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Public Hearing Transcripts - Thematic - Access to Justice - RTJRC02.03 (NHIF Auditorium) (Access To Justice)

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**ORAL SUBMISSIONS MADE TO THE TRUTH, JUSTICE AND
RECONCILIATION COMMISSION ON FRIDAY, 2ND MARCH, 2012,
AT THE NHIF BUILDING, NAIROBI
(Thematic Hearing on Access to Justice)**

PRESENT

Gertrude Chawatama	-	The Presiding Chair, Zambia
Tom Ojienda	-	Commissioner, Kenya
Berhanu Dinka	-	Commissioner, Ethiopia
Belinda Akello	-	Leader of Evidence

(The Commission commenced at 9.40. p.m.)

(Opening Prayers)

The Presiding Chair (Commissioner Chawatama): Good morning, please remain standing for the National Anthem and Commission prayer.

On behalf of the Commission, we would like to welcome you to the second day of thematic hearings on access to justice.

(The Presiding Chair (Commissioner Chawatama) introduced herself and other Commissioners)

Yesterday, we had a number of people representing organizations who spoke to us, on access to justice. We heard from the Law Society of Kenya who highlighted some of the challenges, as they see them and made very good recommendations. We also had an opportunity to listen to a witness who works for the Vetting Board, and we also had the benefit of hearing from FIDA. A lot of what was said is what we have been hearing as we travelled all over Kenya. You would be interested to know that we covered over 37,000 kilometers in our quest to ensure that Kenyans have an opportunity to participate in this process. We informed people that as Kenyans they need to own the report that we would write based on information that we have received from them. This is information that we have as a result of our research and also information that we would gather from past reports.

We emphasize that ownership of the report is important, especially for the implementation. The people of Kenya gladly received this information and we have the confidence that our work is not in vain. In the end, we will produce a report and meet the expectations of many Kenyans. We heard from people on a lot of challenges that they face in accessing justice. We heard from women who are sometimes forced to make a decision whether to put food on their table or to use that money for transportation to go to courts. We also heard of frustrations from the same women because of lack of

communication from their lawyers. This is why we felt that it is important for us to hear from different organizations and institutions so that as we make our recommendations, we are coming from a place where we are informed.

You are welcome to participate in this process today. All we ask of you is that as witnesses testify, please remain quiet. If you have any cell phones, please switch off them off as they not only disturb us but also the equipment that we use for recording.

Leader of Evidence, are you ready with your first witness?

Ms. Belinda Akello: Yes, Madam Presiding Chair.

(Mr. George Mungare Kegoro took the oath)

The Presiding Chair (Commissioner Chawatama): We welcome you, Mr. George Kegoro and we look forward to your presentation. Thank you very much.

Ms. Belinda Akello: Good morning. Kindly inform us your name for purposes of the record.

Mr. George Kegoro: My name is George Kegoro; I am the Executive Director of the Kenyan Section of the International Commission of Jurists (ICJ).

Ms. Belinda Akello: Thank you very much, Mr. Kegoro and we welcome you to today's thematic hearing on access to justice. We have invited you today, through our letter to make a presentation on various studies done on access to justice and recommendations thereon. This is because you are a key stakeholder through your organization on access to justice in Kenya. You are welcome to make your presentation.

Mr. George Kegoro: Thank you, I am very grateful to the Commission for the opportunity to make this presentation. We would be making a fuller documentation before the Commission. What I have and I have provided copies are an abstract of the record from which we would be making our submissions.

We have been asked to make a presentation on access to justice. We have deliberately elected to emphasize issues that we have directly worked on in Kenya, that concern access to justice. The issues which I would speak about are first regarding the application of the death penalty in Kenya. I would also speak on the role of the judiciary in the fight against corruption. Thirdly, I would like to address the Commission on the historical failures to deliver justice and how that can be dealt with by the Commission. Fourthly, I would like to address the Commission on the systemic problem the judiciary has got, and which impede access to justice. The fifth issue I would like to place before the Commission is about legal assistance for indigent persons who seek access to justice. Finally, I would like to speak about the Office of the Director of Public Prosecutions and if its capacity to contribute to access to justice can be enhanced.

If we go to the first issue, which is the application of the death penalty in Kenya, and how that impacts on access to justice, the starting point is that the death penalty is a lawful penalty under the Constitution of Kenya. The point I am making is that the death penalty is a lawful penalty under the Constitution of Kenya. There was opportunity to do something about it in the context of the Constitutional reform process, but that did not happen. While the constitutional reform process did not abolish the death penalty, it also did not directly endorse it because the Constitution merely proceeds on the basis that all lawful penalties that were in force, which include the death penalty remain in force. Because Kenya does not live in isolation, I would like the Commission to consider the state of the death penalty within the African continent.

Thirteen countries have abolished the death penalty. In West Africa, these include; Guinea Bissau, Ivory Coast, Senegal, and Togo. In Southern Africa, it is Angola, Namibia and South Africa. In Central Africa, Rwanda, Burundi, Djibouti, Seychelles and Mauritius have abolished the death penalty. In northern Africa, none of the countries has abolished the death penalty. The point to be made is it is the smaller African states that have abolished the death penalty. The reference countries, sort of the regional powers, Kenya and Nigeria have retained the death penalty. But the only consistence with that conclusion is that South Africa, one of the leaders of the African continent has actually abolished the death penalty.

I attended a conference in Rwanda in October, 2011, which was convened by the Rwandese Government to discuss the state of the death penalty in Africa. The African Union supports the abolition of the death penalty. For the information of the Commission, presentations during the conference were made by none other than the Chair of the Commission, Mr. John Ping himself. It is important to consider why countries that have abolished the death penalty have done so. In South Africa, the reasoning is that the death penalty was applied during apartheid, in a racially selective manner. So, it was one of the tools of repression during the apartheid regime. The abolition of the death penalty through South Africa's case was based on the grounds that the new political order could not accommodate the continued application of the death penalty.

Namibia has had the same racial profile. The Independence constitution abolished the death penalty. They never had the death penalty from Independence in 1990. The reasons why Rwanda has abolished the death penalty started as a result of international pressure which required Rwanda to accommodate the abolishing of the death penalty as a condition for being allowed to undertake domestic trials for some of the genocide cases. So, Rwanda has emerged as one of the strong and very proud supporters of the abolition of the death penalty on the continent. President Kagame said in the Conference in October that if about a million died in the genocide, there must be about a million people who can be tried for their crimes and if the death penalty was retained, the State would have to put to death - through judicial process - about another one million people. So, Rwanda considered that it would not be practical to retain the death penalty because it would be impossible socially to retain its application. So, President Kagame asked - that is the question I would ask this Commission - if Rwanda which has had an extremely

difficult recent past has found in itself to abolish the death penalty, what crimes have happened in our jurisdiction, Kenya that justified the continued retention of the death penalty?

The other point to note around the death penalty is that in a racially divided society such as South Africa and Namibia, the political use of the death penalty is obvious because that political vision is also racial. In a country such as Kenya where the racial divides are not that big, the political use of the death penalty is not that obvious but is still there and I would give the following example: President Moi never supported the death penalty and never signed death warrants for people who were sentenced to death when he was in power. The only exception to that were the people who were charged with an attempt to overthrow him in 1982. These were sentenced to death. President Moi, acting completely contrary to his long standing practice signed their death warrants and they were executed in 1987. For all the rest of the people on death row, Moi did not have an interest in their death. But because these two were his political enemies he wanted them dead and he got them dead. So, Kenya is not a racially divided society but the use of the death penalty for political reasons is still a danger in societies such as ours. President Kibaki has not signed a death warrant during his time. In fact, what he has done is that he has remitted all the death penalty inmates into life imprisonment.

God forbid but if tomorrow there was an attempt on his presidency such as happened in 1982 and somebody was put on trial for it, there would be understandable political pressure to execute the death penalty in relation to that individual. The question has got to be; are defendants in political cases any more deserving of the death penalty than other defendants? I think that translation is not correct. The point I am making is that are persons accused of political crimes for which they are sentenced to death; are they any guiltier? Are they any more deserving of being put to death than other categories of people, for example, people charged with murder? So, the point I am making is that even in our society, the capacities to use the death penalty for political reasons exist as I have demonstrated.

The state of the law is confused. When we were in the conference in Rwanda, Justice Ombija was the official representative of the Kenyan delegation and proudly spoke at the conference saying that as represented by the Mutiso case in the Court of Appeal the Kenyan judiciary has made a stand against the compulsory application of the death penalty. He did not know and none of us knew that only the day before Justice Mohamed Warsame in the High Court had passed the death penalty in another case and had made remarks during the sentencing to the effect that he was in great disapproval of President Kibaki's conduct in not carrying the death penalty as required by the law. So, the judiciary has got two stand points. The Court of Appeal says that the compulsory application of the death penalty is not a requirement of the law. The High Court says it is.

So, if you are a defendant in a case where the death penalty is applicable, how do you practically plan your defence? It is not possible. I would not go into the fact that we have also applied the death penalty in relation to the crime of robbery with violence which then makes the death penalty a relatively rampant sentence because of the relatively

rampant nature of the crime of robbery in this country. The only point I would make about that is that the definition of crime of robbery with violence which attracts the death penalty is ill thought out. So, in terms of the state of the law that deals with robbery, I would consider that the law is so unclear as to be itself a problem. But secondly, the fact that persons charged with robbery with violence are tried virtually without any legal safeguards, ordinarily without availability of a defence counsel subjects them to greater jeopardy than other categories of defendants.

There are studies of the Penal Reform International and other organizations and our own experiences in this country. This country did not have the death penalty for capital robbery until 1975. When we introduced it, the hope was that it would intervene in a population that was getting ravaged by violent robbery as a crime. There is no evidence that interventions have had the effect that was contemplated. So, the main justification for the death penalty is that it is a deterrent effect. Now there is actually no evidence of that in Kenya. What we are left with for all the reasons that I have explained to the Commission is that the death penalty and the manner in which it is administered is inconsistent with Kenya's outlook as a progressive country. Our strong recommendation is that the Commission should recommend for its abolition.

I would like to turn to my second point. I would not take as much time as my understanding is that the Commission has massive time pressures. I would like to touch on the fight against corruption and the legacy of the judiciary in that fight. There is a long list of cases that have been decided by the judiciary in relation to corruption that runs against precedent. One of them is the Saitoti case which arose from the Goldenberg Scandal. There is the Eric Kotut case also arising from the Goldenberg Scandal. Before that, there was one of the cases that arose from high profile corruption allegations that is Arap Ngeny versus the Republic. There is Enedema case, which is one of the Anglo Leasing cases. In all these cases, the judges have made decisions that are demonstrably not justifiable on the basis of the law. We live with those decisions.

If the Commission wants me to demonstrate the allegations I am making in any of this I can and I am happy to do so.

The Presiding Chair (Commissioner Chawtama): I think that would be helpful, maybe in one or two instances, briefly. Thank you.

Mr. George Kegoro: Okay fine. That is alright.

Let me just go back to the Eric Kotut case. Kotut was the Governor of the Central Bank of Kenya (CBK) and he was charged in relation to the Goldenberg scandal. He went to court and made an application that the report of the Goldenberg Commission which made findings against him was erroneous and that those findings were prejudicial to his innocence. Based on the findings of that report, he wanted the prosecution against him to be set aside. In other words, he said he could not get justice in his trial in the court because a prior process through a Commission of Inquiry had made adverse findings against him, which according to him were without foundation. So, the High Court agreed

with him and made a decision that a trial against him would not proceed because justice could not be done.

There were several problems with the findings of the High Court. First, if the former Governor considered that the findings of the Commission report were erroneous, that would have been his defence in a trial and it would not have been itself a reason to stop a trial from going on against him. Secondly, there was no indication because the trial had not happened, that the evidence it would have relied on was the report that had preceded the trial. The third problem was the court found that there has been a huge amount of publicity of the case in the media because the Goldenberg scandal was truthfully the subject of massive media coverage. The court found that the massive media coverage that the scandal as an issue had received precluded the fair trial of Kotut. The problem with that is Kotut had not asked for that finding. He did not have a problem with the pre-trial publicity that had happened with his case. He did not ask the court for that kind of finding. It was a High Court gift to Kotut.

It has the following consequence: Because the scandal has had publicity and there are other defendants other than Kotut, whether or not they asked the court for a similar finding they also therefore cannot be tried because they would say that because there has been a lot of publicity there cannot be a fair trial against us. So, this is just one of them. But if you look at all the high profile corruption cases, the court's decisions are problematic.

