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Report from
OHCHR Fact-finding Mission to Kenya,
6-28 February 2008

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G. EXECUTIVE SUMMARY

From 6 to 28 February 2008, the United Nations Office of the High Commissioner for Human Rights deployed a Fact-Finding Mission (OHCHR Mission) to the Republic of Kenya to look into the violence and allegations of grave human rights violations following the presidential elections in December 2007. The OHCHR Mission also analysed underlying civil, political, economic, social and cultural rights issues and formulated recommendations on possible accountability mechanisms. The OHCHR Mission conducted on-site visits to the affected areas and met with a wide range of actors in the Government, among the opposition, and met with victims, human rights defenders as well as the diplomatic community.

While most allege that violence was predominantly a spontaneous reaction to the election results, the OHCHR Mission observed that actual patterns of violence varied from one region to the next, greatly depending on region-specific dynamics. The first observed pattern of violence –most notably the burning and looting of shops, houses, commercial outlets in the slums of Nairobi and Kisumu by youth groups seemed spontaneous to most observers. According to many OHCHR Mission interlocutors it stemmed from the cumulated frustrations generated by poor living conditions and historical disenfranchisement and was triggered by the anger of opposition supporters at what they perceived as the theft of the presidential election. In a second pattern of violence, perpetrators mainly targeted communities of small farmers and land-holders perceived to be Government supporters in the Rift Valley and aimed at driving and keeping them away from the region. Credible evidence suggests that the violence was partially organized by local political and/or traditional leaders seeking to settle long-held grievances over land issues and other real and perceived discrimination. The third pattern of violence occurred slightly later and was retaliatory. Violent reprisals targeting mainly communities of migrant workers perceived to be opposition supporters, were reportedly carried out by Government supporters and militia mainly in the area of Nakuru, Naivasha, Central Province and in the slums of Nairobi (Kibera and Mathare). Altogether, the violence resulted in over one thousand deaths, hundreds of thousands of individuals being forced to flee and tens of thousands of homes, shops and businesses being destroyed and looted.

The Mission, based on its limited investigations, could not substantiate allegations of a steep increase in the number of cases of sexual violence. OHCHR is nevertheless concerned that some 322 women and girls sought hospital treatment for sexual assaults and rape during this period despite a generalized reluctance to report and the fact that many victims were displaced.¹

While the violations of democratic rights provided the trigger for the bulk of the street violence and human rights violations, a number of underlying causes also contributed to fuelling the outburst. Violations of economic and social rights pre-existed the recent violence as evidenced in the lack of access to water, food, health, decent housing together with the rate of youth unemployment and the gross inequality reported by civil society organisations. According to UNDP, 45.9% of the Kenya population live under the threshold of absolute poverty and 20% of the population experience hunger. The colonial legacy and mismanagement of land distribution especially in the Rift Valley has generated conflict over what is often perceived as the most important form of wealth and source of political power: arable land.

Further, the Mission was told that the actual and perceived discrimination in the distribution of wealth, economic and political power amongst various communities and social segments together with the absence of adequate protection and effective remedy has fed serious grievances within the Kenyan population. Long-term observers of the Kenyan situation claim that the recurrence of politically-instigated violence –particularly during elections – coupled with a prevailing culture of impunity has contributed to generating a high potential for violence within Kenyan society. Many of the Mission's interlocutors argued that the consistent failure to embrace institutional reforms – constitutional,

¹ Nairobi Women's Hospital, "Interim Report – Gender Violence Recovery Centre", 27 December 2007 to 29 February 2008

judicial, police and civil service reform- has left the Kenyan State with a diminished ability to tackle the root causes of violence and human rights violations and little credibility that it would do so.

During recent events, the State appears to have failed to take appropriate measures to prevent or stop the violence and the human rights violations. The OHCHR Mission acknowledges that the Kenyan State faced limitations and constraints – notably inadequate human and material law-enforcement resources and that, in a number of instances, it did exert a certain level of restraint and provided last resort protection against further physical attacks to the fleeing population, notably in police stations. Further, the highly polarized environment resulting from the violence together with widespread lack of trust towards State institutions fostered suspicions and rumours over most of the measures Government authorities have undertaken to respond to the crisis, rendering its management even more complex.

Nevertheless, the findings of the OHCHR Mission indicate that the State failed to take all appropriate measures to meet its obligations to protect the rights of its citizens to life and physical integrity, property, democratic rights, freedom of expression, assembly and movement. In most districts, the police was unable to maintain and enforce law and order. Most of the victims and witnesses recount that during the attacks, the police were often present but were either overwhelmed or passive. In some instances, police officers were even alleged to have taken active part in the violence. The OHCHR Mission received detailed information from witnesses that in various places, most notably in Kibera slum area of Nairobi, Eldoret and Kisumu, the policing of demonstrations and crowds was conducted with excessive use of force resulting in death and injuries of many, including children. According to the Government's own figures, ten percent of the killings were carried out by the police. Also, the OHCHR Mission notes that the ban on both live broadcast and peaceful assembly were unconstitutional and illegally deprived Kenyans of important civil and political rights.

The Government and the opposition have agreed on a political framework to address the post-election violence: the Kenya National Dialogue and Reconciliation. According to the agreement, the final goal of that political dialogue is to achieve sustainable peace, stability and justice through the rule of law and respect for human rights. Within the mentioned framework the parties have made important commitments to address long-standing issues such as land reform, police and judicial reform, socio-economic inequalities, corruption, accountability and the disarmament of militias. It will be essential that these commitments are adhered to.

I – INTRODUCTION

At the end of December 2007, widespread violence broke out in Kenya following the announcement of the results of presidential elections held on 27 December. In the ensuing days, official figures stated that over 1200 people were killed, there was massive destruction of property in some areas, and several hundred thousand Kenyans were displaced from their communities. In addition, human rights defenders who made Statements critical of the electoral process began receiving serious death threats. In light of this situation, the Office of the High Commissioner for Human Rights deployed a fact-finding mission to Kenya from 6-28 February 2008.

