TABLE OF CONTENTS

			Paragraph	Page
LETTER OF TRANSMITTAL		.. ..		(iii)
ACKNOWLEDGEMENTS		.. ..		(v)
I	INTRODUCTION	.. ..	1-87	1-58

MAP

Tribal Clash Areas and Administration Boundaries.

The Map is the work of Johannes Akiwumi and Michael Mwangi of UNEP/DEIA@EW/GRID-NAIROBI.

			Paragraph	Page
II	CHAPTER ONE:	Tribal Clashes in the Rift Valley Province	88-346	59-190
III	CHAPTER TWO:	Tribal Clashes in Western Province	346-447	191-232
IV	CHAPTER THREE:	Tribal Clashes in the Coast Province	448-514	233-278
V	CHAPTER FOUR:	Tribal Clashes in North Eastern and Easter Provinces	515-522	279-283
VI	CHAPTER FIVE:	Recommendations	523-330	284-291

Appendices

"A" : Kenya Gazette Notice No.3312 dated 1st July, 1998.

"B" : Kenya Gazette Notice No.3313 dated 1st July, 1998.

"C" : Opening Statement by the Hon. Mr. Justice A.M. Akiwumi, Chairman of the Judicial Commission at the Opening Session of the Judicial Commission of Inquiry on 14th July, 1998, at the Law Courts, Nariobi.

"D" : Statement by the Attorney-General, Hon. Amos S. Wako, E.B.S., E.G.H., M.P., as amicus curiae of the Judicial Commission, at the Opening Session of the Judicial Commission of Inquiry.

"E" : Statement by Mr. Nzamba Kitonga, Chairman, Law Society of Kenya at the Opening Session of the Judicial Commission of Inquiry.

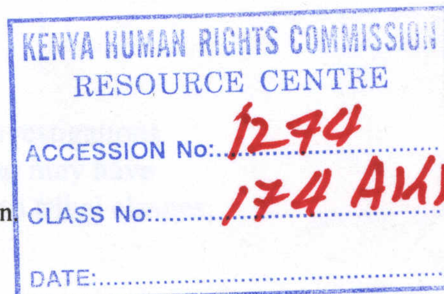
"F" : Kenya Gazette Notice No.3477 dated 10th July, 1998.

"G" : List of persons adversely mentioned and notified.

"H" : List of Exhibits.

"I" : List of Witnesses.

"J" : Law Society of Kenya's final submission to the Commission.



ABBREVIATIONS

ADC	-	Agricultural Development Corporation.
AP	-	Administration Police.
ATSU	-	Anti Stock Theft Unit.
CID	-	Criminal Investigations Department.
CL	-	Commissioner of Lands.
DSI	-	Directorate of Security Intelligence.
DC	-	District Commissioner.
DEO	-	District Education Officer.
DLO	-	District Lands Officer.
DO	-	District Officer.
DSIO	-	District Security Intelligence Officer.
DCIO	-	Divisional Criminal Investigations Officer.
GSU	-	General Service Unit.
MP	-	Member of Parliament.
NGO	-	Non Governmental Organization.
OCS	-	Officer Commanding Station.
OCPD	-	Officer Commanding police Division.
PC	-	Provincial Commissioner.
PCIO	-	Provincial Criminal Investigations Officer.
PPO	-	Provincial Police Officer.
PSIO	-	Provincial Security Intelligence Officer.

JUDICIAL COMMISSION OF INQUIRY
INTO TRIBAL CLASHES IN KENYA
COUNTY HALL
P.O. BOX 49357
NAIROBI

19TH August, 1999.

KENYA HUMAN RIGHTS COMMISSION
RESOURCE CENTRE
ACCESSION No:..........
CLASS No:..........
DATE:..........

His Excellency the President,
Hon. Daniel T. arap Moi C.G.H., M.P.,
State House,
NAIROBI.

Your Excellency,

You appointed us by Gazette Notice No.3312 of 1st July, 1998, as members of the Judicial Commission of Inquiry to inquire into the tribal clashes that have occurred in various parts of Kenya since 1991.

Our specific terms of reference were:

(a) To investigate the tribal clashes that have occurred in various parts of Kenya since 1991, with a view of establishing and/or determining-

(i) the origin, the probable, the immediate and the underlying causes of such clashes;

(ii) the action taken by the police and other law enforcement agencies with respect to any incidents of crime arising out of or committed in the course of the said tribal clashes and where such action was inadequate or insufficient, the reasons therefor;

(iii) the level of preparedness and the effectiveness of law enforcement agencies in controlling the said tribal clashes and in preventing the occurrence of such tribal clashes in future;

(b) To recommend-

(i) prosecution or further criminal investigations against any person or persons who may have committed offences related to such tribal clashes;

(iii)

(ii) ways, means and measures that must be taken to prevent, control, or eradicate such clashes in future;

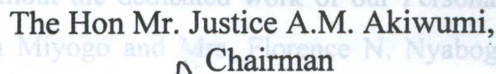
(iii) to do, inquire into or investigate any other matter that is incidental to or connected with the foregoing,

and to report thereon, to you.

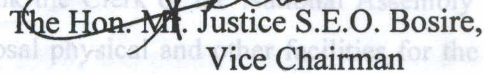
We have carried out and completed our task within the time at our disposal in accordance with the provisions of section 7(1) of the Commissions of Inquiry Act (Cap.102). We now have the honour, Your Excellency, to submit our Report to you and to thank you for the trust that you have bestowed on us.

We are,

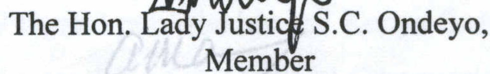
Your Excellency's most obedient servants,



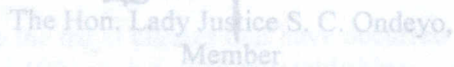
The Hon Mr. Justice A.M. Akiwumi,
Chairman



The Hon. Mr. Justice S.E.O. Bosire,
Vice Chairman



The Hon. Lady Justice S.C. Ondeyo,
Member



ACKNOWLEDGMENTS

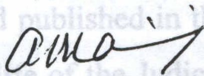
We would like to thank the Attorney-General, Hon. Amos S. Wako, E.B.S., E.G.H., M.P. who appeared as amicus curiae before us and for the valuable assistance that he gave us.

We would also like to record our appreciation to Counsel assisting the Judicial Commission namely, B. Chunga, Esq., J. N. Gacivih, Esq. and Mrs. D. A. Oduor, whose assistance was invaluable in our efforts to ascertain the truth. We cannot also forget those other counsel who deserve our appreciation, and who are mentioned in paragraph 14 of our Report.

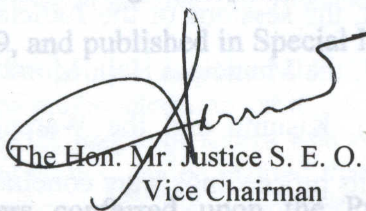
We must express our appreciation for the contribution of the Joint Secretaries to the Judicial Commission, Jacob Letia ole Kipury and Peter Musambi Alubale, in the work of the Judicial Commission. The following deserve our gratitude for their most commendable role in our proceedings; the Parliamentary Hansard team for the preparation of the voluminous verbatim report of our proceedings which we have found extrememly useful in the preparation of our Report and Thomas Furaha of the Chief Magistrate's Court, Mombasa, whose expertise as an interpreter was indispensable to our efficient understanding of the evidence of crucial witnesses.

The writing of our Report was indeed, the most difficult and exacting part of our task. This we could not have achieved without the dedicated work of our Personal Secretaries Mrs. Margret Kenda Otolo, Miss. Theresa Miyogo and Mrs. Florence N. Nyaboga, and our Clerk, James Kimari of the Nairobi High Court, Civil Registry.

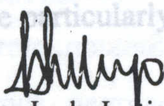
We would finally like to thank the Clerk of the National Assembly who, and the local authorities which, placed at our disposal physical and other facilities for the use of the Judicial Commision.



The Hon. Mr. Justice A. M. Akiwumi,
Chairman



The Hon. Mr. Justice S. E. O. Bosire,
Vice Chairman



The Hon. Lady Justice S. C. Ondeyo,
Member

INTRODUCTION

1. We, the Hon. Mr. Justice Akilano Molade Akiwumi, the Hon. Mr. Justice Samuel Elkana Onderi Bosire, MBS and the Hon. Lady Justice Sarah Chibai Ondeyo were, in exercise of the powers conferred by section 3 of the Commissions of Inquiry Act, appointed on 1st July, 1998, by his His Excellency Daniel Toroitich arap Moi, President and Commander in Chief of the Armed Forces of the Republic of Kenya, to be Commissioners of a Judicial Commission of Inquiry with the Hon. Mr. Justice Akilano Molade Akiwumi as its Chairman and the Hon. Mr. Justice Samuel Elkana Onderi Bosire as its Vice Chairman. The Judicial Commission of Inquiry which in conformity with Commonwealth practice was designated the Akiwumi Commission, was to inquire into tribal clashes which have occurred intermittently in various parts of Kenya since 1991. Our Appointment and Citation which are contained respectively, in Gazette Notices Nos. 3312 and 3313 both dated 1st July, 1998, and published in the Special Issue of the Kenya Gazette Vol. C – No. 36, also dated 1st July, 1998, are reproduced in Appendices "A" and "B" of this Report. Because of the obvious need for more time to be given to the Judicial Commission if it was to undertake a worthwhile inquiry, the life of the Judicial Commission was extended from 31st December, 1998, to 30th April, 1999, by Gazette Notice No. 7191 dated 19th December, 1998, and published in the Kenya Gazette Vol. C - 74 dated 24th December, 1998. This was further extended to 30th June, 1999, by Gazettee Notice No. 1598 dated 24th March, 1999, and published in the Kenya Gazette Vol. C 1-No.16 dated 26th March, 1999. Finally, the life of the Judicial Commission was further extended, only for the purpose of writing its Report, to 31st July, 1999, by Gazette Notice No. 3930 dated 13th July, 1999, and published in Special Issue of the Kenya Gazette Vol. CI-No.39.

2. In exercise of the powers conferred upon the President by section 3 of the Commissions of Inquiry Act, we were particularly, directed in the Citation as our Terms of Reference:

"(a) To investigate the tribal clashes that have occurred in various parts of Kenya since 1991 with a view of establishing and/or determining –

(i) the origin, the probable, the immediate and the underlying causes of such clashes;

(ii) the action taken by the police and other law enforcement agencies with respect to any incidents of crime arising out of or committed in the course of the said tribal clashes and where such action was inadequate or insufficient, the reasons therefor;

(iii) the level of preparedness and the effectiveness of law enforcement agencies in controlling the said tribal clashes and in preventing the occurrence of such tribal clashes in future.

(b) To recommend –

(i) prosecution or further criminal investigations against any person or persons who may have committed offences related to such tribal clashes;

(ii) ways, means and measures that must be taken to prevent, control or eradicate such clashes in future;

(c) to inquire into or investigate any other matter that is incidental to or connected with the foregoing.".

3. In the Citation, Jacob Letia ole Kipury and Peter Musambi Muhatia Alubale were appointed joint secretaries to the Judicial Commission. John Nyaga Gacivih and Dorcas Agik Oduor were appointed counsel to assist the Judicial Commission. Subsequently, John Nyaga Gacivih was replaced by Bernard Chunga.

4. Prior to embarking on our duties, and in accordance with section 5 of the Commissions of Inquiry Act, each of us on 14th July, 1998, made and subscribed an oath in the prescribed form before the Chief Justice of Kenya. In pursuance of its Citation, the Judicial Commission commenced its proceedings with an Opening Session held at 10.00 a.m. on 14th July, 1998, at the Law Courts in Nairobi. Thereafter, save in one instance when evidence was heard in camera, the sessions of the Judicial Commission were held in public at the County Hall, Nairobi, the Municipal Hall, Mombasa, the County Council Hall, Nakuru, the Municipal Hall, Kisumu and the Wareng County Council Hall, Eldoret, until 11th June, 1999, when its proceedings were concluded.

5. In his statement during the Opening Session of the Judicial Commission (See Appendix "C" of this Report), its Chairman summarized the fundamental and tremendous issues involved in our work in this way:

"I would, however, like to make some general remarks about the work of this Judicial Commission of Inquiry.

> 'It has often been said that Kenya is a land of contrasts. This is not only true of the physical, geographical and climatic conditions of the land, but also of the social and cultural characteristics of its people.'.[1]

No one can now pretend or regard with complacency, that these unique circumstances which had in the past, engendered national pride, unity in diversity and tribal harmony, have regrettably in recent times, been threatened by tribal clashes. It is the duty of each and every one of us to stop this emerging tendency which will undermine the stability and unity of our country. It is our duty to investigate and identify the causes of these tribal clashes and to propose lasting solutions for tribal harmony that transcends tribal differences. The establishment of the Judicial Commission of Inquiry is therefore, an important and crucial step in this direction.

Not until we learn to live peacefully together as Kenyans will we have a better and brighter future …".

The following extract from the Statement of the Amicus Curiae to the Judicial Commission, the Attorney General, Hon. Amos S. Wako (See Appendix "D" of this Report), which also summarizes the challenging tasks of the Judicial Commission, deserves to be set out:

"My Lords, the tribal or ethnic clashes that have intermittently bedevilled this nation since 1991 have been a sad chapter in the history of our beloved Republic; they have resulted in considerable loss of lives, injury to persons and destruction of property; they have caused fear, suspicion, mistrust and insecurity among the general population in the Republic; they have inhibited the progress towards social cohesion and the integration of our society; they have been detrimental to public peace, national tranquillity, law and order, human rights and the rule of law which are the cornerstone of economic and social development. Despite efforts including security operations in the past, there has been sadly, evidence of persistence and recurrence of the ethnic or tribal clashes in various parts of the country.

It is with the foregoing in mind that H.E. The President formed the opinion that it is in the public interest to get to the bottom of the matter so that the aspirations of the people of Kenya who wish to see a permanent end to ethnic or tribal clashes can be realised thereby enabling Kenya to move into the next millennium as one nation with one destiny – a united, dynamic vibrant and prosperous nation.".

The Opening Statement by the Chairman of the Law Society of Kenya, is contained in Appendix "E" of this Report.