If you take the case of Nedema, which was one of the 18 Anglo Leasing scandals, this is where the company called Nedema goes to the High Court and makes the allegations. What had happened is that the directors of Nedema had been arrested and charged with offences here in Kenya. They move to the High Court *ex parte* and applied that they should be set free and an injunction against the police not to arrest them again and an application that their passports which had been impounded be returned to them because they were foreigners and an application that the proceedings be not covered by the media. They wanted secrecy as part of their application. Their justification was because the contract between Nedema and the Kenyan Government related to high security installation for the military and so on.

Therefore, the publicity of the trial of the case would be prejudicial to the underlying security concerns. So, the court allowed all those orders including that there should be no media coverage of the case. The court also allowed a return of their passports and it is worth noting that the Government of Kenya resisted these applications and said that we were the beneficiaries of the Secrecy Act in the contract. We are waving our rights to confidentiality so that we can have a trial of the issue. The judge ruled that we, the court, know what is good for you and we will hold the terms. So, these are just two, but there are very many others. They are all sort of aggravating and the recommendation we make is that because you have a mandate to make recommendations on issues relating to economic crimes in this country, there should be a full investigation of this very unusual behaviour on the part of the Judiciary in relation to those cases. The question was; what

were the underlying factors for the Judiciary to behave like this because for us, it does not make sense?

I will speak on the third issue. There have been miscarriages of justice including wrongfully decided cases like the ones I have cited. The effects of this are that first, the parties in the cases in question suffered direct injustice whether through improper sentencing, improper conviction and so on. The issue is the effect it had on precedent. Because we are in a common law jurisdiction that relies on precedence, we are saddened by precedents that are not on a basis that we can explain. We would recommend that the Judiciary establishes a credible mechanism that reviews these cases. That could cover the high profile corruption cases and ensure that the precedential value of those cases which have wrongfully been decided in our view, is done away with. If there has been prejudice to individuals and since there has been prejudice to the public with no doubt, then that mechanism would also ascribe responsibility for the resulting prejudice.

I would like to speak on the fourth issue and this is on the problems of the Judiciary that affect access to justice. We see those problems as constituting delays and those delays lead to backlog and backlog of course leads to cost. Of course, there is also complexity as an issue. We would like to note that there is fresh air in the Judiciary in the leadership of the Chief Justice. Dr. Willy Mutunga is fulfilling his commitment to carry out the reforms that are needed in the Judiciary. However, he could do with the endorsement of this Commission. If this Commission, was in a position to endorse the program of judicial reforms that have been outlined by the leadership of the Judiciary that would strengthen the hand of the Judiciary to carry out those reforms. When people want to do the right things, they find themselves very lonely in this country. I suspect that is what is happening out there at the Judiciary.

The Presiding Chair (Commissioner Chawatama): And here too!

Mr. George Kegoro: And here too, Madam Chair. People are very lonely when they want to do the right things. Since you understand the problems that the leadership of the Judiciary is experiencing, which mirror your own difficulties as a Commission, our recommendation would be that you endorse the programme as outlined by the Chief Justice, Dr. Willy Mutunga. There is, of course, the vetting of judges and magistrates as part of that programme and that speaks directly to your mandate because it deals with our historical view of our Judiciary as one of the institutions that have failed us.

There is very little political support in terms of the vetting and we do not know how it will unfold in the fullness of time. Our hope is that in this Commission, you will also endorse the vetting because you would, otherwise, have to undertake that yourselves. We are thinking that your plate is full without having to deal with it and since there is an independent process of dealing with that, I think the responsibility of the Commission is to endorse and pronounce itself that the vetting is part of its aspirations and supports the aspirations of this country as to the attainment of justice.

The fifth issue I would like to speak on is about justice for the poor. When I joined the legal profession, almost 20 years ago, we were getting ready to introduce legal aid in this country. It looked like it would come the following year, and 20 years down the line, that has not happened. The point is this; there is simply no sufficient political support for legal aid as a desirable arrangement for dealing with the country's problems in terms of access to justice. The ICJ Kenya, working with the Ministry of Justice, National Cohesion and Constitutional Affairs has just drafted another Legal Aid Bill. This is not the first one. I was party ten years ago to another Legal Aid Bill that went nowhere. I would like to urge this Commission to use its privileged position to endorse the agenda for legal aid in this country. The Bill that we have drafted is ready. The only outstanding aspect is a national conference to validate it. We have already held a number of meetings in the country concerning the Bill and, after that the Bill will enter the political track and try to get political support for its enactment. There are very few political takers that are interested in legal aid. This Commission, if it endorsed legal aid as an agenda for this country that would contribute massively to our aspirations of access to justice.

The last issue I would like to speak on is about the Office of the Director of Public Prosecutions (DPP). Of course, the new Constitution established that office which has not been separated from the Office of the Attorney-General. The DPP, of course, has massive powers and unlike other Constitutional entities which work in groups, for example, Commissions and so on, this is far deposited in an individual. There can be abuse, obviously, and there can be insufficiency of accountability. The decision to charge people and what to charge them with and pushing the case through trial, all those are potentially unaccountable stages. The question we are left with as we embrace the Office of the Director of Public Prosecutions is, what will be the transparency threshold as we move on? In a recent situation which has been a subject of coverage, the DPP said that he could not find evidence that would prosecute the Deputy Chief Justice who had problems. I do not think I am speaking for myself, that he should have charged the Deputy Chief Justice under the circumstances, but other people think that should have happened. As I said, they could be wrong. That shows that given a set of circumstances and the decisions that he has made, under those circumstances, it is very difficult to know whether or not the DPP is acting correctly because the public never gets to know what the DPP knows. Therefore, he exercises his discretion and if a case does not, therefore, go to court, you will never know what the DPP knew as a result of which he acted the way he did.

There are no clear mechanisms for holding that office accountable as we move forward. But a strong statement from this Commission to the effect that the prosecution is a public trust like all other powers and needs to be exercised transparently, would go a long way towards establishing a culture of transparency and how this country manages the prosecution of cases.

That is all I had to tell this Commission. It was a good privilege to have a chance to address you all.

The Presiding Chair (Commissioner Chawatama): Thank you very much. It has been a privilege hearing you address these issues and I am sure that the Leader of Evidence has questions after which the Commissioners may also ask questions.

Ms. Belinda Akello: Thank you very much, Madam Presiding Chair. I have one issue. As you had started saying yesterday, access to justice surpasses an individual's access to courts or just acquiring legal representation. As the presenter has just presented many issues that are barriers to access, among them is lack of *de facto* protection especially for vulnerable groups, lack of adequate legal aid systems and lack of adequate information in terms of rights also amounts to denial to justice. So, while the courts are responsible for access of justice, our Constitution also requires other branches of the Government to assist. Your organization, Mr. Kegoro, has worked hand in hand with the Ministry of Justice, National Cohesion and Constitutional affairs in a number of issues. We would like to find out whether your organization has programmes that are specifically targeted to improving access to justice including other things as you have mentioned such as awareness, protection of rights and equal access to all judicial mechanisms in the country.

Mr. George Kegoro: We supported access to justice for a long time about 20 years. We have been part of the pioneering groups for paralegals and para-legalism in the country. In 2004, we did what was pioneering works in what was African Peer Mechanisms for Access to Justice that concentrated on the communities living in the northern part of Kenya. We got those reports and the overall findings from those studies were that traditional mechanisms are available and are sanitary. The only drawback which is significant is that they tend to marginalize women and women's rights. They tend to marginalize women participation and can also lead to injustices against women. Otherwise, they have strong benefits which include speed, which also includes the fact that they are understandable by the people. The other advantage is that they do not result in a "winner take all" situation. So, they contribute to the socio-cohesion in the communities where they are exercised. Of course, there is also the fact that there are no resources needed for those mechanisms are readily locally available. What is needed and what we recommend is that the Government has to come up with a programme of deliberate recognition of those mechanisms of justice subject to what I have said, which is building mechanisms to protect women whose interests tend to be prejudiced through those mechanisms.

Ms. Belinda Akello: Just a comment and not a question, could these reports be made available to the Commission as well?

Mr. George Kegoro: I would be very happy to make them available.

Ms. Belinda Akello: One of the issues I dealt with yesterday was where do we draw the line between formal and informal systems given the traditional justice systems are partly discriminative to women and children as you have cited? If we can get these reports and other reports that your organization could have made directly in relation to access to justice?

Mr. George Kegoro: We publish, on an annual basis for the last ten years a report called Judiciary Watch and it deals with the different aspects of the Judiciary and the access to justice for the last ten years. We will also make those available.

Ms. Belinda Akello: Thank you Presiding Chair. That is all I had.

The Presiding Chairperson (Commissioner Chawatama): Thank you very much. I will now ask the Commissioners whether they have any questions and I will begin with Commissioner Ojienda.

Commissioner Ojienda: Thank you George. You dealt with the issues and details that were required including the death penalty. I think it is time that the law is amended to leave no doubt because as you said, the death sentence; the decision of Justice Warsame, that is now on appeal, took back what we thought had been settled. I want to agree with you on the proposals of cases and the fact that this Commission should endorse the Chief Justice and the reforms that are going on. I have no question for you but to thank you for appearing and sharing with us.

Commissioner Dinka: I also would like to thank Mr. Kegoro for coming here and giving us that testimony. His presentation was very clear and very systematic and even from a lawyer like him, he was very clear. I would like to ask you one question on the death penalty. You are a lawyer and you have fought for a long time and must have studied this issue properly. Looking at the death penalty and those who have been affected, do you think there is some kind of developmental threshold in terms of institutions, political systems, governance, and economic development of even intellectual development that somehow triggered this kind of action?

Mr. George Kegoro: The point I made is that the “unfashionable countries” are the ones that have abolished the death penalties. The leading African states (all of them) except South Africa retain the death penalty in their books. So, I think there is a correlation between sophistication and the retention of the death penalties because the countries that regard themselves as most sophisticated keep the death penalty. I would also like to make the general point that there are also religious dimensions to this because all the Muslim countries in northern part of Africa have not abolished the death penalty. All the great religions have a basis for justifying the death penalty. So, some people who support the death penalty say that it is ordained in their religion. The other point to be made which I had not made is that the countries that have not abolished the death penalty keep it but do not carry it out. They keep the penalty but they do not execute it. The threshold for countries regarded as retentionists are the ones that have used the penalty in the last ten years or more recently. You will find that not many of the African countries including Kenya - the figures are somewhere but I did not include them - the vast majority do not carry out the death penalty even when they have it. So, the last execution here in Kenya was in 1987 and after that there has not been any.

President Kibaki is about to leave office without signing a death warranty. So, the question is, why keep it when you do not have the political courage to carry it out? That

means that you no longer support it. So, go to the next stage which is to formally abolish it.

Commissioner Dinka: Thank you very much. Even when you look at the United States and Europe in all, right now, although they are on equivalent developmental stage, they have different laws on this. I will agree with you that a number of countries, including my own have these laws in their books, but they have not signed death warrants for a long time. But as you said, for some reason, they refuse to take it out of their books. We will try to study these issues. You have given us very good background for study. We will make appropriate recommendations, not only for Kenya but also for other countries.

Commissioner Shava: Thank you Presiding Chair. I have no questions. I would like to thank Mr. Kegoro for that. I would like to first associate myself with the remarks of fellow Commissioners and thank Mr. Kegoro for a very good presentation that has brought out the very different facets of the issue of access to justice. From the point of view of the consumer, access and other persons and also from the point of view from practitioners and from other newly created offices of the DPP and lawyers. We also had a discussion yesterday in taking up *pro bono* work and approaching the law from a point of social justice and not from commercial justice. You have given very clear examples which have shown the failures of justice. Right from them, there are very clear recommendations. The Commission has benefited from your knowledge and experience. I would like to thank you for putting together your presentation and coming to present it and answer our questions. I would also like to thank the ICJ Kenya Chapter.

The Presiding Chair (Commissioner Chawatama): Thank you for your testimony. I will begin asking my questions with a quotation from Lord Anken in his Descending Opinion, *Liversage versus Anderson*, 1941, England Reports, 338. He had this to say: Law, he pointed out, speaks the same language in war and in peace; judges are no respecters of persons. We will have an opportunity to look at reports that have been written and recommendations that have been in those reports for the records, since you have brought up the issue or matters that have been dealt with by the court stemming from the Goldenberg Scandal. You mentioned that these decisions were tried at the High Court level. Did they ever go to the court of appeal?