The OHCHR Mission visited the districts and localities that were most affected by the electoral violence, including Nairobi, Burnt Forest, Eldoret, Endebess, Kericho, Kitale, Kikuyu, Kisii, Limuru, Naivasha Nakuru, Nyamira, Mau Summit, Molo, and Tigoni. It interviewed 188 victims and witnesses of post-electoral violence. Additionally, the OHCHR Mission met with members of the Government, law-enforcement authorities, the Attorney General, the Orange Democratic Movement (ODM) opposition leaders, the Panel of Eminent African personalities, the UN Country Team, the diplomatic community, national and international NGOs, the Kenya National Commission on Human Rights², church representatives and others. In view of the short timeframe, the OHCHR Mission could not carry out in-depth investigations but conducted a preliminary fact-finding mission.

OHCHR understood its fact-finding mission to exclude the electoral process per se, which had already been subject to close monitoring by a number of national and international experts. The findings of various observation missions and independent reports, pointed out procedural irregularities in the vote tallying, casting serious doubts on the legality of the re-appointment of President Kibaki and therefore on the later formation of a new Government. Such findings suggest that Kenyans voters were indeed deprived of their basic democratic right to free and fair elections.

On 24 January, the Government and the opposition agreed on a political framework to address the post-election violence: the Kenya National Dialogue and Reconciliation. According to the agreement the final goal of that political dialogue is to achieve sustainable peace, stability and justice through the rule of law and respect for human rights. Within the mentioned framework the parties have made important commitments to address long-standing issues such as land reform, police and judicial reform, socio-economic inequalities, corruption, accountability and the disarmament of militias. They also agreed to establish an independent review mechanism to investigate all electoral aspects of the 2007 presidential election (Independent Review Committee); to conduct a constitutional review process to be completed within 12 months; to establish a Truth, Justice and Reconciliation Commission and a Commission of Inquiry, the latter with a mandate to investigate the facts and circumstances related to the violence that occurred between 28 December 2007 and 28 February 2008. On 28 February, President Mwai Kibaki and ODM leader Raila Odinga signed a power-sharing deal, under which a new Prime Minister's position will be created and cabinet posts allocated based on each party's representation in parliament.

II – BACKGROUND

The violence triggered by the flawed electoral process should be analysed in its context of long-standing conflict over land rights, prevailing impunity for human rights violations and highly unsatisfactory fulfilment of economic and social rights.

A. Long standing dispute over land rights

² The Kenya National Commission on Human Rights (KNCHR) is the official national human rights institution in Kenya, while the Kenya Human Rights Commission (KHRC), also referred to in this report, is a non-Governmental human rights organisation.

The Government Lands Act³ which regulates the former “crown lands” now known as Government lands gives considerable power to the President. This act extends the power of the Commissioner of Lands – a President’s appointee – to lease land within the townships for 99 years and agricultural areas for 999 years, with the power to convert leases into freeholds. In light of the centrality of the presidential figure and the community-based political environment, land has thus often been used in Kenya to award patronage, solidify support and build alliances.

In the early 1900s, the British colonialists evicted the Rift Valley’s communities (Nandi, Maasai, Samburu and Turkana) to create the “White Highlands”. Agricultural labourers from the neighbouring provinces, particularly Kikuyus from the Central Province, were recruited to work on the colonial farms. In the aftermath of Kenya’s independence from the British Empire, some of these agricultural labourers took advantage of the land-buying schemes offered by President Jomo Kenyatta and bought the land they had worked on for the British colonialists. These small lands were in Nakuru, Uasin Gishu, Nandi, Trans Nzoia and Narok districts. This situation was largely maintained until 1992-1993, when, during President Moi’s tenure, politically-instigated violence forced many Kikuyu farmers out of their farms. At this point, some ministers and national politicians from the Kalenjin and Maasai communities rallied on the reestablishment of a *majimbo*⁴ system of Government – a federal system based on ethnicity⁵. Some proponents of *majimboism* simultaneously called for the expulsion of all other ethnic groups from land they claimed to be historically theirs, and the return of the “Kikuyu outsiders” to their “homeland” or “ancestral home”, in the Central Province.

B. Recurrent violence and persistent impunity

Ever since the restoration of multiparty democracy in December 1991, violence has been common in Kenya’s elections. In 1992 and 1997, the incumbent President Moi was elected in a violent environment. During both campaigns, Moi’s party, the Kenya African National Union (KANU) instigated violence to exclude opposition leaders from certain areas, notably from localities in Uasin Gishu and Nakuru districts. Meanwhile members of the communities considered to be the opposition’s supporters were regularly targeted⁶. It is worth highlighting that, in 1992, violent attacks were organized under a central command, often with the participation of local administration and security forces officials, and that alleged perpetrators arrested in connection with the violence were often released unconditionally⁷. As a result of the 1990s politically-instigated communal clashes, some 380,000 Kenyans were still internally displaced in 2007⁸. The 2002 presidential election was however a notable exception. In a relatively calm atmosphere, a large coalition of opposition leaders headed by Mwai Kibaki – the National Rainbow Coalition (NARC) – defeated Moi’s designated successor, Uhuru Kenyatta, the son of the first independence leader.

C. Pre-existing violations of economic and social rights

Unsatisfactory fulfillment of economic and social rights have been long-standing in Kenya as seen in the lack of access to water, food, health, decent housing together with the rate of youth unemployment and gross inequalities. According to the World Bank, Kenya is one of the ten most unequal societies in the world, with the richest tenth of households controlling more than 42 percent of the country’s income while the poorest tenth survive on less than one per cent. Some 45 percent of the Kenyan population experience absolute poverty, a figure that declined from 52.3 percent in 1997 according to the most recent Government data. Yet, poverty increased in cities where one out of five Kenyans live. Meanwhile, sharp divergences in province level rates of adult literacy or distribution of health

³ Government Lands Act (Cap. 280).

⁴ Literally, the term *majimbo* means “region” in Kiswahili.

⁵ The *majimbo* debate dates back to 1960s, when minorities, both African and European, of the newly independent Kenya argued for a form of regionalism – *majimboism* – that could counteract the economic domination of more populous ethnic groups.

⁶ International Federation of Human Rights/Kenya Human Rights Commission, “Massive internal displacements in Kenya due to politically instigated ethnic clashes”, n°471/2, April 2007.

⁷ See Inter-Parties “Symposium I Task Force Report”, June 1992 and Republic of Kenya, “Report of the Parliamentary Select Committee to investigate Ethnic Clashes in Western and Other Parts of Kenya”, September 1992.

⁸ *idem*

facilities indicate that some regions and groups benefited from the Government's attention for decades while others make do with little or no services and infrastructure.