---

[1] Kenya, an official handbook, p.8

6. It is significant that the Citation of the Judicial Commission contained no directions to be observed by us with respect to the reception of direct, hearsay or opinion evidence and also any of those affecting the reputation, character or conduct of any person. These issues were therefore left to be regulated by us, and in exercise of the powers conferred upon us by section 9 of the Commissions of Inquiry Act, we prescribed related provisions in Rules 5 and 10 of the Rules and Procedure for the conduct and management of the proceedings of the Judicial Commission. These Rules and Procedure which also designated the Amicus Curiae to the Judicial Commission, are contained in Gazette Notice No. 3477 dated 10th July, 1998, and published in the Kenya Gazette Vol.C – No. 38 also dated 10th July, 1998, and are reproduced in Appendix "F" of this Report. Rules 5 and 10 of the Rules and Procedure of the Judicial Commission which deal with the reception of adverse evidence against any person are as follows:

> "5. Any person who is in any way implicated or concerned in any matter under inquiry shall be entitled to be represented by an advocate.
>
> …
>
> 10. Any person who is in any way implicated or concerned in any matter under inquiry may adduce material evidence in his behalf in connection with the matter under inquiry."

7. It is obvious, and natural justice demands, that as far as persons who may be implicated by evidence to be given before the Judicial Commission are concerned, they should be given notice of the general nature of the evidence to be adduced against them so as to enable them to decide whether to be represented by counsel or not. Whether represented or not, it goes without saying, that counsel or the persons themselves, as the case may be, should have the right to cross-examine the witnesses who may give adverse evidence against them. A notice should also inform people who may be implicated in the matter under inquiry, of their right to adduce evidence in rebuttal. We therefore, as a matter of convenience only, adopted the terms of section 3(3) (a), (i) and (ii) of the Commissions of Inquiry Act with respect to the notices to be served on persons who may be implicated. We did not receive any evidence which adversely affected the reputation of any person or which tended to reflect adversely in any way upon the character or conduct of any person, except where all reasonable efforts had been made to give such a person prior notice or where the general nature of the adverse evidence to be given, had

been communicated to him. Furthermore, such a notice did not only, give a person reasonable and practical opportunity to be present either in person or by counsel at the hearing of the evidence, but also, informed him of the right to cross-examine the testifying witnesses and to adduce evidence on his own behalf. In all, notices were given to the persons listed in Appendix "G" of this Report.

8. With respect to hearsay evidence, we decided that it was consistent with the duty of the Judicial Commission to inquire into and ascertain facts concerning the Terms of Reference of the Judicial Commission and matters appertaining thereto, to receive such evidence. The generally accepted principle in inquiries such as the one on which we were embarked, is for hearsay evidence to be received and considered for what it is worth, and as a means of securing further evidence. But if any authority is required to support this principle, we need only refer nearer home, to the celebrated Report of the Judicial Commission Appointed to Inquire into Allegations involving Charles Mugane Njonjo (Former Minister for Constitutional Affairs and Member of Parliament for Kikuyu Constituency), which like the Judicial Commission, was also established under the Commissions of Inquiry Act. In PART I of that Report and under the heading "THE EVIDENCE – OUR APPROACH", appears the following authoritative statement of the law with which we agree and have followed:

> "15. An inquiry as this, not being a trial of any individual, may go on what are called 'fishing expeditions' thereby permitting the reception of hearsay evidence, as it may lead to the discovery of matters of great public importance. If it does, the result justifies its admission. If it does not, no injury has resulted. (Hallet's Royal Commissions and Boards of Inquiry 1982 Edition)."

We accepted certain hearsay evidence on the basis explained above and acted upon it only when it became authenticated by other evidence.

9. The enormity, ramifications and repercussions of the tribal clashes which is an appalling blot on the national landscape will not be forgotten so quickly. It is this as

much as anything else, that makes it inevitable and salutary that a public inquiry should be instituted into the tribal clashes. Indeed, such an inquiry may also provide the opportunity for mistakes to be acknowledged, forgiveness granted and the past forgotten. The course of action adopted in this regard, was the appointment as already recounted, by the President, of the Judicial Commission. In order that we should be able to discharge our functions effectively and fully, our Citation also gave us wide powers including the power:

> "to receive views from members of the public and receive oral and/or written statements from any person with relevant information, and may:
>
> (a) use official reports of any previous investigations into the tribal clashes;
> (b) use any investigation report by any institution or organization into such tribal clashes;
> (c) commission reports from experts in any relevant arrears.".

These powers, taking into account the provisions of our Rules and Procedure for the conduct and management of the Judicial Commission, where necessary, we exercised to the full. But it must be emphasised that the time placed at the disposal of the Judicial Commission to complete its work, did not permit an extensive and fully comprehensive investigation into the tribal clashes and in respect of all the places where they occurred.

10. We were also fortified in the discharge of our onerous and exacting task by the provisions of section 7 (1) of the Commissions of Inquiry Act which in setting out our duties, state in part that:

> "It shall be the duty of a Commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire...".

We have endeavoured to discharge this duty faithfully. A duty which we owe not only, to the President of Kenya who appointed the Judicial Commission but also, to the country at large. We are very conscious of the difficulties involved in the preparation of a report such as this one, which must deal with the wide, deep and fundamental issues involved in the tribal clashes that we have been commissioned to investigate. Yet, if this Report is to have any virtue, it is that it attempts to do just this. Referring to our role in this regard, the Chairman of the Judicial Commitssion at its Opening Session gave this assurance:

> "We would also like to assure every one that in keeping with our well established responsibilities as members of an independent and separate

arm of government, and as members of this Judicial Commission of Inquiry, we shall boldly and without delay, tackle the issues enumerated in, and in accordance with our terms of reference, and, as required by the Commissions of Inquiry Act under which this Judicial Commission of Inquiry has been established, make a full, faithful and impartial inquiry into the matters entrusted into our care."

11. The proceedings of the Judicial Commission, owing to its immense national importance, the necessity to investigate conscientiously and fully, every matter which may have a bearing on our inquiry, the very many witnesses that were properly required to give evidence, and the necessity to make a full, faithful and impartial inquiry, and subject to the time at the disposal of the Judicial Commission, lasted for a hundred and ninety four days. Indeed, the very nature, wide-ranging extent and implications of the Terms of Reference the Judicial Commission demanded the utmost patient, painstaking and meticulous inquiry on our part. Three hundred and eighty four exhibits were tendered by counsel assisting the Judicial Commission, by counsel appearing for the Law Society of Kenya and other counsel and by various individuals. A list of these exhibits which includes investigative reports and other documents is reproduced in Appendix "H" of this Report. Altogether, three hundred and thirty one witnesses who are listed in Appendix "I", testified on oath before the Judicial Commission. Where they were summoned by counsel assisting the Judicial Commission, he examined them in-chief, cross-examined them where appropriate, and where necessary, re-examined them after counsel for the Law Society of Kenya and other counsel, had cross-examined them. Witnesses summoned at the instance of counsel appearing for the Law Society of Kenya and other counsel, testified on oath before the Judicial Commission. After being examined-in-chief, they were cross-examined by counsel assisting the Judicial Commission. Thereafter, they were re-examined by counsel who had called them. We questioned witnesses as we thought necessary. We also received and considered reports by the Police Force, the Director of Intelligence, the Law Society of Kenya, the Standing Committee on Human Rights (KENYA), the Kenya Human Rights Commission, International Federation of Women Lawyers (FIDA) Kenya Chapter, the Parliamentary Select Committee to investigate Ethnic Clashes in Western and other parts of Kenya 1992, Human Rights Watch Africa, National Election Monitoring Unit and United Nations Association (Kenya), the Standing Committee on Human Rights (KENYA), the

National Council of Churches of Kenya (NCCK), the Symposium Taskforce (composed, inter alia, of representatives of the following political parties the Democratic Party of Kenya, Ford Kenya and KENDA and of the International Commission of Jurists, the Law Society of Kenya Womens' Lobby Group and the NECEP/UNIVERSITIES), Wachu Chachole, Nicholas Kariuki Githuku, Samuel Migui Wachira, Prof. Ezra Kiprono Maritim and Lawrence M. Chemaru. We also took into account statements made by individuals including those who gave evidence before the Judicial Commission.

12. During the early sessions of the Judicial Commission on 30th July, 1998, the Law Society of Kenya applied to be represented by counsel in the proceedings of the Judicial Commission on the grounds that it had reports and witnesses relevant to the Terms of Reference of the Judicial Commission. We had no difficulty in ruling that this constituted proper grounds which would entitle counsel representing the Law Society of Kenya to take part in the relevant proceedings of the Judicial Commission, provided that advance copies of the statements of such witnesses, had been served on counsel assisting the Judicial Commission. Some twenty days later after this ruling, a second application was made on behalf of the Law Society of Kenya, this time, for leave for counsel appearing for the Law Society of Kenya to cross-examine a witness whom it was claimed, was a witness of the Law Society of Kenya, after he had been examined in-chief by counsel assisting the Judicial Commission. But no advance copy of this witness's statement to the Law Society of Kenya had been served on Counsel assisting the Judicial Commission. We ruled that to allow cross-examination by counsel for the Law Society of Kenya where such a procedure had not been followed, would permit the Law Society of Kenya to take part willy nilly as it pleases, in the proceedings of the Judicial Commission, which would not do. This, however, was not to be the end of the saga. Upon our refusing on 26th August, 1998, to allow counsel for the Law Society of Kenya to participate in our proceedings willy nilly as it pleases, the Law Society of Kenya

applied to the High Court, by way of judicial review, inter alia, for an order of certiorari to quash our ruling which refused the Law Society of Kenya:

> "unqualified right of audience before the Respondent, to call witnesses, examine such witnesses and to cross examine such witnesses called by any other party and to make submissions", and

for an order of mandamus compelling us to allow the Law Society of Kenya:

> "an unqualified right of audience … to call witnesses to examine such witnesses in chief and to cross examine witnesses called by any other party and to make submissions.".

13. After considering the application of the Law Society of Kenya, the High Court, Hayanga J.. concluded in: In the Matter of: AN APPLICATION BY THE LAW SOCIETY OF KENYA (LSK) ACT CAP 18 LAWS OF KENYA and In the Matter of: JUDICIAL COMMISSION OF INQUIRY INTO TRIBAL CLASHES IN KENYA, Misc. Civil Application No. 141 of 1998, thus:

> "LSK wants to be given an unqualified audience before the Commission and this as I understand it is simply that they will be allowed to give as a member of the public, as a person concerned with the matter under inquiry to have its own advocate and of course while in there to proceed in line with the Rules of Procedure set by the Commission. That I believe can be enforced by Mandamus as an appropriate remedy for the injury complained of. I think Mandamus should issue to compel the Commission to grant participation in the stated particulars as matters within its statutory duty.
>
> I do not see where the Commission is enjoined to have LSK or any member of the public come into the Commission's proceedings calling its witnesses and cross examine everybody about without check. Therefore, the right to call and cross examine any witness and to act as an assisting counsel is not ordered and therefore refused.
>
> Does LSK have Locus Standi in all these matters? I have endeavoured to show that it has but I would support this by quotation from R v GLC Ex Parte BLACKBURN [1948] 2 QB 118 when Denning M. R. said:-
>
> > 'I agree it is a matter of High Constitutuional principle that if there is good ground for supposing that a government department or a local authority (a statutory body) (in brackets mine) is transgressing the law or is about to transgress it then any one of those offended or injured can draw it to the attention of the Courts … and the Courts in their discretion can grant whatever remedy is appropriate – One remedy which is always open, by leave of the Court is to apply for prerogative writ such as Certiorari, Mandamus, or Prohibition.'

The LSK in those terms has Locus. There will therefore be order for CERTIORARI and of MANDAMUS to issue against the ruling of the Commission of 26th August, 1998 and order – commanding it to allow LSK to present its testimony, views, statement and or give oral evidence by its spokesman and be allowed to present and cross examine any witness and be represented by counsel, in conformity with Statute, the Terms of Reference and the Procedure the Commission has laid out for itself. The said decision will be and is hereby cancelled, and the Commission is by mandamus commanded as above.".

14. This Ruling, uncertain in some respects, determined the role of the Law Society of Kenya in the proceedings of the Judicial Commission. There the matter now stands. In our view, it is a novel decision concerning proceedings such as those of an essentially investigative organ as the Judicial Commission. We hope that someday, the issues raised in this Ruling will receive full judicial consideration at the highest level. In conformity with this Ruling, the Law Society of Kenya was represented at various times before the Judicial Commission, by H. Ndubi, Esq., G. Ngibuini Esq., M. Gathenji, Esq., M. Mureithi, Esq., R. Onsongo, Esq., W. Chebukati, Esq., M. Kariuki, Esq., J. Kiplenge, Esq., K. Kiburi, Esq., J. Olago, Esq., L. Muchai, Esq., and M. Khatib, Esq. A. Omutelema, Esq. Appeared for the Kenya Police Force and the Departyment of Provincial Administration. The following advocates also appeared for various individuals and institutions: N. Amolo, Esq., K. Murungi, Esq., P. Muira, Esq., M. Gathenji, Esq., C. Kihara, Esq. M. Mbaka, Esq., G. Ngombo, Esq., Y. Khanna, Esq., S. Madzayo, Esq., A. Mabeya, Esq., J. Asige, Esq., R. Kipsang, Esq., G. Salim, Esq., M. Warsame, Esq., Major M. Ndungu, Esq., J. Mburu, Esq., J. Omwenga, Esq. R. Sheth, Esq. W. Konosi, Esq., H. Makhecha, Esq., J. Kaguchia, Esq., D. Kimatta, Esq., Mrs. V. Barasa, J. Sergon, Esq., O. Odhiambo, Esq., P. Lilan, Esq., C. Koech, Esq., P. Lumumba, Esq., W. Wagara, Esq., M. Wetangula, Esq., K. Langat, Esq., W. Waweru, Esq., J. Cherutich, Esq., J. Ogeto, Esq., F. Orege, Esq., M. Githiru, Esq., K. Orina, Esq., E. Monari, Esq., K. Kipkenda, Esq., O. Ochieng, Esq., N. Migiro, Esq., K. Nyaundi, Esq., C. Korir, Esq., J. Rono, Esq., F. Tuiyot, Esq., B. Ochieng, Esq., Mrs. M. Kasango, M. Nyaoga, Esq., L. Mwangi, Esq., L. Nyangau, Esq., Mrs. J. Wandera, J. Kiplenge, Esq., M. Eboso, Esq., O. Osiemo, Esq., W. Arusei, Esq., P. Muite, Esq., K. Kipkeei, Esq.

