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**REPUBLIC OF KENYA
KENYA NATIONAL ASSEMBLY
TENTH PARLIAMENT – FOURTH SESSION**

REPORT

**OF THE
DEPARTMENTAL COMMITTEE ON FINANCE,
PLANNING & TRADE**

**ON THE NOMINATION TO THE OFFICE OF
CONTROLLER OF BUDGET**

FEBRUARY, 2011

Handwritten notes and signatures at the bottom of the page, including names like 'Speaker', 'Deputy Speaker', and 'Members'.

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1.0 PREFACE

Mr. Speaker Sir,

On behalf of the Members of the Departmental Committee No. F on Finance, Planning & Trade, and pursuant to the provisions of Standing Order No. 181, it is my pleasure and duty to present to the House, the Committee's Report on the nomination to the office of Controller of Budget.

The Committee membership comprise of the following:-

The Hon. Chrysanthus Okemo, EGH, MP **(Chairman)**

The Hon. (Prof.) Philip Kaloki MP **(Vice Chairman)**

The Hon. Jakoyo Midiwo, MGH, MP

The Hon. Musikari Kombo, MP

The Hon. Lucas Chepkitony, MP

The Hon. Nkoidila Ole Lankas, MP

The Hon. Sammy Mwaita, MP

The Hon. Lenny Kivuti, MP

The Hon Nelson Gaichuhie, MP

The Hon. Ntoitha M'Mithiaru, MP

The Hon. Shakeel Ahmed Shabbir, MP

Committee mandate

Finance, Planning & Trade Committee is one of the Departmental Committees established under Standing Order No. 198. In accordance with Second Schedule of the Standing Orders, the Committee is mandated to consider:-

- ◆ Public finance;
- ◆ Banking and insurance;
- ◆ National planning and population development;
- ◆ Trade, commerce and industry;
- ◆ Tourism promotion and management.

Committee meetings

The Committee commenced its deliberation on the nomination matter on Monday 7th February, 2011 and held seven Sittings during which the Committee invited the following persons/institutions to appraise it on the subject matter:-

1. OFFICE OF THE PRESIDENT

Amb. Francis Muthaura, EGH- Permanent Secretary/Secretary
to the Cabinet & Head of Public Service
Prof. Nick Wanjohi, CBS - Private Secretary to the President
Prof. Kivutha Kibwana, EGH - Advisor, Constitutional Review
Mr. Kennedy Kihara, EBS - Secretary/ Liaison, Parliament
and Commissions

2. OFFICE OF THE RT. HON. PRIME MINISTER

Mr. Caroli Omondi - Chief of Staff
Mr. Miguna Miguna - Constitutional Advisor
Mr. Mugambi Imanyara - Legal Advisor

3. MINISTRY OF JUSTICE & CONSTITUTIONAL AFFAIRS

Hon. Mutula Kilonzo, EGH, MP - Minister

4. COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)

Mr. Charles Nyachae - Chairman
Dr. Elizabeth Muli - Vice Chairperson
Prof. Peter Wanyande - Commissioner
Mr. Kamotho Waiganjo - ”
Mr. Kibaya Laibuta - ”
Dr. Florence Omosa - ”
Ms Catherine Muma - ”
Mr. Philemon Mwaisaka - ”

5. INTERNATIONAL COMMISSION ON JURISTS (K)- ICJ

Ms Priscilla Nyokabi	-	Council Member
Mr. Chris Gikari	-	Programme Officer
Ms Esly Sainna	-	Programme Officer
Ms Anne Nderi	-	Programme Officer

6. LAW SOCIETY OF KENYA

Ms Marykaren Kigen	-	Deputy Secretary
Mr. Donald Kipkorir	-	Council Member
Mr. Alfred Opiyo Chieng'	-	”

7. FIDA KENYA

Ms Claris Ogangah	-	Deputy Director
Ms Christine Kungu	-	Legal Counsel

8. NATIONAL MUSLIMS FORUM (NAMLEF)

Mr. Abdullahi Abdi	-	Chairman
Mr. Al Hajj Yusuf	-	Vice Chairman
Mr. Abubakar Said	-	Chief Executive
Mr. Salim Vayani	-	Secretary General

Committee's expected output

The Committee is expected to submit a report setting out the consultations/hearings held, the evidence received, and the findings of the Committee on the constitutionality of the nomination process and other propriety of the nominations and its recommendations thereof.

