



# Ending impunity

How commission went the extra mile to find the truth and seek accountability for perpetrators of the post-election violence

**E**xcitement -- then panic, then terrified powerlessness. Kenya's politicians have ridden the rollercoaster of emotions since the Commission of Inquiry into the Post Election-Violence presented its report.

They have said the report is a threat to peace and national cohesion. They have said it is a product of illegal processes. Finally, they have also come round to accepting that they must implement it.

One of the expectations in setting up the Commission of Inquiry into Post-Election Violence was that it would find the people responsible for gross human rights violations and recommend appropriate punishment.

The decision not to publish the names of people the commission believes bore responsibility for the violence has elicited mixed reactions.

The commission handed the coalition government two tough political choices involving complex tradeoffs. While there are those who would prefer that justice for perpetrators of the post-election violations be secondary to structural reforms of the institutions that failed the country, Kenya's recent crisis suggests that failure to punish those responsible would set a bad precedent.

The single most important recommendation in the Waki Report is the setting up of a Special Tribunal to seek accountability from persons bearing the greatest responsibility for serious violations relating to the 2007 elections.

The tribunal should apply Kenyan law as well as international criminal law through the International Crimes Bill, which is pending enactment into law.

Further, an agreement on the tribunal's formation must be signed within 60 days of the Panel of Eminent Persons receiving the report. The Special Tribunal should be created by law within 45 days of the agreement being signed.

The tribunal will be anchored in the constitution and insulated from challenges arising from constitutional provisions about its jurisdiction.

If the Special Tribunal is established in any other manner than what has been set out, a list containing the names of suspects and relevant information will be handed over to the Prosecutor at the International Criminal Court.

The commission not only set general guidelines and principles on how to bring to justice those who were behind the post-election violence, it also provided measurable benchmarks within a specific timeframe. Failure to comply would automatically invite referral to the ICC. *continued on pg2*



Top, The Hague, President Kibaki, Premier Odinga and Justice Waki

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Thus, the commission refused to sweep the country's history of ethnic violence under the carpet, and instead provided a straitjacket for the authorities – to either set up a tribunal or cede that role to the international criminal court.

The commission rightly noted that the violence that rocked Kenya after the 2007 elections was not the first episode of ethnic strife in the country. Previous episodes, as narrated especially in the Akiwumi report, are a hallmark of Kenya's history of ethnic bloodletting and the resultant plight of those killed, displaced and dispossessed. It is a scar on the conscience of the nation. Obviously, if the cries of the dead and dying were heeded in 1992 and 1997, perhaps the country could have avoided the post-2007 election violence.

The commission put in motion a process for holding to account those responsible for gross violations of human rights, and especially those it believes to have been responsible at high levels of government, security agencies or political parties for actions and omissions that provoked or fuelled the violence.

Full due process protection, such as that required in criminal trials, was not necessary before publicly

identifying those who must be further investigated and tried. Still, the commission chose not to publicly shame those it believed to be responsible at the highest level. A coherent plan of action has been provided, based on how the commission was formed, and its accountability not only to the President but also to the African Union.

Individuals who believe they have been wrongly targeted in testimony can resort to civil suits for defamation.

In proposing a mechanism that is beyond the control of the State or the Attorney General, those identified will have the allegations against them eventually brought to their attention and an opportunity to rebut them. In bypassing the AG, the commission emasculated the coalition partners' capacity to scuttle the action on the report.

On the requirement to recommend ways to prevent future violations, the commission proposes an administrative procedure that provides for a further hearing before the proposed Special Tribunal for Kenya where those affected may state their case and if found guilty, be barred from holding any public office.

The Waki commission saw its role as part of a continuous accountability process that envisages further inquiry and follow up towards responsibility for what transpired in the aftermath of the elections.

# Obstacles for Tribunal

The first step towards fulfilling the recommendation to set up the Special tribunal lies in parliament debating and passing the International Crimes Bill, 2008. The recommendation that the International Crimes Bill, 2008 be enacted at once is an admission that the current national criminal law is inadequate to deal with violations on the scale of what took place after the elections. Parliament has numerous vested interests. Further, the International Crimes Bill, 2008 has two major shortcomings:

It does not provide for the irrelevance of one's official capacity in conducting proceedings against a suspect as required by the Rome Treaty. This is a major flaw in the bill since it insulates the Head of State from scrutiny. This omission needs to be rectified for Kenya to avoid a situation where our enabling legislation and or political environment is deemed as either unwilling or unable to vindicate international crimes, especially since there were allegations in the Waki report of meetings at State House with the outlawed criminal Mungiki sect members.

Further, section 14 (1) of the constitution should be amended. It provides that "no criminal proceedings whatsoever shall be instituted or continued against the President while he holds office, or against any person while he is exercising the functions of the office of the President".