15. Having achieved this eminent standing, the Law Society of Kenya, however, did not entirely discharge its much vaunted and proclaimed role of assisting the Judicial Commission. Some evidence implicating Nicholas Biwott, the Minister for East African and Regional Co-operation, Amos Wako, the Attorney General and Al Haji Omar Masumbuko, were given before the Judicial Commission. In accordance with the Rules and Procedure of the Judicial Commission as already explained, these persons could if they so wished, have cross-examined witnesses or given evidence in rebuttal. Their failure to take advantage of this procedure would be purely a matter for comment. Then there was Police Inspector Peter Muiruri. It was alleged by counsel appearing for the Law Society of Kenya that he had obtained from Omar Masumbuko a confession statement about his role in the tribal clashes that occurred at the Coast Province. We did not, however, insist on Inspector Peter Muiruri being called as a witness before the Judicial Commission as counsel appearing for the Law Society of Kenya did not produce any evidence to establish that any statement of that kind was ever made by Omar Masumbuko, to Inspector Peter Muiruri. It is in the light of the foregoing, and in view of the fact that counsel appearing for the Law Society of Kenya had altogether, either examined in-chief or cross-examined all the three hundred and thirty one witness that gave evidence before the Judicial Commission, that we regard with disappointment and dismay, the following pitiful letter of 18th June, 1999, from the Law Society of Kenya to the Joint Secretaries of the Judicial Committee as some manifestation of its insincerity and lack of seriousness in the role and reputation it had sought to establish in its judicial review application to the High Court:

> "Dear Sirs
>
> <u>RE: LAW SOCIETY OF KENYA'S FINAL SUBMISSIONS TO THE COMMISSION</u>
>
> You will recall that on Friday 11th June 1999 the Commission wound up its business of taking evidence. Their Lordships the Commissioners ordered that the Law Society of Kenya and Assisting Counsel to the Commission do make written submissions to be handed to you on or before 18th June 1999.
>
> Counsel for the Law Society of Kenya Mr. Haron Ndubi made an application to the Commission to call Hon. Amos Wako, Attorney General of the Republic of Kenya, to be called to testify before the Commission to explain what he, as a law enforcement agent, did or did not do in regard to matters under the Commission's enquiry. The Lordships declined.

Further, on various occassions before, counsel for the Law Society of Kenya has sought that summons of attendance to testify be served on various people including; Hon. Nicholas Biwott, Al Haji Omar Masumbuko, one Inspectoz Peter Muiruri, among others.

These persons were not called and the Law Society knows no reason why they were not called.

It is the view and position of the Law Society of Kenya that in the absence of evidence of those persons, the Commission failed to come in tandem the Terms of Reference conclusively.

In that regard, we are humbly notifying you that the Law Society of Kenya shall not be making any final submissions to the Commission.

Very kindly and humbly inform their Lordships.

Yours faithfully

G.M.KEGORO
SECRETARY
c.c. Mr. Haron Ndubi
Advocate
P.O.Box 41778
MOMBASA .".

A copy of this letter is to be found in Appendix "J" of this Report.

16. Not unconnected with the foregoing Ruling, are two other Rulings of the High Court that affected the proceedings of the Judicial Commission. In the course of its proceedings a witness, Emmanuel Karisa Maitha, denied that he had made to Inspector of Police, Adiel Mate, two handwritten cautionary incriminating statements concerning his role in the tribal clashes that occurred in the Coast Province, and which statements had been produced and admitted without any objection from Karisa Maitha or his counsel as Exhibit 79 and 84. Also produced without objection by Inspector Adiel Mate and contained in Exhibit 92 and which is in a handwriting similar to those in Exhibits 79 and 84, is a letter dated 28th June, 1998, which Karisa Maitha admitted having written to the District Criminal Investigation Officer, Mombasa. Contained in Exhibit 92 are a letter of 14th September, 1998, from Karisa Maitha to the District Criminal Investigation Officer, and Karisa Maitha's Notice of Appointment of Advocates to act for him in an Election Petition case, both of which were admittedly signed by Karisa Maitha. Even though we

had Exhibits 79, 84 and 92, we subsequently, and only out of excessive caution, ordered that Maitha should give to the police handwriting expert a specimen of his handwriting and signature for comparison with the two cautionary statements. Karisa Maitha who was then being tried for offences not unconnected with the Terms of Reference of the Judicial Commission, applied to the High Court in: In the Matter of: AN APPLICATION BY HON. EMMANUEL KARISA MAITHA, FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION AND CERTIORARI and In the Matter of: THE COMMISSION OF INQUIRY ACT, CHAPTER 102 LAWS OF KENYA THE EVIDENCE ACT CHAPTER 80 OF THE LAWS OF KENYA AND THE CONSTITUTION OF THE REPUBLIC OF KENYA – EMMANUEL KARISA MAITHA –APPLICANT v. THE JUDICIAL COMMISSION OF INQUIRY INTO TRIBAL CLASHES IN KENYA – RESPONDENT, MISCELLANEOUS APPLICATION NO. 186 of 1998, by way of judicial review for orders to quash our order and to prohibit us from considering the cautionary statements or hearing expert evidence on their similarity or otherwise, with the handwritten specimen to be provided by Karisa Maitha.

17. Hayanga, J. granted the orders sought. The ratio decidendi of his Ruling as it is, appears herein below:

> "In most jurisdictions particularly in Australia, Commissions and Boards of Enquiry can be guilty of contempt. In the case of CLOUGH v. LEAHY, [1905] 2 CLR 136. The question was whether Royal Commission dealt with subject of enquiry which had been adjudicated on by Arbitration Court. It was held per GRIFFITH, C.J. that if persons acting under Commissions of Enquiry were to do acts which if done by private individuals would amount to unlawful interference with the course of justice, such acts would be unlawful and punishable in the ordinary courts as contempt. I have looked at the provisions of Cap. 102 and I do not respectfully see any sections that would entitle the Commission under it to act in any way to interfere with the Courts of Justice, nor that the Commission cannot be guilty of contempt.
>
> It is clear to me that the order to produce cautionary statements in the proceedings of the Commission would be interference with the due course of the administration of justice and any acts which interferes with proceedings in a lower court or any court or in connection with criminal proceedings constitutes contempt. It is of utmost importance that Enquiry bodies need to exercise great care and caution where their enquiry proceeds parallel with litigation or trials already in court over the same facts so that they are not to open themselves for charges of interference with the course of justice.

In Australian case of EX PARTE LEAHY [1905] 2 S.R. (NSW) Court stated:-

> 'It is clear therefore that a Royal Commission taking an enquiry of this nature from a duly constituted court deprives the party summoned of a very important safeguard to which he would be entitled in the court. And further it would compel one of the parties to the dispute to disclose his case to the other side.'

I have come to the view that prerogative order should issue, the only question is can CERTIORARI issue. This is an order that issues to quash a decision that is made by a public body for either being unreasonable or for breach of fundamental rules of natural justice or where there has been a material error of law. Chesoni, C.J. in Civil Appeal No. 215 of 1992 DAVID MUGO t/a MANYATTA AUCTIONEERS –v- REPUBLIC, said quoting Lord Parker, C.J. with approval in the English case of R. v. CRIMINAL INJURIES COMPENSATION BOARD, Ex P LAIN 1967 2 QB 804:-

> 'The exact limit of the ancient remedy by way of certiorari have never been and ought not to be, specifically defined. They have varied from time to time being extended to meet changing conditions … We have reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially.'

I would grant the prayer for certiorari.

As for prohibition I would follow Court of Appeal's pronouncement in Civil Appeal No. 266 of 1996 KENYA NATIONAL EXAMINATION COUNCIL –v- REPUBLIC. The court said that Order of PROHIBITION:

> 'is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however lie to correct the course practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings, See Halsbury's Laws of England, 4th Ed. Vol.1, pg.37.'

My humble view is that to disregard the rules of fairtrial, to ignore the rules of fundamental freedom is an act that should be stopped and I grant the order.

US Chief Justice Warren in MIRANDA -v- ARIZONA, 384 US 436: 16 L ed. wnd 694 [1966] said:-

> 'We sometimes forget how long it has taken to establish the privilege against self incrimination the sources from which it came and the fervour with which it was defended, its roots go back into ancient times.'

Narrating how John Lilliburn in 1637 refused to take Star Chamber Oath which would have bound him to answer to all questions posed to him on any question he said it was against his fundamental rights to force an answer to questions concerning himself in matters criminal ... the Chief Justice said:-

> 'Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachment on individual liberty. They knew that ... illegitimate and unconstitutional practices get their footing ... by silent approaches and slight deviations from legal modes of procedure.'

It would be wrong to waive these Constitutional fundamental rights every time we find it convenient. If we get used to that it means we shall have made inroads into our Constitutional liberties and weakened its protective strength to our future peril. These courts must always resist this.".

18. Even though the cautionary statements had been tendered in the course of our investigations as set out in our Terms of Reference and had already been accepted as exhibits with no objection from Karisa Maitha or his counsel, yet, Hayanga, J. went on to make in our view, the following inappropriate order:

> "The order therefore will be that the order made by the Honourable Commission on requiring Mr. Maitha to produce his cautionary statement and to give to Police handwriting expert a specimen of his handwriting is by this order hereby commanded to be brought before this court and be and is hereby quashed.".

Secondly, he also ordered, and part of which will be very difficult to enforce, that:

> "... the Commission is further and hereby stopped or stayed from acting on the same cautionary statements and from using same handwriting experts.".

19. Our next encounter with the process of judicial review was the strategy employed to effectively paralize the work of the Judicial Commission, in preventing it from hearing a potential witness. This occurred when a witness we had summoned to appear and give

evidence before us, refused to do so. Two booklets written by this witness, Alamin Mazrui, on the tribal clashes that occurred at the coastal region of Kenya, had been produced as exhibits by those who had sponsored the writing of the booklets namely, the Kenya Human Rights Commission. When finally, he appeared before us, this witness sought to be excused from giving evidence on the grounds that compelling him to do so, would be contrary to his constitutional right of freedom of conscience. We rejected this application and held that in compliance with the audi alterem partem principle of law, those who had been adversely mentioned in his booklets, should be given the opportunity to cross-examine him, if they so wish.

20. Alamin Mazrui subsequently, applied to the High Court for leave to apply for an order of prohibition to stop us from compelling him to give evidence. In: <u>IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION AND IN THE MATTER OF THE COMMISSION OF INQUIRY ACT (CAP 102 LAWS OF KENYA) JUDICIAL COMMISSION OF INQUIRY INTO TRIBAL CLASHES IN KENYA BETWEEN PROFESSOR ALAMIN MAZRUI AND THE ATTORNEY GENERAL MISC. APPLICATION NO. 178 OF 1999</u>, Alamin Mazrui was not only, granted leave by Ang'awa, J. to apply for the order of prohibition sought by him, but also, that such leave shall act as stay preventing us from compelling him to give evidence in the manner ruled by us, until the determination of his application for the order of prohibition.

21. We do not wish to comment any further on these two Rulings except to say that they in effect, with respect to the particular issues involved, tied our hands and prevented us from fully carrying out our functions which are essentially that of an investigative nature as opposed to an administrative or judicial role. We think that there is need for these aspects of the role of a Commission of Inquiry to be looked into so as to establish clearly, the parameters of its functions.

22. Our last encounter with the legal process occurred this way. Francis Gitari who sought to give evidence before us, had prior to this, submitted two statements and an

affidavit containing the facts that would form the basis of his evidence. These three documents referred to the same issues of fact except that the affidavit, in addition, referred to an important and novel issue, namely, the recruitment and training of certain persons by named personalities, to carry out tribal clashes. Apart from this novel issue, we had heard evidence from other witnesses on the other issues of facts and so ordered on 7th May, 1999, that we would only hear Francis Gitari on the recruitment and training of people to undertake tribal clashes. On 19th May, 1999, when Francis Gitari appeared before us to give evidence, his counsel, J. Kiplenge, applied for us to review our earlier order and argued, inter alia, that Francis Gitari represented millions of tribal clash victims who should be compensated for the injuries suffered by them, and that if we would not review out previous order, then, Martin Gitari would rather give no evidence at all. In dismissing Martin Gitari's application, we made the following detailed ruling:

"JUDICIAL COMMISSION OF INQUIRY
INTO
TRIBAL CLASHES IN KENYA
RULING

On the 7th May, 1999, we ordered that the evidence to be given by Mr. Gitari should be confined to paragraph 20 of his less than candid affidavit, Exh. 177 which forms part of evidence before us, and in which he has given the names of 16 persons whom he claims were recruited to start and continue the tribal clashes that occurred in the Rift Valley.

When it comes to the hearing of evidence by us, we need not hear the evidence of each and every person who claims he has relevant evidence to give. If we are to do so, willy nilly, we would never finish this Inquiry. It is up to us to decide having regard to existing evidence that we have heard, what further evidence we should hear or consider and in this regard, we may also receive and consider statements, affidavits and reports.

We made the order of 7th May, 1999, because whilst we had received a great deal of evidence from very many persons on the causes, incidents and results of the tribal clashes in Rift Valley province and other parts of the country with which the other paragraphs of Exh.177 are concerned, paragraph 20 thereof referred for the first time, to the important issue namely, those who had been recruited and trained to cause the mayhem that came to be known as the tribal clashes.

Mr. Kiplenge appearing for Mr. Gitari and the Catholic Diocese of Nakuru has asked us to review our order so that Mr. Gitari, who he alleges represents over a million clash victims in the tribal clashes that occurred in the parts of the country already referred to, may give evidence on their behalf in connection with the compensation that should be paid to them for the injury that they suffered as the result of these tribal clashes. We must say at once that the functions of this Judicial Commission of Inquiry is not to determine what compensation should be paid to the victims of the tribal

clashes and by whom, but according to our terms of reference as an investigative body, to investigate the causes and incidents of tribal clashes and to make recommendations concerning appropriate action to be taken against those who we find to have been involved in the tribal clashes and such as would avoid future tribal clashes. Mr. Kiplenge has also with some audacity stated that if we do not review our order then Mr. Gitari would rather not give any evidence at all. Apart from the fact that this might constitute contempt of our Judicial Commission, one can not help regarding such an attitude as being one of insincerity and liable to undermine the trustworthiness of the evidence of Mr. Gitari.