Mr. George Kegoro: I am aware that the Saitoti case which was decided in the High Court had an appeal which was dismissed on technicalities. The Office of the Attorney-General then had a problem with the record of the appeal and the case was dismissed. The others I have spoken about Mandema and arap Ngeny, 2001/2002, have not been the subject of appeal to the best of my knowledge. There was one of the Anglo Leasing cases which was the subject of appeal and this is the Macherntile Security which was one of the questioned decisions. The High Court had ruled that the Kenya Anti Corruption Commission had no power to seek legal assistance from Switzerland. It is one of the Anglo Leasing cases. There was an appeal on that and the Appeal Court reversed that finding.

The Presiding Chair (Commissioner Chawatama): What do you think the impact is on ordinary poor Kenyans on decisions such as this where high profile matters have been handled in the manner that they have handled on justice?

Mr. George Kegoro: I think there have been two effects or more. The first effect, obviously, is that corruption has a disproportionate effect on the poor. So, if the Judiciary has not played its role in curbing corruption or the arrangements that are in place do not help in that, it means that the effects it has on the poor continue. The other point is that the outlook on this country is one that tolerates impunity and it is sustained through these decisions. In the views of people, if you are of a certain socio-standing, then you are above the law.

The Presiding Chair (Commissioner Chawatama): We have spoken to many Kenyans and as I mentioned earlier on, we have covered over 37,000 kilometers in our quest for truth, justice and reconciliation and to bring about national healing.

Ordinary Kenyans have really lamented that they are really not accessing justice and it is true that the doors of the courts are open to every man like the doors of the Ritz Hotel and in this case, maybe the Hilton. I do not know to what extent you have looked at the reforms that are going on in the judiciary right now. In your opinion, do you think these reforms will ensure that justice reaches the ordinary Kenyans and, if so, what is it about the reforms that give you that confidence?

Mr. George Kegoro: I think the access questions, I have provided some of the hindrances to access and one of them is of course the fact that the institutions of justice are not represented in certain places in the country. I am aware that the judiciary has now put in place mobile courts in the northern parts of the country especially where there have not been any courts since independence. That will ameliorate access. I am aware also that the judiciary is in discussion with the World Bank for the possibility of support for infrastructure. We resisted that for a long time because the judiciary would have received World Bank support a long time ago. We resisted it all the time. We said the judiciary needs leadership first before it can start undertaking infrastructure. We are satisfied that the leadership now exists and a discussion about infrastructure can commence so I am told that the tail end of the negotiations is happening. We have asked to do third party monitoring of the infrastructure project. We hope we can get into discussions about that. What will happen is if the plan materializes, the support for infrastructure development can take a long time. When it starts, the question of physical facilities can then be addressed systematically.

There are personnel issues and the judiciary has spoken about recruiting additional judges and generally increasing its establishment but there is also the important issue of diversionary mechanisms of justice which includes small claims court and petty sessions and so on and so forth. That discussion again has been going on for a long time. Unfortunately and frustratingly, it has not moved forward. We hope it can and there is also what we have already spoken about in this session which is the Government embracing alternative traditional mechanisms of justice. I think justice can only be

secured through very many interventions and not just one. So if all those interventions are pursued, they can potentially increase access significantly.

The Presiding Chair (Commissioner Chawatama): It is quite saddening to hear the state of lack of legal aid facilities for those with limited means. What happens to persons who are facing very serious offences and need legal representation? Who represents them? I am asking this because it is automatic in my jurisdiction that anybody charged with aggravated robbery or murder will have legal representation from legal aid if they do not have a lawyer of their own and you cannot proceed as a court without this representation.

Mr. George Kegoro: In previous realms of discussion on legal aid in Kenya in 2002, we had the benefit of the participation of people from your country who told us about what has happened there in terms of legal aid. The demonstration was that a country that has the same economic conditions as Kenya, has put in place a modest and effective legal aid mechanism and, therefore, the confidence, I hope was built during that meeting that Kenya can put in place its own legal aid mechanism. It does not need to be particularly rich to have that mechanism but that effort came to nothing at that time. What practically happens is that people who are charged with serious crime and who the courts regard as needing legal aid, then the court will arm-twist a lawyer and say, can you come and defend this person. What typically happens is that it would not be the top end of the legal profession whom even the court understands; you are too busy for this kind of work so we will get the riffraff, the bottom end of the legal profession who we deem to have time to deal with this kind of wretched cases. So it is quite unfair.

The Presiding Chair (Commissioner Chawatama): You will be happy to know that a lot of people we spoke to have a lot of confidence in the Constitution, that with the new Constitution in place, their lives will be a lot better. When we asked them about the reforms in the judiciary and the police and especially the judiciary, a lot of people had the confidence that with the coming reforms, they would be able to access justice. Basically, it is really up to the judiciary. The judiciary has to do their part and other stakeholders such as yourselves will also have to do your part. There is a lot of lack of information; people do not understand why somebody who has been convicted can be released on bail pending appeal. Just explaining the hierarchy of the court and what happens that the matter does not stop with the magistrate's court. You have a lot of work to do and I am sure the Commission will do their part but all Kenyans must do their part in order to ensure that the reforms are carried out and that our report is implemented. We can write a beautiful report but if ownership is not there and no implementation, then it will just be another report. I believe that I have a bone to pick with you; you are the first Kenyan I met after I had applied for this position. You came to Zambia and you did not give me further and better particulars but I shall take that up with you afterwards, I think towards the end of the month.

Mr. George Kegoro: Thank you very much. Guilty as charged. I will not say anything further in public.

The Presiding Chair (Commissioner Chawatama): Thank you very much, it was a pleasure. I hope you will be able to sit in. We have invited the judiciary and I do not know if they are here yet but we have other speakers and maybe you will pick up one or two things.

Mr. George Kegoro: Sadly, I cannot sit in but I am very grateful for the privilege of addressing the Commission.

The Presiding Chair (Commissioner Chawatama): Thank you very much. Have a good day.

(Mr. Edgar Kavulavu took the oath)

The Presiding Chair (Commissioner Chawatama): I think when you call a witness, the first thing we expect from you, Leader of Evidence, is for you to tell us the name of the person and the organization even before they are sworn in.

Ms. Belinda Akello: The current witness is a representative from Kituo Cha Sheria and he comes on behalf of the Executive Director, Priscilla Nyokabi.

Thank you very much for coming. For purposes of our records, kindly state your names.

Mr. Edgar Kavulavu: My name is Edgar Kavulavu. I am here on behalf of my director, Ms. Priscilla Nyokabi, who could not make it today but she sent her apologies on behalf of Kituo Cha Sheria. I am the director of Kituo Cha Sheria. We are very grateful for the Commission giving us this opportunity to make our presentation.

Ms. Belinda Akello: We thank you and we welcome you to today's session Mr. Kavulavu. Today during our thematic hearing on access to justice, we had invited you to make a presentation before this Commission on the role that Kituo Cha Sheria plays in promoting access to justice, challenges that you have faced in offering legal aid, statistics and maybe a catalogue of human rights violations that you deal with and evaluation of the current procedure for national legal aid and finally, any recommendations that you may wish to make to the Commission with regards to access to justice. We welcome you to make your presentation.

Mr. Edgar Kavulavu: Thank you very much. I will address the Commission as follows; first I will start with a brief introduction of Kituo, then I will proceed to the role of Kituo Cha Sheria in promoting access to justice, then I will look at the challenges faced by Kituo Cha Sheria and brief statistics and a catalogue of human rights violations dealt by the organization and an evaluation of the current national legal aid program. Last but not least, our recommendations on measures necessary to advance access to justice in this country. I have distributed a memorandum on our issues but I will just take you briefly through the contents of it.

Kituo Cha Sheria is a human rights legal aid Non-Governmental organization that was established in 1973 by advocates committed to providing legal empowerment to the indigent in Kenya. Kituo's services to poor and marginalized communities are offered through legal advice, representation, public interest litigation, advocacy and community capacity building in the areas of land, labour, housing, refugees' intervention and governance. Access to justice in our perspective is therefore accordingly broadly conceptualized. It begins from inclusion within embodiment of rights in the law, awareness of understanding of the law, easy availability of information pertinent to one's rights, equal rights to the protection of one's rights by the legal enforcement agencies, easy entry into the judicial systems, easy availability of physical legal infrastructure, affordability of adjudication and judgment, cultural appropriateness and conducive environment, timely processing of claims and timely enforcement of judicial decisions.

I will run you briefly through the role of Kituo Cha Sheria in promoting access to justice. Kituo has carved its niche in the areas of land, labour and housing as far as they relate to the human and people's rights of the poor and marginalized. Provision of the traditional legal aid by Kituo is accompanied with designs of programs and projects which deal with the systematic causes of inequality and injustices. Institutionally, advocacy has grown as a tool for change. Kituo began from legal aid to legal empowerment and collecting and disseminating information to empower communities. It carries out research, documentation and it shares the information with the target audiences.

Further to that, litigation and advocacy have been linked together and communities are empowered to demand their rights. Now I would like to look at the services that we offer or services that we have offered to the 2007-2008 post-election violence victims. Kituo Cha Sheria is assisting more than 1,800 post-election violence victims to participate in the truth justice and reconciliation process in Kenya. Clients were informed about the TJRC process and referred to the TJRC statement takers all over the country. Moreover, the victims were informed about the intervention of the International Criminal Court and assisted them to apply for participation and reparation. Further more, the organization takes up single welfare cases for these target groups.

Now I would like to address you on the challenges faced by Kituo Cha Sheria in offering legal aid. The first challenge is the lack of political goodwill in implementation of the Constitution and the enforcement of the rule of law. As we are all aware, there are crucial Bills which are yet to be passed in Parliament. Further to that, the Government has in some instances failed to comply or obey court orders against them. The second challenge that is faced by Kituo is the extreme poverty and non-affordability of the legal services. The poor and the marginalized clients in most instances cannot afford administrative costs such as court filing fees, transport from their dwelling places to the courts, among others. As such, the clients cannot easily access the court facilities.

The third challenge is the inadequate court infrastructure. There are certain regions in the country such as Lamu where the residents have to travel seven kilometers to access court facilities. The nearest court for the Lamu residents is in Mombasa which is very far from Lamu. The fourth challenge that Kituo faces is the number of poor clients *vis- a-vis*

Kituo's capacity. We all realize that the need for legal aid in Kenya is high due to high poverty levels. The request for our services is on the increase as Kenyans are more aware of their rights and are encouraged to take action.

The fifth challenge that we face as Kituo Cha Sheria is the legal language and practice that is lagging behind the social change. For instance, where a client cannot afford legal representation in court, the client faces a lot of difficulties in representing themselves in court. Six is impunity of law enforcement officers when they violate the law. First of all, it undermines the trust of our clients in a fair justice system. Also, a good case for our clients is easily lost through the malpractices and corrupt practices by the officers. The public's ignorance of their rights and the law is another challenge that is faced by Kituo cha Sheria. There are an overwhelming number of clients who approach Kituo Cha Sheria as a result of the public's ignorance of their rights and law that have been put in place.

Last but not least, we have the archaic laws. These laws are still an impediment to access to justice for the poor and marginalized.

On the challenges that we face, specifically in dealing with the post-election violence victims, the first one is the nature of the post-election violence. The post-election violence is perceived as State sanctioned violence therefore victims mistrust the justice system to enforce their rights. For Kituo Cha Sheria, it requires additional resources to be able to assist them adequately as interactions with the victims of the described atrocities require a specific time and resource intensive approach.

Secondly is the issue of frustration. The experience of victims of violence is that the law enforcement agencies fail to protect them and that they are inactive when it comes to upholding the rule of law and establishing accountability. Many fear that they only fill in application forms or give statements before they are laid down at the end of it all.

Thirdly, there is the issue of documentation. It is a huge challenge to document the crimes suffered by the clients and to assist them, for example, to seek restitution or compensation. Many clients lost all their property including identification documents, title deeds and many others. Death certificates in particular for victims of police shooting were hardly issued. Proof of kinship to the deceased is equally hard to establish. Furthermore, the majority of the victims have not reported the crimes suffered to the police and, therefore, they do not have an occurrence book number. We realize that some of them were intimidated when they tried to report the crime at the police station. Number four is the issue of capacity. Kituo can only assist a relatively small number of post-election violence victims if compared to the established number of victims. As a matter of fact, many victims are still excluded from legal services.

The other challenge that we face in realizing access to justice is the security situation because you realize that due to the upcoming elections, people still fear that there may be a recurrence of what happened after the last elections. Another issue is the sexual gender

based violence victims. We realize that interactions with these clients are an enormous challenge.

The other groups of victims are children. Approaching children victims require appropriate measures and strategies.