D. Vigilante groups

It is in this context that, over the last decade, a number of youth vigilantes emerged, offering an attractive avenue of socialization, informal employment and income opportunities. While the Government banned 18 of these groups in March 2002, most remained active. The most notorious are the Mungiki – originally a quasi-religious sect claiming thousands of followers and renown for its brutality – even among the Kikuyu community – from whom it recruits. Operating from Nairobi's Kibera and Mathare slums, the Mungiki also recruit urban youths in the Rift Valley and Central. Over the last decade the sect became a criminal organisation running an extortion empire with ultra violent methods and suspected political links. Following a 2007 police crackdown, the KNHRC reported that about five hundred Kikuyu youths were allegedly subjected to extra-judicial killings and disappearances upon suspicion of Mungiki membership. Other communities such as the Kalenjin have their own militias, which reportedly launched large-scale attacks against their perceived enemies. In addition, along the north-western border areas the Sabaot Land Defence Forces have been waging armed hostilities, including cattle-rustling.

It is against this background of political and other violence, deep economic inequalities and sustained far-reaching impunity that the presidential elections and post-electoral violence took place.

III – THE 2007 PRESIDENTIAL AND PARLIAMENTARY ELECTIONS

Kenya's fourth multiparty presidential elections pitted, in a tight race and a highly-charged campaign, the incumbent president and leader of the Party of National Unity (PNU), Mwai Kibaki, against the leader of the Orange Democratic Movement (ODM), Raila Odinga.

While both Mwai Kibaki and Raila Odinga enjoy support from multi-ethnic constituencies, their respective coalitions are also rooted in specific communities. PNU draws on the Kikuyu, Embu, and Meru⁹ communities, mainly represented in the Central and Eastern provinces, as well as in Nairobi Area, Coast and Rift Valley provinces. ODM, for its part, draws largely from the Luo, Luyha, and Kalenjin¹⁰ communities, mainly living in Nyanza, Rift Valley, and Western provinces. ODM also enjoys significant support in Kenya's major urban areas, and among the coastal Muslims and within the youth. In opinion polls, Raila Odinga, maintained – almost throughout the campaign – a slight edge over Mwai Kibaki¹¹, while a third candidate, Kalonzo Musyoka trailed far behind.

The period leading to the elections was marred by several incidents of violence, which were directly or indirectly related to the electoral campaign itself. Meanwhile, in its monitoring of the pre-election human rights situation in 79 constituencies, the NGO Kenya Human Rights Commission (KHRC) reported 36 cases of political violence that left at least 20 people dead and more than 60 injured. Of particular concern was also the level of gender-based violence that was targeted at female contestants.

Throughout the campaign, elements of both leading coalitions' – notably at local level – rivalled in proclaiming inflammatory or threatening Statements. Mobile phone text messages and email disseminating hate messages against particular candidates and other communities were regularly reported¹². The leading candidates publicly appealed for calm and refrained from holding electoral

⁹ The Kikuyu or Gikuyu are also known as the GEMA, an acronym of Gikuyu, Embu, Meru Association, a community-based organisation, created in 1969 to support the settlement of Kikuyu families in the Rift Valley.

¹⁰ Kalenjin also refer themselves as part of the Kamatusa, which stands for Kalenjin Maasai, Turkana and Samburu communities. The term Kalenjin was created in the late 1950s by the British colonial administration to refer to 'Nandi-speaking' peoples. In a similar fashion, the term Luyha was also created. See B.E. Kipkorir, "People of the Rift Valley", Kenya's People series, Evans Brothers, Nigeria, 1978.

¹¹ The East African Standard "Steadman releases its last polls before election", 19 December 2007.

¹² KNCHR, "Still Behaving Badly: Second periodic report of the Election-Monitoring Project", December 2007

rallies in areas of each other's traditional constituencies, in an apparent attempt to refrain from outright provocation.

The Police, for its part, cautioned against violence, and warned that anyone targeting any specific community for violence or threatening to evict certain communities from their homes on the grounds that they voted for another party or candidate will be dealt with expeditiously¹³.

At first, national and international election observers concurred that the polls went relatively smoothly. On 29 December, by 6:00 a.m., the Electoral Commission of Kenya (ECK) released results from half of Kenya's 210 constituencies, putting Raila Odinga at 2,755,111 votes and Mwai Kibaki at 2,172,440 in the presidential contest. However, suspicion of electoral fraud grew by the hour as presidential vote tallying appeared to be increasingly delayed. In the afternoon, the ECK Chair announced results that largely cancelled out much of Raila Odinga's lead. Scuffle scenes followed at the Kenyatta International Conference Center (KICC), and some angry demonstrators took to the streets.

On 30 December, in early afternoon, ODM held a press briefing during which the party alleged ECK-engineered electoral fraud in 48 constituencies. Despite strong allegations of irregularities, at 4:20 pm, the ECK Chair, in a live broadcasted press conference, attempted to announce the presidential elections results. Confusion ensued in the KICC building, as ODM representatives loudly protested the announcement. All ECK Commissioners thus left the KICC building under police escort. Meanwhile, an ECK staff member joined an ODM-convened press conference and told the audience the poll results had been manipulated at the KICC. The press conference was retransmitted on live television. Amidst this confusion, at 5:39 pm, ECK Chair under the protection of the paramilitary police, declared Mwai Kibaki winner of the presidential elections. Less than an hour later, a hasty swearing-in ceremony followed. Within moments of the presidential election results being announced, violence erupted in two opposition strongholds – Nairobi's slum of Kibera, and in Kisumu.

IV – PATTERNS OF VIOLENCE

The violence which broke out after the election results lasted throughout the following month with peaks of violence during specific periods –notably immediately after the elections, around mid January (16-18) and in the last week of the month. The provinces of Rift Valley, Western, Nyanza, Nairobi, Central and to a lesser extent Coastal were particularly affected. Altogether, the violence – including violence by the State— resulted in the reported death of over 1,200 persons, the displacement of over 268,300¹⁴ individuals and the destruction of over 41,000 houses, the looting of numerous shops, commercial outlets and crops. The Fact-Finding Team identified three distinct but sometimes concurrent patterns of violence – spontaneous, organised and retaliatory. Lack of accountability for previous acts of electoral violence and on-going violations of economic and social rights seem to have contributed to fuelling and exacerbating the violence in the aftermath of the elections.

