2% among senior staff.
- On the other hand, the percentage of the highest represented ethnic community in three universities increase in representation at senior staff level. Kenyatta University and Multimedia University exhibits an increase in the percentage of the Kikuyu at Senior Staff level by 4% each.
- However, Masinde Muliro University seems to demonstrate the same trend both generally and at Senior Staff employment with the Luhya holding 68% at both levels.

Brief Six: Universities that Comply with the National Cohesion and Integration Act, 2008

- There is only one university and two constituent colleges that comply with the act. That is, no one community comprises over a third of their workforce.

Table 6: Universities that comply with the National Cohesion and Integration Act, 2008

Ser no	University	No of Employees	Highest Community	Percentage
1	Egerton	1,848	Kikuyu	25.9
2	Multimedia University College	125	Kikuyu	20.0
3	Mombasa Polytechnic University College	561	Mijikenda	28.1

Brief Seven: Public Universities that Flout the NCI Act, 2008

- The following universities violate the provision of the NCI Act, 2008 which stipulates that ‘no public establishment shall have more than one third of its staff from the same ethnic community’. In this regard, the institutions mentioned in this section have more than 33.3% of their employees from one community.
- As seen in Table 7, universities such as Masinde Muliro and Moi have more than 50% of their employees from one community. The situation is worse in constituent colleges (see Table 8).
- It should however, be noted that most of the constituent colleges inherited most of the staff who were in these colleges before they were converted in university colleges.

Table 7: Universities that Flout the National Cohesion and Integration Act, 2008

Ser no	University	No of Employees	Highest Community	Percentage
1	Masinde Muliro	946	Luhya	68.9
2	Moi	1082	Kalenjin	55.0
3	Jomo Kenyatta	1783	Kikuyu	49.7
4	Nairobi	4223	Kikuyu	38.0
5	Kenyatta	2613	Kikuyu	38.0

Table 8: Constituent Colleges that Flout the NCI, 2008 Act

Ser no	University College	No of Employees	Highest Community	Percentage
1	Bondo	127	Luo	84.3
2	Meru	146	Meru	83.0
3	Kisii	532	Kisii	79.1
4	South Eastern	250	Kamba	67.5
5	Kabianga	59	Kalenjin	57.6
6	Pwani	172	Mijikenda	41.2
7	Laikipia	357	Kikuyu	37.0

Suggestions/Way Forward

- As is the case in parastatals, these data being used to develop Policy on Inclusive Employment.
- Letters should be written to these universities and constituent colleges highlighting their areas of strength and weaknesses – and asking them to make deliberate efforts to comply with the constitutional requirement on ethnic diversity in recruitment and comply with the NCI Act, 2008.
- Meetings should be held with the various chief executives in these universities and officers from the parent ministries to discuss the way forward. These forums could also be used to gather information that would feed into the policy development.

NOTES



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