A look at the statistics and the catalogue of the human rights violations in Kituo cha Sheria, it is important to note that Kituo Cha Sheria uses public interest litigation as a strategy to advance the social rights of marginalized people and public interest litigation has contributed towards effective voicing of human rights grievances. Kituo Cha Sheria has litigating in-house advocates who attend to various courts in Kenya and who record almost 136 times a year court attendances. In most cases, success ranges from release of clients, compensation in labour matters, land matters and child maintenance.

In the memorandum, I have highlighted some of the public interest litigation cases that Kituo Cha Sheria has been able to handle. A look at the current legal aid program; Kituo Cha Sheria appreciates the efforts that have been put forth by the Government in trying to provide legal aid to the poor. The national legal aid awareness program that was launched by the Government in 2008 to increase access to justice to the poor and marginalized is also appreciated by Kituo Cha Sheria. However, a lot still needs to be done to ensure improved services to the poor and the marginalized. The pilot programs by the Government have not reached a majority of the citizens especially in the marginalized areas who are our clients.

Some of the recommendations or measures necessary to advance access to justice in Kenya; some of the general recommendations are: A national legal aid service to be put in place to help the poor and the marginalized who cannot afford the cost of access to justice. There is need to rework and implement the legal aid Bill which should be consistent with the Constitution. Another recommendation that we make is that there must be a deliberate de-centralization of courts across the country especially in the marginalized areas. Also, the court in some instances conducts on site hearings in areas where we have the victims.

Another recommendation that we also make is adequate deployment of judges across the country. We also recommend that there should be reforms in the investigating authorities in so far as the criminal justice system is concerned. The Office of the DPP should consider taking operational control of prosecution undertaken by the police. Some of the specific recommendations that we make for the post-election violence victims are as follows:

Investigations, prosecution of acts of violence of the 2007 Post Election Violence (PEV) and in particular establishment special division of the High Court before the next elections and the division should be perceived as impartial and independent. Some of the other recommendations that we make are that the PEV victims should get reparations through the Government of Kenya. It is also important that the Government recognizes

the victims of the PEV. As such, they can create memorials that remind Kenyans the atrocities committed by Kenyans and the immense suffering caused to Kenyans.

The other recommendation that we make is; victims of violence and especially the PEV should be exempted from the court administrative costs, for example, court filing fees.

Last but not least, we recommend that there should be accountability for the 1991, 1992, 1997 and 1998 election violence. With regard to that, there should be avenues for accountability which have to be developed which go beyond the TJRC. A specific alternative dispute resolution mechanism would be appropriate to deal with these injustices.

Thank you very much.

Mr. Belinda Akello: Thank you very much, Mr. Edgar, for your elaborate presentation. It has also enlightened us on the work that your organization has done in promoting access to justice. Maybe just one question; since your organization has been in operation for about 39 years, how in your opinion would you rate the level of awareness of the justice system and legal remedies by the public and particularly the vulnerable group; women, children, the poor and the disabled?

Mr. Edgar Kavulavu: In my opinion, the poor and the marginalized have not for the longest time in Kenya been made aware of the rights and responsibilities owed to them by the Government. In the current times, however, very many people are now willing to learn the rights and the freedoms and especially with the promulgation of the new Constitution. It is my opinion that the Government of Kenya has not done enough to ensure that most Kenyans realize and understand their rights especially in the marginalized areas. When you are carrying out civic education, we realize that most Kenyans do not even know how to open a Constitution, leave a lone to read and understand it.

Ms. Belinda Akello: Thank you very much. In as far as Kituo cha Sheria is concerned, do you have a public legal education programme or any awareness programme? As you are aware, the civil society is usually the voice of the people and its deliberations and reports are usually the judgment of the public courts? So, you have a key role where the Government has not been able to fulfill its dues and obligations. As an organization, have you been able to come in and fill this lacuna that the Government has not been able to perform?

Mr. Edgar Kavulavu: At Kituo cha Sheria, we have a department known as the Legal Aid Department which focuses on two groups of clients. We attend to them on matters of land, labour and housing. We also have public interest division. We usually refer these clients who do not fall within our thematic areas to our volunteer advocates. We have a database of volunteer advocates who take up most of these cases on a *pro bono* basis. Apart from that, we usually have legal aid clinics where we entertain a variety of claims from the clients. We also have justice centres around the country and these justice centres

are usually run by paralegals. These paralegals are trained by Kituo cha Sheria. We are currently launching a justice centre at the Kamiti Prison.

Ms. Belinda Akello: Thank you very much, Edgar, and we thank you for the presentation and the questions that you have clarified.

Presiding Chair that is, all from the Leader of Evidence.

Commissioner Shava: Thank you very much, Mr. Kavulavu, for your presentation. I have a few questions for you. You have said in your statement that Kituo cha Sheria is assisting over 1,800 victims of the PEV to participate in the TJRC process by referring them to statement takers countrywide. So from that, I understand that through the efforts of Kituo cha Sheria, people have come to make statements to the Commission and clearly, the Commission will be making findings and recommendations with regard to information that they have provided. You have also enlightened us as to how Kituo cha Sheria works and you provide assistance to the poor and marginalized through the provision of legal advice, legal representation and public interest litigation. Our experience as we have gone round the country is that people have got clear cut cases which could be presented to the courts, have clear evidence but they do not know how the court system works and nether do they have the money to prosecute or pursue their cases.

We have also found people have also outright injustice through the kind of violent evictions that you have shown in your document. Very sadly, we have also found people who actually have court orders but do not know how to enforce them. My question to you is; when our report comes out, how does Kituo cha Sheria see its role in participating in its implementation particularly with regard to the issues I have just raised in helping people access justice through our recommendations? What do you think you will be doing with our report?

Mr. Edgar Kavulavu: Thank you. We usually keep a database of most of these clients that we attend to. We have also handled quite a number of cases of clients who have clear cut cases but due to lack of money or lack of the legal knowledge, they cannot go to court or at the end of it, actualize their rights. The assistance that we can give as Kituo cha Sheria is, we can give a documentation of the report that we have been able to document over time.

Commissioner Shava: My question was: Kituo cha Sheria as an interested party in this process and an institution which has knowledge of what the issues on the ground are once our report comes out, how do you believe that as an institution that report is going to assist you to assist your clients?

Mr. Edgar Kavulavu: Of course, we will have to look at the report and look at the reports that we have at Kituo cha Sheria and we can see how the report seeks to fill some of the loopholes that have been in the system. If in our opinion, we will think that the recommendations are not adequate, then we will have to raise our concerns to the Commission.

Commissioner Shava: I move on to my next question. You have also told us that the Office of the Director of Public Prosecutions (DPP) should undertake operational control of prosecutions that are undertaken by the police. I wonder whether you can say a bit more about that because I am not very clear on that recommendation. Perhaps when clarifying, you could speak to the role of the police in the new order with a new independent office of the DPP and perhaps address any overlaps in the functions that are causing you to make this recommendation. What precisely is the concern? When you say operational control of prosecution, what do you exactly mean?

Mr. Edgar Kavulavu: Well, you realize that in our courts, the police were doing the function of prosecuting. The manner and mode in which the police were carrying out their prosecution was not sufficient to ensure that justice is delivered at the end of the day. With the new dispensation, we find that the Office of the DPP is now charged with the duty of prosecution. This is a plus for us especially in the sector of access to justice for the poor and marginalized because we realize that in most instances, State counsel will be involved in the prosecution of these cases. Therefore, if the DPP takes the operational control of the prosecution, we are confident that most of these cases that will not have been handled properly by the police will now be well taken care of.

Commissioner Shava: So, do we understand your recommendation is that the law as it currently stands should be followed or are you making a new and different recommendation?

Mr. Edgar Kavulavu: I am not making a new recommendation. What I am saying is that the law should be followed as it is right now and we ensure that the office of the DPP carries out its duties as mandated to it by the Constitution.

Commissioner Shava: Thank you. I think that is clear now. My next question is with regard to your vision on the establishment of a special division of the High Court for the next elections. Which court should be charged with investigating, prosecuting and punishing the perpetrators of the PEV? That struck me as an interesting recommendation because there have been proposals for a special tribunal to perform that function. I do not know whether you are proposing the same thing when you say a special division of the High Court. What strikes me about that recommendation is that given Kituo cha Sheria's core function of representing the poor and marginalized with regard to all sorts of issues around housing and land and also given that elsewhere in your document, you say that the Government focus on PEV of 2007 only leaves out a lot of other people who have been victimized by violence around elections. I find it a bit strange that your recommendation is that there should be a special division of the High Court to deal only with victims of PEV. I find it a narrow objective. Why do you make that recommendation? Perhaps you can inform us more as to your thinking behind that recommendation.

Mr. Edgar Kavulavu: I agree with you that that is a narrow approach that we want to take because you realize that in the PEV 2007/2008, the magnitude of that violence cannot be compared to the others. There are very many issues surrounding the PEV that

need to be tackled. For example, there is the issue of the IDPs and many other issues. Our opinion, therefore, is that, if we establish a special division in the High Court, it will be able to deal with the current issues of the PEV.

Commissioner Shava: Would such a court deal with any violence that may occur after the next elections or would we set it up like the previous court which was set up for specific issues around the Constitution and then dissolved? Is that how you see it or would it be a deterrent to persons who were contemplating such violence in future elections?

Mr. Edgar Kavulavu: For purposes of national accountability, it would be important that it is established to specifically focus on the PEV.

Commissioner Shava: Thank you. My final question is still on the same issue. You propose that an alternative dispute resolution mechanism should be put in place to deal with violence that occurred in 1992 and 1997 elections. The purpose of this mechanism would be to establish accountability. I find it interesting that it is an alternative dispute resolution mechanism that should address the violence. If you are talking about violence, I presume that you are talking about issues such as the identification of perpetrators such as prescribing punishment for persons who have been proven to have been perpetrators or are you talking about issues around reparations or reconciliation? Is it an alternative dispute mechanism? I mean, is there a dispute or are we looking at examining acts of violence?

Mr. Edgar Kavulavu: In as much as we get the truth and justice, it is important that you also get reconciliation. Now our Constitution recognizes ADR as a way of settling disputes. ADR will be appropriate especially when you look at the issue of reparation and reconciliation.

Commissioner Shava: I would agree with you there. My question then would be: What about the outstanding issues of identifying and punishing perpetrators? Are those appropriate issues to be dealt with by an alternative dispute resolution mechanism or would there be a different way of dealing with that part of the issue?

Mr. Edgar Kavulavu: There will be a different mechanism of dealing with those issues because ADR will not be adequate. There are certain cases which can be handled through the out of court settlements especially when we want to realize things such as peace.

Commissioner Shava: I think it would be important to share with you some of the things that we heard out there from Kenyans, particularly from young Kenyans who have watched their parents being killed or mothers being raped. I can tell you that they are not interested in ADR. They are interested in acknowledgment that this is what was done to them. They are interested in public identification and punishment of the perpetrators. Perhaps, that is information that would be of use to Kituo cha Sheria.

Finally, I would just like to note this recommendation of the waiver of court filing fees for victims of PEV. Indeed, I think that is a very useful recommendation. Things like court filing fees are exactly the kind of barriers to justice that we were talking about. If I go back to my first question, which I will not ask again, that is the kind of thing I was trying to get at; does Kituo cha Sheria see itself as an institution that is going to help those kind of people to access justice through the courts by removing one barrier at least which is court filing fees and fees for legal representation? I would hope personally that that is something in which Kituo cha Sheria would interest itself after our report comes out.

Thank you. I have no further questions.

Commissioner Dinka: Thank you Edgar for your testimony and for your presentation which his very clear. Perhaps it is because I am not a Kenyan and do not have the same understanding of the situation like you do but in our travels through the country, what I felt was extremely important to the people who came and appeared before us is the issue of eviction from land. This eviction is from what they call traditional ancestral land in some cases but in other cases, land for which they had letters of allotment, title deeds and then somebody else comes and says your title deed is not good, I am coming with another title deed from Nairobi and then he evicts them. They do away with the support of the police, the DC and GSU and these guys with some little resources have been able to go to court, get a good ruling in their favour. As the Presiding Chair said earlier, they do not even know how to enforce court orders. About 90 per cent of the cases, they do not have the money to go to court.

Secondly, they just leave as asked by the DC and the police and have no recourse to justice. From your presentation, I see emphasis on a number of issues but not on this particular category of cases. Do you think it would be useful to have a number of special courts set up to fast track these cases with assistance from organizations like yours? Are there *pro bono* lawyers to get justice to these people who otherwise have lost not only their property but also the right as citizens to access justice? What do you think should be done?