There is no provision for the law to be applied to cover for past offences. It ought to go at least as far back as May 2005 when Kenya deposited its instrument of ratification in New York so as to bring the recent violations within its ambit. Lawyers are likely to argue that the offences were not known in Kenya at the time, thus section 77(8) of the constitution should be amended.

If the tribunal is to be shielded from objections it has to be entrenched in the constitution and, Parliament will have to pass the amendments. Reaching the threshold of 148 MPs to pass a constitutional amendment, especially in the current polarised political environment present a serious challenge.

Further, the International Crimes Bill not only defines international crimes as understood under customary international law – genocide, crimes against humanity and war crimes -- it provides for the manner in which individual responsibility is borne by those who directly commit the crime and also those who order it. There are two ways in which responsibility can accrue: direct responsibility for persons who may have committed crimes under international law and command responsibility where security officials exercising effective command or control are accountable for the conduct of all the units under them.



**THE INTERNATIONAL CRIMES BILL IS A SOURCE OF LAW FOR THE SPECIAL TRIBUNAL TO EFFECTIVELY DEAL WITH INDIVIDUAL HUMAN FOLLY, HUMAN WICKEDNESS AND THE HUMAN AGGRESSIVENESS THAT CHARACTERISED THE POST-ELECTION VIOLENCE**

# Hurdles on The Hague route

In spite of the default clause in the recommendations, the Rome Statute lists the following as instances when a matter can be taken to the International Criminal Court:

A State refers a situation in which one or more crimes as genocide, crimes against humanity and war crimes appear to have been committed to the Prosecutor. It requests the Prosecutor to investigate the matter to determine whether specific persons should be charged. The referral should specify the relevant circumstances and be accompanied by supporting documents.

The UN Security Council refers a situation in which one or more crimes appear to have been committed to the Prosecutor.

The Prosecutor may, on his own motion, initiate investigations based on information on crimes within the jurisdiction of the court. The Prosecutor enjoys ex-officio powers and prerogative to initiate proceedings based on a simple notice of a crime from any source. The Prosecutor has a right to take action without having to wait for a State to denounce a particular crime. He can initiate proceedings based on reports from intergovernmental or non-governmental organisations, or other reliable sources. The Pre-Trial Chamber of the Court, which judges its appropriateness and legal foundation -- to reduce the risk of illegitimate, oppressive and unwarranted investigations and procedures, close supervises the ex-officio action of the Prosecutor.

The ICC Prosecutor would not, therefore, automatically take up and investigate Kenya's post-election situation. All the same, a referral by the African Union under the auspices of the Panel of Eminent African Personalities would be extremely persuasive.



Prosecutor Luis Moreno Ocampo

While the ICC has jurisdiction in respect of crimes committed after July 2002 when the Treaty received the 60 signature ratifying it, Kenya signed the treaty in 1999 and ratified it in 2005. This means that any acts committed in Kenya after 2005 would fall within the Court's jurisdiction. This principle, of complementarity, relates to the balance between the jurisdiction of the ICC and that of States.

The Rome Statute also defines the relationship between the ICC and national courts. Even where Kenya has a functional judicial system, the ICC can intervene if Kenya is either unable or unwilling to prosecute.

For example, if the proceedings at the national level or decisions are being undertaken to shield persons from criminal responsibility for crimes within the jurisdiction of the court, then the ICC can step in.

The same is the case if there is an unjustifiable delay in starting proceedings, which in the circumstances is inconsistent with intent to bring the persons concerned to justice. Also, the ICC can intervene if the proceedings are not conducted independently or impartially.

While Kenya is guaranteed the right to repress, at local levels, crimes punishable under international law, the ICC would intervene only in cases where the Prosecutor can prove that national courts have neither the desire nor the means to start and conduct proceedings.

The threshold for ICC intervention is high -- the jurisdiction of the court is limited to the most serious crimes of concern to the international community. The court is not concerned with lesser crimes or other violations that are in the province of national systems -- or with monitoring human rights below the limit of such lesser crimes.

## LINKING WAKI COMMISSION TO TJRC

Kenya, like many countries in transition, is faced with a flood of new expectations, values and demands for justice over misdeeds related not only to the post-election period, but also to other previous episodes. The commission acknowledged a number of challenges the country faces, among them:

- Providing a national catharsis and healing to consolidate recent political developments and provide a break from the past.
- Providing a forum for moral reconstruction by taking stock of national morality in politics, governance and the culture of humanity.
- Reversing the culture of impunity by revealing the painful truth of the post-election violence so that the nation may say "never again".
- Promoting reconciliation and reconstruction.
- Providing a novel platform for justice through reparation, restoration and retribution by prosecuting perpetrators through the due process of law over the most outrageous violations and crimes.
- Providing a framework to understand the linkages and interface between human rights violations and Kenya's political competition.
- Boosting international recognition for having created a culture of accountability and human rights centered governance.

