

PART I

OVERVIEW

CHAPTER ONE

Introduction

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

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

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

Setting up the Commission

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

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

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

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

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

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

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

Establishing a communication strategy

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

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

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

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

Publication of Rules and Procedure

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

Consultations with Government Departments and Others

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

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

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

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

Role of Civil Society

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

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

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

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

Standing Before the Commission

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

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

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

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

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

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

Methodological Issues

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

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

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

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

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

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

The Commission's Methodology by Province

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Alleged Perpetrators: To Name or Not To Name?

We realize that Kenyans and the international community have been hoping the Commission's report will identify the individuals behind the 2007 post election violence. After all, the Commission's first term of reference² is to investigate the facts relating to the post-election violence. An important part of that investigation is to identify who planned, organised, facilitated, and committed egregious human rights violations.

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

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

² 1(a) of the Terms of Reference.

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

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

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

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

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

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

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

Basis for Recommendations

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

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

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

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

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

Supporting Documentation

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