I insist on this because I feel one of the principle causes of conflict including 2007 and 2008 is not only political but also land. I think one has to really give these people some facility in which they can address their problem and find some justified fair solution. I really want to hear from you. What would you like us to recommend?

Mr. Edgar Kavulavu: I totally agree with you on the issue of land because land is an emotive issue in Kenya. We appreciate the fact that now in our Constitution, we have a chapter on land and environment and that, Kituo cha Sheria has been agitating for land rights since time immemorial. Recently, I have been dealing with issues of eviction from land. One of the challenges that I mentioned was that in certain instances, certain Government officials do not obey court orders. For example, if you take the case of Syokimau, the court had issued conservatory orders but they went ahead and demolished the houses. Public interest litigation is a new concept in our Constitution and it is one way of realizing the rights that have been given in our Constitution.

Now that we have an environmental division in the High Court, it is important as litigants and civil rights organizations that we litigate more especially on public interest litigation. At Kituo cha Sheria, we handle our cases on a *pro bono* basis. The advocates that we have as volunteer advocates also take these clients on *pro bono* basis. Apart from offering legal representation, there are those clients who can afford legal fees but they do not know how to pursue it. That is why through our legal aid, we entertain all nature and manner of cases.

At Kituo cha Sheria, we realize that most of the complaints that we have from clients are from advocates. You find that a client took an advocate to represent him or her in a matter but something went wrong somewhere and then now they come to Kituo cha Sheria for legal advice. We realize that not all these clients are able but we also get clients who are able to pay court fees. It is, therefore, important that the Government fast tracks the Legal Aid Bill.

Commissioner Dinka: Thank you very much. I think we need some people or organizations like yours to go out to the countryside and through your offices kind of do some civic education telling people that you are available to help them and the way to go. I know you will be flooded. Nobody will have the capacity to take all those cases but at least, some of the cases that are very obvious and simple to litigate can be taken. The most important thing is information on what to do, how to go and where to find assistance. People do not have any idea. I thank you very much. I have no further questions.

The Presiding Chair (Commissioner Chawatama): Thank you, Edgar. I think all the difficult questions have been asked. I do not recall whether or not you said as an organization, you participated in the drafting of the Legal Aid Bill.

Mr. Edgar Kavulavu: First, allow me to respond to Commissioner Dinka's concern; in my presentation, I said that we have justice centres around the country. We have our regional office in Eastleigh and another office in Mombasa. Apart from that, we train paralegals. These are the ones who run the justice centres. That is what we employ as a way of realizing micro-justice. Kituo cha Sheria has participated in drafting of the Legal Aid Bill.

The Presiding Chair (Commissioner Chawatama): Then my question would be whether you find that adequate. Are all the issues of concern addressed? Having been in this business for 39 years or so, how many advocates do you think it will take to run the legal aid programme successfully by the Government to satisfy the whole nation?

Mr. Edgar Kavulavu: In the opinion of Kituo cha Sheria, the Bill as it is right now, just requires a bit of fine tuning so as to cover all the groups. You find that it focuses mostly on a particular group of persons, for example, maybe women or children only. We realize that, that is not how it is supposed to be. It should cover all persons and it should be applicable even to the minority areas.

The Presiding Chair (Commissioner Chawatama): It is worrying then if it does not cover all groups because I thought that the only qualification for someone to get legal aid would be that you have legal means to go to court and pay what needs to be paid and the legal aid would provide the service. When I was listening to Commissioner Dinka's last question or observation; do you think that opening yourselves up and having all these clients come in would also be a way of preparing for service that is long overdue because they would be able to take up some of that work? I do not know what sort of relationship you are going to have with them and whether or not after the legal aid has been established, you will phase out or work hand in hand. Let us understand a little bit how you see the relationship between yourself and the Legal Aid Department that will be established by the Government.

Mr. Edgar Kavulavu: Kituo cha Sheria is experiencing a paradigm shift from legal aid to legal representation in court. Now we have advocates who actually go to court. You realize that access to justice does not, in most instances, end at the legal advice. In as much as they will be getting the legal advice, we can represent them in court. One thing we should all agree is on the threshold of determining whether a person is poor or not. As I said earlier on, we realize that most of the persons who require legal aid are not only the poor. Just thinking outside the box, someone might be rich today but as a result of the PEV, you find the person loses all his property. Therefore, someone who is rich today might be poor tomorrow.

You find that after a general election, one loses all his property. So, somebody who is rich today might be poor tomorrow. So, one thing that we really need to focus on is determining the threshold to whether someone is poor or not.

Another thing that we realise is that most Kenyans still do not have faith in the Government. So, being a civil legal aid organisation, I want to believe that most of the clients will still be coming to Kituo cha Sheria.

The Presiding Chair (Commissioner Chawatama): Thank you very much for coming today. I thank you for your testimony. Should we have any more issues that we may want to raise with you, we will surely do so.

Thank you.

Leader of Evidence, call the next witness.

Ms. Belinda Akello: Presiding Chair, as the witness has presented a memorandum, we pray that the same be admitted as part of the records of the Commission.

The Presiding Chair (Commissioner Shava): It is admitted as prayed.

Ms. Belinda Akello: Commissioners, the next witness is one Vincent Chakhale, who will come and speak on behalf of the chair, Commission on Administrative Justice, Mr. Otiende Amolo.

(Mr. Vincent Chakhale took the oath)

Ms. Belinda Akello: Good afternoon. You are welcome to today's thematic hearings regarding access to justice. For purposes of our record, kindly, state your names.

Mr. Vincent Chakhale: My names are Vincent Chakhale.

Ms. Belinda Akello: What do you do and where do you work?

Mr. Vincent Chakhale: I work at the Commission on Administrative Justice as an Assistant Executive Director.

Ms. Belinda Akello: Thank you very much for coming. This Commission had invited your Commission to come and make a presentation on the role of the Commission on Administrative Justice in promoting access to justice and also look into issues of the perceived magnitude of maladministration in the country and the consequences thereof. We also wanted your Commission to also look at the challenges and recommendations for administrative justice. Finally, the Commission would like you to give recommendations that you may have that will strengthen the capacity of the Judiciary in the delivery of justice.

We welcome you to make your presentation.

Mr. Vincent Chakhale: Thank you very much. First and foremost, commissioners, please, allow me to pass my sincere apologies of my Chairman, Mr. Otiende Amolo; until this morning, he wanted to personally attend but due to circumstances beyond his control, he could not come. I hope I will be able to do justice to your time by trying to fit into his big shoes.

Commissioners, the first thing I should do is perhaps to take a little while to explain the establishment and the role of the Commission on Administrative Justice. This Commission is a constitutional Commission. It is popularly known as the Office of the Ombudsman. The work of this Commission, in one sentence, is to see to it that the Government delivers to the people. Therefore, it is an oversight agency. It was established pursuant to Article 59 of the Constitution.

Commissioner Shava: I am sorry, Mr. Chakhale. Please, let me interrupt. This is a very technical session and I can hear that our interpreters are having some difficulties. So, I will just give them the opportunity to interpret again. Our witness has talked about "an oversight agency". That is an agency which oversees certain work. It is one that supervises. So, perhaps, for the sake of our audience, we could have that again from the interpreters, please. A committee that oversees would be called what?

Mr. Vincent Chakhale: I wish I could assist the Commissioners, but I am limited by language.

Therefore, commissioners, this Commission has very basic ideas that are very dear to it. The first one is access to justice. My presentation will perhaps have a bias to administrative justice, but I will attempt to take the questions that we were to address one by one.

The first one is the role of the Commission in promoting access to justice. Under the Commission on Administrative Justice Act, the Commission has been given a function of providing advisory opinions or proposals on improvement of public administration. These include proposals on review of legislation and, therefore, towards attaining access to justice. The Commission then can give proposals on review of legislation that would facilitate and enhance access to justice.

Secondly, the Commission has a function of promoting public awareness of policies and procedures on matters relating to administrative justice. Therefore, if there may be policies in Government that are so bureaucratic that they may hinder access to justice, then the Commission can make recommendations towards review of the same.

Thirdly, the Commission is required to publish periodic reports on the status of administrative justice in Kenya. The Commission, which is a successor to the Public Complaints Standing Committee, has taken over the functions that were being conducted by that Committee, which included helping to set up complaints handling capacities in the public service.

Towards this end, the Commission oversees and requires public institutions to have complaints handling officers and desks in their institutions, so that the public can readily access them and complain of any administrative injustices. The Commission is also actively participating in the drafting of Bills that obviously have a bearing towards the enhancement of accessing justice to the citizenry.

Justice can always be well served if the presiding officers are people of integrity. Therefore, towards this end, as I speak, the Commission is in the process of sending a memorandum to the Board that is vetting the judges and magistrates on the complaints that the Commission has received against particular judicial officers. In our view, this will help in assisting the work of that all important Board.

Since its establishment, the Commission has also received very many complaints, which would otherwise have been dealt with by the Judiciary. Therefore, we have been able to refer the complainants to the Judiciary Complaints Office. As you may be aware, commissioners, the Chief Justice established an Office of the Ombudsman in the Judiciary. Therefore, we are working with that office by making referrals of people who are complaining against delivery of judicial services.

Lastly on this point, the Commission, being a Commission that does not require any costs to be paid by the complainants and has, therefore, enhanced access to justice to those people who are vulnerable and would otherwise not have accessed justice because of limited financial capabilities.

I will move on to the second point, which is what the perceived magnitude of maladministration in the country and the consequences thereof are. I would have preferred, perhaps, if the word “real” had been used instead of the word “perceived” because “perceived” can be interpreted differently to mean that it is just speculative but it is real.

When the precursor to the Commission was established in 2007, namely the Public Complaints Standing Committee, it received from the then Kenya Anti-Corruption Commission about 85 per cent of the complaints they had. The reason was that some of the complaints that the Kenya Anti-Corruption Commission had received were complaints on maladministration whereas the corruption that that Commission was to deal with was only that which attracts criminal liability. Therefore, they did not know what to do with such cases.

I will give an illustration just to buttress my point. For example, if a member of the public went to a Government office and wanted to procure a service and the public officer simply refused to give that service, there was nowhere this person could go. If he tried to allege corruption, then it would not amount to corruption. Therefore, maladministration was very rampant in the public sector and it has real effect even to the economy.

You might recall that a few years ago, there were houses built at the Central Police Station in Nairobi for the Police Department. About two or so years after they had been built, a section of them had to be demolished to pave way for expansion of the road. Therefore, somebody may ask: If the Government knew that it was going to expand the road two years down the line, why was money spent to put up those houses? That is maladministration and that is wastage, and it affects the country economically.

Maladministration also promoted having an ineffective Public Service, because there was nobody who could question the abuse of power by public officers. I would say they were almost law unto themselves. All this was contributed to by maladministration. There was a lot of abuse of power. I would say that, interestingly, maladministration negatively affects even the destiny of the citizenry. I am reminded of a case we received where a young girl was trying to follow up the pension and death gratuity of her late father. The mother who had then also been deceased had tried to follow up for years but she could not manage. So, this young girl, upon attaining majority age, came to the Commission after also trying to follow up that pension unsuccessfully. That is money that was meant to educate them. So, if it can take 10 years or so, what destiny would those children have? Hence, my statement that maladministration affects, even the destinies of the citizenry.

So, the role of this Commission is to enable the citizenry to access the administrative justice that the Constitution has granted them under Article 47.

I will move on to the third question – challenges and recommendations focussing on administrative justice. The first challenge that the Commission has faced is resistance. Public institutions, and more so senior public officers, are not used to being questioned on the administrative decisions they make. Therefore, we are facing a lot of resistance but I thank the Legislature that this Commission was granted powers necessary to seek responsiveness from public officers.

Secondly, there are numerous outdated policies and regulations in Government. This Commission has a huge task and a big challenge because it has a function of making recommendations on review of these policies. There are those who may not want review of these policies, maybe, even for personal interest. Some of these policies are, in my view, to say the least, unjust.

If I may give an example, it is just recently that the Government established medical insurance for all civil servants. Prior to this, civil servants were being given some minimal medical allowances. However, this medical allowance varied depending on the job groups of the public servants. Therefore, personally, I always asked myself: Does it mean that as you grow into the senior Job Groups, you are more vulnerable to get sick and therefore you require a bigger medical allowance?

Also, there is something in Government called *per diem*. This is money that is given to public servants when they are going out of town on public duty. You will be amazed at the difference of the amount of money that is given to them. So, sometimes I ask: If an officer in Job Group “Q” and another one in Job Group “D”, are going to the same town, where they will incur the same expenses, why would they be given different *per diem*? This is with a light touch but I am trying to demonstrate how policies can be unjust and, therefore, need to be reviewed. That is why we face a challenge when we try to review such policies.