From the foregoing, and in spite of the commission having addressed the issue of internally displaced persons to the Truth, Justice and Reconciliation Commission's attention, its work lays the groundwork for the TJRC. The challenge is to ensure that politicians do not attempt to use the TJRC ostensibly to implement the commission's recommendations.

# Short of the goal

Though yielding important findings, the investigation on sexual and gender-based violence was not as thorough as it should have been



**F**or the first time in Kenya's history, a commission of inquiry isolated sexual and gender-based violence for special attention.

The Commission of Inquiry into Post-Election Violence felt strongly about focusing on sexual violence first because it fell within its mandate, and secondly because it was horrified by the stories of sexual violence. Commissioners wanted to learn and expose what had happened with a view to deterring its recurrence.

Before beginning its task, the commission listened to many specialist agencies on the best way to determine that gender-based violence occurred as well as ways in which it could reach survivors for their testimonies. Some 40 organizations in Kenya – which included groups from the health and gender ministry departments as well as the judiciary, UN agencies, the Red Cross and Red Crescent, and local and international non-governmental organizations – had come together to reach out to victims of sexual violence after the 2007 elections even before the commission began its sessions.

This umbrella group had responded to the sexual violence in the post-election period, particularly against women, by providing medical, psychosocial and other services for survivors.

The commission sought to know from the organisations if sexual violence had occurred, where it occurred, its manifestation, where to find evidence of it, and how that evidence should be collected.

The commission relied on the expertise of the organisations and individuals as well as the testimony of the survivors to make recommendations on how to deal with the perpetrators of sexual and gender-based violence.

Many women testified to the commission in closed-door hearings, which accounted for 40 per cent of the commission's evidence. Even then, the commission was aware that if all testimony from victims of sexual violence was heard in private rather than in public, the issue might get lost and never be discussed or flagged to the public.

Though known to exist, no male survivors of sexual violence came forward to give testimony.

Generally, victims of sexual violence were too fearful to seek police because not only were the police otherwise engaged, but also because of discomfort in filing complaints with institutions they felt were associated with the perpetrators of the violence.

Realising that it would be easier to find out what had happened in Nairobi than in the countryside, where lack of anonymity and fear of speaking up might be a greater problem, the commission chose to focus on this area. Sexual and other forms of gender-based violence reached epidemic proportions in Nairobi. This area proved the most problematic in terms of determining the extent of violations.

The sexual violence experienced demands immediate responses through the provision of more effective physical protection, especially in the poorer areas of Nairobi, where women and children faced and continue to face the greatest at risk.

**COMMISSION RECOMMENDATIONS**

1. Although government hospitals had established Gender Violence Recovery Centres that offer free medical services to victims, most survivors did not know about them. The commission recommends that citizens be informed about them in awareness campaigns. Such a campaign has started in Mombasa and needs to be repeated in other parts of the country. These centres should be set up as departments in every public hospital with their own staff, facilities, and budget. Currently, they fall under other departments and rely on them for funding as well as staff, thus reducing their visibility and effectiveness.
2. Every police station should have a gender unit that will treat victims of sexual violence with sensitivity, properly record all cases and investigate them. The current units are limited and sometimes only constitute having a woman officer available to deal with women victims. For such units to be effective, the security forces, including the police, have to change their attitude radically. Police require first aid training, as well as skills on how to handle sexual violence cases -- but only after mechanisms for accountability within the security forces are in place. An example would be severe punishment for police and other security personnel who commit crimes of sexual violence and those who mishandle victims of sexual violence dismissed.
3. Non-governmental organizations working in the health sector should collaborate with medical institutions and share information to ensure a swifter and improved response to sexual violence. There is a low level of awareness about the possibility of help that victims of sexual violence can receive, and there is no pressure on law enforcers to do the right thing when dealing with cases of sexual violence.
4. Parliament should pass a law to create the office of Rapporteur on Sexual Violence. The Rapporteur will continuously highlight the fact that sexual violence is a serious crime and needs an equally serious response on the part of law enforcement authorities. The Rapporteur should have appropriate staff and would be required and empowered to work with existing government institutions that address sexual violence, including the courts, the police, and the National Commission on Gender. Once every year, the Rapporteur should present a report to the National Assembly outlining on how, during the year, cases of sexual violence were handled.

# Too reactive

## More work needed to prevent sexual violence and deliver justice for survivors

All these recommendations react to the situation rather than providing a structural framework to address, comprehensively, sexual and gender-based violence. These recommendations provide an opportunity to put in place preventive measures structured to identify and make rapid responses to sexual and gender-based violence within the community setting instead of taking 'after-the-event' measures.

Overall, it appears that sexual and gender-based violence was not investigated with the same rigour, and against the standard set out in the commission's terms of reference.