Mr. Kiplenge also mischievously stated that this Judicial Commission was making secret investigations into certain actions of the Diocese of Nakuru. Whilst this Judicial Commission can make whatever investigation it thinks desirable, the truth of the matter is that when the representative of the Judicial Commission sought to investigate the contents of a video cassette submitted by the Catholic Diocese as to its relevance and importance to the work of the Judicial Commission, he met with surprising evasiveness on the part of the representatives of the Catholic Diocese that were interviewed.

The other minor submissions made by Mr. Kiplenge are not worth considering in view of their mischievous nature, which in our view are merely calculated to catch the news headlines.

In the result, Mr. Kiplenge's application is hereby dismissed.

Dated at Nairobi this 19th day of May, 1999.

A.M. AKIWUMI, J.A.
CHAIRMAN

S. E. O. BOSIRE, J.A.
VICE CHAIRMAN

S.C. ONDEYO, J.
COMMISSIONER.".

23. Being dissatisfied with this ruling J. Kiplenge, then successfully obtained leave of the High Court to institute proceedings for judicial review by way of certiorari and mandamus, not in respect of our order made on 19th May, 1999, but rather of the earlier one made on 7th May, 1999. Not unexpectedly, J. Kiplenge scandalously failed to disclose to the High Court our ruling of 19th May, 1999. The application entitled IN THE MATTER OF JUDICIAL COMMISSION OF INQUIRY ACT CAP. 102 OF THE LAWS OF KENYA AND IN THE MATTER OF JUDICIAL COMMISSION OF INQUIRY INTO THE ETHNIC CLASHES IN THE RIFT VALLEY AND OTHER PARTS OF THE REPUBLIC OF KENYA IN 1991/3 AND 1998 AND IN THE MATTER OF AN APPLICATION BY FRANCIS MARTIN KAHINDI GITAARI AND THE CATHOLIC DIOCESE OF NAKURU FOR AN ORDER OF CERTIORARI TO

BRING TO COURT AND TO QUASH THE DECISION OF THE JUDICIAL COMMISSION OF INQUIRY INTO TRIBAL CLASHES DATED 7TH DAY OF MAY, 1999 DIRECTING FRANCIS MARTIN KAHINDI GITAARI TO LIMIT HIS ORAL EVIDENCE TO ONLY ONE PARAGRAPH AND FOR AN ORDER OF MANDAMUS TO COMPEL THE SAID COMMISSION TO HEAR ORAL EVIDENCE OF FRANCIS MARTIN GITAARI RESPECT OF ALL THE PARAGRAPHS OF HIS AFFIDAVIT BETWEEN REPUBLIC ... APPLICANT VERSUS THE JUDICIAL COMMISSION OF INQUIRY ... RESPONDENT. MISC. CIVIL APPLICATION NO. 582 OF 1999, came for hearing inter partes before Aluoch J. During the hearing of the application, J. Kiplenge and M. Gathenji who was appearing for the Law Society of Kenya, argued the following grounds:

> "The order of 7th May, 1999 delivered in Eldoret limiting the evidence of the lst subject was unlawful and offends the principles and tenets of Natural Justice;
>
> The said order was made "suo moto" by the Respondent without affording the 1st subject an opportunity to be heard;
>
> The ex-parte order is discriminative and unconstitutional on the face of the record;
>
> That the respondent acted ultra vires the terms of reference particularly in refusing to hear all evidence from the 1st subject;
>
> That the Respondent cited the lack of time as a reason to shut out the evidence of 1st subject which is an irrelevant consideration;
>
> That the lst subject's evidence points a finger at the government as the real cause of the clashes and the Respondent is biased in favour of the Government;
>
> The order is meant to cover-up Government senior officers and Cabinet Ministers and politicians who instigated the clashes;
>
> The Commission ought to be independent and should not serve partisan interests.".

The points that were argued against the application included the following:

> that since the life of the Judicial Commission was soon coming to an end, and in order that the High Court might not make an unenforceable order, the appointing authority, namely, the President should have been made a party to the proceedings;
>
> that the Judicial Commission did not act in excess of its jurisdiction or contrary to the Constitution; and
>
> that the applicant was undeserving of the orders sought because of the failure to disclose important information to the High Court.".

24. In her ruling in which she dismissed the application with costs, Aluoch J, dealt briefly with some of the points raised, namely, that the Judicial Commission acted properly when it made the order of 7th May, 1999, that the recent House of Lords decision in In Re

Pinochet which applied to the administration of justice, was clearly distinguishable from the circumstances of the members of the Judicial Commission and from its essentially investigative function, and that the decision of the Judicial Commission made on 7th May, 1999, was in consonance with its mandate. The learned judge then dwelt at length on the issue whether the application was meritorious having regard to the non disclosure to the High Court of the ruling of the Judicial Commission of 19th May, 1999. After setting out this ruling in full, the learned judge concluded as follows:

> "I am faced with a situation where material facts have been concealed from the court by advocates not only for the purpose of misleading the court but also their clients who have not been given the true and correct picture of what application should be before this court, i.e. is it the one where they are seeking compensation (Review) or where they want to adduce oral evidence. I find this to be the highest degree of professional dishonesty.".

25. But before proceeding any further, it would be desirable at this stage, to sketch in general terms, the factors which shall guide us in the discharge of our functions. In this respect, the Terms of Reference of the Judicial Commission are invaluable. It is not denied that tribal turmoil in the form of tribal clashes between certain tribes took place from 1991 and continued intermittently until October, 1998. These clashes took the form of warlike activities between tribes in which sophisticated as well as primitive weapons were used. This led to the killing of, and the infliction of barbaric injuries on men, women and children; the displacement of thousands from their land and homes; the theft, slaughter and maiming of innumerable, valuable and precious livestock; the burning of thousands of rural homes; and the looting and destruction of billions of shillings worth of property.

26. There are certain aspects of the tribal clashes that cannot but make one at least, speculate about the possibility of some official connivance and political incitement of the tribal slaughter as the justification of preconceived and publicised evil consequences of

multi-party politics. These include the magnitude and well orchestrated nature of some of the tribal attacks and the relatively few connected arrests and successful prosecutions. As the Director of Intelligence was to conclude, as set out by the then Commissioner of Police, Duncan Wachira, in his letter of 1st September, 1997, to Noah Arap Too, the then Director of Criminal Investigation Department, Exhibit 202:

> "It cannot be gainsaid that the attacks against the up-country people at the Coast was premeditated and professionally executed.".

The impunity, blatant arrogance and daring nature of these attacks including the burning of nothing less than the office of a District Officer and a Police Station as well as the looting of its armoury, and the apparent deliberate ineptitude or inaction on the part of the Provincial Administration officers and members of the security forces, have their own story to tell.

27. We will now deal with a number of issues with the view to setting out the relevant landscape that was in place just before the tribal clashes that began in 1991. Prior to that, however, but which the Judicial Commission is not directly required to deal with, there had existed in some cases, from time immemorial, clashes between various tribes including traditional enemies, in the country and even within clans in a given tribe. These clashes and their causes where relevant, will be taken into account in assessing the causes, objectives and circumstances of the tribal clashes that occurred in the country from 1991 to 1998. The phrase "tribal clashes" within the context of what occurred during the period under consideration, and the political and economic development of Kenya and its advancement in modern civilization, can no longer be limited to the unsophisticated objectives of pre-colonial primitive wars between tribes.

28. In 1963, Kenya attained independence with a complicated federal constitution which locally became known as the Majimbo Constitution and which conceded a great deal of

autonomy to the regions. This state of affairs did not last long for on the first anniversary of Kenya's independence in 1964, the Majimbo Constitution was replaced by one that converted Kenya into a Republic with a central government. The same year also saw the absorption of the Kenya African Democratic Union (KADU) by its rival political party, the Kenya African National Union (KANU). The de facto one party state that this amounted to, was finally converted into a de jure one party state in 1982, when the Constitution of Kenya was appropriately amended by the introduction of a new section 2A which was as follows:

> "There shall be in Kenya only one political party, the Kenya African National Union.".

29. By 1991, Kenya had already been independent for twenty eight years. It was economically, and also because of its large European and Asian population, the most developed and modernized country in Eastern Africa, notwithstanding that for nearly twenty two years before that, it was politically a one party state and which was seen to favour the Kikuyu and then the Kalenjin. The year 1991, witnessed the inexorable struggle for, and the genesis of, a westernized democratic form of government. This led to the amendment of the Constitution of Kenya by the Constitution of Kenya (Amendment) (No.2) Act, 1991, which entered into force on 20th December, 1991, and which repealed section 2A of the Constitution. Subsequently, the Constitution was also amended by the Constitution of Kenya (Amendment) Act, 1992 which entered into force on 29th August, 1992. This Act provided inter alia, by the replacement of the then existing paragraph (f) of subsection (3) of section 5 of the Constitution, with a new paragraph (f) which is reproduced hereunder, that a successful presidential candidate should in addition to obtaining the majority of votes cast, also obtain not less than twenty five percent of the votes cast in at least five of the eight provinces in the country:

> "the candidate for President who is elected as a member of the National Assembly and who receives a greater number of valid votes cast in the presidential election than any other candidate for President and who, in addition, receives a minimum of twenty-five per cent of the valid votes cast in at least five of the eight provinces shall be declared to be elected as President;".

Because of the past, the then imminent multi-party parliamentary and presidential elections, saw the emergence of opposition political parties based on tribal allegiences. This was also exemplified by the tribal pattern of the results of the democratic

parliamentary and presidential elections held in 1992 and 1997. In this respect, and we must not deceive ourselves, the ordinary mwananchi even now, regards himself, firstly, as a member of his tribe and only secondly, as a national of the country. The onus is clearly therefore on tribal leaders not to take advantage of this dangerous and fragile situation, but rather to preach peaceful co-existence.

30. We turn now to the nature and extent of the tribal clashes; the ostensible and real causes of the clashes; the traumatic and lasting effects of the clashes; and the role of government institutions and politicians in the fostering and execution of the clashes. But before doing so, we must first determine the tribes that were involved in the clashes, and other relevant matters, such as the constitutional and political development of Kenya, the issue of land, and the role of the Provincial Administration and the Police Force, with regard to the tribal clashes.

31. The tribes that were involved in the tribal clashes according to the particular areas affected are as follows:

RIFT VALLEY

DISTRICT	AREA	TRIBES
NAKURU	Molo	Kipsigis, Ogiek -vs- Kikuyu and Kisii
	Njoro	Kipsigis, Ogiek -vs- Kikuyu
	Olenguruone	Kipsigis, Ogiek -vs- Kikuyu and Kisii
KERICHO	Londiani	Kipsigis -vs- Kikuyu, Kisii, Luo, Kamba & Luhya
	Fort Tenan	Kipsigis -vs- Kikuyu, Kisii, Luo, Kamba & Luhya

	Kipkelion	Kipsigis -vs- Kikuyu, Kisii, Luo, Kamba & Luhya
	Thessalia	Kipsigis -vs- Luo
	Kunyak	Kipsigis -vs- Luo
	Sondu	Kipsigis -vs- Luo
NAROK	Enoosupukia	Maasai -vs- Kikuyu
LAIKIPIA	Ol Moran	Samburu, Turkana & Pokot -vs- Kikuyu
NANDI	Miteitei	Nandi -vs- Kikuyu, Luhya & Kisii
	Kamasai	Nandi -vs- Luhya
	Owiro	Nandi -vs- Luo
	Songhor	Nandi -vs- Luo
UASIN GISHU	Burnt Forest	Nandi -vs- Kikuyu
	Turbo	Nandi -vs- Luhya
TRANS NZOIA	Saboti	Sabaot -vs- Bukusu
		Pokot -vs- Luhya
TRANS MARA	Nyangusu	Kisii -vs- Maasai

NYANZA PROVINCE

DISTRICT	AREA	TRIBES
KISUMU	Sondu	Kipsigis -vs- Luo
KISII	Ochodororo	Kisii -vs- Luo
	Nyangusu	Kisii -vs- Maasai

WESTERN PROVINCE

DISTRICT	AREA	TRIBES
BUNGOMA	Mt. Elgon	Sabaot -vs- Bukusu & Teso

COAST PROVINCE

DISTRICT	AREA	TRIBES/CLANS
MOMBASA	Likoni	Digo -vs- Luo, Kikuyu & other upcountry people
	Matuga	Digo -vs- Luo, Kikuyu & other upcountry people
TANA RIVER	Bangale	Dgodia -vs- Orma
	Garsen	Orma -vs- Galjael
	Hola-Garsen	Wardey -vs- Pokomo
	Saka	Ogaden -vs- Munyoyaya
	Nanighi	Degodia -vs- Orma
	Boka	Degodia -vs- Ogaden

NORTH EASTERN PROVINCE

DISTRICT	AREA	TRIBES/CLANS
GARISSA	Benane	Ogaden -vs- Borana
	Saka	Ogaden -vs- Munyoyaya
	Masalani	Ogaden -vs- Pokomo
WAJIR	Griftu	Degodia -vs- Ajuran
	Hadado	Degodia -vs- Ajuran
	Bute	Degodia -vs- Ajuran
	Bute	Ajuran -vs- Garre
	Habaswein	Degodia -vs- Ogaden

MANDERA	Bagalla	Degodia -vs- Borana & Gabra
	Kotulo	Garre -vs- Degodia
	Korofa Harer	Garre -vs- Degodia
	Mansa	Garre -vs- Degodia

EASTERN PROVINCE

DISTRICT	AREA	TRIBES/CLANS
ISIOLO	Garbatulla	Borana -vs- Degodia
	Benane	Borana -vs- Ogaden
MOYALE	Budhudha	Borana -vs- Degodia
	Moyale Town	Borana -vs- Degodia
MARSABIT	Archers Post	Borana -vs- Degodia

N.B. The Kipsigis, Ogiek, Nandi and Sabaot are all sub tribes of the Kalenjin tribe; the Bukusu are a sub tribe of the Luhya tribe; the Digo a sub tribe of the Mijikenda tribe; and the Ogaden, Degodia, Ajuran are clans of the Somali tribe.

32. One of the problems that befell the first independent African government was the existing deep rooted tribalism which was there because of the lack of contact between the various tribes promoted in the colonial days. In spite of various attempts to eradicate this fundamental problem, it has continued up to today to hamper the consolidation of Kenya into a united nation and adversely affects the political life of the country. Indeed, the brutal expulsion that seemed to be an important objective of the tribal clashes, supports the conclusion that what occurred can also be described with some justification, as ethnic cleansing.

