V. Kiplagat Tribunal and Related Documents

Aide Memoire re Kiplagat

Truth, Justice, and Reconciliation Commission

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• The Commissioners are concerned about the conflicts of interest presented by Ambassador Kiplagat.
  o Ambassador Kiplagat was present at a meeting of the Kenya Intelligence Committee in Wajir two days before the start of what became known as the Wagalla Massacre;
  o Ambassador Kiplagat was an important witness to events leading up to the assassination of the Honorable Robert Ouko, and was recommended for further investigation and noted as an uncooperative witness by previous inquiries into that assassination;
  o Ambassador Kiplagat has admitted to having been involved in land transactions that were labeled by the Ndung’u Commission of Inquiry as irregular and illegal.
• The Commissioners are also concerned that Ambassador Kiplagat swore under oath before the panel that selected the Commissioners that he “has not in any way been involved, implicated, linked, or associated with human rights violations of any kind or in any matter which is to be investigated” by the Commission. (See Section 10(6)(b) of the Act.)
• The Commission is required by its mandate to investigate all three of the areas listed above in which Ambassador Kiplagat is involved or linked: massacres, political assassinations, and irregular and illegal land transactions.
• All three of the areas listed above have been the subject of numerous statements and memoranda to the Commission, and many of these statements (over three dozen) have specifically mentioned Ambassador Kiplagat as linked to these and other violations within the mandate of the Commission.
• The Commissioners are united in the position that the conflicts of issue raised by Ambassador Kiplagat need to be addressed in a credible and transparent process that is consistent with the rule of law.

History
• The Commissioners, including Ambassador Kiplagat, with the assistance of an external facilitator and mediator, engaged in a series of internal consultations from February to April 2010 to come up with a mechanism to address the conflicts of interest of Ambassador Kiplagat.
• After much discussion and consultation, Ambassador Kiplagat insisted that the only proper mechanism to address the issues raised by his presence was a tribunal established pursuant to Section 17 of the Act. The other Commissioners agreed with this approach, and all nine Commissioners, including Ambassador Kiplagat, agreed in writing that the Commission would request such a tribunal and that Ambassador Kiplagat would step aside until such a tribunal had finished its work.
• The Commissioners filed a petition with the Chief Justice in April 2010 asking that a tribunal be established to determine if Ambassador Kiplagat had engaged in “misbehavior or misconduct” under the Act by signing a false affidavit claiming that he had no involvement with matters to be investigated by the Commission and by continuing to privately and publicly claim that he was not involved with any matter to be investigated by the Commission.
At the time the Commission submitted its petition Ambassador Kiplagat had already changed his position on the meeting in Wajir, first asserting that he had never been to Wajir in his life, and then claiming that he did not remember if he had attended a meeting in Wajir or not. Since the filing of the petition Ambassador Kiplagat has been reminded by others that he had in fact been present at a meeting in Wajir two days before the start of the Wagalla Massacre. Having been reminded of his presence, Ambassador Kiplagat now asserts confidently that no security operation was discussed in the meeting he attended over 27 years ago.

The Chief Justice announced the establishment of a tribunal in October 2010.

The Chief Justice in exercising his proper legal authority under the Act adopted an interpretation of the phrase “misbehavior or misconduct” that was broader than that asserted by the Commissioners in the petition, and created a tribunal to look into issues of integrity and credibility throughout Ambassador Kiplagat’s life.

A three judge tribunal began its work in earnest in December 2010 following the “stepping aside” by Amb. Kiplagat.

While Ambassador Kiplagat first welcomed the creation of the tribunal as a forum before which he could assert his innocence, Amb. Kiplagat filed a challenge before the tribunal questioning its jurisdiction.

The tribunal rejected Ambassador Kiplagat’s challenge and continued with its work.

Ambassador Kiplagat then went to the High Court to challenge the jurisdiction of the tribunal. The High Court granted a temporary stay of the proceedings of the tribunal so that Ambassador Kiplagat’s arguments could be heard without prejudice.

While Ambassador Kiplagat pursued his matter in the High Court, the life of the tribunal expired in April 2011.

The tribunal never had an opportunity to finish its work, and thus did not rule either in favor or against Ambassador Kiplagat.

In November 2011 Ambassador Kiplagat withdrew his case before the High Court before the Court could reach a decision.

The High Court never ruled on Ambassador Kiplagat’s challenge to the legality of the creation of the tribunal.