Questions still linger about whether the commission could have done more to guarantee respect for the dignity of the survivors, assure confidentiality, and guarantee them more security. As it is, the Witness Protection Act is still not yet fully in force.

From the report, it is not clear what impact the evidence received in private had on the commission's conclusions. It is not clear from the report what sources of information or evidence the commission relied on. It would have been helpful if the commission had said which women and men gave evidence, and the type – whether forensic, personal or dialogical.

The commission only consulted experts on gender-based violence on an ad hoc basis. Had the commission wanted to examine sexual and gender-based violence with the same lens as it did other forms of violence, it would have investigated it as a phenomenon that cut across the gender and sexual divide rather than as a 'women's' issue.

Various civil society organisations presented data and case analyses to the commission enable it to investigate gender-based violence and seek ways of reaching possible witnesses. The commission's report does not reflect the use of this information and even it is touched on, the quality of the presentations is lost.

Because the conclusions are set out in general terms, they appear to undermine the credibility and value of the report. In this respect, the commission falls short of the expectations in its terms of reference.

Despite the commission's specific mandate to investigate the causes of the election violence and make recommendations to the Truth, Justice and Reconciliation Commission, it does not provide in-depth, factual and analytical investigation of gender-based violence. It is not apparent that the commission assessed itself to find out if it created sufficient and appropriate space for women to speak about their experiences. It is not clear whether or not women considered the commission as a safe public space given the danger of re-experiencing traumatic events, the fact that amnesty agreements signal that violence goes unpunished and that perpetrators of crime occupy powerful positions in society.

From its report, the commission outlines the remote causes of the violence as being the growing

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## WAKI REPORT Election Violence



# Weighed, measured

How did state security agencies act in the lead up to polling day? Answering this question enabled the Commission of Inquiry into the Post-Election Violence to determine how prepared security agencies were for what would come.

The Waki report analyses how the security apparatus runs as well as its failures in the period after the elections. Overall, its verdict is that the state security agencies “failed institutionally to anticipate, prepare for, and contain the violence” and that “individual members of the state security agencies were [often] guilty of acts of violence and gross violations of the human rights of the citizens.”

The report analyses how the state security machinery works in detail. This machinery as consisting politicians, civil servants and officials in the national intelligence service, the police, the administration police, the prison service and the military.

In summary, the Waki commission found the following anomalies in the way the security system was run:

- 1. Monopoly of Force:** The President unilaterally appoints all the people who occupy senior positions in this system. In the post-election period, the security machinery, which is designed to serve the interests of the regime in power, was under the control of the Party of National Unity.
- 2. Partisan Spy Agency:** The National Security Intelligence Service conducted an opinion poll and seemed to communicate the results outside the formal and established channels. The NSIS also became an agent of government in the electoral process. It sought accreditation badges for its officers from the Electoral Commission of Kenya; and it wrote to the ECK advising on “how certificates should be dealt with by agents and that ECK should meet with media house owners

and editors and the candidates “with a view to striking a deal on the modalities of transmission and announcement of results.” Specific advice of this nature was unwise and outside the NSIS mandate. In the run-up to the December elections, NSIS had warned of “... emerging allegations that the government is planning to use some sections of government organs including the provincial Administration and the Administration Police (APs) to rig the forthcoming elections.” NSIS chose to do nothing about these allegations.

- 3. Abuse of power:** It appears that the Head of Public Service and Secretary to the Cabinet, Mr Francis Muthaura, ordered that a large number of Administration Police officers be trained to act as election agents for the Party of National Unity. The role of the AP officers “was to disrupt polling and where possible ensure that government supporters amongst the candidates and voters prevailed.” Mr Muthaura “told that Commission that this deployment was approved by the Government and was commissioned for security reasons” and that the “reason for sending these people under plainclothes is that the area was very unfriendly.”
- 4. Licence to Kill:** The police often used excessive force and killed many citizens using live bullets in efforts to maintain law and order. In some cases, victims were “shot whilst in and around their own homes.” As a result, 405 people died of gunshot wounds, while 557 received treatment for gunshot wounds. The commission largely attributes these excesses to the police, saying it did not receive any evidence to show that anyone else shot or killed people with guns. Police armoury records relating, for example, to the use of firearms and ammunition in Nyanza Province were analysed and revealed that

“significant amounts of ... were expended ... and is no record at all of ... Witnesses also testified ... was indiscriminate. The “prime difficulty” in de force on retreating cro or operational basis fo of civilians from behind the circumstances pres ammunition also raises For example, the Homa Commission that his st live rounds and not b How was it that this o ammunition? Perhaps rubber bullets, were ov resorted to using w disposal to deal with th be that a deliberate dec bullets in areas hostile

- 5. Cover-ups and Inco** provided with stron offenders, police did n – especially those relat deaths by shooting, a files were opened, “at investigative effort was to investigate is attri as “self censorship or investigators who are and manipulation.” Se the commission that s “especially in respect o who could influence prospects or pose a pe
- 6. Criminals in Uniform** credible evidence of c



# and found wanting

ammunition and tear gas in very many cases there ammunition expended." that police use of firearms the police themselves had a defending the use of lethal dows. There was "no legal or justifying the shooting d at any given time during ented to it." The use of live two important questions. a Bay police boss "told the staff were only issued with blanks or rubber bullets." district only received live the police had run out of overwhelmed and therefore whatever means at their the emergency. Or it could sion was made to use live to the government.