Mr. Speaker Sir,

On behalf of the Departmental Committee on Finance, Planning & Trade, I have the honour and pleasure to present the Committee's Report on the nomination to the office of the Controller of Budget

for adoption by the House.

Mr. Speaker Sir,

May I take this opportunity to thank all Members of the Committee for their input and valuable contributions during the deliberations on the matter.

Thank you.

Signed 

Hon. Chrysanthus Okemo, EGH, MP

Chairman,
Departmental Committee on Finance, Planning &
Trade

Date 

1.1 BACKGROUND (CHRONOLOGY OF EVENTS)

Nomination of constitutional office holders by H.E. the President

On Friday 28th January 2011, H.E. the President announced the nomination for approval by Kenya national Assembly of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget.

Hon. Gitobu Imanyara, MP intervention

On Tuesday 1st February 2011, Hon. Gitobu Imanyara, MP rose on a point of order to seek the direction of Mr. Speaker on the constitutionality of the nomination of the said constitutional office holders by H.E the President and cited Articles 3(1), 166(1), 172 and section 24 of the Sixth Schedule to the Constitution.

Speaker's Ruling

On Thursday 3rd February 2011, Mr. Speaker acknowledged receipt of two letters on the nomination of the said constitutional office holders. One, from the Office of the President on 31st January, 2011 forwarding the nominees to the National Assembly in accordance with the Constitution. Two, from the office of the Rt. Hon. Prime Minister on 1st February, 2011 making representation as to the validity and constitutionality of the letter from the Office of the President.

Consequently, Mr. Speaker ruled that:-

- (i) The House was not yet substantively seized of the matter since there was no motion before the House hence declined to make a determination on the constitutionality of the nominations.
- (ii) The two letters from both the office of the President and the Rt. Hon. Prime Minister be forwarded to the departmental

Committees on Justice & Legal Affairs and Finance, Planning & Trade according to their respective mandates, for disposal as provided for in the Standing Orders and the law.

- (iii) The two Committees to carry out requisite inquiries on the constitutionality of the nomination process and other propriety of the nominations and make recommendations for action by the House and table their reports on or before 10th February, 2011.
- (iv) The role of a Committee in the vetting process is to consider all aspects of the proposed nomination, including compliance with the constitution and all relevant enabling and incidental laws.

1.2. ESTABLISHMENT OF THE OFFICE OF CONTROLLER OF BUDGET

Article 228 of the constitution provides that:-

- (1) There shall be Controller of Budget who shall be nominated by the President and with the approval of the National Assembly, appointed by the President.
- (2) To be qualified to be the Controller, a person shall have extensive knowledge of public finance or at least ten years experience in auditing public finance management.
- (3) The Controller shall, subject to Article 251, hold office for a term of eight years and shall not be eligible for re-appointment.
- (4) The Controller of Budget shall oversee the implementation of budgets of the national and county governments by authorizing withdrawals from public funds under Articles 204, 206, and 207.

- (5) The Controller shall not approve any withdrawal from public funds unless satisfied that the withdrawal is authorized by law.
- (6) Every four months, the Controller shall submit to each House of Parliament a report on the implementation of the budgets of the national and county governments.

2.0 SUBMISSIONS ON THE NOMINATION PROCESS

2.1 OFFICE OF THE PRESIDENT

2.1.1 Amb. Francis Muthaura, Permanent Secretary/Secretary to the Cabinet & Head of Public Service

He informed the Committee that the consultative meetings between H.E. the President and the Rt. Hon. Prime Minister on the nomination process took place as follows:-

6th January, 2011 - (Annex 1)

The agenda on consultations between H.E the President and the Rt. Hon. Prime Minister had the following items:-

1. Fast tracking of appointments necessary for the establishment of a local mechanism for the trial of post-election violence suspects.
 - Gazette Notice advertising the post of Director of Public Prosecutions.
 - Identification of a nomination for the post of Chief Justice.
 - Deputy Chief Justice to be recommended by the Judicial Service Commission which is already in place.
2. Advertisement for the post of Controller of Budget.
 - Gazette Notice
3. Renewal of contract for the Director General, NSIS
 - Being recommended for renewal to ensure continuity.