33. Also inherited from the colonial era, is the system of governance known as the Provincial Administration which had power, authority and influence. This, largely

remains the order of things to date. As a Department in the Office of the President, the Provincial Administration is heavily relied upon for the general control and implementation of Government policies. In addition, the Provincial Administration took over certain important responsibilities of the political party KANU such as the recruitment and registration of its members, the organization of KANU elections, the collection and custody of KANU funds and the issue of permits for public meetings. What is more, District Commissioners conducted all general elections from 1963 until the 1992 multi-party elections, when they relinquished these responsibilities to the Electoral Commission of Kenya. The Provincial Administration has remained ubiquitous in various activities in the country while maintaining a prominent position. Some of the reasons for this are that the Provincial Administration is one of the oldest institutions in the country with entrenched practices and traditions. It consists of a network of officers at all levels with its own distinctive hierachy. Today, there is a total of eight Provincial Commissioners, sixty eight District Commissioners, six hundred and four District Officers, two thousand one hundred and ninety Chiefs and six thousand and twenty nine Assistant Chiefs country wide. These administration officers are also well placed to provide effective co-ordination of economic and development activities nation wide. Various Acts of Parliament make the District Commissioner in a given District, the Chairman of over fifty statutory boards and administrative committees such as, the District Education Board, the District Tender Board, the District Development Committee, the District Agricultural Committee and the District Land Allocation Committee. The District Commissioner or any other administration officer is in effect, the chief Government executive officer and invariably, carries the greatest responsibility and accountability in the eyes of the Government and the public at large.

34. As the Government's principal public relations officers, an important feature of the day-to-day functions of the provincial administration officers, is the holding of barazas. Through this age-old forum of communication with the public, akin to a round table conference, Government makes known its intentions and seeks to enlist support from the public. It also enables the public to register their views and reactions, including those affecting simmering problems and conflicts within and between communities. But the

ineffectiveness of barazas in time of inter tribal wars, was demonstrated during the tribal clashes. In some cases, members of rival tribes would obediently attend barazas at which peaceful co-existence would be demanded by provincial administration officers, only to go back and continue their tribal clashes as if nothing had happened. Moreover, with time, more and more Kenyans had begun to feel free and not easily intimidated.

35. The role of the Provincial Administration with regard to the internal security is of paramount importance. The Provincial Commissioners are the Chairmen of the Provincial Security Committees and the Provincial Intelligence Committees. At the District level, the District Commissioners are the Chairmen of the District Security Committees and the District Intelligence Committees. The other members of these Committees at the Provincial and District levels are respectively, the provincial heads of the various departments of the Police Force, and the district heads of similar institutions. Sub-District Security Committees chaired by District Officers and also similarly composed, exist at the Divisional level. Representatives of the Army may be co-opted as members of these security committees. The Provincial Administration thus, clearly occupies a position of considerable power indeed, as the political agent of the Executive. Even though the role of the Provincial Administration and that of the Police Force may as far as security matters are concerned, be said to be complementary, the dominance of the former over the latter is the real state of affairs. As recently as June, 1999, and as reported in the KENYA TIMES, THURSDAY, JUNE 24, 1999, the:

> "North Eastern Provincial Commissioner, Mr. Maurice Makhanu, has ordered the provincial police boss Mr. Jeremiah Matagaro to institute an immediate investigations into allegations of police brutality in the area following a peaceful demonstration to the effect in Garissa town by the residents.
>
> The PC made the order when he addressed over 1,000 secondary school students who staged a protest march to the provincial administration headquarters and instructed the PPO to investigate the alleged torture of a school teacher, Mr. Yakub Faraah Hassan by police officers who were on night patrol.".

Provincial administration officers would in joint armed security operations, give orders to police officers which were obeyed without any hesitation. From the practical point of view, it must also be noted that throughout the country, there are fewer police stations than administration police posts at Chiefs' or District Officers' centres.

36. It can be seen from the foregoing that the Provincial Administration did not only, constitute a highly centralized and important institution of Government, having ascendancy over other agencies of the Executive, but is also, the political agent of the Executive. This position is best summarised by President Jomo Kenyatta in his closing speech at the meeting of the Ministers and high officials of the ruling KANU party which was also attended by the then seven Provincial Commissioners, four Deputy Provincial Commissioners and forty one District Commissioners, held at Nakuru on 27th July, 1968. Referring to the historial significance of that meeting, President Kenyatta said:

> "This is how we should co-operate in nation building. I am convinced that no ruling party can effectively exist without the Administration.".[2]_/

It would not therefore, be surprising that after its long role as the political agent of the Executive, that the officers of the Provincial Administration would in the early years of multi-party politics still regard it as their duty to sustain the continued ascendancy of the political party in power under which they had thrived, rather than a new opposition party. Such an attitude which is not entirely unexpected, led, as was the case in certain instances, to provincial administration officers without even receiving any directions from the Executive, taking such actions including turning a blind eye on reprehensive acts of KANU leaders and the pursuance of such strategies as they thought would benefit KANU.

37. Without wishing to play down its lack of personnel and facilities, the Police Force including its Special Branch were also not above adopting such an attitude and behaviour. In some cases, the seriousness of the situation was played down, and there was a reluctance to carry out investigations that might adversely affect itself, or leading Government and KANU supporters.

38. The following examples are sufficient at this stage, to illustrate the high-handed and uncomplimentary actions of some members of the Provincial Administration and the Police Force during the tribal clashes:

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[2] _/ Daily Nation, Monday, July, 29, 1968, p4.

(a) In 1989, in the days of one party politics, members of the Kuria tribe allegedly, originating from Tanzania, were accused to have illegally settled on Maasai land in Kilgoris in the Trans Mara District of the Rift Valley Province. A meeting of Elders comprising mostly of government officials including members of the Provincial Administration and KANU functionaries and chaired by the then Provincial Commissioner, Mohamed Yusuf Haji, who is now a nominated MP and an Assistant Minister in the Office of the President, was held on 9th January, 1989, to consider this problem. This meeting according to its minutes, Exhibit 140, decided that these illegal settlers should be given two weeks to vacate the land occupied by them. Yusuf Haji, who gave evidence before the Judicial Commission, testified that the illegal squatters were informed of this decision at a baraza, and that after they had refused to vacate the land, he ordered their forceful eviction by armed Administration and regular policemen. He said that the Maasai had threatened that they would drive out the Kuria tribesmen "with spears". In such circumstances, and he said this without any contrition, that the action that he took, was the right one, no matter whether it was against the law of the land or not. This illustrates the ethic which the Provincial Administration had over the years adopted; one that makes particularly its senior officials, feel that they are above the law and can flout the law with impunity.

(b) During the period covered by the tribal clashes, this ethic was also displayed by Timothy Sirma, the then Kericho District Commissioner, who gave notice , when he had no right whatsoever, to do so, to Luo squatters, who as a Co-operative and as required to do, had paid to the very Kericho District Treasury, money to purchase the Thessalia Farm in Kericho District which they were occupying. At this time, which was about the middle of 1993, there is evidence that some Kipsigis who lived nearby, wanted Thessalia Farm because it was located in what they claimed to be their ancestral land. Timothy Sirma, like these Kipsigis, is a Kalenjin. His action in giving the Luo squatters notice to quit, to us, was clearly suspect. He was succeeded as District Commissioner of Kericho District, by another Kalenjin, Nicholas Mberia, who not only, deliberately refused to accept the clear indisputable state of affairs, but also, flouted the law and illegally ordered that the "Luo squatters" be evicted from Thessalia Farm by armed policemen. This was accomplished by two bulldozers

which razed the houses of the "Luo squatters" to the ground whilst the armed policemen stood guard to ensure that the unlawful and brutal eviction was successfully carried out. Incidents like this only encouraged other Kipsigis to lay violent claim to other nearby farms occupied by Luo.

39. On the other hand, there have been cases such as in the Coast Province, where a Chief and Assistant Chiefs who were of the same tribe as the major ty indeginous inhabitants, connived with them in the preparation and perpetration of tribal clashes. Ironically, instead of being punished, they have been retained in the provincial administration service as it were, for a job well done. This regretable incident occurred after Omar Hussein Gari, Chief of Ngobeni Location in Kwale District, Athuman Zuberi Mwakunyapa, Assistant Chief of Pungu Sub-Location, Ramadhani Mwalimu Mwaonu, Assistant Chief of Kiteje Sub-Location and Nyaume Mohamed, Assistant Chief of Ngombeni Sub-Location, all in Ngombeni Location, had been interdicted by their then District Commissioner, David Jakaiti, for keeping to themselves vital information they had, and which led to tribal clashes in the Coast Province, that Digo youths had taken an illegal oath and were receiving military training to attack the Likoni Police Station. This attack took place with devastating results. Inspite of their feeble letters seeking reinstatement, Exhibits 65 (A), 65 (B), 65 (C) and 65 (D), and inspite of the serious implications of the actions of these subordinate provincial administration officers in the catastrophic attacks mounted by their fellow Digos, they were scandalously reinstated for no good reason by the Coast Province Provincial Commissioner, Samuel Kipchumba Limo. His only lame and unacceptable excuse for doing this, was to reconcile the Digos. In other words, to condone what these subordinate provincial administration officers had done. We were most unimpressed by the reason he gave us for behaving like that. Wilfred Kiptum Kimalat, the Permanent Secretary of the Ministry of Education and the former Permanent Secretary in charge of Provincial Administration and Internal Security, when giving evidence before the Judicial Commission, expressed the same opinion though somewhat mildly, that having regard to all the surrounding circumstances, Kipchumba Limo should not have reinstated these subordinate provincial administration

officers. In our view, Kipchumba Limo's action is a disgrace to the Provincial Administration and he should be disciplined for this.

40. Cases where proper corrective actions were taken, but which nonetheless, illustrate the partisan role played by members of the Provincial Administration, also occurred in the tribal clashes along the border between the Trans Mara and Gucha Districts. A Criminal Intelligence Report on the tribal clashes in the Trans Mara and Gucha Districts, and made by Senior Assistant Commissioner of Police, John Namai, Exhibit 204, contained, inter alia, allegations of criminal acts against certain politicians in connection with the tribal clashes; that Chiefs and Assistant Chiefs in the affected areas were partisan; and also that the District Security Intelligence Officers did not pass on relevant information obtained by them to their collegues on the District Security Committees. This Criminal Intelligence Report was submitted by John Namai to his superior Noah Arap Too, the then Director of Criminal Investigation, and who in turn, passed it on to Duncan Wachira, the then Commissioner of Police as shown in Exhibit 205, with the following unhelpful comment:

> "This report is for your information and any necessary action you may consider necessary taking."

41. Adopting the same lukewarm attitude and avoiding to take any steps with respect to investigating the allegations made against the politicians, Duncan Wachira in his letter of 12th January, 1998, to Fares Kuindwa, Permanent Secretary, Secretary to the Cabinet and Head of Public Service, Exhibit 206, stated:

> "… Though the report is long, I would appreciate if you could study it and please take necessary administrative action to direct appropriate administrative and political action so as to harmonise the close co-operation and co-existence of the tribes living in this area …
>
> I have these observations and recommendations to make:
>
> (a) the two DSC in Transmara/Gucha should be changed and fresh officers posted to those two districts. There are glaring indications of indifferences and partiality on members of the DSC during the election period particularly as is seen in Transmara. Due to this fact, I had changed the OCPD of the area.

(b) Political goodwill by the local politicians is very important so as to restore peoples confidence and reassurance.
(c) Security officers working in this area and who come from the same communities fighting should be transferred out of the two districts.
(d) The Chiefs and their assistants should be restrained from fuelling tribal animosity.
(e) The issue of land in this area is very sensitive and the government should address itself to this issue and issue the necessary instructions.".

42. Fares Kuindwa did not tell Duncan Wachira to investigate the allegations of criminal acts made against the politicians, which would seem to be a matter within the province of Duncan Wachira. On his part, however, all that Fares Kuindwa did, and which was insufficient, was merely to concur with the change of the membership of the District Security Committees and the admonishment of the Chiefs and Assistant Chiefs.

43. About six weeks before the attack on the Likoni Police Station which took place on 13th August, 1997, the Provincial Security Intelligence Officer of the Coast Province, Shukri Baramadi, sent to his Director of Intelligence retired army Brigadier, Wilson Boinett, a letter dated 25th June, 1997, and headed: CRIMINAL ACTIVITIES OF POSSIBLE SECURITY SIGNIFICANCE/ALLEGED PLANS BY YOUTHS TO PERPETRATE POLITICAL THUGGERY/KWALE. In this letter which forms part of Exhibit 89, Shukri Baramadi passed on the information that he had received, that some youths from Kwale and Likoni who did not support KANU, were taking illegal oaths that would bind them "to cause civil disobedience and other acts of lawlessness during the election period". In furtherance of this purpose, about seven thousand seven hundred and sixty three men including some eight hundred servicemen and ex-servicemen were to be recruited. Shukri Baramadi went to say that the youths already had two rifles and a pistol which had been stolen from policemen attached to Likoni Police Station. He ended by saying that the matter was being investigated by the relevant District Security Committee. On the same day he sent letters to the District Security Intelligence officers in Kwale,

Mombasa and Kilifi to carry out necessary investigations into the matter he had raised in his letter to the Director of Intelligence.

44. The next letter that Shukri Baramadi wrote to Wilson Boinett which also forms part of Exhibit 89, is dated 28th July, 1997, which is some sixteen days before the attack on the Likoni Police Station. In this letter which now has the following different heading MATTERS OF MORALE WITHIN THE KENYA POLICE/O.C.S. LIKONI POLICE STATION ACCUSED OF BEING COMPROMISED BY A POLITICIAN/ MOMBASA, Shukri Baramadi diverted attention from the main subject of his letter of 25th June, 1997. He now dealt only with the conduct of the Inspector in charge of Likoni Police Station, Peter Kariuki who, it was alleged, having been influenced by Suleiman Rashid Shakombo a KANU parliamentary aspirant, released the latter's supporters who might be in police custody, and arrested those who did not support him on trumped up charges.