**Competence:** Even when g evidence identifying ot investigate complaints ting to property offences, and rape. Where inquest t best [only] a superficial s undertaken." This failure butable to factors such fear on the part of the susceptible to pressure enior public officials told uch self-censorship is real f investigating individuals an investigator's work rsonal threat."

**Conclusion:** The commission found riminal behaviour by the

police, including murder, gang rape and looting. For example, an Administrative Police officer in Nairobi, who was identified by many witnesses, is alleged to have shot a number of citizens, many of whom were killed. There were numerous instances of police officers committing acts of sexual violence, including gang rape.

- 7. Winking on Rape:** The police failed to take allegations of rape seriously. For example, some senior officers told the Commission they did not include "figures relating to sexual violence in their statistics, apparently not deeming it important." The presentation by the Commissioner of Police does not have any statistics on sexual violence. The Commissioner of Police should also be held accountable for this serious omission. Indeed, the commission says victims of sexual violence who went to the police to report were met with a "dismissive response."
- 8. Tribal Police:** Policing agencies were divided along ethnic lines. In Naivasha, for example, the commission established that there were "breaks in the chain of command and parallel ethnic command structures" within the police meant that even with the best planning the police were too weak to respond adequately to the violence. In addition, victims testified that they "received assistance from police officers from their ethnic groups while facing hostility from officers who were not from their tribe." This testimony is corroborated by the Kenya National Commission on Human Rights and the International Crisis Group, which observes that there was "considerable evidence that officers have taken sides" and that "in many cases, decisive police action came only when officers thought their tribes or those who voted with their communities were under siege." In addition, the

commission observed, "at least four senior police officers were transferred or retired from their area of responsibility during the violence and at the height of operations." It is plausible that ethnic considerations were a major motivation for these transfers and retirements.

- 9. Misplaced Arrogance:** The police were "simply too far off the mark" in terms of being prepared to deal with the post-election violence. Their preparation and planning "was scant, commenced far too close to the event, failed to take account of the intelligence received and information available on the ground, and did not encompass preventive activities designed to reduce and/or ameliorate the impact of violence around the 2007 General Election." The approach taken by the police "reflected misplaced arrogance that they would always be able to control what came up." Second, the policing system in Kenya is designed for reactive, as opposed to, preventive policing. It was, therefore, incapable of preparing and planning properly to manage the General Election. Many police officers said their plans were not written. Many seemed to be actions or reactions to events as they unfolded on the ground."

- 10. Planning Failure:** The National Security Advisory Committee did not meet during the crisis period. Few of the other systems that run the security machinery were working. The provincial and district Intelligence committees put in a mixed performance. The police did not have their own highly developed information gathering and intelligence systems. The commission established that the security agencies do not review their performance as a matter of practice, and have not made credible efforts to assess how they worked during the post-election violence period.

# Beyond the Waki Report

The world over, it is recognised that gender-based violence is always widespread in emergencies. The post-election violence in Kenya in January and February 2008 witnessed systematic and rampant use of sexual violence in the various conflict areas and situations as a method of vengeance to brutalise and instill fear in the civilian population, especially women and girls. As a member of the United Nations family, Kenya should be guided by the measures taken to address gender-based violence in conflict situations, especially to the most vulnerable persons in society.

The UN Secretary-General has laid out Special Measures for Protection from Sexual Exploitation and Sexual Abuse to prevent gender-based violence, including in particular sexual violence, ensuring appropriate care and follow-up for victims and survivors, and working towards holding perpetrators accountable.

Besides increasing access to comprehensive survivor services, reducing the negative health effects of sexual and gender-based violence and assisting survivors to access legal service and protection, Kenya needs to reframe sexual and gender-based violence as a public concern. That way, preventive measures to identify women in danger before violence breaks out or escalates can be taken and protection offered to them.

These reforms require a systems approach to gender-based violence. Institutional reforms educate and train policy makers and law enforcement officers should be a priority to improve policies specific to gender-based violence.

Survivors' should have access to forensic examinations, post-exposure prophylaxis for HIV and protection of confidentiality through policies and protocols. There is also an urgent need to pass laws that enable professionals handling gender-based

violence cases, providers and caregivers to file reports.

Legal protection and social services for survivors is often lacking in low-income areas. There is need for professional investigators, medical personnel and legal officers working in coordination.