4. To attend to urgent legislation, vet and approve nominations of persons to fill state offices.

(i) The Minutes on Agenda items 1 and 2 of the Meeting of 6th January, 2011 state that:-

(a) The two Principals considered fast tracking of appointments necessary for the establishment a local mechanism for the trial of post-election violence suspects and the nominations were:-

- Chief Justice
- Director of Public Prosecutions
- Controller of Budget
- Deputy Chief Justice

(b) The two principals agreed that the nomination of the Deputy Chief Justice be done through the Judicial Service Commission while the others were to be done directly by the Principals through consultations as provided for in the Constitution.

(c) The Technical Team was authorised to facilitate identification of the persons through consultations.

(ii) The Committee was further informed that:-

(a) The two Principals disagreed with the proposal by the Technical Team to advertise for the positions and on the basis of legal advice received from Prof. Kivutha Kibwana, agreed not to advertise for the positions but to consult in accordance with the Constitution and agree on the names.

(b) The Ministry of Finance was requested but did not submit nominees for the position of Controller of

Budget and Mr. William Kirwa was settled on from the list of applicants for the position of Chairperson of the Commission on Revenue Allocation. The National Security Intelligence Service also gave a clean report on Mr. Kirwa to the Head of Public Service verbally.

27th January, 2011 - (Annex 2)

1. Item 5 on the proposed agenda was constitutional appointments of:- Chief Justice, Deputy Chief Justice, Director of Prosecutions, Attorney General, and Controller of Budget.
2. The Minutes on Agenda item 5 on consultations between the Office of the President and the Rt. Hon. Prime Minister state that:-
 - (a) H.E. the President presented a list of the following persons which had been compiled out of consultations between the two Principals for appointments to various positions.

POSITION	PROPOSED PERSON FOR NOMINATION	CURRENT POSITION	COUNTY
Chief Justice	Justice Paul Kihara Kariuki	High Court Judge	Kiambu
Deputy Chief Justice	Justice Hannah Okwengu	High Court Judge	Homa Bay
Attorney General	Mr. Fred Ojiambo	Private practice	
Director of Public Prosecutions	Mr. Kioko Kirukumi	Private Practice	
Controller of Budget	Mr. William Kirwa	MD, Agricultural Dev. Corporation	
Kenya Anti-corruption Commission	Prof. PLO Lumumba	Director, KACC	

- (b) The Principals referred the list after consultations to the Technical Team comprising:- Amb. Francis Mathuara, Dr. Mohammed Isahakhia, Prof. Nick Wanjohi, and Mr. Caroli Omondi to scrutinize and prepare a harmonized position.
- (c) H.E. the President indicated that he needed to make the nominations by the following day before his departure for the AU meeting in Addis Ababa and therefore the Technical Team was directed by the Principals to present a harmonized list later in the afternoon.
- (b) The Technical Team met to harmonize the list and agreed on all the names except for the proposals for Chief Justice. The Technical Team agreed to forward separately to the Principals the following three names for the position of Chief Justice with request that the Principals assist in selecting one name for nomination.
- Justice Paul Kihara
 - Justice Riaga Omolo
 - Justice Magan Visram

(iii) 7th February, 2011- (Annex 3)

The proposed Agenda included the following items:-

- Review of the nomination to fill constitutional offices.
- Review of government approach in localizing the ICC.

The press statement issued by the Presidential Press Unit after the meeting stated that, the two Principals agreed to respect the on-going parliamentary process and its outcome on the issue of the nominations currently under consideration by Parliament.

2.1.2 Prof. Kivutha Kibwana - Advisor, Constitutional Review

He presented a written submission (*Annex 4*) and informed the Committee that:-

- (i) The nomination of the Controller of Budget is provided for under Article 228(1) of the Constitution which states that, there shall be a Controller of Budget who shall be nominated by the President and with the approval of the National Assembly, appointed by the President.
- (ii) It is the President's constitutional duty to nominate the person qualified to be eventually appointed to be Controller of Budget.
- (iii) Under Section 29(2) of the Sixth Schedule, the President is required, subject to the National Accord and Reconciliation Act, to consult the Rt. Hon. Prime Minister on the name that the President proposes as Controller of Budget.
- (iv) Article 259(11) describes, *inter alia*, the meaning of consultation but it should be noted that consultation does not mean concurrence as the value of consultations is to help the President access any vital information regarding any nominee before his ultimate decision on the suitability.
- (v) Kenya's unique position in which the Rt. Hon. Prime Minister will be in existence until the next General Election requires that, H.E. the President must consult with the Prime Minister before he makes any nomination to an office requiring National Assembly approval.
- (vi) If the H.E. the President refused to consult the Rt. Hon. Prime Minister where consultation is required, then the purported nomination by H.E. the President is null and void.