A. Spontaneous Violence

The first wave of violence appears to have been spontaneous and reportedly stemmed from the anger of opposition (ODM) supporters at what they perceived as the theft of the presidential election. Part of the violence was sparked by confrontations between law enforcement forces and crowds of demonstrators who were prevented from taking to the streets by the police. In some cases youth vigilantes allegedly received funds from individuals identified as ODM supporters to target PNU voters or the Kikuyu community. Typically, within the context of demonstrations, large groups of urban youth engaged in spontaneous outbreaks of violence during which they burnt and looted

¹³ Agence France Presse (AFP), "Threat of violence hangs over Kenya vote", 24 December, 2007.

¹⁴ According to the Kenyan Red Cross, as of 27 February 2008, some 268,330 persons were displaced as a result of post-electoral violence.

commercial businesses or Government installations. Property belonging to PNU party candidates, Kikuyu families and perceived PNU supporting communities were particularly hard hit. This pattern of violence met a firm response from the Government whose law-enforcement forces severely repressed the outbursts of violence.

The described spontaneous violence first arose as an immediate reaction to the announcement of the election results but reoccurred throughout January in reaction to unfolding political events. In particular, similar expressions of spontaneous violence erupted again after the appointment of the Vice-President and Cabinet members, then from 16 to 18 January, during the three days of nationwide protests called by ODM, and later after the consecutive assassination of two ODM MPs.

B. Organised attacks against targeted communities

The second pattern of attacks occurred mainly in the rural setting of the Rift Valley where the bulk of the violence erupted on 29-30 December 2007, particularly following the announcement of the election results. Witnesses and victims throughout the region described remarkably similar attacks. Typically, groups of young men ranging from several hundreds to several thousands of the same age group and armed with traditional weapons¹⁵ conducted simultaneous raids and attacks on multiple villages and towns. The reported attacks appear to have targeted non-Kalenjin communities and those perceived as ODM opponents, including the Kikuyu, Kisii and Luyha communities. Violence particularly engulfed the Molo, Trans-Nzoia, and Uasin Gishu districts of Rift Valley as well as Eldoret and Kericho towns.

Events in the area of Burnt Forest were particularly illustrative of the type of violence that spread in the Rift Valley. Large scale violence erupted on 30 December with a number of attacks systematically targeting Kikuyu families starting within 30 minutes of the announcement of the presidential election results. A total of 22 farm settlements and four estates - including at least 1320 houses that belonged to Kikuyu families and hosted some 5,000 people – were attacked simultaneously. The case of Kamuju Farm, in Burnt Forest, illustrates the type of violence that affected the Kikuyu community of that district. Throughout the evening and the night of 30 December, the besieged community allegedly fought to protect its village from an overwhelming number Kalenjin “warriors”, but was forced to retreat to the school compound. As the community retreated, the attackers torched down all the houses of the village. Reportedly, three persons died of arrow and machete wounds during the attack. Inhabitants of the surrounding farmers’ settlements also sought shelter at the Kamuju school ground. In the early morning hours, the local chief arranged for the evacuation of the population to a nearby IDP site. The inhabitants left all their possessions behind. The OHCHR Mission conducted an on site visit to Kamuju, where it noted that all houses, shops, storage houses, bars and church had been entirely burnt to the ground. It also observed that “Kamuju Farm” was renamed “Kipgyinie Farm”, after the group that had attacked the village. While in most cases, attackers appear to have aimed primarily at chasing away the targeted victims, instances of killings and one instance of massacre were reported.

Apart from attacks on rural farming communities, the violence in the Rift Valley is also characterized by attacks on small town businesses and residential areas which in some cases left entire blocks of houses razed. Violence also spread to the region’s communication routes with the setting-up of road-blocks, notably between Eldoret and Nakuru. Roadblocks were erected out of cut trees and rocks by groups of youth who stopped traffic to extort money and harass members of targeted communities.

Overall, the OHCHR Mission noted from information collected that tensions had emerged in the northern Rift Valley, during the electoral campaign, as the Kalenjin community reportedly emboldened by some ODM leaders’ call for *majimboism* had threatened to evict all the non-Kalenjin communities.

¹⁵ Typically traditional weapons included handmade bows, arrows and clubs. In some instances attackers also had machetes and in the region of the Northern Rift, around Mount Elgon in particular, attackers also carried guns.

Though the immediate trigger to the clashes in the Rift Valley may have been political, violence was perpetrated largely along ethnic lines. Credible evidence suggests many attacks were partially organized, reportedly by political and/or traditional leaders eager to settle long-held grievances over land issues and other real and perceived forms of discrimination and that they aimed at permanently displacing specific communities. Some of the attacks were allegedly blessed by Kalenjin village elders who apparently exploited the fairly common initiation ceremonies to rally their community youths around the common objective of evicting all the non-Kalenjin communities¹⁶.

A number of elements corroborated by the Fact-Finding Team suggest that the violence occurred along community lines in what appears to have been the systematic targeting farms and business by Kalenjin youths bent on evicting the non-Kalenjin communities out of Rift Valley. Of particular note in this respect is that contrary to previous incidents of electoral violence, which had led to the temporary displacement of Kikuyu families, this time property was systematically burned and razed and some villages renamed under Kalenjin appellation, leaving little doubt as to the intent to evict any perceived “outsiders” for good.

C. Organised retaliatory attacks

The immediate post-electoral attacks eventually took on a retaliatory character. Counter-attacks and reprisals developed, led by mobs of Kikuyu youths, notably in Nairobi’s Mathare slum, and two localities of the Rift Valley – Naivasha and Nakuru. The Central Province, appears to have been affected later than other regions and as a reaction to a dynamic of secondary displacement.

The attacks in Nakuru mirrored those of Mathare, and Naivasha town and seem to have involved the same group of alleged Mungiki militiamen. Two Kikuyu leaders from Naivasha reported to the Fact-Finding Mission that a regional political figure from their community had sent some recruiting agents among the youths, allegedly to avenge the Kikuyu community from northern Rift Valley and Western provinces, through targeted attacks against the Luo community of Naivasha. The organised attacks would have been prompted by the arrival, in Naivasha, in early January, of Kikuyu families displaced from northern Rift Valley and Western provinces. Some of the young men who participated in the Nakuru and Naivasha attacks told the Fact-Finding Team that they had been assisted by some members of the Mungiki militia, who allegedly came from Nairobi. They also stated that a coordination meeting had been organized, before the attacks, with wealthy individuals of Nakuru’s Kikuyu community.