All public health programmes should be prepared to respond to gender-based violence by having sufficient supplies of services and preventive medicines. The government should put in place a forensic nursing system and install systems for data collection.

Ultimately, community mobilization can be extremely effective in preventing sexual and gender-based violence. It is essential for improving the service response for survivors.

It is important to develop a best practices policy and plan of action to strengthen capacity to deal with gender-based violence. By building on existing policies and guidelines, including a best practices matrix for gender-based violence interventions in conflict situations, Kenya can promote a coherent, participatory and multi-sectoral approach to prevent and respond to gender-based violence.

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politicisation and proliferation of violence in Kenya; the growing power and personalization; the feeling of certain ethnic groups as marginalized; and the growing population of poor unemployed youth. It does not address the core question – What caused the violence? It appears to have taken no deliberate steps to discover the causes of sexual and gender-based violence.

The report would have been richer if it had focused on delivering truths about patterns of conflicts, violations and violence rather than individual experiences.

## RESCUE PACKAGE

In addition to the recommendations the commission made, it is important that the following steps are undertaken.

1. End to impunity for human rights violations – investigate sexual violence crimes committed by civilians and government security agents and prosecute perpetrators.
2. Fast-track justice – Sexual and gender-based violence cases, tagged at a certain date, should be fast-tracked as a pointer that the state has 'zero-tolerance' on sexual exploitation, and sexual gender-based violence.
3. Ensure protection for survivors and witnesses – Assess all cases and seek ways of addressing urgent health concerns, short term and long term implications as well as medical-legal and compensation of survivors of sexual violence.
4. Improve and increase access to services – Prevention and response for survivors at the community level through sustained support to key sectors including health, legal, judicial, security and psychological. A special focus on gaps such as availability of forensic examiners, legal aid and an expeditious judicial system, prioritise sexual violence cases.
5. No amnesty for sexual violence crimes – Completely exclude sexual violence crimes from any amnesty provisions/negotiations/truth and justice.
6. Provide security – Women, boys and girls in conflict situations and in resettlement areas should be guaranteed protection to prevent occurrence/recurrence of sexual violence by provision of police stations, gender desks and increased surveillance.
7. Resources for implementation of the Sexual Offences Act – Allocate adequate resources for effective coordination and prosecution of sexual offences, as well as the interpretation and implementation of the Act, together with policy guidelines for addressing sexual violence in times of conflict.
8. Protect other rights due to survivors of GBV – Property rights for widowed women, HIV-infected persons and orphans should be guaranteed and cultural biases eradicated.
9. Community support – Set up community-based psychosocial support for survivors of sexual violence and their families.
10. Arrest and prosecute all known perpetrators of sexual violence and create a data bank of known perpetrators
11. Legislative reforms – Repeal section 38 of the Sexual Offenders Act, enact the Family Protection Bill, and operationalise the HIV/Aids Control and Prevention Act and the Witness Protection Act.
12. Gender equality at TJRC and all other Commissions.



## WAKI REPORT Election Violence



# Urgent reforms needed

1. Policing reforms should be guided by the principles of fair representation of all ethnic groups in the policing entities, impartiality and cultural sensitivity, decentralization informed by a "single integrated command model based upon community policing," respect for human rights, legal and political accountability, and integration of the Kenya Police Service and Administration Police. These principles are based on best international practices.
2. The Police Act should be amended to strengthen "police governance, accountability and organisational arrangements in a way which is suitable for a contemporary age" and improving the effectiveness of the police.
3. A new and modern Code of Conduct should be enacted to build trust in the police because trust is an essential component without which the police cannot function effectively. Such a code of conduct would seek to instill ethical standards in policing, including honesty, integrity, professionalism, fairness and impartiality, respect for people and confidentiality.
4. Criminal investigations should be strengthened. The question of independent investigations is particularly important because the commission says the police have a fundamental problem with its investigative capability and capacity."The commission also found that there was inability or reluctance to investigate effectively, serious crimes and their perpetrators even when strong evidence existed. The omission also established that the Police service has weak systems and approaches to investigating incidents where police officers are involved." There is therefore a compelling case for establishing an independent and autonomous Directorate of Criminal Investigations.
5. A Police Service Commission must be established, and with it a Civilian Oversight of Policing. The Police Service Commission would be responsible for holding an amalgamated police agency (that integrates the Kenya Police Service and Administration Police Service) to account. With respect to civilian oversight of policing, it envisages the "establishment of a well researched, legally based, professional and independent Police Conduct Authority." Among other things, the Police Conduct Authority would be responsible for investigating the conduct of policing agencies and officers. A "specialized and independent Police Reform Group (PRG)" consisting of both national and international policing experts would lead this reform process. The PRG is supposed to be established immediately (presumably following the presentation of Waki Report) and report to the Minister of Justice within six months.