- (vii) When the President presents names to the Speaker of National Assembly under his hand in which the President confirms that consultations have taken place, it is not the duty of the Speaker to question the President's action. Any dissatisfied party can challenge the matter in any appropriate legal fora.

2.2 OFFICE OF THE PRIME MINISTER

2.2.1 Mr. Caroli Omondi, Chief of Staff

Mr. Caroli Omondi presented a written submission (*Annex 5*) informed the Committee that:-

A. Technical Team/Panel

- (i) There were no minutes of the Meeting of 27th January, 2011 between H.E the President and the Rt. Hon. Prime Minister and no Minutes of the meetings between the two Principals have been kept to the best of his knowledge. This is confirmed by the two draft agenda from both the two offices which do not contain the items, "Adoption of Agenda" or "Confirmation of the Minutes".
- (ii) The Principals had agreed that a Panel be established comprising representatives of the Office of the President, Office of the Prime Minister, Law Reform Commission, Law Society of Kenya, Judicial Service Commission and the Public Service Commission, to identify and recommend three (3) candidates for each position to the Principals.
- (iii) The Panel was to be constituted and chaired by the Head of Public Service/Secretary to the Cabinet. The Panel met for the first and only time during which the Head of Public Service excused himself and invited the President's Private Secretary to chair the meeting on his behalf.

- (iv) The Panel comprising the President's Private Secretary; Permanent Secretary, Ministry of Justice & Constitutional Affairs; Permanent Secretary, Provincial Administration and Internal Security; Solicitor General; and the Chief of Staff in the Office of the Prime Minister, met only once to deal with the preliminary aspect of the nomination matter. The Panel discussed the criteria and options for appointing a Chief Justice and agreed that the key factors on criteria be seniority, competence, integrity and reform-mindedness.
- (v) The Panel agreed that:-
- (a) The new Chief Justice could be appointed from the Commonwealth, the Judiciary or from the private practice in Kenya but the Panel did not discuss any nominee to the position of the Chief Justice.
 - (b) The Judiciary would be invited to provide a list of the serving Judges so as to establish their seniority **(Annex 6)**.
 - (c) Candidates for the position of the Director of Prosecutions would be identified from private practice, prosecution service and the Judiciary. While various members mentioned various names of prominent criminal law practitioners, there was no discussion on the suitability of any nominee.
- (vi) The Panel did not discuss the position of the Attorney General. The Panel did not also discuss the position of Controller of Budget as there was no representative from the Treasury present at the meeting.

- (vii) There were no minutes of the meeting of the Panel and the Panel has not met again after its first and only meeting. The Panel did not produce any joint report and never reported back to the two Principals.

B. The National Accord & Reconciliation Act

Mr. Caroli Omondi presented a written submission (*Annex 7*) and further informed the Committee that:-

1. Consultations (Item No. 5)

- (i) Appointments under the Constitution are subject to the National Accord & Reconciliation Act, which is premised on “**real power-sharing**”, “**consultations**” and “**willingness to compromise**”. Real power-sharing connotes equality and parity in making the appointments.
- (ii) Appointments are subject to the provisions of the National Accord which established the Grand Coalition Government based on shared power. Consequently, any nomination must be made jointly by both coalition partners.
- (iii) Consultations within the framework of the National Accord therefore mean “**compromise**” between the two Principals as the basis of any decisions on a matter under consideration.
- (iv) Consultations require that the parties consulting offer each other sufficient opportunity to exchange views; share sufficient information available on each nominee on the basis of full disclosure of accurate information; act reasonably and must be free and frank in exchanging views.

- (v) Consultation must be undertaken when the proposals are still in their formative stages without any fixed views all through to the end and consultation must not be treated “*perfunctorily*” or as a mere formality.
- (vi) Consultation must be practical and conducted within a time period sufficient for views to be exchanged fully and matters thoroughly interrogated. The timeframe depends on the seriousness of the matter and urgency is no substitute to sufficient time for practical consultations.

2. National Values and Principle (Item No. 7)

- (i) The nominations breached the constitutional requirements of regional balance and gender parity as no woman was nominated.
- (ii) The nominee of the office of the Attorney General, if accepted, will put majority of all the senior positions within State Law Office under one ethnic group
- (iii) The nominee for the position of Director of Public Prosecutions, if accepted, will undermine the independence of the Prosecution Service in prosecuting pending cases of grand corruption in which the nominee has been defence counsel.