In Central Province, and in particular, in the locality of Kikuyu, the violence and the evictions were first sparked by news about the massacre in Kiamba church, then, in the second half of January, it appears to correspond with the arrival of Kikuyu IDPs from Rift valley and other nearby regions.

V – HUMAN RIGHTS CONCERNS

A. State violence: excessive use of force, violations of the right to life and lack of equal protection before the law

The OHCHR Mission found evidence to support the allegation that an additional pattern of violence seems to have emanated from the State apparatus. Indeed, credible evidence including witness and victim accounts corroborated by data gathered at hospitals suggest that Kenyan police used excessive force in dealing with the demonstrations which followed the announcement of the election results and to control crowds which, in some cases, had turned violent.

¹⁶ Several witnesses alleged that contrary to customary practices, Kalenjin’s initiation ceremonies had been organised in October/November instead of late December, reportedly to prepare the youths for elections-related violence.

The Government acknowledged that out of the reported 1,220 people killed during the post-election violence, 123 were killed by the police. The OHCHR Mission believes that there is credible information to indicate that this figure might be higher. A survey of 80 post-mortem examinations in public mortuaries by the Independent Medico-Legal Unit (IMLU)¹⁷ of Kenya concluded that 43 percent of the examined bodies had gunshot injuries to various parts, including the head, abdomen and chest. Twenty percent of the victims whose deaths were documented in Rift Valley had suffered from gunshot injuries. In Nairobi, 38 percent of the victims whose deaths were documented had been shot, while 100 percent of the IMLU cases sampled in Kisumu had gunshot wounds. Partial hospital data gathered during the Fact-Finding yielded 227 victims injured and at least 153 dead from gunshots. It is widely acknowledged – even by police officials - that the vast majority of bullet wounds and ensuing death were caused by the police who reportedly were the only ones to carry firearms¹⁸.

Credible evidence suggests that there was a consistent pattern of police using firearms and live ammunition to respond to demonstrations and related violence in Kibera, Eldoret and Kisumu and that the police failed to abide by the principle of proportionality and of necessity. Information gathered by the Fact Finding Mission suggests that, in a number of cases, the police failed to use the full range of “crowd control tools” such as teargas, batons and rubber bullets before resorting to firing live ammunition and that in many instances it failed to issue clear warning to the demonstrators and the crowd prior to shooting with live ammunition.

According to international standards, should firearms become a necessity, they should be used as to “[m]inimize damage injury”¹⁹ and resorting to intentional lethal use of force should only occur when “strictly unavoidable”.²⁰ In various instances, witness and victim accounts report that the police shot arbitrarily at unarmed individuals, including women, children and passers-by that were engaging in neither the demonstration nor the violence surrounding them.

Victim and witness Statements also indicate that the police continued to shoot at demonstrators even though they had started to disperse and did not present an imminent threat any longer. These Statements are corroborated by a number of hospital records which attest to bullet wounds entering through the backs of bodies. For instance, in Kisumu, on 31 December 2007, Police continued to fire live ammunition, indiscriminately, even after protesters or looters started running away in the suburbs of Manyatta and Nyamasira.

The State of Kenya also has a duty to investigate and prosecute serious violations of the right to life and physical integrity under international law but according to information from the Ministry of Provincial Administration and Internal Security, so far only one officer is under investigation for police brutality. In view of the number of deaths caused by bullet and the recognition that such injuries could only in their majority have been caused by police fire, clearly indicates to the public the prevalence of impunity enjoyed by the police.

B. State responsibility to protect

¹⁷ Using indicative random samples IMLU surveyed public mortuaries in Nakuru, Molo, Kericho, Kisumu, Eldoret, Webuye, Bungoma Mumias and Nairobi, See “Forensic investigations into post-election violence related deaths” – IMLU, 24 February 2008

¹⁸ With the notable exception of the Mount Elgon area, demonstrators and attackers were unarmed or carried traditional weapons such as clubs, bows arrows, and machetes.

¹⁹ *Basic Principles*, Principle 5(b); *see also*, *Basic Principles*, Principle 11(b).

²⁰ *Basic Principles*, Principle 9; *see also Code of Conduct*, Art. 3: “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.” As underlined by the SR in his report “The distinction drawn between the use of firearms and the intentionally lethal use of firearms stems from the recognition that any use of firearms is potentially lethal. Shots fired to warn rather than strike or to stop rather than kill cannot be relied upon not to cause death. Indeed, any use of force may result in death, whether by happenstance or due to the condition of the target. Principle 9 interprets the principle of proportionality as it applies to two points on a continuum, specifying the objectives that would be proportionate to that level of force.

Under international law, States bear the primary responsibility for protecting the rights of all individuals within their territory, including the rights to life, security, physical integrity, movement, property. The Constitution of Kenya provides that everybody in Kenya is entitled to security of his person and the protection of the law²¹. It is estimated that due to post-election violence – including State violence - 1200 persons died, many more were injured, over 300,000 individuals were displaced and that 42,000 houses and many more businesses were destroyed and/or looted. The scale of the violence and destruction indicates the failure of the Kenyan State to protect its citizen's right to life, security and property during these events.

A number of State officials reported that such an outbreak of violence had not been foreseen and that the State was thus caught unprepared. However, the regular recurrence of violence along ethnic lines around past elections particularly in the Rift Valley, the existence of publicly documented pre-electoral violence, including early displacement in some region, the circulation or inflammatory mobile phone text messages and a high number of pronounced threats and the seeming organization of militia groups ahead of elections provided strong indicators of mounting tensions. The failure of the State to take preventive measures to address signs of ethnic radicalization and early occurrences of ethnic violence must be looked at in correlation with the decision of the State to ensure heavy police presence at all polling stations on election day and to deploy strong police contingents to the slums and opposition strongholds as early as 29 December. The discrepancy between the level of preparedness and the means dedicated by the State to address one type of violence rather than the others strongly suggests that the Government failed to take appropriate measures.

According to Government data, as of 27 February 2008, the police had opened 5600 files for investigations related to the post-election violence. However, at the time of the OHCHR Mission, only fifty-eight persons had been arrested and brought to court on charges, amongst others, of murder, preparation to commit a felony, robbery with violence, burglary and stealing and arson.