# Not going far enough

No punishment is recommended for crimes committed by police officers, or sanctions for public officers who abused their power



**A**s political temperatures rose and the election loomed, Kenya had a security machinery that was dominated by the regime in power. This security machinery gave wide unrestricted powers to various individuals. The commission made a number of important recommendations that should be implemented. However, it does not provide a clear plan for prosecuting and punishing security agents who committed various crimes against the citizenry; and it does not recommend how the security intelligence apparatus can account to the citizenry, as well as be integrated with policing agencies. The Waki report is an excellent account of how police officers exploit and violate the human rights of Kenyans. It collected credible evidence to show that a number of officers committed murder, rape, theft and bribery. These findings support those of other organizations such as the International Crisis Group, Human Rights Watch and the Kenya National Commission on Human Rights. Abuse of power by police officers greatly compromises the effectiveness of policing.

The commission appears to suggest that errant police officers should be investigated and dealt with through the machinery of the proposed Independent Police Conduct Authority. This Authority is expected to have “power to investigate public complaints against police” and “retrospective powers to deal with historical serious misconduct.” Since there are no timelines on when this authority must be in place, it is hard to

tell how long the victims of police crime will wait for justice.

The recommendations concentrate too much on the reform of the Kenya Police Service and the Administration Police. The NSIS also requires a total overhaul if the goal of democratic governance of security intelligence is to be achieved. Additionally, security reform will need to embrace the military. Specifically, it is important to take note of the following gaps in the report:

It is clear that Mr Muthaura acted arbitrarily, abused the powers of his office, and violated the tenets of civil service neutrality. It is not clear why the commission did not recommend sanctions against Mr Muthaura for abuse of office. These circumstances the commission established raise questions about whether, in a multi-party democracy that preaches political neutrality for the civil service, the Head of the Public Service and Secretary to the Cabinet should sit in, and exercise power over, the state’s key security agencies.

Kenya needs to re-examine the NSIS to determine how best it can serve the interests of Kenyans as opposed to the parochial interests of the regime in power. Although the Waki report says that NSIS was perhaps the best-prepared state security agency, it fails to sanction it for its blatant partisanship. The NSIS is one of the institutions that Kenya must constitute afresh as a matter of necessity and urgency. For as long as the President retains the power to appoint the

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Director-General of NSIS, security intelligence will always be dictated by the imperatives of keeping the ruling regime in power. The NSIS is not a democratic institution and its preoccupation with helping the ruling regime to hold power has ruled out the need for public accountability in its work.

The commission says the security machinery did a good job of collecting security intelligence in the run up to the election, but this information was not shared in time and in the right way. There is an urgent need to overhaul the police structure to embrace preventive policing. Among other things, this will require that “quality, extensive and specialized planning begins many months if not years before an event such as a general election”.

On investigations, the commission’s recommendations are not clear. On one hand, the commission seems to go along with the Attorney-General’s suggestion that an independent and autonomous Directorate of Criminal Investigations should be created. On the other hand, it also suggests that “in addition to developing workable and functioning independent civilian oversight arrangements, there should be provisions for some less serious allegations to be investigated and resolved by the police themselves.” This raises a number of questions. What are “less serious” allegations? Should the police handle cases where the less serious allegations are made against police officers? How would an independent and autonomous Directorate of Criminal Investigations function alongside independent civilian oversight arrangements?

Although the military may not have been intimately involved in the post-election violence, it is worth noting that the police undertook a joint mission with the Kenya Army to deal with the challenge posed by the Sabaot Land Defence Force, a militia group fighting for land rights. As the dispute over the result of the presidential election was raging, the SLDF was wreaking havoc in the districts of Mt Elgon and Trans-Nzoia. In a joint operation against the SLDF termed “Operation Okoa Maisha”, the police and the Kenya Army are said to have committed ‘truly shocking’ human rights violations, ‘in particular, systematic torture.’ This activity raises a number of fundamental questions. First, how should the citizenry be policed especially in times of war? Second, how should joint operations of the police and the armed forces be conducted in a democracy? Third, how should allegations of improper

conduct made by the citizenry against security forces be handled? In particular, how can the citizenry hold security forces to account in times of peace and in times of war? In this respect, it will be necessary to interrogate how the military works. It is also worth noting that the power to deploy the military in the maintenance of internal order is not regulated. The Defence Council is not required to consult or seek the approval of Parliament. Given that the Armed Forces are not subject to the ordinary courts of law, it is therefore difficult for the public to hold the army to account for transgressions in the course of maintaining internal order.

### CONCLUSION

In view of the commission’s highly credible and damning findings, there is an urgent need to overhaul the state security machinery.