45. In our view, this deliberately diversionary tactics on the part of Shukri Baramadi, was intended to give the Directorate of Intelligence which until 1999, was a department of the Police Force, and since then replaced by the independent Directorate of Security Intelligence, the excuse when cornered of saying that it did not get a realistic and proper account of the situation. This is supported by the fact that according to the Special Branch Information Report, Exhibit 42 (F), which was received by Shukri Baramadi, many Mijikenda youths which included some ex-servicemen and unemployed persons, had taken an oath for the purpose of Majimboism, to violently evict from the Coast, the upcountry people. The Special Branch Handler's comment on this report which was highly rated as B/3, was significantly, as follows:

> "A similar report was submitted that the MIJIKENDA youths were taking oaths. The youths are claiming regional Government and are prepared to start clashes any time. However, the allegation is still being investigated and a full report will be submitted."

The COMMENTS AND ACTION of the Handler's senior officer who happened to be none other than Peter Wilson, the District Security Intelligence Officer, Mombasa, and which is dated 12th August, 1997, is also worth setting out:

"A similar report had been received here from a different source confirming that chances are high that oathing is secretly being conducted. Investigations are underway.".

46. It is in the light of the foregoing circumstances that we have come to the conclusion that not only, Peter Wilson, but also, Shukri Baramadi who must have known that tribal clashes were about to erupt at the Coast Province at anytime, deliberately diverted attention from them and played down the issue. In this respect, we have also taken into account, as testified by Wilson Boinett, that Shukri Baramadi as well as the other Provincial Security Intelligence Officers in the country and he himself, had in 1996, because of tribal clashes that occurred in 1991/1992 and the imminent general elections in 1997, prepared a threat assessment report FLASH-POINTS FOR VIOLENCE 1997 GENERAL ELCTIONS, Exhibit 30, which is dated 3rd September, 1996, and distributed to the following: The Head of the Public Service, the Permanent Secretary Provincial Administration and Internal Security, the Chief of General Staff, Department of Defence, the Commissioner of Police, the Permanent Secretary, Ministry of Foreign Affairs and International Co-operation, and the Director of Intelligence.

47. District Security Intelligence Officer, David Kipkorir Siele, was stationed in Nakuru in January 1998. On 23rd January, 1998, Kipkorir Siele received a letter from Kihika Kimani, the opposition Democratic Party of Kenya (DP) MP during the aftermarth of the emotional multi-party parliamentary and presidential elections held in December, 1997. In this letter, Kihika Kimani warned of the imminent attack by the Kalenjin who supported the ruling political party KANU, to drive out from the Nakuru and nearby Districts, the Kikuyus living there and who had supported DP in the parliamentary and presidential elections. In this letter, Kihika Kimani also informed Kipkorir Siele that the Kikuyus would defend themselves against Kalenjin aggression. Although Kipkorir Siele was aware of the contents of Kihika Kimani's letter, he did not bring it to the attention of the District Security Committee of which he was a member, and which met on 23rd January, 1998, or thereafter. The security situation of the District as described in Min

6/98 of the minutes of the meeting of the District Security Committee, Exhibit 22, was therefore, not unexpectedly, misleadingly, described as "still satisfactory".

48. The next day, 24th January, 1998, Kihika Kimani and Kipkorir Siele met. The former briefed the latter fully on the contents of his letter. In spite of the obvious looming tragedy and without bothering to inform the other members of the District Security Committee about Kihika Kimani's letter and his meeting with him, Kipkorir Siele, even though his immediate boss was away, thought it fit to sneak out that evening and in the given circumstances, on the very lame excuse that he had gone to see his mother. What he did as a cover up, was to send on 24th January, 1998, a facsimile, Exhibit 37, a report on possible tribal clashes in Nakuru District, to the Headquarters of the Directorate of Intelligence in Nairobi. In his final "Comment" in this facsimile, he played down the seriousness of the situation. He also did not make any mention of his meeting with Kihika Kimani who had warned him of the impending clashes. We find this most suspicious. Wilfred Kimalat, the Permanent Secretary of the Ministry of Education, and the former Permanent Secretary, Provincial Administration and Internal Security, expressed the same view in the course of his evidence before the Judicial Commission.

49. Kipkorir Siele's deliberate act of deception was also repeated in his first statement of 12th February, 1998, to the police, and contained in Exhibit 13 (E), where he made no mention whatsoever, of Kihika Kimani's letter or his meeting with him. It was only three days later, and after he had been pressed by police investigators, that he disclosed this in his further statement of 15th February, 1998, which is also contained in Exhibit 13 (E).

50. Anyway, the very next evening of 25th January, 1998, whilst Kipkorir Siele was still away, the Kalenjin struck. But Kipkorir Siele miraculously, appeared at the scene the next morning and indeed, tried to pursuade the police officers who had been there earlier and who had arrested some Kalenjin caught red handed, burning Kikuyu houses, to let one of them go. Kipkorir Siele is a Kalenjin and these irresponsible and suspicious actions on his part, support the view that he well knew what was going to happen and

thought it wise to be away when the attack began, but to be present during the course of it, so as to be able to co-ordinate and keep an eye on what was happening.

51. Wilson Boinett is now since 19th January, 1999, the Director General of the new National Intelligence and Security Service, the independent status of which may well make things worse in the future. However, with refreshing candidness which had not been displayed by many of the officers of the Provincial Administration and the Police Force in their evidence before us, he agreed with us that Kipkorir Siele's Facsimile, Exhibit 37, his disappearance from Nakuru on the night of 24th January, 1998, his first statement to the police, as contained in Exhibit 13 (E), and his subsequent actions, showed firstly, that Kipkorir Siele's facsimile and first statement not only, lacked candidness but also, deliberately played down the real state of affairs so as to make his disappearance from Nakuru appear not to be irresponsible, and secondly, that he might have connived at the tribal clashes. When his attention was drawn to the fact that this had not prevented Kipkorir Siele from being promoted, Wilson Boinett pleasantly surprised us all by his honest comment that this is the sort of thing that happens in a third world African country like Kenya. But true to his profession as a spy, Wilson Boinett was only selectively frank. For instance, he refrained from telling the whole truth namely, that at the relevant time, senior Special Branch officers like Kipkorir Siele, were promoted by the Public Service Commission upon his recommendation. Duncan Wachira who, as Commissioner of Police, was at the time, Kipkorir Siele's overall superior, told us that he would have disciplined Kipkorir Siele if he had been directly under him.

52. Another interesting aspect of this matter relates to the investigation and Report of the cause of the clashes in Molo which was undertaken by a team of police officers led by then the Deputy Commissioner of Police, Philemon Abongo. He stressed in his evidence before us how it was impossible to obtain any statement or information from the Nakuru Provincial Security Intelligence Officer, Petkay Shen Miriti, who was then, Kipkorir Siele's immediate senior officer. In his Report to the then Commissioner of Police, Exhibit 13, and inspite of having expressed the view to the Judicial Commission that

Kipkorir Siele should have brought to the attention of the meeting of the District Security Committee held on 23rd January, 1998, the contents of Kihika Kimani's letter, Philemon Abongo did not castigate Kipkorir Siele who at that time, even though he belonged to the Police Special Branch, was like any other member of that service, subject to the Police Act and under the direction of the Commissioner of Police.

53. This sacred-cow syndrome also seems to have played a role in the Report on Ethnic Clashes in Coast Province and the surrounding Areas, Exhibit 8, of Peter Mbuvi, the Deputy Director of the Criminal Investigation Department, which had been commissioned by the then Director of the Criminal Investigation Department, Noah Arap Too. There was ample evidence that Chief Inspector Omar Raisi of the Police Special Branch and a Digo, had prior information of the taking of illegal oaths of commitment and secrecy by, and the military training of, Digo youths among other things, to attack nothing other than the Likoni Police Station. This information he passed on to his superiors in the Special Branch namely, Peter Wilson and Shukri Baramadi which these senior Security Intelligence Officers never passed on to their colleagues on the Provincial and District Security Committees. Indeed, there was information that Omar Raisi had been seen near the Likoni Police Station shortly before it was attacked. When finally, and after showing a lot of reluctance, Omar Raisi gave a self recorded statement to Edwin Nyaseda, Senior Assistant Commissioner of Police, who was assisting Peter Mbuvi in his investigations, and which is to be found at page 34 of Peter Mbuvi's Report, Exhibit 8, Omar Raisi produced a deliberately shallow and misleading statement which if any thing at all, to our minds, showed not only, that he was concealing important information but also, that he must have condoned or taken part in the outrageous attack on the Likoni Police Station in which, according to Peter Mbuvi's Report, six policemen were killed, twelve policemen injured, over forty firearms and one thousand four hundred rounds of ammunition stolen from the Likoni Police Station and several buildings including the Police Station, burnt. Yet, in his light weight Report, whether provisional as Peter Mbuvi called it, or not, he did not dare point an accusing finger at Omar Raisi or any of his superiors who like him, were all, now, not suprisingly, subsequently rewarded with promotions. All that he dared to recommend was that:

"Once any criminal intelligence report is received by any law enforcement agency the same should be shared, coordinated and acted upon promptly and appropriately.".

54. Duncan Wachira condemned what can be described as the conspiracy of silence on the part of the Special Branch officers. He recalled that Omar Raisi had to be compelled to even make his unhelpful and uncandid statement contained in Peter Mbuvi`s Report. Duncan Wachira also said that having read Shukri Baramadi`s letters of 25th June, and 28th July, 1997, to Wilson Boinett and contained in Exhibit 89, on the recruitment of over seven thousand Digo youths for military training and the alleged embarrassing behaviour of the former Inspector in Charge of the Likoni Police Station, Peter Kariuki, he thought that his attention should have been drawn to the contents of those letters by Wilson Boinett. This conspiracy of silence on the part of the Special Branch officers together with the apparent reluctance to investigate and criticise the actions of Special Branch officers, undermined the work of those members of the law enforcement agencies who had no hidden agenda, and who were prepared to do an honest day`s work.

55. The fact that the Special Branch officers kept the information that they had from their colleagues in the other branches of the Police Force and the Provincial Administration, did not necessarily mean that these colleagues did not also have prior knowledge of some of the tribal clashes that took place. On 28th October, 1991, one day before the first of the tribal clashes in the country that occurred between the Nandi and the Kisii at Miteitei farm in the Nandi District, it had become glaring not only, to the Chief Inspector of Police, then of Songhor Police Station, Julius Ndegwa, but also, to the District Officer I, then of Nandi District, Christopher Shitsimi Mwashi, that there was bound to be a terrible commotion between what was disingineously thought to be merely rival share holders in Miteitei Farmers Co. Ltd. The attack on the Kisii and the burning of their houses by their Nandi neighbours in Miteitei farm, which began in the evening of 29th October, 1991, and during which two hundred and fifty houses nearly all of them belonging to the Kisii, were set on fire by the Nandis, two hundred and fifty Kisii grain stores destroyed by the Nandis, and a shop owned by a Kisii also destroyed by the Nandis all within three days, showed that this was nothing of the sort.

56. On 28th October, 1991, Christopher Mwashi and Julius Ndegwa had gone to the Miteitei Trading Centre to settle a long simmering dispute, which had been there for over eleven years without any violence erupting, between two rival groups of share holders in Miteitei Farmers Co. Ltd. which owned the Miteitei farm. This time, however, Christopher Mwashi and Julius Ndegwa knew that violence was most likely to flare up. The latter was accompanied by twelve policemen eight of whom, were armed. They also had with them tear gas canisters. Christopher Mwashi was also accompanied by a good number of armed administration policemen. When it became obvious that the meeting would degenerate into chaotic violence, Mwashi cowardly and hurriedly made his exit together with the District Officer as if he knew what was going to happen, and did not want to be part of it. Julius Ndegwa was left behind to deal with the situation. The view that he expressed about this to us, quite rightly, was that he would not have left if he were the District Officer 1. Later that evening, Julius Ndegwa left to go back to his station. He left behind six of his men. Nothing happened that night. The early evening of 29th October, 1991, however, saw in this heavily populated farm, the houses of the Kisii being burnt. The obvious reason for this, being to chase the Kisii out of Miteitei farm. Julius Ndegwa who had arrived with about thirteen men, together with those he had left behind at the Miteitei Trading Centre could not do much to stop the burning of the Kisii houses. They fired in the air, a strategy which the police were to employ in many other incidents of tribal clashes but which proved not only, useless but which also, indeed, at times, seemed deliberately calculated to assist those burning houses during the tribal clashes. In this instance, this strategy only succeeded in enabling the Nandi arsonists to run away and to return during the night of 30th October, 1991, to burn more Kisii houses. This was in spite of the fact that by then, Julius Ndegwa had received reinforcement of seventy men.

57. This trade mark police intervention was condemned by Duncan Wachira who testified and we agree with him, that the police on such occasions, such as during the violent acts of tribal clashes, should have shot to disable, but which they had obviously, been ordered not to do. It is not surprising that the firing into the air by the police was also ridiculed by those intended to be frightened by it who, well aware that they would not be targeted,

would simply move away and mount another attack elsewhere. This tactics was successfully employed in such tribal clashes as those between the Kikuyu and the Kipsigis at Londiani and between the Luo and the Kisii along the Migori and the South Kisii border. In the latter clashes, as Michael Morris Ayieko, the Assistant Chief of Kanyimach Sub Location in Migori District, was candid enough to tell us, and we have no reason to disbelieve him, the frustrated armed policemen simply left the Luo and the Kisii combatants who were only armed with unsophisticated weapons, saying that they would return when the Luo and the Kisii had finished each other. Across the valley from Roshanali Karmari Pradhan's farm which is 10 km from the Likoni Ferry and where the Digo youths had received military training, the dreaded General Service Unit had a few days after the Likoni Police Station raid, seen the raiding armed Digo youths. The General Service Unit men went to their Commander for permission to attack. According to Karmari Pradham, the Commander refused permission saying that a helicopter which was on its way, should be allowed to track the raiders to their camp. For what! Senior Chief Francis Ayieko Okechi of Getenga Location in Gucha District, was also frank enough to admit that the problem which Chiefs and Assistant Chiefs faced at the grassroots level was that if they arrested or squealed on their own fellow tribesmen, in respect of matters connected with the tribal clashes or the tribal clashes themselves, they would be regarded as traitors, which stigma they were not ready to risk.