C. Reactions on the Statement made by the Vice President in Parliament on Tuesday 1st February, 2011

Mr. Omondi Caroli presented a written submission (**Annex 8**) and made the following reactions to the Statement by the Vice President in Parliament on the consultative process between

H.E. the President and the Rt. Hon. Prime Minister regarding the nomination matter:-

1. Technical Team

There was only one Technical Team which held only one meeting and therefore, there were no “*Technical meetings*” or “*Technical Teams*” as stated by the Vice President.

2. Foreign Chief Justice

The Rt. Hon. Prime Minister did not express the view that we should have a foreign Chief Justice as stated by the Vice President, but only suggested that a transitional Chief Justice be appointed from the Commonwealth for a fixed non-renewable term of three (3) years for the reasons that:-

- (i) It was important to get a new Chief Justice from a functioning Judiciary as such Chief Justice would be able to identify the shortcomings of our Judiciary and offer best international practices in reforming our Judiciary.
- (ii) A Commonwealth Chief Justice would bring the credibility needed in establishing a local mechanism to deal with post-election violence matters and to negotiate with ICC, a referral of the pending cases.
- (iii) Such Chief Justice would not be seen as bias or partisan or beholden to any interest in the country.
- (iv) The transition period would allow the country to assess newly appointed or promoted Judges and identify a suitable successor.
- (v) A local candidate appointed from outside the Judiciary was likely to experience resistance within the Judiciary and thus undermine the reform process.

(vi) That the current serving Judges had not been vetted as required by the new Constitution and were therefore ineligible for appointment.

3. Justice Riaga Omolo as the Prime Minister's preference

The Prime Minister did not at anytime propose or insist on the choice of Justice Omolo as stated by the Vice President. The Hon. Judge is ranked as the senior most Judge after the Chief Justice and it is in this respect that his name came under consideration in addition to having been vetted by the National Assembly as a Member of the Judicial Service Commission.

4. Mr. Fred Ojiambo

That Mr. Fred Ojiambo was replaced by Prof. Githu Muigai because the former did not have higher post-graduate qualification is incorrect because this was not a consideration before the Technical Team.

5. Prime Minister's trip to Addis Ababa

The Rt. Hon. Prime Minister left for Addis Ababa on 28th January 2011, and the trip was known to both Amb. Francis Muthaura and Prof. Nick Wanjohi well in advance as it was discussed in the meeting of 27th January, 2011 under the agenda on the AU's Peace and Security Council. The clearance of the plane that would transport the Rt. Hon. Prime Minister to Addis Ababa was also discussed during the said meeting.

6. Finalization of the consultations on nomination

(i) The matter had not been finalized as at 27th January, 2011 as stated by the Vice President and further

consultations were planned by the parties but the parties did not agree that Friday 28th January, 2011 would be the final date for the consultations.

- (ii) There was no agreement that the Prime Minister would be consulted on phone while in Addis Ababa and indeed the Prime Minister had proposed in writing that the consultations would be held the following week vide the letter dated 27th January, 2011 to Amb. Francis Muthaura (***Annex 9***).

(7) Proposal to nominate Justice Alnashir Visram

The proposal to nominate Justice Visram to the position of Chief Justice was never communicated to the Prime Minister as stated by the Vice President and the proposal was not discussed by the Technical Team.

(8) State House Comptroller phone call to Mr. Omondi

- (i) The Comptroller called his phone at around 6.30 p.m. and informed him that H.E the President had wished to talk to the Rt. Hon. Prime Minister but did not divulge the subject matter.
- (ii) The Rt. Hon. Prime Minister was at the time attending the AU's Peace and Security Council Meeting with the other Heads of States and Governments that started at 4.00 p.m. and ended at around 11.00 p.m. in the night.
- (iii) No aide was allowed into the meeting and he only had the opportunity to inform the Rt. Hon. Prime Minister at 11.30 p.m. while back at the Hotel that the Comptroller had called and informed him that H.E.

the President had wished to talk to the Rt. Hon. Prime Minister but he was not aware of the subject matter.

- (iv) The Prime Minister only learned from the media during refreshment break that the nominations had been made for these positions.