C. Freedom of expression / Freedom of assembly

On 30 December 2007, the Police Commissioner announced that public rallies were banned and the Permanent Secretary of the Ministry of Information issued a notice to all media houses ordering the suspension of all live broadcasts.

The Kenyan Constitution and international human rights standards both guarantee the right to assemble peacefully and the freedom of expression. Limitations to the rights of freedom of expression are allowed under international human rights law but must be "provided by law". Restrictions on the right to freedom of assembly must also be in accordance with the law²². Under Kenyan law, the President is granted the power to issue an order to limit these rights when justified by a threat to public order.²³ The ban on rallies and live broadcast failed to follow the procedure prescribed in Kenyan law. As such, the limitations imposed on both rights were both unconstitutional within the national framework and a breach of State obligations under international law.

At the time of issuance of the ban, demonstrations had started in only a few parts of the country and had for the most part been peaceful. In Kisumu violence had erupted in the context of a demonstration, however, incidents of looting and violence that followed in many towns had not yet taken place. In Kibera, however, on 29 December people who were anxiously following the development of the elections had gathered notably in the area of Machina carrying twigs and wearing white clothing to signal their peaceful intention.

²¹ Constitution of Kenya, Revised Edition (2001) (1999), art.70 (a)

²² Article 21 of ICCPR States "No restrictions may be place on the exercise of this right other than those imposed in conformity with the law."

²³ Public Order Act, art.5; Preservation Security Act, art.4 and section 85 of the Constitution of Kenya

It is questionable whether the decision to ban all demonstrations regardless of their location and without a case-by-case assessment of the exigencies situation met the requirement of necessity under international law, however, further information is needed to fully review the compliance of the ban with international standard. In any case, the ban on demonstration was widely perceived by the population as a further infringement on its freedom to voice protest against the perceived violations of its democratic rights. As such, it seems to have contributed to fuelling violence.

The ban on live radio and TV news reports constituted a *de facto* ban on news programmes²⁴ as most of the broadcast media suspended all their news programmes. This may have contributed to disinformation and the spreading of rumours – particularly as information allegedly continued to circulate via text messages.

Contrary to the restrictions imposed on freedom of assembly and live media, several organisations expressed concern that the Government took little to no measures to put an end to inflammatory and ethnically divisive items aired on the call-in programmes of several vernacular radio stations. Kenya does not have a legal framework for cases of hate speech and incitement.

D. Sexual and Gender-Based Violence

The OHCHR Mission sought information from a variety of sources as to the existence, extent and nature of Sexual and Gender Based Violence (SGBV). Whilst there was little hard evidence that there had been widespread and systematic use of SGBV as a tool for intimidation of members of different ethnic groups, there remain very serious concerns in this area.

Hospital reports indicate that between 27 December 2007 and 29 February 2008, 322 cases of sexual assault and rape of women and girls were reported to Nairobi Women’s Hospital²⁵, while 26 were reported to the Moi teaching and Referral hospital and two cases to Nyanza Provincial hospital.

Information gathered during interviews conducted with victims of rape and sexual violence suggests that by and large, most of the reported cases of rape seem to have been “opportunistic”, perpetrated in the urban setting by groups of youth taking advantage of the chaotic and violent situation. Victim and witness accounts indicate that, overall, attacks which targeted specific communities in the rural areas mostly spared women and children who in most cases were told to leave. Though instances of victims allegedly raped on the basis of belonging to a particular community may have occurred, sexual violence does not appear to have been used as a systematic tool to target specific victims on the basis of their political allegiance or ethnic background.

Overall, based on interviews conducted and the above hospital data, there does not appear to have been a steep increase in the number of cases of sexual assaults reported in the hospitals visited or large-scale assaulting of women during the attacks.

Caution is however warranted. Indeed, it must be noted that due to the stigmatization attached to it, sexual violence is generally underreported. The situation of insecurity during the post-election violence may also have added to the usual underreporting: Indeed a number of the victims reported that hospitals were overwhelmed by victims of violence and that they were unable to be examined. Victims may also have been unable to reach the medical care facilities.²⁶

²⁴ Radio and television are the main sources of information on politics for 59 percent of the Kenyans, according to a 2007 survey by the International Republican Institute in “Republic of Kenya National Opinion Poll September 13 - 18, 2007”, IRI.

²⁵ Nairobi Women’s Hospital, “Interim Report – Gender Violence Recovery Centre”, 27 December 2007 to 29 February 2008. Nairobi Women’s Hospital is specialized in Sexual and Gender-Based violence and receives patients from various facilities in the country

²⁶ For further information on SGBV during the post-electoral violence in Kenya see for example: UNFPA/UNICEF/Christian Children’s Fund, “A Rapid Assessment of Gender-Based Violence during the Post-Election Violence in Kenya”, February 2008

A number of UN agencies and other organisations also expressed concerns about sexual exploitation of IDPs – often the allegations concern women and girls providing sexual favours in exchange for food and other services. According to their findings, cases of sexual exploitation within camp settings are on the rise but numbers are impossible to ascertain because of lack of standardised reporting mechanisms, and challenges associated with acknowledging victimization. The Government agency that manages the IDP sites has since decided to post two female officers at each site to encourage reporting of such cases. Steps are also being put in place to train camp officials and others working with IDPs on the issue of sexual exploitation and abuse, the adoption of codes of conduct for camp officials and other humanitarian workers and to develop reporting mechanisms.

A few cases of ethnically motivated forced circumcision of males from the Luo and Luhya communities allegedly perpetrated by Mungiki were documented in Naivasha, Nakuru, the Lain Saba area of Nairobi. However, the number of cases encountered suggests that these were sporadic rather than an overall trend in the violence.

E. Forced displacement

Though, all agencies acknowledge the absence of reliable numbers and a constantly evolving situation, as of 27 February the Kenyan Red Cross estimated that there were 268, 330 IDPs in sites, displaced from six of Kenya's eight provinces, while a similar number of displaced persons were living in host communities. Most of the displaced are living in some 200 IDP sites in the Rift Valley, Nyanza, Western, Coastal and Central provinces.²⁷ Some 12,000 Kenyans were also reported to have sought refuge across the border, in Uganda.