Overall, the Waki commission largely fulfilled its mandate. It established credible evidence that clearly demonstrates “the actions or omissions of State security agencies” during the period when the post-election violence occurred. Nevertheless, it did not suggest concrete measures for bringing to justice police officers responsible for criminal acts. This is a glaring shortcoming in the report. This could unduly delay efforts to give justice to the victims of police crime.

Secondly, the report does not make recommendations on how the security intelligence and policing agencies can be integrated in a legal and accountable manner. This measure is particularly necessary if Kenya is to have democratic governance of its security. Additionally, the commission should have suggested how public actors such as the Commissioner of Police, the Director-General of the NSIS, and the Head of the Public Service and Secretary to the Cabinet should be sanctioned for their abuse of office since evidence of this is abundant throughout the report.

The greatest obstacle to the implementation of the Waki report is lack of political will. Many politicians are apprehensive that their careers will come to a halt should the recommendations of the Waki report be acted on. The international community must stay engaged; Kenyans must view the Kenya National Dialogue and Reconciliation process as an international initiative.

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WAKI REPORT  
Election Violence

# Roadmap to ending impunity

Recommendation	Time frame	Responsibility
A special tribunal, to be known as the Special Tribunal for Kenya set up as a court.	Within 60 days of the presentation of the Report to the Panel of Eminent African personalities	PNU, ODM sign agreement establishing the tribunal The Government
A statute (to be known as "the Statute for the Special Tribunal") shall be enacted and to come into force. It should be insulated from objections on constitutionality hence anchored in the Constitution of Kenya	45 days after signing of the agreement	Parliament
Commencement of the Special Tribunal's work	Within 30 days of the Statute receiving presidential assent	President, Prime Minister, the Chief Justice, Government, and the Attorney-General
If there are hurdles facing the Special Tribunal -- agreement for its establishment is not signed, or the Statute is not enacted, or it fails to start functioning, or its purposes are subverted, a list containing names of and relevant information on suspects forwarded to the Special Prosecutor at the International Criminal Court.	Conditional	Panel of Eminent Personalities
Comprehensive reform of the Kenya Police Service and Administration Police	Immediate	Parliament, Government
Integrating the Administration into the Kenya Police Service to create a single police entity	Immediate	Parliament
An Independent Police Conduct Authority	Immediate	Parliament, Police
Specialised and independent Police Reform Group (PRG) is established to report to the Minister for Justice, National cohesion and Constitutional Affairs	Immediately	Ministry of Justice, Government, Parliament
Establishment of a Police Service Commission, an Independent Police Complaints Authority (IPCA)	Not indicated	Government
State Security Agencies develop, under the oversight of the National Security Advisory Committee (NSAC), joint operational preparedness arrangements including desktop scenarios and full operational exercises to assist in their readiness for dealing with high level security and emergency situations	To be conducted once every two years	National Security Advisory Committee
The NSAC to conduct a full review of the functionality of the committees that make up the Kenya Security Intelligence Machinery (KSIM) to determine their relative performance during the Post Election Violence	Immediately	NSAC
Steps taken to put in place independent oversight arrangements of the operation of the NSIS, NSIS be required to report annually to Parliament and the annual report to be made public	Immediate	Government, Parliament, NSIS
The development and application of the National Security Policy be finalised	Immediately	Government
The Conflict and Disaster Early Warning and Response systems, articulated in the First Medium Term Plan (2008-2012), are developed and implemented	Immediately	National Disaster Operations Centre
Enactment of International Crimes Bill 2008, Operationalise the Witness Protection Act, 2008 Enactment of the Freedom of Information Bill	Immediate	Parliament, AG
All persons holding public office and public servants charged with criminal offences related to post-election violence be suspended from duty until the matter is fully adjudicated upon On conviction the persons shall be barred from holding any public office or contesting any elective position	Conditional	Government
Establish GVRCs as departments in every public hospitals with their own staff, facilities and budget; Create awareness about the existence of Gender Violence Recovery Centers (GVRCs) in Government hospitals; create well staffed gender units/sections in every police station where victims of sexual violence can be treated with sensitivity and where their cases will be properly recorded and investigated; establish, under Kenyan law, of a well-staffed and independent office of Rapporteur on Sexual Violence	Immediate	Ministry of Health, Government, Parliament
Non-Governmental Organizations (NGOs) working in the health sector partner with medical institutions and share information to ensure a swifter and improved response to sexual violence	Immediately	Government NGOs
Enact a clear policy and legal framework for dealing with the IDPs, assess the effectiveness of the current programs in place to address the plight of IDPs	Within 4 months, Immediate	Government Parliament
Cases of hate speech in the media, including in vernacular FM radio stations, aiming to foment ethnic hatred and/or incite, organize, or plan for violence thoroughly investigated in a timely fashion.	When it occurs	Government

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ADMINISTRATION: Africa Centre for Open Governance (AfricOG), P.O. Box 18157- 00100 NAIROBI, <admin@africog.org>

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