A group of former MPs brought a case in the High Court in August 2009 challenging, inter alia, the creation of the TJRC and the selection of all of the Commissioners. Ambassador Kiplagat retained separate counsel in that case, and argued that the only proper procedure for questioning the appointment of a Commissioner was through a tribunal under Section 17 of the Act.

The High Court dismissed the challenge brought by the former MPs, and in its opinion noted that the proper avenue for challenging the presence of a Commissioner was found in Section 17 of the Act.

In January 2012 Ambassador Kiplagat returned unannounced to the TJRC offices asserting that he had been “cleared” by the courts.

The Commission requested that Ambassador Kiplagat honor the pledge he made to the people of Kenya and to the Commission that he would step aside until the tribunal finished its work.

Ambassador Kiplagat rejected the appeal of his fellow Commissioners and insisted, contrary to the history of the court proceedings, that he had been cleared by the courts.

The Commissioners went to the High Court to, inter alia, enjoin Ambassador Kiplagat from returning to the TJRC unless and until a tribunal addressed the issues raised in the Commission’s petition.
• Judge Warswame of the High Court in his decision noted that no process had yet been completed concerning the issues raised in the Commission's petition, yet the learned judge nevertheless ruled against the Commission before providing the Commission an opportunity to argue the merits of the matter.

Current Situation and Way Forward

• The Commission has appealed the decision of Judge Warswame.
• Ambassador Kiplagat has now returned to the TJRC. The CEO vacated her office in order to provide Ambassador Kiplagat with an office.
• The Commissioners met with Ambassador Kiplagat on 30 March 2012. At that meeting the Commissioners reiterated to Ambassador Kiplagat that the differences with him were not of a personal nature, but were differences based on principle. The Commissioners explained that the issues involved the integrity of the TJRC process, including the final report, and the conflicts of interest presented by Ambassador Kiplagat in three areas within the mandate of the Commission.
• The Commissioners expressed disappointment that the conflicts of interest raised by Ambassador Kiplagat had yet to be addressed, and asked Ambassador Kiplagat to honor the pledge he made to the Commission and the people of Kenya in November 2010 – viz., that he would graciously stand aside while his conflicts of interest were addressed by a tribunal set up under our Act.
• The Commissioners concluded by noting that until a process addressing Ambassador Kiplagat’s conflicts of interest was concluded, the Commissioners would continue to be reluctant to work with him.
• The Commissioners exchanged views with Ag. PS Mr. Kibara on April 3rd 2012 on the possibility of involving Ambassador Kiplagat in the remaining phase of the TJRC work, in particular the review and approval of the Commission’s final report.
• In the meeting with the Ag. PS the Commissioners reiterated that the issues we have with Ambassador Kiplagat are not of a personal nature, but concern issues of principle and the integrity and credibility of the TJRC process.
• The Commissioners noted that allegations linking Commissioner Farah to matters to be investigated by the Commission were raised. The Commission, with the full cooperation of Commissioner Farah, investigated those allegations and found clear and convincing evidence absolving Commissioner Farah of the allegations. Commissioner Farah declined to request a tribunal pursuant to Section 17 of our Act.
• The Commissioners are of the view that the following could be the basis of such involvement:

1) Ambassador Kiplagat will review drafts of the final report in the same manner and at the same time as other Commissioners. The final report is being prepared by a technical team of experts under the supervision of a committee of the Commission. Once a draft of the report is ready, Commissioners will be given an opportunity to review and comment on the draft. The technical team will then redraft the report taking into account the comments of the Commissioners.

2) Ambassador Kiplagat will not be allowed to review those sections of the report that concern areas in which he has a conflict of interest, including those parts of the report concerning massacres, political assassinations, and land. Ambassador Kiplagat will be given the same rights and opportunities as any other adversely mentioned person. Thus if the report includes an adverse finding concerning Ambassador
Kiplagat, he will be given the same opportunity as other adversely mentioned individuals to respond to that finding and to have his response taken into account in the final drafting of that finding.

3) Ambassador Kiplagat has refused to honor a summons to testify before the Commission. He is the only person to date who has so refused a summons. Unless Ambassador Kiplagat agrees to testify before the Commission pursuant to this summons, the Commission reserves the right to pursue legal enforcement of its summons as provided for under Section 7(6) of the Act.

4) Ambassador Kiplagat must agree to comply with the decision-making processes of the Commission set forth in the Act and as established by resolutions of the Commission. The Commission has operated successfully for over fifteen months with these procedures, and all of the other Commissioners to date have abided by them.