The issue of displacement has been long-standing in Kenya. Its causes are rooted in multiple factors among which community rivalry over land, cattle rustling or competition for available resources, conflicts between refugees and local populations, natural disasters such as flood and droughts and political and past electoral violence. To date, Kenya has no national IDP policy or legal framework to deal with displacement and help facilitate return, resettlement or reintegration.

In the course of its mission, the Fact-Finding Mission visited some 16 IDP sites in four regions. According to the information received, it appears that the new wave of displacement coincided with the announcement of the elections results and the ensuing attacks on homes and businesses targeting small farmers and smallholders. It affected mainly the Rift Valley and the urban slums of Nairobi and Kisumu. As violence erupted, targeted communities –including Kikuyu, Kisii and other real or perceived PNU-supporters - fled their places of residence. Some sought shelter on Government land and property, while others found refuge with family and friends. The vast majority of these people left in panic, taking very little with them, and are reluctant to return to their homes.

A second surge in this new wave of displacement was triggered by the resurgence of violence around the third week of January and the attacks on migrant workers from the Luo, Luhya and other communities perceived as ODM supporters in Naivasha, Nakuru, Kikuyu, and throughout the Central Province. The enduring level of violence and insecurity throughout January also resulted in a continuous flow of displacement.

A few instances of early returns were reported, notably in the Western region. Nevertheless, to date the vast majority of IDPs either remain in displacement sites or have relocated to different areas of the country. In this context, it is important to differentiate between “returns” – people returning to homes which they had been forced to leave due to the post-electoral violence – and “relocations.” In the Kenyan context, relocations also include movement to ethnically homogenous areas to which an IDP is linked either because of his/her community lineage or through connections to so-called “ancestral homelands”. Relocations of IDPs appear to have been un-coerced. Nevertheless, most of the individuals interviewed by the Fact-Finding Team did not appear to have been given any choice but to

²⁷ OCHA, Briefing to the Security Council on the Situation of Kenya, Statement by USG Holmes, 25 February 2008.

relocate, sometimes at very short notice. Of serious concern, is the risk that such patterns of displacement and relocations result in Kenya being segregated into ethnically homogenous provinces.

Due to time constraints, the Fact-Finding Mission was unable to thoroughly investigate allegations of discriminatory treatment between the various displaced communities.

F. Right to Health, Education and housing

Post-electoral violence also severely impacted on Kenyans' enjoyment of economic and social rights. The rights to food, adequate housing, health, and education were particularly affected. Attacks and destructions of farms included burning of crops and stockpiles of food. Forced displacement also means that fields will not be prepared or sown, thereby reducing overall food production in a country where twenty percent of the population was already experiencing food poverty. The right to food of many displaced Kenyans who now subsist from their hosts' generosity or from handouts in IDP sites is directly affected.

The destruction of schools, fear and displacement resulted in thousands of teachers and pupils staying away from school. In some cases, stolen or burned school uniforms, books and learning material, a burden on already poor families, deprived some children from attending school.

The post electoral violence did not spare health workers some of whom were unable or afraid to report to work out of fear or because of displacement. In some cases, a hospital declared to its staff it could not guarantee the safety of some of them from a particular community. A few patients reportedly refused to be treated by someone from a disliked community but charges of discriminatory behavior by staff were not confirmed. Access by patients to medication was also affected, with many HIV and TB patients facing difficulties in accessing ART centers while at least one hospital faced medicines shortage. As a result of fear and displacement, many health and education workers submitted transfer requests.

The destruction of thousands of houses in the post electoral violence and the massive displacement of population has already increased the number of people who cannot enjoy their right to adequate housing. The preexisting gap in adequate housing by a vast segment of the Kenyan population has only worsen and will require a special effort in years to come so as to avoid that the newly displaced face the same challenges as previously displaced persons.

VII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

On 27 December, in most parts of Kenya, the population voted in a largely peaceful and orderly manner. Based on the findings of various observation missions and independent reports, however, it is clear that procedural irregularities in the vote counting and tallying cast serious doubts on the legality of the election results. Kenyan voters who did not support Kibaki and who felt they had been deprived of their basic democratic rights then unleashed a wave of protests and violence that engulfed the country for weeks and that, according to official data, by 15 February had resulted in 1,220 deaths, including 17 police officers, and in the burning of 41,396 houses. The main trigger of the violence was, therefore, political. However, the extent, duration and devastating impact of the violence can only be explained by analyzing the root causes and other factors that fuelled the violent acts.

According to most of those interviewed, "historical injustices", mostly linked to land but also to real or perceived discrimination in access to job and other financial opportunities were behind most of the expressions of inter-ethnic violence, especially in the Rift Valley. Those "injustices" must be more thoroughly clarified and addressed to avoid that they be turned into divisive populist messages. The Truth, Justice and Reconciliation Commission which is to be established through a legislative act is

seen by many as the natural forum to address these issues, provided it is set up in a manner which ensures its independence, competence and effectiveness in accordance with international standards and best practices – including extensive participation of civil society and other stakeholders in the drafting of legislation and the selection of commissioners.

Poverty and disenfranchisement were also identified as primary fuelling factors of the violence. Many individuals and organisations that met with the OHCHR Mission stressed the direct relationship between long-term violations of economic and social rights and the violent reactions to the flawed electoral process.

A lasting legacy of impunity contributed to and continues to foster the resurgence and persistence of violence and conflict. Consistent failure to act on the findings and recommendations of various State-commissioned inquiries and studies has distanced the citizens from State institutions. Most Kenyans identified the failure to prosecute perpetrators of past communal violence at the national, district and village level and the consequent feeling of being able to act in total impunity as a major contributing factor to the violence. They unanimously pointed to the need to bring the perpetrators to justice, including those who planned and organised the violence. The eventual establishment of a Commission of Inquiry on Post-Electoral Violence could therefore be a much needed first step towards re-building confidence towards justice.

Lack of trust in State institutions and, more importantly, in the Constitutional construct is a fundamental issue. In fact, many Kenyans define the period of elections and electoral violence as a time when all State institutions failed them. Corruption is seen as inseparable from the system. Again, failure to improve and reinforce institutions against a background of excellent studies and inquiries has led the majority of Kenyans whom the OHCHR Mission spoke with to the conclusion that they need a new social contract with the State. Many expressed the feeling that Constitutional reform should be conducted by an independent body, validated through a popular referendum and concluded ahead of the next round of elections.