2.2.2 Mr. Miguna Miguna, Constitutional Advisor

Mr. Miguna informed the Committee that:-

- (i) It is not true that it is the President's constitutional duty to nominate the person qualified to be eventually appointed to be the Controller of Budget as stated by Prof. Kivutha Kibwana under item No. 3 of his submission, without taking cognizance of the National Accord & Reconciliation Act.
- (ii) The instructions from the two Principals to the Technical Committee to submit three (3) names for each position was not complied with.
- (iii) The legal opinion for the government on the nomination process of the Controller of Budget should have only been sought from the Attorney General as principal legal advisor to the government and not Prof. Kivutha Kibwana.
- (iv) If the President refused to consult the Prime Minister where consultation is required then the nomination process was unconstitutional and therefore null and void as confirmed by Prof. Kivutha Kibwana in his submission under item No. 14.

2.2.3 Mr. Mugambi Imanyara, Legal Advisor

Mr. Mugambi informed the Committee that:-

- (i) The nomination process was unconstitutional and the letter and the spirit of the Constitution should be respected in the nomination process. Both Article 27(3) on equality for men and women, and Article 27(8) on gender balance should be respected.
- (ii) The subject letter forwarding the nominees to the National Assembly from the Office of the President was not under the hand of H.E. the President as provided for in the Constitution but was signed by Amb. Francis Muthaura not for or on behalf of H.E. the President.

2.3 COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)

The CIC presented a written submission (*Annex 10*) and informed the Committee that:-

1. The mandate of CIC as contained in Article 249 (1) of the Constitution is to:-
 - (i) Protect the sovereignty of the people;
 - (ii) Secure the observance by all state organs of democratic values and principles including those articulated in Article 10 and Chapter 6 of the Constitution particularly with respect for the rule of law, participation of the people, integrity, good governance, transparency and accountability; and
 - (iii) Promote constitutionalism.
2. CIC is mandated to work with each constitutional commission (of which the Judicial Service of Commission is one) to ensure that the letter and spirit of the constitution is respected in the appointment.

2.3.1 Appointment of the Chief Justice

The CIC informed the Committee that:-

- (i) Article 166(1) (a) provides for the appointment of the Chief Justice while Sections 24(2) and 29(2) of the Sixth Schedule reinforces this provision that the appointment will be subject to the National Accord and Reconciliation Act, and after consultation with Rt. Hon. Prime Minister and with the approval of the National Assembly.
- (ii) The three provisions should be read together in dealing with the appointment of the Chief Justice based on the following:-
 - (a) Article 166 is not suspended under Section 2 of the Sixth Schedule.
 - (b) Article 24(2) which deals with the appointment of the first Chief Justice under the Constitution does not expressly excluded the Application of Article 166.
 - (c) The Judicial Service Commission is already established and is operational and one of its primary roles is to recommend persons to be appointed as Chief Justice.
- (iii) Article 166(1) contemplates that the appointment of the Chief Justice shall be a shared responsibility among the three arms of the government and in carrying out the mandate of appointment prior to the first elections, the President shall consult the Rt. Hon. Prime Minister.
- (iv) The letter and the spirit of the Constitution should be followed in the implementation of the Constitution and with regard to the appointment of the Chief Justice, the provision in Article 166 and read together with Sections 24 and 29 of the Sixth Schedule require that:-

(a) The process should commence with recommendations by the Judicial Service Commission to H.E. the President who in turn should consult the Rt. Hon. Prime Minister, after which the President forwards the name of the nominee to National Assembly for approval.

(b) The role of the Judicial Service Commission in the appointment of the Chief Justice should be respected and the Commission allowed to undertake the function reserved to it by the Constitution.

2.3.2 Appointment of Attorney General, Director of Public Prosecutions and Controller of Budget

The CIC informed the Committee that:-

- (i) The provisions relating to the appointment of the three constitutional offices are set out in Articles 156, 157 and 228 of the Constitution respectively.
- (ii) In the period before the first elections, these Articles must be read together with the provisions of Section 29 of the Sixth Schedule which require H.E. the President to consult the Rt. Hon. Prime Minister prior to appointment, subject to the National Accord and Reconciliation Act. Therefore, the process of appointment should reflect both the letter and the spirit of the Constitution.

2.4 THE MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS

Minister informed the Committee that:-

- (i) The Ministry of Justice and Constitutional Affairs is not a player in the current nomination process for the constitutional offices.