Another challenge that we have is devolving into the counties. Obviously, this requires a lot of financial resources yet it is in the remote counties that the citizenry require our services the most. Therefore, it is a major challenge to us.

The citizenry, especially in remote areas, are not aware of the administrative rights that they have. Therefore, because we have a responsibility of creating awareness of administrative rights, it is also a challenge to get into those areas to educate them on the same but the Commission is equal to the task. If well facilitated, then we will do so to the best of our ability.

Obviously, the opposite of the challenges would be the recommendations as far as question number three is concerned, but I would want to add that the Commission, having received thousands of complaints, has seen that it is better to have a systemic approach towards solving these complaints. For example, we have received so many complaints regarding delay in pension. Somebody retires and waits for even 15 years before he receives his pension. Therefore, seeing the numerous complaints, it means that there is a

systemic issue within the Pensions Department. Therefore, this is the approach that the Commission wants to take – to deal with the root of the problem even as we deal with the individual complaints.

I will move to the fourth question, which is on recommendations that will strengthen the capacity of the Judiciary in the delivery of justice. This is a question that has been discussed in many forums. Even as I speak, I know that there are reforms going on within the Judiciary. When this Commission was still a Committee, it did give its contributions to the Judicial Task Force on Reforms. We are happy to see that most of the recommendations we gave were adopted, but if I may just mention, presently, the Commission works hand-in-hand with the Judiciary.

In fact, we paid a courtesy call on his Lordship, the Chief Justice, and had very fruitful discussions with him. The uniqueness of our collaboration is this, as you may be aware, the Judiciary has a Judicial Review Court that is supposed to deal with unjust administrative actions. Before the establishment of this Commission, the only way you could deal with such unjust administrative action was through the courts. However, with the establishment of this Commission, which deals with administrative injustice, a big load of the cases that would otherwise go to the courts have now come to this Commission.

Towards that end, it will strengthen the Judiciary's capacity to deal with cases because they now have fewer cases to deal with. This Commission is also mandated to conduct alternative dispute resolution using both the Constitution and the Act. If alternative dispute resolution is adapted on a wide scale, it will obviously reduce the workload of the Judiciary. However, some of the other recommendations I would make are already in the process of being implemented. One of these is enhancing the intellectual capacity of Judicial Officers, not because it is limited but because in the legal profession, you learn every day. You may imagine, Commissioners, a magistrate who has been in a Wajir Court for 10 years is suddenly appointed a Judge of the High Court and is supposed to deal with very complex commercial matters at the Milimani Commercial Courts. Therefore, if there is no consistent training of Judicial Officers, it would reduce the quality of jurisprudence.

Please, allow me to end there and, maybe, address the questions that you have.

The Presiding Chair (Commissioner Chawatama): That was a good place to end because, maybe, you would have said something else about judges and then I would have been offended, and then I would have forgotten that I am sitting in a Commission and I would have a flashback to the bad case that I had; maybe, I would have been tempted to sentence you.

(Laughter)

Thank you very much for your presentation. Belinda, do you have any questions for the witness?

Ms. Belinda Akello: Maybe, just one, Presiding Chair. Vincent, one of the interesting parts of your presentation would fall back on what we have heard during the rounds that we have done in the country. The greatest evil that the people at the grassroots face is what you have been talking about as maladministration, where they are literally at the mercy of the chiefs, the District Officers and the District Commissioners. These Government officials are very powerful when you get back to that point.

We have heard that you have planned to, maybe, decentralise your functions to different levels, which I hope is also intended to improve the competencies in trying to get the complaints from these people, and especially in areas where they often seem to occur. I would then have just two issues that I would like to ask of the Commission, and also in helping to access justice because access to justice is a lot about if I am able to raise my complaints and also addressing the justice mechanism that would help me in have my complaints sorted out.

Does your enabling Act have provision for protection of the identity of the person complaining? We are alive to the fact that if you complain against the District Commissioner or the chief or even the village elder, as provided for in the new Constitution, you will still go back to the same village elder or the same District Commissioner for services. Most people will fear and tell you that “I cannot take any action against the DC even though he has taken my land unjustly and they have gone ahead to collude with the lands officer. They have as well taken away my cow but I cannot complaint because if I do, either I or my children or other people will suffer.”

So, do you have provision for protection of identity to encourage people to file complaints? In addition to that, do you have provision for follow up action? For instance, Mr. Chakhale did make a complaint. Is he safe, one month down the line, or is he an example to the whole locality of why one should not file a complaint, thus making your office redundant?

Mr. Vincent Chakhale: Thank you, Belinda. Under the provisions of the Administrative Justice Act, the Commission is required to maintain confidentiality. Therefore, if a complainant or client does not want to be identified, we do not identify him but we will still proceed to investigate that complaint, and at least to protect him. Sometimes it is very difficult because even if you do not mention the person, in some instances, it can be known who the person or complainant is. In such instances, we keep a very keen eye to protect such individuals so that they may not suffer reprisal actions.

On the second question about follow up, yes, we do make a follow up of the complaints until the matter that is complained of is resolved. So, we do not leave it hanging. Our doors are always open for that person to come in and complain. What has enhanced our powers is that right now, in case of misconduct of a public officer against a person who has complained, we can make recommendations that such person is ineligible to hold public office, and we make this known to public officers when we make our inquiries. I

can say that it has really enhanced even responsiveness, and it has prevented them from going back to the complainant. I hope I have addressed your question.

Ms. Belinda Akello: Yes, you have. Thank you very much. Maybe, on that note, I would say that your Commission might also want to take a good...

Mr. Vincent Chakhale: I hope I have addressed your question.

Ms. Belinda Akello: Yes, you have. I hope that your Commission will look at our report. Having gone round, we were able to reach very many people and in some of our public hearings, we used to get public complaints about a number of cases that amount to misconduct according to your mandate. You might want to look at that.

Another issue is complaints by officers against fellow officers. Most officers feel that they cannot complain against fellow officers especially in the disciplined forces and if the officer concerned is senior, then the junior officer might be dismissed from work. My second and last concern would be from the angle of human rights and access to justice. What recommendations would you give as legal and political balance of power between the Judiciary and the Executive? You have told the Commission about the benchmarking of cases. There is a very thin line between the affluent and the big witnesses in court who have a direct link to the Executive.

Mr. Vincent Chakhale: On your first question, I wish to say that we also receive complaints from public officers against public officers, public officers against public institutions, and public institutions against other public institutions. So, we also deal with such kinds of complaints. I will attempt to answer your second question. I will start by asking why it would be preferred by a judicial officer to balance between legal and political. I have not had the advantage of ever being a judge, so my knowledge on this might be limited.

Ms. Belinda Akello: What we meant is about gate-keeping as the first speaker had said. It mostly happens with economic crimes and corruption related charges. We have a person in the Judiciary who takes care of cases; who handles cases touching on persons of affluence and significance within the society. Most of them are also directly linked to the Executive that now then brings a direct link between the legal and the political balance that comes between the Judiciary and the Executive. It is a very silent area of mal-administration because there is ideally no one to complain to because the person who is on the defense is a highly placed person in the society. Therefore, the country suffers on that point. So, I am asking if you have tried to look at areas that pacify the legal and political balance. These are the cases that are referred to as gate-keeping. We have safe administrative officers assigned to such cases just because of the kind of influence that they bring along. The people who are aggrieved have no voice or might to even be able to get to your office to lodge a complaint.

Just to illustrate, when land is allocated to squatters and one side is favoured, it amounts to gate-keeping. This also relates to economic crimes and corruption cases.

Mr. Vincent Chakhale: I now get your question. I think the answer is more preventive because of two reasons. When a matter is before the court, the law prohibits us from investigating such matters because it is *sub judice*. Secondly, it is the universal protection that has been given to judicial officers and rightly so. Even if a judicial officer would be, in making their judicial pronouncements, fail to meet the requisite principals or make a judgement that you would suspect that has been influenced by politics or other reasons you would still not question it. It can only be questioned by way of appeal. If the same decision still comes after going to the highest court then in so far as it is concerned, it would be the decision. I am saying that the answer to that is preventive in the sense that when we are putting reforms in place, we want to have a nice process in the appointment of judges so that the ones that occupy those offices, we shall be sure that they are men and women of integrity and we do not expect them to be gate-keepers. The only manner in which the Commission can make contribution towards preventing the same is to see to it that the presiding officers who are appointed meet the requisite requirement of Chapter Six.

Ms. Belinda Akello: Thank you, Mr. Chaale. In your own view, do you feel that there are accountability mechanisms within the Judiciary as a part of the justice system?

Mr. Vincent Chakhale: I want to believe that after the passage of the new Constitution and after its implementation in its entirety then we will have a system of accountability. Moreso, because in my understanding of the Constitution, there is a fourth arm of state that has been created and, therefore, deviating from the usual three arms of the Government. Those are the commissions and independent offices under Chapter 15 of the Constitution.

These offices will tremendously assist in enhancing accountability even within the Judiciary and other departments concerned in administration of the public like the police and the office of the Director of Public Prosecution (DPP).

Ms. Belinda Akello: Presiding Chair that is all from Leader of Evidence.

The Presiding Chair (Commissioner Chawatama): Any questions, Ambassador?

Commissioner Dinka: Thank you Vincent for your testimony. I am not very familiar with the institution of *Ombudsman*. I know it is some Swedish word but can you take me through what you do? For example, if somebody comes and complains about a Minister or somebody else who did something that affected promotion, what do you do?

Mr. Vincent Chakhale: Once we receive that complaint, in pursuit of observing the rule of natural justice, we also want to hear what the person complained against has to say. Therefore, we send an inquiry letter to that person. The letter contains the allegations levelled against one. So, we give him an opportunity to respond. Upon his response, we make a determination on whether the matter should be investigated or further inquiries made. We also want to know the course of action depending on a particular set of facts.

Sometimes, you might find that even the response of that person pursuant to receiving our letter is geared towards resolving the complaint. At this stage, one is able to determine whether this matter should be approached through reconciliation, investigation or through any other means. At the end of it all, we will make recommendations which are enforceable. We even have the power to sermon to appear or even to conduct a public hearing in order to reach to a just determination. These are just some of the powers that the Act that was passed last year gave the Commission.

Commissioner Dinka: How do you enforce your decisions? Do you send an inquiry to the Minister and when he responds and you find that there is need for further investigation, you investigate and when you get your findings and make a ruling, how do you enforce such a ruling on the Ministry?

Mr. Vincent Chakhale: We make our recommendations to Parliament annually. However, even before that we can make recommendations and direct that particular officer to do as recommended. Under the Act, the Minister for Public Service is supposed to inform Parliament periodically on the recommendations made by the Commission and the implementation of the same. Probably, that would be on a wide range recommendation. If it is just about a particular public officer who remains unresponsive, the Commission may even make a determination. As I said before, he might be declared ineligible to hold office. Therefore, that enhances the enforcement of the same. In other instances, if we require the attendance of somebody to our hearings and he fails to attend, under the Act, we have powers of the court where we will now partner with the Judiciary to enforce such requests.

Commissioner Dinka: Politicians or Ministers are very clever people and do not confront you like that. For instance, if you make a recommendation that a certain individual should be promoted, he accepts it for two months and then rubbishes the report and the person will be out in the streets. If there is something that the *Ombudsman* can do to protect individuals against abuse of power, it would be good.

Mr. Vincent Chakhale: That would obviously be abuse of power and apart from dealing with that person as an individual, since the Commission has powers to make recommendations on review of policies, then we would look at particular powers, policies, laws or regulations that give that public officer the power to do that, then see to it that the regulations are amended. We usually keep statistics for the complaints before we are able to identify systemic issues then deal with them by addressing the root cause.

Commissioner Dinka: Do your statutes allow you to go over the Minister and appeal to the President or the Prime Minister to protect a particular individual? Suppose that individual is on the streets, what can be done for him or her? Otherwise, it would be like the whistle blowers who are usually victimized.

Mr. Vincent Chakhale: If we have investigated and found out that he has been taken out of office unjustly, and then apart from recommending punitive measures against the person who has abused his or her powers, nothing would stop us from making

recommendations that the person should be reinstated or compensated. That is why under Section 8 of the Commission on Administrative of Justice Act, the Commission has powers to make recommendations on compensation or any other appropriate remedy in such an instance.

Commissioner Dinka: Does the *Ombudsman* have any powers to look into a rogue judge or is it only geared towards the Executive?

Mr. Vincent Chakhale: It is not only the Executive but also the Judiciary because it is also a public institution.