58. The lenient attitude of the security organs described above and which contributed to the effrontery of the attackers and to the length of the incidences of the tribal clashes which could have been easily curtailed if the security organs really wanted to do so, is also in sharp contrast to the well known no nonsense attitude of the Flying Squad in the fight against robbery which in all respect, is a lesser crime than the nationwide tremendous destruction of millions and millions worth of property, cold blooded murder, brutal tribal cleansing, callous displacement of persons and the indescribable trauma involved in the tribal clashes. Indeed, if only the security organs had at the beginning of their operations employed any thing near the drastic counter actions of the Flying Squad, we are sure that the initial tribal clashes would have been brought to a speedy conclusion and those contemplating further tribal clashes would have been discouraged from

indulging in it as nonchalantly as they did. In the result, the culture of political violence in the country led to a cycle of violence from one tribal clash to another with frightful and uncanny similarities in the kind of violence, brutality and destruction perpetrated and the guerilla-type pattern of attacks, movements and operations, in an atmosphere of apparent complacency and complicity of the Provincial Administration and security forces, and which all seem to suggest a well orchestrated strategy in the conception and implementation of the tribal clashes.

59. Another example where the police had prior knowledge of an attack but failed to take steps to foil it, was the daring attack on the Likoni Police Station. Karmari Pradham had written two letters dated 4th August, 1997, and 27th August, 1997, and contained in Exhibit 8, to the Senior Police Officers in Mombasa informing them of the taking of illegal oaths and the training of Digo youths in his farm. Yet no action was taken. It is no wonder that on 17th August, 1997, while the Commissioner of Police was in Mombasa after the attack on the Likoni Police Station, and had sought to know from the members of the Provincial Security Committee, composed of the Acting Provincial Commissioner, Hassan Mohamed Haji, the Provincial Security Intelligence Officer, Shukri Baramadi, the Provincial Criminal Investigation Officer, John Namai, and the Provincial Police Officer, Francis Gichuki, why nothing had been done to foil the attack, these officers, according to the evidence of Edwin Nyaseda which we accept, "looked down in shame".

60. But Duncan Wachira, had as far back as September, 1996, received a copy, Wilson Boinett's Report on FLASH-POINTS FOR VIOLENCE 1997 GENERAL ELECTIONS, Exhibit 30, which in respect of Mombasa, had warned of possible violence, inter alia, between the "upcountry vs. Coastal residents", and called for the "strenthening of … especially the security organs, which will be the sole authority to take measures on the looming crisis". Duncan Wachira did not seem to have taken any appropriate measures as a result of this Report. Instead, he seemed to have been more concerned about providing cover for some people that might be affected by the investigation into the clashes that occurred at the Coast Province. He had instructed the then Provincial Criminal Investigation Officer, John Namai, and we accept this, to make sure that

Emmanuel Karisa Maitha at the time, a KANU activist, and who had been charged before the Mombasa Chief Magistrate, Aggrey Muchelule, with offences relating to the tribal clashes at the Coast Province, was released on bail. This had forced John Namai contrary to his wishes, to privately and unsuccessfully, ask the Chief Magistrate to release Karisa Maitha on bail. Another tell tail evidence was adduced when in the cross examination of John Namai, a report made by Edwin Nyaseda to Duncan Wachira, Exhibit 82, was produked. In this report, the guidance of Duncan Wachira was sought concerning the production of confessions in court of persons involved in the tribal clashes at the Coast Province such as Karisa Maitha and Al-Haji Mohamed Omar Masumbuko, which would also implicate important government personalities. In our view, Edwin Nyaseda would not have sought such guidance if Duncan Wachira had not intimated such a procedure to him.

61. Another instance where the police showed a reluctance to investigate matters where important government personalities had been mentioned, occurred, not unconnected with the abortive private prosecution against Ntimama for instigating the tribal clashes in the Rift Valley. This private prosecution (No. 13/95) was instituted by Mbuthi Gathenji, an Advocate of the High Court of Kenya and subsequently discontinued when the Attorney General as he may do, entered a nolle prosequi. Shortly after the institution of this private prosecution, the police, in a manner reminiscent of the inhuman practices of the notorious KGB of the Soviet Union, raided the house of Mbuthi Gathenji between 1 a.m. and 2 a.m. on the night of 17th October, 1995, where they conducted a search for seditious documents. Upon finding nothing there, the police proceeded to Mbuthi Gathenji's office where he produced to them some copies of written confession statements allegedly made by some members of the army and two police officers to the effect that certain cabinet ministers and other persons, had recruited and had them trained to commence and continue the tribal clashes. That same night, Mbuthi Gathenji was arrested and kept in police custody for five days when, without any further investigation and clearly then unsupported by any evidence whatsoever, he was taken to court and charged with twenty four counts of the offence relating to alarming publications.

62. The shameful police action already described, was headed this time, by none other than John Namai, who in the course of his investigations, did not even dare interrogate those adversely mentioned in the confession statements, obtained by him during the search of Mbuthi Gathenji's office. What he did on 8th November, 1995, nearly a month after Gathenji had been arrested and charged, and to ensure that their case against Gathenji would succeed, was to ask his superior, Noah Arap Too in his report to him, Exhibit 185, to obtain permission for him to interrogate the "leading and key personalities in the country" adversley named in the confession statements. Incidentally, John Namai well knew that only about half of them were such personalities. We were impressed by Noah Arap Too's comment that what he was required to do, was not to seek permission for the "leading and key personalities in the country" to be interrogated by John Namai but rather for him to determine whether he himself, should interrogate these personalities. In the event, of course, he interrogated no one. When the criminal proceedings against Mbuthi Gathenji were brought to the attention of the Attorney General, he had no difficulty in entering a nolle prosequi and thus terminating them. However, the obvious sinister intention of the police to teach Mbuthi Gathenji a lesson, he would never forget, had been achieved.

63. It is under these circumstances that we note with regret from the evidence adduced before us, that the Director of Public Prosecutions, Bernard Chunga had, even though there was not an iota of evidence to support them, given his blessing to the charges brought by the police against Mbuthi Gathenji. With respect to the alleged confession statements of soldiers obtained by the police during their search of Mbuthi Gathenji's office, Exhibits 198 (A) – 198 (X), the police merely contented themselves with the rejection by a records officer in the Department of Defence that there were no soldiers with the identical service number, names, rank and attachment particulars as given as belonging to each of those supposed to have made the confession statements. We are satisfied that even though the particulars of the soldiers may well not be genuine, they are most likely to have been concocted by someone who had some knowledge of such details, such as, a soldier. Although Sammy Kipketer Cheraisi at the time, a Major in the army, but now retired, and Senior Assistant Commissioner of Police, Jeremiah Cheruiyot,

were mentioned for instance, in Exhibits 198(B) and 198(C) as some of those that had recruited soldiers for the tribal clashes, they have strangely up to now, never been interrogated by the police about their alleged role in the tribal clashes. If the police wanted to undertake a bona fide and proper investigation into a matter of such national importance, they should also have sought, which they did not, the assistance of the military police and military intelligence. Wilson Boinett agreed that the starting point of such an investigation would be the Records Office, but as shown in the verbatim report of the proceedings of the Judicial Commission of 29th May, 1999, in answer to the question:

> "Yes, it may be the starting point should this not have been investigated by the Military Intelligence and the Military Police, having regard to what I have told you; names and numbers?",

he replied:

> "My Lords, doing it otherwise, is really to beat about the bush and to waste time.".

64. We are constrained to observe that evasiveness characterised the evidence of both the former Commissioner of Police, Duncan Wachira, and the former Director of Criminal Investigation Department, Noah Arap Too. Duncan Wachira's favourite answers to difficult questions as can be seen from the verbatim reports of the proceedings of the Judicial Commission of 4th and 7th June, 1999, were "I have no comment on that", "I am not able to confirm that" or "I take note of that, my Lords". Duncan Wachira denied that he had in 1992, when he was the Provincial Police Officer in Mombasa, caused to be issued to Rashid Sajjad, then a leading local KANU politician and now a KANU nominated MP, a police pocket phone or walkie talkie. However, we had no difficulty in accepting as true, the evidence that Rashid Sajjad had given, that the police pocket phone which would enable any one operating it to overhear what was being said over the police radio network, had been issued to him on the instructions of Duncan Wachira. Indeed, Rashid Sajjad had been assigned a police call sign "Romeo Siera".

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65. All this evidence had been given in the presence of Senior Superintendent of Police, Peter Mwangi who attended all the sessions of the proceedings of the Judicial Commission as a personal representative of Duncan Wachira. If Duncan Wachira had wanted to challenge any of the evidence given against him, he could have done so, but rather chose not to do so. Noah Arap Too on his part, took the unlikely position that he was merely a conduit pipe in respect of investigations which were undertaken at the request of the Commissioner of Police and the reports of which, he merely passed on to him when he received them.

66. It is interesting to note that even though Exhibit 30 was also copied to the Chief of General Staff, Department of Defence, there was a marked reluctance to use the armed forces in crushing the tribal clashes. Whilst the principal role of the armed forces is to protect the country against external threats to its security, it is well known that the military have been employed on several occasions to deal with internal acts of banditry and other criminal activities, as well as other situations that affect the internal security of the country. Northern Kenya has continued to be affected by serious internal armed incursions because of the instability of our northern neighbours and the resultant influx of illicit arms. The districts affected by this form of insecurity include: Tana River, Lamu (Coast Province), Garissa, Wajir, Mandera (North Eastern Province), Moyale, Isiolo, Marsabit (Eastern Province) and Turkana, West Pokot, Samburu, Marakwet, Keiyo (Rift Valley Province). The armed forces have also, time and again, been called upon to tackle the recurrent problem of cattle rustling between the Pokots and the Turkanas, the Pokots and the Marakwet and the Pokots and the Samburu. In North Eastern Kenya, various ethnic groupings and clans maintain albeit clandestine militia who are heavily armed and intermittently engage in fierce duels over water, pasture or hegemonism. The army has been used to deal with such matters. These include the five year skirmishes between the Ajuran and the Degodia in Wajir Distict which left scores of people dead, and the Bagalla/Budhudha massacre of the Degodia by the Borana and Gabra of Marsabit and

Moyale which became the subject matter of another Commission of Inquiry. Other incidents where the army has been involved are the armed clashes between the Orma of Tana River District and the Degodia and between the Ogaden Somalis and the riverine peoples of Tana River District the Malokote, Munyoyaya and Pokomo. As Major John Mberia put it, which is contained in the verbatim report of the proceeding of the Judicial Commission of 5th October, 1998:

> "My Lords, the primary role of the military is to defend this country against external aggression. But in a case of breakdown of law and order, we take up our secondary role, which in our Armed Forces Act, is to aid the civic powers.";

67. In the conduct of their operations, the army operates jointly with other forces such as, the Kenya Police, including the General Service Unit, the Administration Police and armed members of the Kenya Wildlife Service. Such operations are executed firmly, decisively, with precision and successfully as evidenced by the large cache of weapons and numerous livestock recovered. During these joint operations the army takes charge. Such joint operations would be necessitated by the scale of the problems in terms of its national importance, the weaponry at the disposal of the enemies and their numerical strength, and other logistical considerations such as terrain. The failure to employ the army in crushing the tribal clashes at their inception contributed to the wide ranging and devil-may-care tribal clashes that plagued the country for seven years. As Kipketer Cheraisi told us, the clashes could have been brought to an early and abrupt end if the army had been used right from the beginning. We agree with him. Wilberforce Arap Kisiero, a veteran politician and who had been the KANU member of parliament for Mt. Elgon from 1979 to 1997, also told us that the police force could not cope with the tribal clashes that occurred intermittently for two weeks in the Mt. Elgon area until the army was deployed there. He said, and we agree with him, that the mere presence of the army that was deployed between the rival Saboat and Bukusu tribes, was by itself, sufficient to deter any further tribal clashes or skirmishes.

68. And one last comment. As recently as on 5th July, 1999, the British government did not hesitate to employ the army as well as the police, to stop the inciting annual march of

Protestant Orangemen along Garvaghy Road into the Catholic estate of Portadown in Northern Ireland, which in the recent past had sparked off religious tension and violence.

69. As was succinctly set out in Wilson Boinett's rather sketchy Report on FLASH-POINTS FOR VIOLENCE 1997 GENERAL ELECTION, Exhibit 30:

> "1. There will be lawlessness leading to violence in some parts of the country before and during the electioneering period.
> 2. The most significant catalyst to the factors that may lead to violence is the perception by ... and the opposition, that President Moi and KANU will win the next Genral Election. This belief arises from the frustration of the opposition over their own failure to forge a united front in their avowed intent to dislodge President Moi and KANU from power.".

With respect to these excerpts from the FLASH-POINTS FOR VIOLENCE 1997 GENERAL ELECTIONS, Exhibit 30, the following extracts from the verbatim report of the proceedings of the Judicial Commission of 28th May, 1999, say it all:

> "Mr. Chairman: I want to look again at Exhibit No. 30 – the Executive Summary. I think it is very well put: "There would be lawlessness leading to violence in some parts of the country before and during the electioneering period." You were drawing attention to the fact that this was politically motivated?
> Mr. Boinet: Yes, My Lords.
> Mr. Chairman: So, politics from your analysis, and I agree with you, was going to be the cause of the lawlessness and violence?
> Mr. Boinet: Yes, my Lords.
> Mr. Chairman: If you turn to page 3, factors which may be exploited for this political purpose would be ethnicity, land ownership and all things that are listed in "a"?
> Mr. Boinet: Yes, my Lords.
> Mr. Chairman: So, when some people come here and say the causes of the clashes was land, it is rubbish. It is politics, but they are exploiting all these problems that exist?
> Mr. Boinet: My Lords, I think you have put it correctly.".

70. The foregoing analysis of the situation by Wilson Boinett with which we fully agree, also applied with equal force to the situation in 1991. We also agree with Boinett's enumeration of the various factors that could be exploited to this end such as "Ethnicity and clannism. Land ownership v. polititics, political affiliations, alliances and supremacy. Cattle rustling and illegal arms." We have no doubt that the tribal clashes

were politically motivated and that existing conducive situations were exploited. Among those instances that were brought to our notice, were the KANU political rallies held during the advent of multi-party politics, at Kapsabet, Kaptatet and Narok. These KANU political rallies had clearly been called by KANU political leaders to counter the unlicensed and disrupted history making SABA SABA political rally which was to have been held at the famous political rallying rendesvous, Kamukunji in Nairobi, on 7th August, 1991, by politicians opposed to the then prevailing one party political system. Not unexpectedly, the disruption of the SABA SABA rally erupted into violent civil disturbance in which death and destruction and looting of property, occurred. Nevertheless, this was to usher in multi-party politics in the country. At the KANU political party rallies, and also, not unexpectedly, KANU party leaders decried multi-party politics and urged their tribal followers who supported KANU, to drive out from their midst, the members of the other tribes who supported the emerging opposition political parties, so as to strengthen KANU's dominance in their ancestral lands.