The recent power sharing agreement reached within the Kenya National Dialogue and Reconciliation process is a welcome compromise towards a solution of the crisis. Important commitments have been made in the context of the dialogue to carry out reforms to address long-standing issues, including constitutional and institutional reforms, inequality and accountability. It is important that those commitments are held to and result in the effective establishment and functioning of the proposed investigative, truth-seeking and reformatory structures. Violence, which has cyclically affected Kenya, could re-emerge unless the root causes of the social malaise are finally addressed.

B. Recommendations

The following OHCHR recommendations should be seen as a contribution to the parties' efforts to achieve sustainable peace through justice and respect for human rights.

1) Post-Election Violence

In discussions with the OHCHR Mission, senior State officials, members of civil society and diverse representatives of the public unanimously expressed the conviction that justice for post-election violence would need the establishment of special prosecutorial capacity of highest quality and independence, including ethnically balanced judicial structures, that can effectively use the findings and recommendations of the non-judicial Commission of Inquiry into Post-Election Violence in subsequent criminal proceedings. OHCHR therefore recommends that the GoK considers special, highly independent, prosecutorial measures, possibly with international support, to strengthen Kenya's capacity to bring the perpetrators, including planners and organizers, of post-electoral violence to justice.

Also, international organizations, including the AU and/or the UN, should be requested to play an independent and supportive role in the monitoring of the implementation of the recommendations eventually issued by the Commission of Inquiry.

2) Truth, Justice and Reconciliation

OHCHR welcomes the 4 March 2008 agreement on general parameters and principles for the establishment of a Truth Justice and Reconciliation Commission but stresses the importance of considering the following points when drafting and approving the legislative Act establishing the TJRC:

- Perpetrators of gross human rights violations should under no circumstances be recommended for amnesty. The United Nations rejects such amnesties and is therefore unable to provide support to institutions and mechanisms recommending or granting amnesties for gross human rights violations.
- The TJRC should have a clear mandate to recommend and feed into criminal prosecution of individual perpetrators
- The Commission should also have a mandate to recommend and provide guidance to the establishment of a Government reparations programme in line with the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
- In accordance with international best practices, structured and broad civil society participation in the drafting of the Act and in the selection of the Commissioners should be ensured.
- The mandate of the TJRC needs to be comprehensive but narrow enough to be manageable in time and scope. The Commission's investigative responsibility in relation to corruption, land distribution and other "historical injustices" must be realistic and commensurate with resources and time assigned to the Commission.
- International experiences indicate that public hearings by truth commissions create national ownership and have the potential to substantially contribute to the process of reconciliation.

3) Constitutional Review and other Institutional Reforms

OHCHR welcomes the agreement to proceed with the review and reform of, inter alia, the Constitution, the Parliament, the police, the legal and judicial as well as the electoral systems, public service, public finance and revenue management systems and institutions. The need for independent oversight of those key services, and notably of the police, should be assured. The concluding observations of the UN human rights treaty bodies and the recommendations of the various special rapporteurs that visited Kenya in recent years could provide an important framework for these reforms.

4) Witness Protection

The Government should ensure the protection of all the victims and witnesses of human rights violations, particularly those who were in contact with post-electoral investigative missions and ensure the protection of all human rights defenders. In order to ensure the proper functioning of the Truth Justice and Reconciliation Commission and the Commission of Inquiry into Post Election Violence, but also of ordinary criminal justice, the 2007 Witness Protection Act should be implemented as soon as possible.

5) Strengthening Kenya's forensic capacity

The current crisis revealed the serious limitations of Kenyan forensic capacity, especially in the area of pathology. A concerted effort should be made to reinforce such capacity.

6) Passing hate speech bill

In line with its obligation under Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Government of Kenya should consider establishing a regulatory framework against hate-speech by drafting a law for parliament's consideration. This framework would regulate the issuing or dissemination of any public Statement or program by any actor of society –media, political parties, members of parliament etc - whose content comprises elements instigating hate or inter-communal division. Particular attention should also be paid to protecting human rights defenders from being individually targeted when they exercise their fundamental right to speak out on human rights issues.

7) Securing the rights of IDPs to return or resettle

In line with the work of the United Nations Special Representative of the Secretary General on Internal Displacement and the Guiding Principles on Internal Displacement, the Kenyan Government and all other stakeholders should recognize that IDPs can truly exercise their right to freely choose among durable situation only once all three options –return, resettlement or integration at the site of displacement- are meaningfully available to them. All stakeholders should commit to ensuring that IDPs are able to freely decide their fate through a voluntary and informed choice free from any political consideration.

A key element in respecting this right must be that other actors refrain from premature actions or decisions that would hinder IDPs choice by undermining or precluding these options. The Kenyan Government together with relevant stakeholders should consider developing a legal framework for the displaced and a national strategy to deal with the recent and long standing issue of forced displacement in Kenya.

8) Displacement related and structural sexual and gender-based violence

In order to prevent the occurrence of SGBV and to provide protection and justice to victims of such violence it is recommended that national and local authorities consider:

- establishing reporting and protection mechanisms and mandatory investigation into the allegations of sexual exploitation and sexual violence in the camps and sites of displacement in accordance with the Inter-Agency Standing Committee Gender Guidelines
- creating centres in the camps where women can obtain health care, counselling and legal advice relating to SGBV during displacement
- reviewing procedures within the criminal law which might discourage women from lodging complaints and identify further obstacles to women accessing formal justice mechanisms
- institutionalizing initiatives around sexual and health education, in particular among disenfranchised slum populations
- creating legal aid programmes to assist those subject to sexual violence to seek redress
- conducting specialized training in all police stations on dealing with complaints of sexual violence

9) Independent monitoring and investigation

Civil society and other initiatives to investigate post-election violence, notably the investigation currently being undertaken by the Kenyan National Human Rights Commission should be supported. Their findings should be widely disseminated and an appropriate mechanism, including possibly the TRJC and CIPEV should review and build on the recommendations. As part of the Police reform, the monitoring role of the KNCHR should also be reinforced together with a more active role for Parliament in overseeing the security sector.

The United Nations Office of the High Commissioner for Human Rights, within its limited resources and mandate, stands ready to work with the Kenyan Government in support of the effective

implementation of the above recommendations, including support to the TJRC and the CoI on Post-Electoral Violence.