That is what he did depending on his judicial capacity. Article 75 of the Constitution provides for the conduct of State officers and judges are State officers. Under Article 59 of the Constitution, the first function of the Commission is to investigate any conduct in State affairs. So, it would not include that but only to the extent that we are not impugning the independence of the Judiciary and that we are not over-stepping into the mandate of the Judicial Service Commission which has the primary role of dealing with that.

Commissioner Dinka: Thank you, Vincent. I have no further questions.

Commissioner Shava: Thank you for your interesting presentation. I have a few questions and a couple of observations. You pointed out that you intend to establish offices around the country. You also said that you have calls to set up desks in various public institutions. Most of the complaints that we have received around the country is the issuance of identity cards and birth certificates particularly at border areas. These areas include the north eastern part of Kenya like Mandera, Wajir; and western part of Kenya like Busia and Malaba. As you wait for the county system to come fully into operation, my question is, do you have these desks at the Immigration and Registration of Persons offices around the country?

Mr. Vincent Chakhale: This is an initiative that was started less than two years ago when the then committee was included in performance contracting cycle. One thing that they required for public institutions is to have complaints handling infrastructure. So, it is an exercise that is still ongoing but at the moment, I know that most public institutions have complied or are in the process of complying. We are required to give a certificate annually which this public institution will present to the performance contracting department. We also score them on the same as a way of enforcing it.

Commissioner Shava: I would be interested to see the score card of the Ministry of State for Immigration and Registration of Persons.

My second question is linked to the first question; have you started rolling out your offices around the country? Where are your offices?

Mr. Vincent Chakhale: We are in the process of starting to roll out. The Commissioners were appointed and gazetted last year. So, they have been in office for barely three months but I do know that rolling out of county offices is one of their priorities. We can only hope that the funds will be available to make us devolve to the 47 counties at ago.

As to where our offices are, we are now stationed at the Prime Minister's Office. I would like to say that we are soon moving out of that building because it may give a different perception of us. We were only in that building because it was a department in the Government.

Commissioner Shava: Well answered, Mr. Chakhale. Now that you have mentioned funding, I would like to know from you, what is your experience in terms of the political will to support the work of this very important Commission? Do you get the sense that you would have the funding that you require to, do the duties required of you?

Mr. Vincent Chakhale: I think that the *Ombudsman* is more or less a new concept in Kenya. So, the first thing is for us to make the decision makers understand the kind of work that we are doing and the importance to the citizenry. So, we are gearing towards making them understand that. For the moment, I have not seen any negative political will from leaders.

Commissioner Shava: That is very encouraging. When we were talking about the accountability of the Judiciary and you were talking about the vetting process, I just wonder how much you are recognizing that there might be problems with the judicial officers but also with the judicial and support staff. You have also mentioned that you are working well with the Chief Justice who has also established the *Ombudsman* within the Judiciary. So how are you both going to deal with complaints against administrative and support staff within the judicial system?

Mr. Vincent Chakhale: Since the complaints office within the Judiciary has been established, once we receive a complaint from a member of the public against such an officer, we refer him immediately to that complaints office. Therefore, those offices are the places for first impact. So, our officers will work hand in hand with the Judicial Service Commission if it is a matter to do with discipline, but we work hand in hand. The fact that the public knows that there is now such an office and there is also such a commission will itself enable the public to be assisted.

Commissioner Shava: Finally, I would like to make an observation. I think you have your work cut out for you. Public Administration has very many layers. The examples that we had earlier with regard to Syokimau is a very good example. What we have heard is what we have heard before in different places. There is a lot of passing the buck because there are so many layers of the Government. Who allowed the squatters to stay there for the last ten years? Is it the chief of the area, the Ministry of Lands or the Provincial Administration? It seems nobody is responsible. You cannot point a finger at how this whole situation happened. There is a court order issued against one arm of the Government preventing it from doing something then another arm of the same

Government comes in and carries out exactly the same action that the court has prohibited. Therefore, we have a problem and we are looking forward to how the office of the *Ombudsman* is going to help us to address such issues in our country.

The Presiding Chair (Commissioner Chawatama): Thank you very much. I only have one question. Do you view yourself as being independent and if you do, who or what is one of the biggest threats to your independence as a commission?

Mr. Vincent Chakhale: We view ourselves as being independent because the Constitution which is supreme has granted us that independence. We have just enjoyed that independence for three months now. We do not know whether in future, there may be some impediment which in my view might be there. We might get some resistance that may try to impugn our independence. Since we have been granted that independence by the Constitution, then we will overcome in case we get such incidents so that we can meet the values and principles outlined in the Constitution.

The Presiding Chair (Commissioner Chawatama): We wish you all the best. Independence is something that will be guarded jealously and if it is not then people would step in and make certain decisions for you.

Thank you very much for coming to speak to us. You may now step down.

Leader of Evidence, please approach the table.

Ms. Belinda Akello: Presiding Chair, the witness who was here yesterday, the Chief Registrar of the Judiciary has sent a representative, Mr. Nicholas Okemwa to come and present on her behalf before this Commission.

The Presiding Chair (Commissioner Chawatama): Could Mr. Nicholas Okemwa tell us the position he holds in the Judiciary?

Mr. Nicholas Okemwa: I am the Legal Counsel, Office of the Chief Registrar.

The Presiding Chair (Commissioner Chawatama): Mr. Okemwa, we would like to welcome you.

(Mr. Nicholas Okemwa took the oath)

Commissioner Shava: Leader of Evidence, what would be useful for us in this presentation is if the witness can focus on the challenges with regard to access to justice within the new set up of the Judiciary in the new constitutional dispensation so that we are not talking about the concepts which we have already gone over. What we want to hear from this witness is, within the current set up, what are the challenges and how do we address them?

Ms. Belinda Akello: For purposes of our record, could you please repeat your name?

Mr. Nicholas Okemwa: My name is Mr. Nicholas Muturi Okemwa from the Office of the Chief Registrar.

Ms. Belinda Akello: What do you do at the Office of the Chief Registrar?

Mr. Nicholas Okemwa: I am the Legal Counsel in the office.

Ms. Belinda Akello: Thank you for finding time to come. The Commission had sent an invitation to the Office of the Chief Registrar to come and make a presentation on the Judiciary generally and access to justice, judicial independence and sustaining confidence in the Judiciary, application of tradition justice system in a manner that boosts access to justice and recognition of human rights, milestones in the development of the Judiciary from the colonial government to date, challenges that the Judiciary has faced in dispensing justice, both internally and externally, opportunities for reforming the Judiciary, achievement of the Judiciary so far, specialized courts towards access to justice, copies of review task forces that have been set up, statistics of cases both civil and criminal and funding of the Judiciary in general.

We do take note of the presentation that you have provided to this Commission in writing of which the Chief Registrar, Madam Gladys Sholei articulated in her presentation.

As directed by the Commissioner, Kindly take us through the fifth item of the presentation, which is on the challenges that the Judiciary has faced in dispensing justice and ways in which you have been able to combat the same, if at all. We welcome you to make your presentation.

Mr. Nicholas Okemwa: Thank you for the question. I must start by conveying the apologies of the Chief Registrar. She would have liked to be here in person but due to unavoidable circumstances, she was not able to make it. But straight to the question, the first challenge that we have is capacity.

Capacity has many dimensions. First and foremost, we start with human resource. Kenya has an estimated population of 40 million people, yet the Judiciary has an estimated 300 magistrates, 62 High Court Judges, 15 Court of Appeal Judges and 7 Judges of the Supreme Court, including the Chief Justice and his deputy. Given the figures, it is clear that, indeed, human resource is a major challenge. But the Judiciary has taken steps to remedy this. The Judiciary recently advertised vacant posts of around 160 magistrates. As a second step, the Judiciary has taken steps to engage the Ministry of Justice, National Cohesion and Constitutional Affairs and the Attorney General's office, seeking amendments to the Judicature Act that provides the thresholds to the number of Judges. Currently, the threshold is 70 but the proposition is that the number be increased to 150. For the Court of Appeal, the threshold is 15 and the proposition is to increase it to 30. This, at least, will ensure that the judicial officers are an adequate number, to be able to deal with cases before the courts.

In addition, the Judiciary has also proposed amendments to the Magistrates Courts Act, to increase the pecuniary jurisdiction of the magistrates. Currently, the pecuniary limit of a Chief Magistrate is Kshs3 million only. Therefore, this means that all cases with the subject matter that is beyond this threshold of Kshs3 million, are handled by the High Court. The Judiciary proposes that this limit be increased to at least Kshs10 million, so that the number of cases that are handled exclusively by the High Court in relation to the value of the subject matter, are significantly reduced.

Another challenge that we had was the lack of research facilities. The Judiciary in remedying this is in the process of recruiting legal researchers. This will drastically reduce the amount of time to reach decision making. The number of researchers now recruited is 169.

The second limb of capacity is structural or institutional capacity. The court houses or buildings are few, even comparing to the now envisioned increase in the number of Judges. Indeed, the Constitution provides that each county will have a high court station. Currently, there are only 17 High Court stations. That means that there is a shortfall of 14. The Judiciary is working hard to obtain or build those court buildings within those counties. But in the meantime, even in the far-flung regions, we have the mobile courts. I must say these were not incorporated within the last one year, but have been in place for sometime. What the Judiciary is doing is providing more support.

In addition, due to complex nature of cases that come before the courts, the Judiciary is building the capacity of judicial officers in terms of their ability in providing jurisprudential cases by strengthening the Judicial Training Institute. This point is in reference actually to the presenter before me, who had stated the need to build capacity for judicial officers. The Judiciary recognizes this and has taken active roles.

The third point in relation to access is the issue of simplifying the rules of procedure. Previously, the rules of procedure were very complex. Therefore, not only just the general public, but even lawyers had a problem. This is without prejudice. However, the new Constitution provides that justice shall be accorded without undue regard to technicalities and procedure. The Judiciary on taking note of that went ahead and simplified the Civil Procedure rules. The rules even envision the existence of a small claims court. In this regard, members of the public will be able to access justice in a more timely manner. The Judiciary is also looking at the costs and reviewing them as we speak. This is to ensure that nobody is denied justice due to the prohibitive costs.

In addition, the Judiciary is coming up with policies to embrace alternative dispute resolution mechanisms, including traditional dispute resolution mechanisms. However, we must recognize that such traditional dispute resolution mechanisms, as they existed in the traditional African setting, were some for the most part, discriminatory against women and children. But the Judiciary is alive to this and will give its due importance in analyzing this particular question. In addition, the Judiciary will not sit back and wait for people to come to it; it is developing an outreach facility. This is to engage members of the public and other stakeholders in preventive

mechanisms. However, we are alive that the main role of the Judiciary is to resolve disputes that are brought within it. This should not be taken as the Judiciary acting, in most part, as an activist in the political and socio-economic arena.

Another step that the Judiciary has taken is the issue of enhancing or streamlining the internal mechanisms or operations. Previously, judicial officers used to be engaged in administrative roles. For instance, you would find that judicial officers would be in various committees, like the procurement or tender committees. However, the Judiciary has since separated the judicial and administrative functions. Therefore, more time is created for the judicial officers to engage in their core mandate.

The Judiciary has also created specialized divisions. There are the Admiralty and Commercial divisions which have been in place for quite sometime. The reason or rationale of having such specialized courts is that the cases brought before them might be more complex in nature. Therefore, more time, perhaps, will be needed to be accorded to them. By having such specialized courts, this creates timeliness in dealing with such matters.

The Judiciary also now is in the process of reviewing and formulating the Judiciary Fund regulations. This is particularly important, given that the independence of the Judiciary is a precursor to any democratic country or state. Due to this, we project that the Judiciary will have enough funds to carry out all its operations as envisioned in the Constitution.

In order to coordinate the programmes that we have in the Judiciary so far, we are coming up with a transformation framework. It is important to note that we refer to it as transformation and not reforms. That is because the Judiciary is of the view that it is regenerating. Indeed, this is supported by the strong public support that we have, unlike in the previous constitutional dispensation.

The Judiciary also, as has been mentioned by my colleagues before here, created the Office of the Ombudsperson. We call it the Ombudsperson because we are alive to gender sensitivity. It operates both internally and externally receiving complaints from members of the public. Further to that, there is also a body called the National Council on Administration of Justice. This is an amalgamation or grouping of all the stakeholders in the legal sector. It is chaired by the Chief Justice. The reasoning of Parliament is that justice is a chain linking different stakeholders. Therefore, for justice to be availed to the public, the police, the office of the Director of Public Prosecutions (DPP), Prisons Department and Judiciary have to do their part well. So far, there have been several meetings on this and the secretariat is currently being set up.