71. The Kapsabet rally held on 7th September, 1991, nearly two months before the first of the tribal clashes occurred at Miteitei farm, was attended by several influencial KANU leaders from the Rift Valley such as the Nandi KANU branch Chairman Henry Kosgey, two Ministers, ten KANU members of parliament and about fifty Councillors from the Rift Valley. Addressing the large gathering of Kalenjin, Willy Kamuren, the then Baringo North KANU MP, for instance, as was reported in the Daily Nation of 9th September, 1991, said that:

> "... Kalenjin were not tribalistic but only rejected people bent on causing chaos. He told government critics to move out of Kalenjin land.
> 'Let them keep quiet or else we are ready for introduction of Majimboism whereby every person will be required to go back to his motherland.'.
> Once we introduce Majimbo in Rift Valley, all outsiders who acquired our land will have to move and then leave the same land to our children.".

72. On 21st September, 1991, a fortnight after the Kapsabet KANU rally, another one was held at Kapkatet in the same Province. This time, nineteen KANU MPs from the Rift Valley, were present. They included three Cabinet Ministers and four Assistant Ministers. This rally which was for a similar purpose as that of the Kapsabet rally, was

the forum for the condemnation of multi-party politics and its supporters and the promotion of majimboism. Some of the inciting statements made at that rally include as reported in the Daily Nation of 22nd September, 1991, the following made by Cabinet Minister Timothy Mibei when he:

> "… instructed wananchi in the province to visit beer halls and 'crush any Government critic and later make reports to the police that they had finished them' ".

Paul Chepkok added his voice to this when he:

> "… urged the people of the province to arm themselves with rungus, bows and arrows and 'destroy any FORD member on sight' ".

Willy Kamuren is also reported to have said that:

> "… the Kalenjin, Maasai, Samburu and West Pokot … were ready to protect the Government 'using any weapon at their disposal' ",

and declared that:

> "… if any FORD member dared to visit any part of the province, they will regret it for the rest of their lives' ".

When he gave evidence before us, Willy Kamuren attempted unconvincingly, to exhonorate himself, by saying that when he spoke about "weapons" he meant "voting by using the ballot paper". The less said about this the better. Timothy Mibei, though served with notice that adverse evidence would be given against him, did not deign to appear before us or to instruct counsel to cross examine the Daily Nation reporter who covered the Kapsabet KANU rally. It is no wonder as will be shown, that John Keen, the well known Maasai KANU leader, was to find the statements made at the Kapsabet and Kaptatet KANU rallies most frightening.

73. The Narok rally which was held on 28th September, 1991, was attended by several KANU Cabinet Ministers including the Vice President, George Saitoti, and other KANU political leaders. The local MP William Ole Ntimama, then Minister of Local Government, hosted and presided over the mammoth rally, consisting mainly of his fellow Maasai tribesmen. He did not mince his words when he said as reported in the Daily Nation of 29th September, 1991, that:

> "We have now buried the FORD, multi-party politics and the NDP. All the Ministers and Kanu leaders you see here have resolved to fight together and follow President Moi together … Majimbo was here at the

time of Independence and was done away with; if Majimbo ended, multi-party politics should end – or else … We will use rungus if this will be the effective way of ending talk about multi-party. This I have said on this platform and I am repeating it: The violence of saba saba was not a milk drinking party.".

74. William Ole Ntimama, as is to be expected, denied having made such inciting statements. He even denied as reported in the front page headlines of the same issue of the Daily Nation, that two KANU leaders namely John Keen and Nicholas Biwott, who had been present at the Narok rally, had quarelled over the use of force to displace tribes which, with the advent of multiparty politics, no longer supported KANU. Another reason why we do not accept Ntimama's evidence that he made no inciting statements at the Narok rally is the evidence of John Keen, which we found to be not only, plausible but also, candid. Judging from the violent political language used at the earlier Kapsabet and Kaptatet rallies, he was worried that the employment of similar language at the Narok rally, could incite the Maasai. He felt so strongly about this that even though the rally was tense and explosive, and even though he had been evicted from the front row seats on the dais, he managed to interrupt proceedings to condemn the inciting speeches that William Ole Ntimama and other KANU leaders were making.

75. Another KANU politician and a former Assistant Minister, who was also present at the Narok rally, was Willy Kamuren. Although he tried to put a better face on what was said by William Ole Ntimama, he confessed that not only, did the Narok rally adopt a Declaration that the Rift Valley was a KANU Zone, but also, that things that may be said at a political rally may incite some people to violence.

76. And finally, early in 1993, tribal clashes broke out in Enoosupukia which is in Maasailand, between the Maasai and the Kikuyu.

77. There is no doubt that the three KANU rallies were as usual, attended by police officers who heard all the inciting speeches that were made, but as was now to be

expected, no action was taken against those who made them. In recent times, utterances less inciting than this made by politicians, have not escaped retribution from the police. For instance, the police did not hesitate in January, 1999, to charge David Mwenje an opposition member of parliament with Incitement to Violence with the following particulars as contained in the Charge Sheet, Exhibit 31 (E):

> "On diverse dates between 1st December and 24th December, 1998 at Kayole estate Nairobi within the Nairobi area without lawful authority uttered words namely 'I will settle landless people on land belonging to other people' which words implied that he was in a position to settle people an act, which was calculated to lead to violence.".

78. In his letter of 20th January, 1998, Exhibit 31 (B) written after the December, 1997, general elections, to the Permanent Secretary, Office of the President and Secretary to the Cabinet, Fares Kuindwa, and copied to the then Commissioner of Police, Duncan Wachira, the Director of Intelligence, Wilson Boinett made the following revealing observations:

> "The Likoni issue still lingers on. It has so far caused untold harm both to the local people and the country at large through adverse publicity abroad, … and displaced upcountry people. The perpetrators are contemplating to renew the raids and would not mind if they embraced the entire Province. One of the key players, Juma Bempa, had the audacity to address the press on 16th January, 1998, and issued threats to the upcountry people.".

What was reported about Juma Bempa and what he said as reported in the East African Standard of 18th January, 1998, Exhibit 31 (F) is as follows:

> "Bempa who we later learnt is an ex-policeman then warned that his men were ready to champion for the independence of the Coast province from the rest of the country if the government ignores their demands. He said they will strike again if the government ignored their demands …
>
> Bempa denied that a foreign donor or local influential people had sponsored the mayhem which claimed more than 70 lives including 10 policemen.
>
> Bempa admitted police took away some of their weapons. But he said they still have adequate arms to put up a fierce battle against the police.
>
> Bempa, however, declined to say where they live and how they manage to execute their mission.
>
> Coast Deputy PC Hassan Haji, confirmed that Juma Bempa is one of the prime suspects that the police have been looking for.
>
> He denied Bempa's claims that none of the Likoni raiders has been arrested or killed by the police.".

Needless to say, nothing was done by the police about this. Juma Bempa was a KANU supporter who, in the name of majimboism, had taken part prior to the 1997 general

elections, in the violent eviction of upcountry people from the Coast who were suspected of being supporters of opposition parties. As already noted in Exhibit 42 (F), the Mijikenda youth including ex-servicemen, had taken an oath to violently evict from their midst the upcountry people in support of "regional Government". Wilson Boinett's relevant, and frank assessment of the position during his evidence before us, as shown in the verbatim report of the proceedings of the Judicial Commission of 28th May, 1999, also deserves to be set out:

> "Mr. Chairman: Why was action not taken against him after making a statement like that?
> Mr. Boinet : My Lords, action was taken against him, my Lords.
> Mr. Chairman: Thank you.
> Justice Bosire: Is it one of the reasons why you wrote this letter?
> Mr. Boinett: In the context of that statement, my Lords, yes, but in the total context of what I probably saw, this is one of the many politicians that were going to create animosity and hatred.
> Mr. Chairman: In my view, it seems that the attack on the upcountry people was so that they were being suspected that they would support the Opposition. They were being attacked so that they can go away and not vote?
> Mr. Boinett: My Lords, if you notice this, my letter was dated 20th January, 1998 after the elections. So, it is only here that, I think that reason stands. I guess in my own mind and in the mind of my assessors, given the parttern of voting after the results, that could be the reason.
> Mr. Chairman: That is why nobody wanted to arrest and judge Juma Bempa because he had been with those coastal people who had attacked the upcountry people?
> Mr. Boinet: Yes, my Lords.
> Mr. Chairman: I admire your frankness.
> Mr. Boinet: Thank you very much, my Lords.".

79. The issue of land in Kenya is often treated with fervent sentimentality and sensitivity and in many ways, considered explosive. Whereas, the Constitution guarantees the right of ownership of property anywhere in the country, the peaceful co-existence of the forty two tribes that live within our national borders, appears to have been profoundly undermined by divers man-made problems that are either directly or indirectly connected to land. Recent developments in the political arena have tended to exacerbate rather than ameliorate the situation and by the same token, have ushered in such problems that have

far-reaching implications to communities living within multi-tribal farm settlements which we expect will disappear as the violent antagonism that accompanied the introduction of multi-party politics dies down with time. Some of the underlying causes of these conflicts stem from the pre-independence era, while a host of others emanate from the policies and programmes of Government.

80. At the dawn of independence, it was incumbent upon the independent Kenya Government to urgently give out land to the landless and displaced as a true testimony of their hard-won independence. Upon the colonization of Kenya, the colonial administration decided to turn Kenya into a "whiteman's country" like had been done in Canada and Australia. To achieve this, vast tracts of land were alienated and economic policies that would serve the interests of the white settlers pursued. The homelands of the Africans were designated as "Reserves". Those who lost most from the alienation of land for the white settlers were the Maasai, Samburu, Kalenjin, Kikuyu, Kamba and the Mijikenda of the coastal area of Kenya. Thousands and thousands of Africans were rendered landless; others were hemmed in within Reserves. Complimentary to the alienation of large tracts of land for the white settlers, was the emergence of "squatters" who as African farm labourers of the white settlers, were permitted to live on parts of the white settlers' farms set aside for them.

81. Immediately after independence, the Government established various mechanisms that would enable Africans to buy back white-owned farms through soft loan schemes for squatters and local landless people in a given area, and landless people from any part of the country. Among the various farms purchased and subdivided into small farms, were those bought under the aegis of the Commissioner for Squatters and the Central Agricultural Board as well as by farm-buying companies and by a few people who subsequently, subdivided them into small farms which were sold to various individuals. These farms became the source of serious conflicts between indigenous landless persons of the area where the farms were situated, and the new owners. They were also the same farms that have been notoriously affected by incessant invasions by ex-farm workers and other landless people living in or around the farms but who had been left out when such

farms were being sold out. Many of the indigenous people from say, the Maasai and Kalenjin tribes whose traditional lands had been alienated by the colonial government for the benefit of the white settlers and thus, rendered landless, strongly resented the manner in which members of other tribes had been settled on land that had at one time, belonged to their forebears. Such resentment also stemmed from the fact that whilst the indigenous people were landless and lived in conspicuous poverty, the new owners of the farms almost exclusively, occupied the most fertile arable rain-fed land in the given area and were thus able to enjoy a better standard of living to the chagrin of the indigenous people. Indigenous people by and large, have never accepted that holders of title deeds have a more legitimate right over such farms than they do. Another problem that the unregulated land settlement produced was the conflicting interests of tribes. Whilst for instance, the Maasai as pastoralists valued land for the grazing of livestock, the Kikuyu treasured the same for farming.

82. Up to a point, this order of things was tolerable but with the advent of multi-party politics and the increased population of the new farm owners, the situation became increasingly difficult. Apart from the newcomers asking for Chiefs and Assistant Chiefs from their own tribes, multi-party democracy of one-man one vote, meant that the "foreigners" or as they were to be derogatorily referred to as "madoadoa" in the Rift Valley Province and as "Watu wa Bara" in the Coast Province, could represent the indigenous people in parliament and local authorities. Given the tribal pattern that most major opposition political parties took in the recent general and presidential elections, it was evident that the indigenous people who in many constituencies were economically inferior to the newcomers, found the new concept of democracy disadvantageous. They saw this as a further move to marginalise and dispossess them of land. Indeed, multi-party politics having been strongly influenced by tribal considerations would in turn, make it easier to incite politically based tribal violence. This scenario therefore provided a fertile ground for exploitation for political ends through ethnic cleansing.

83. Whereas the majority of farm buying companies were formed in the Central Province, there were many farms in the Rift Valley Province where the indigenous people who

86. It was suggested to us on several occasions that where multi-party politics had caused tribal clashes, that this was because those who fought or caused destruction and mayhem, did not really understand the implication of multi-party politics. We find this explanation unacceptable. Everyone well knew that with the advent of multi-party politics, the monopolistic status previously enjoyed by KANU in politics in the country, had been brought to an end. It was the resultant possibility that opposition parties which were established on tribal basis, could reduce, indeed, eliminate the leadership role of KANU in national politics, that not unnaturally, led the supporters of KANU to regard the supporters of the new opposition parties as political enemies and the supporters of the opposition parties to also feel the same about the supporters of KANU. This in itself, is not abnormal. What caused the problem was not multi-party politics itself, but the successful exploitation and incitement the first time, in 1991 and intermittently, until 1998, of the tribal allegience and barbaric instincts of a certain class of people who cannot be said to be ignorant of what multi party politics was all about. Prior to these incidents, the tribes that were affected had, as was repeatedly emphasised, co-existed peacefully, though not without some differences and animosities. Tribal or similar clashes like the ones that traumatized the country stand a good chance of being expunged if influential personalities do not take advantage of tribalism and human failings. The ordinary people who comprise the foot soldiers in tribal clashes should learn not to allow themselves to be used to perpetrate violence of any kind. Civilised behaviour by all is what will really make a difference. Although immemorial fratercidal clashes arising from land grazing, livestock theft and animal watering rights, continued to occur among the Somali clans of the North Eastern and Eastern Provinces, politics was to become one of the causes of these fratercidal clashes that occurred from 1991 to 1998.

87. We shall now deal with the causes and incidents of tribal clashes as they occurred in particular parts of the country. Those parts of the country that were affected by the tribal

clashes were within:- the Rift Valley Province, Nyanza Province, Western Province, the Coast Province and the North Eastern and Eastern Provinces.