Perhaps, I can respond to some of the queries and questions that I have heard my predecessors here talking about. I do not know if that is in order.

The Presiding Chair (Commissioner Chawatama): You will have your questions which we will ask and they might be the same. So, do not pre-empt.

Mr. Nicholas Okemwa: Okay. That is the long and short of what I had to present.

Ms. Belinda Akello: Thank you very much for your presentation. We also take cognizance of the very detailed presentation that you have also provided to the Commission, which provides a lot of information on the issues that we would have wanted to clarify.

Maybe, just two issues that I would want to ask. I do take note from your presentation of a lot of the transformation that you have made. You have actually tried to go around a lot of barriers to access justice, including costs, delays and quality of judgements being given. One question I might have is: Amongst the transformation framework that you have, do you have an accounting mechanism that will be able to hold offices of the Judiciary to account once we have such issues, other than the Ombudsperson's Office? Do you have an internal checking system that will be able to act as an accounting system?

Mr. Nicholas Okemwa: We have a Performance Management Directorate and part of their responsibility is to ensure that officers deliver on what they are supposed to do.

Ms. Belinda Akello: My last question is: We have had thematic hearings also on prisons and gone around the country. The other organizations with which we work in collaboration seem to be of the opinion that a lot of people are given unnecessary sentencing, which also leads to overcrowding of the prisons and a lot of work for the other organizations. How best has the Judiciary embraced the Community Service Order? What is the view of the Judiciary with issues on parole as it is currently provided for in law? What is your take on the issue that the Judiciary is just clearing a backlog rather than actually making corrective sentencing orders?

Mr. Nicholas Okemwa: The Judiciary currently is coming up with a bail and sentencing policy. This I must admit had been lacking. So, we can find different judicial officers giving different sentencing options. But with the policy, we hope that this will cure that. With regard to the community sentencing, also there needs to be a policy on that, which of course will be included in the larger sentencing policy. Currently, the community sentencing orders that are given are for manual labour within the different Government departments like the chief office and courts. This *per se* does not really enrich the community because we have not taken into consideration the skills that, that person might have. For instance, if it is an accountant or professional, he should be able to do community service within his lines of expertise.

Ms. Belinda Akello: Thank you very much. That is all from the leader of evidence.

The Presiding Chair (Commissioner Chawatama): Thank you very much, leader of evidence. Ambassador, do you have any questions for the speaker?

Commissioner Dinka: First of all, thank you very much, Nicholas, for the testimony and clear presentation. I have got just one question, which I was not clear about. You said

that the Judiciary is developing some outreach programme to engage the public with a view to preventing dispute as opposed to dispute resolution. How is it done?

Mr. Nicholas Okemwa: I must recognize that there is a very thin line that we are treading on here. That is why we are formulating a policy; we have not started that yet. But I envision it as such. For instance, we have the chiefs' *baraza*, a Judge, coming and talking to members of the public, for instance, about female genital mutilation or child labour. This is because you will find that most of the time, especially outside the major towns, accused persons who come before the court are not aware that the act that they have done is actually contrary to the law. But just by virtue of having a judicial officer just speak to them, generally of course, and not pertaining to cases actually before them, would perhaps have a preventive reaction to members of the public. That is just an example.

Commissioner Dinka: Thank you very much. Just because of the thin line that you referred to, do you not think that it would be, perhaps, better to use lawyers like the researchers that you are going to employ, to go out and do this thing instead of the judges who may be judging the issue at one point or another?

Mr. Nicholas Okemwa: I appreciate your comments, but it also goes further. It is not just the example I gave. For instance, it involves even giving talks to schools. The problem that we have is that the Judiciary is very mysterious. Part of the outreach programme is to educate on the roles of the Judiciary in part of governance. So, the outreach programme *per se*, is not giving legal advice, but perhaps demystifying the role and engaging the public, where the public can ask questions.

I should have mentioned before that the Judiciary has held open days, which started in 2007, where members of the public freely interacted with the judicial officers and asked all sorts of questions regarding the administration of justice. But, the judicial officers have to be very careful in treading that thin line.

Commissioner Dinka: Thank you very much. I have no further questions.

Commissioner Shava: I just have two questions. I note that in your document, when you are talking about the court structure, you have talked about the divisions and said that they include--- Can you give us a definitive list of the divisions as they stand now? This is because I see here that the Family Division which has been there for a long time is not there. Are you saying that, that has been absorbed within another division or this list is not exhaustive?

Mr. Nicholas Okemwa: The list is not exhaustive.

Commissioner Shava: Okay. I am sure that we can get an exhaustive list later.

Mr. Nicholas Okemwa: Yes. A refined copy of the presentation will be sent to you.

Commissioner Shava: Okay. Thank you for that. My final question is with regard to access to justice and the Judiciary. I note that we have Ombudsperson as opposed to an Ombudsman to make people feel that, that is an accessible office even in terms of gender issues. But at the same time, we note that despite the construction or rehabilitation of the former Community buildings into what is now the High Court, the Judiciary failed to take into account access to the courtrooms for people in wheelchairs. I just would like to know from you, as the county courts are put in place, whether this is an issue that the Judiciary is going to take into account. What do you intend to do about the present situation? What is your situation even in terms of access through language? Do you have an adequate number of interpreters as you look to enhance the human resource within the Judiciary? Are you taking into account things like interpretation and even sign language? Thirdly, are you taking into account persons who have experienced sexual violation which is a grave issue in this country and is always increasing? There have been proposals for specialized systems and mechanism such as shielding victims from their attackers during court proceedings. So, what is the Judiciary doing and intending to do on those three issues?

Mr. Nicholas Okemwa: Thank you for your questions. Regarding the first question on access to courts, the Judiciary recently announced a judicial architectural competition inviting members of the public to submit ideas on what they want their courts to look like. We have realized, as you have said, that indeed, the courts were unfriendly in particular to the physically challenged. Once we develop a court prototype, after the submission of the ideas from the general public, it will be replicated in all the new buildings across the country. Not only will it include facilities to allow the physically challenged to access, but also it will provide the latest in ICT, to enable proceedings to carry on faster and in essence, deliver justice in a timely manner.

Regarding the issue of language, the Judiciary, indeed, has taken note of the issue of interpreters. When the Judiciary is hiring for certain positions, for instance, court clerks, it takes into consideration the diversity of the tribes of Kenya. This is actually in addition to the monies set aside to hire interpreters when and as need arises. This is the same also for sign language. On that note, I would like to inform the Commission that the Judiciary recently entered into a memorandum of understanding with the Kenya Society for the Blind to see in what ways we can offer employment opportunities. Indeed, the Constitution provides that there are a certain minimum number of persons with disabilities who should be absorbed in the public service, and this includes the Judiciary.

On the third point regarding access to court by persons who have experienced sexual violations, indeed, the Judiciary has noted that there is a disconnect between the number of cases or incidents reported at the police station and the cases actually that proceed in court. This has been taken into consideration when the Judiciary is coming up with the prototypes. Therefore, there will be no instance where the accused person will be waiting in the same room with the person who has been violated. Furthermore, the Judiciary has been training magistrates on how to handle witnesses who have been sexually violated. With regard to the specialized courts or systems dealing with such, proposals have been made by other stakeholders in the same and this, in due time, will be addressed.

Commissioner Shava: Thank you very much. With the indulgence of the Chair, I just have a couple of more things to say arising from what you have said. I would hope that in the MoU that the Judiciary is developing with the Kenya Society for the Blind, you will also address issues such as how the blind access court documentation so that if a person who is visually impaired has a judgment in his or her case, he or she can read it. I hope that, that will also be addressed.

Secondly, we heard yesterday – you were not here – that with regard to ICT technology in the Judiciary, the institution has been rather slow and laxly, not just in terms of proceeding in court. I think ourselves, we had a judgment read to us on Friday morning and we did not manage to get the copy until Tuesday. But what I am referring to is the issue of the virtual transmission of judgments, which I understand is a pilot project. I think Nairobi and Mombasa have that technology. However, after the big launch, that seems to have gone dormant. So, in your refined document in the paragraph where you talk about the ICT, perhaps you can give us more information on the intentions of the Judiciary with regard to that.

Finally, I come back to my first question. We are talking about the architectural competition and it is really good initiative for Kenyans to say what they like the court rooms to look like so that they are not intimidated when they go there. They want to ensure that the courts are user friendly. That is well and good, but do you intend to do that now because unless I am mistaken, the Judiciary is currently being sued by persons who say that they are unable to access court buildings because they are on wheelchairs? What is the solution to this issue now?

Mr. Nicholas Okemwa: As a parallel programme to the development of the court prototype, the Judiciary has also gone around the country looking at the suitability of the court houses. This will now inform on the repairs necessary to rectify the current situation.

Regarding the access to justice by blind people, the National Council for Law Reporting (NCLR), which is a State corporation under the Judiciary has also been working with the KSB. As such, the information displayed on the website is in such a format that it is easily accessible to the visually impaired. It is important to note that there are people with varying degrees of visual impairment and the NCLR has taken that into consideration. It has published the information in a font which universally has been proven to be more accessible to the visually impaired.

Regarding the publication of the information in Braille, this indeed is one of the components of the access to justice segment of the Judiciary transformation framework.

Regarding the ICT, indeed, the Judicial Service Act mandates the Judicial Service Commission (JSC), which provides policy and oversight of the Judiciary to incorporate ICT or modern technology in its operations. The Judiciary, on that note, has rolled out the Judicial Service Desk which, this month, is going to be launched by the hon. Chief Justice. Such a system brings the office services closer to the public, in that a complainant will be able to mail his queries to the e-mail address which will be issued a

reference number and we will be able to follow up. Therefore, the transport cost to be incurred by such a person in travelling to the station will be reduced. This is just one of the many projects that the Judiciary is engaged in now.

Commissioner Shava: Thank you very much. I think you have now answered all my questions. I have no further questions now. I thank you for your presentation and your very precise answers.

The Presiding Chair (Commissioner Chawatama): Thank you very much for representing the Judiciary. I think if I had to start asking you questions, we would be here for three days. So, I will not, but maybe to just say that among some of the things that we would like to see in the detailed memo that you are going to hand in, I know you have dealt with issues of training and continued training, we also would like to know what judges and magistrates are being trained in. I know that for a very long time, we dealt with the usual injunctions and judicial reviews and we forgot that there were bankers and economists and we lived in a world of our own. So, we would like to get more details on the training and training programmes.

On how the Judiciary intends to eliminate corruption, because as we have travelled round the country, that is one of the issues that keep coming up, whether it is corruption within the magistracy or the support staff and how they intend to deal with officers who engage in corruption--- We would also like to know – although this has also been mentioned briefly – the strategies for strengthening integrity. We would also expect to see some statistics on backlogs. We want to be able to have an idea on numbers; maybe cases filed and issues like that.

Also whether or not you have a mentorship programme; again, this is very important especially when we hear the number of people that you want to recruit at all levels and the fact that there is a vetting process going on. It is important for new people who join to be mentored. So, do you have a mentorship programme and what does it involve? I think a lot of what is happening now, even the process of vetting, to the extent, speaks volumes on the independence of the Judiciary or the lack of the fact. Maybe this independence was not jealously guarded. So, what are the strategies that you have put in place to strengthen judicial independence?

And most important – and I am sure this has been mentioned by the Commissioners – is greater public awareness. People think in many places, maybe because of lack of high courts, that once you have appeared before magistrate's courts, that is it; that there are no other courts beyond that. They do not understand why certain things happen, such as bail pending appeal. So, they expect that the person should be locked up and when they see that person in the community, they are very disturbed, their conclusion, therefore, is that the courts are not working or somebody has been bribed. So, a lot of public awareness needs to be done.

The complaints were many, but I think that once justice has been strengthened or the foundation of justice has been strengthened, I am sure that the people of Kenya will be happier and there may be, less abuse, corruption and other vices.

We would like to thank you more sincerely for making yourself available. You will exchange numbers with Belinda just in case we think of other areas where we would like some information so that we are able to quickly get in touch with you.
Thank you.

What I would do now is to ask Commissioner Shava to thank all the witnesses who appeared before us and to close these proceedings.
Thank you.

Commissioner Shava: Thank you, Madam Presiding Chair. The Commission would like to thank George Kegoro, Edgar Kavulavu, Vincent Chaale and Nicholas Okemwa for appearing before this Commission today. We thank our attentive participants in the audience. We also thank the Commission staff for facilitating today's hearings.

I will now hand over to the Master of Ceremony to let us know what next.

(The Commission adjourned at 2.35 p.m.)