- (ii) Article 10, 73(2) and Chapter 6 of the Constitutions demands that the process of sourcing for constitutional offices be transparent, inclusive, non-discriminatory and allow for public participation. Article 10 on principle of governance is not negotiable and is a mandatory requirement as regards public participation.
- (iii) Gazettement of the advertisement for the position of Chief Justice could not have been done before setting up the Judicial Service Commission, because it is the Commission that is supposed to recommend nominees as per Article 166(2).
- (iv) The Court Ruling of 3rd February, 2011 on the nomination process is interim as the case is on-going but the judicial decisions should be respected.
- (v) The Constitution provides for the current Chief Justice to vacate the office by 27th February, 2011 but there is no provision for the effective date for the in-coming Chief Justice. However, there cannot be a constitutional crisis because a precedent has been set before by having the senior most Judge as acting Chief Justice. The benefit of having a new Chief Justice by the said date is to assist in the vetting of Judges and setting up of the Supreme Court.
- (vi) He welcomed the nominations as it allowed for public participation and for the reform process to move forward.

2.5 INTERNATIONAL COMMISSION OF JURISTS (K) – ICJ

The ICJ presented a written submission (*Annex 11*) and informed the Committee that:-

- (i) Article 165(3)(d)(i) gives the High Court exclusive jurisdiction to hear any question regarding the interpretation of the Constitution. The Article further specifies that such interpretation includes the determination of whether anything said to be done under the authority of the constitution is constitutional or not.
- (ii) A petition filed in the High Court to determine the constitutionality of the nomination process by the H.E. the President for the constitutional offices of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget was heard and determined on 3rd February 2011, that the nominations were unconstitutional and that the nominees should therefore not be processed for their proposed offices.
- (iii) In the light of its assurance to the International Community of its intent to prosecute perpetrators of post-election violence, the government is revamping the Judiciary. Therefore, it would be important to respect the decisions of the Judiciary, otherwise such revamping would be superficial and it cannot be ruled out if post election violence perpetrators would also not respect the court decisions as aggrieved parties.

2.5.1 UNCONSTITUTIONALITY OF THE NOMINATION PROCESS

The ICJ informed the Committee that:-

- (i) Clause 29 of the Sixth Schedule requires H.E. the President to consult with the Rt. Hon. Prime Minister in making any appointment to new constitutional offices or those that fall vacant. Therefore, the nomination of the Attorney General, the Director of Public Prosecutions and the Controller of

Budget legally require a consultative process between the two Principals.

- (ii) Consultation in various case laws and jurisdiction has been accepted as, ***“such decisions shall require the concurrence of such other functionary; provided that if such functionary is a body of persons, it shall express its concurrence in accordance with its own decision making process”.***
- (iii) Under the National Accord and Reconciliation Act, the two Principals are equal partners in the governance of the country and the new constitution also takes cognizance of this. Therefore, the assertions by the Rt. Hon. Prime Minister that he was not consulted are grave and should be ventilated prior to nominees for such positions being accepted.
- (iv) Articles 69, 118, 196, and 201 of the Constitution provide for public participation in governance. Therefore, H.E. the President violated the Constitution by excluding public participation. The public ought to have been informed of every step of the nomination process as constitutional offices cannot be legally filled behind closed doors and still be in compliance with these provisions.

2.5.2 ICJ RECOMMENDATION ON THE NOMINATION PROCESS

In view of the foregoing, the ICJ recommended to the Committee the following:-

- (i) To declare the nomination process unconstitutional in solidarity with the High Court and render the process back to H.E. the President and the Rt. Hon. Prime Minister for proper nomination in accordance with the Constitution.

- (ii) That the nomination process of the Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget should be competitive, transparent and accountable. Therefore, these constitutional offices should be advertised, shortlisted and nominated publicly.

2.6 LAW SOCIETY OF KENYA AND FIDA-KENYA

2.6.1 FIDA Kenya

FIDA Kenya Presented a written submission (*Annex 12*) and informed the Committee that it considered the following issues with regard to the nomination process:-

- (i) Whether the letter and the spirit of the Constitution was adhered to in the nomination process.
- (ii) Whether the nomination process accorded both men and women equal treatment which includes right to equal opportunities in political, economic, cultural and social spheres as envisaged under Article 27 of the Constitution.
- (iii) The implicatiation of not having a transparent, participatory, competitive process for constitutional office bearers and more specifically the current nominations.
- (iv) The historical background in respect to equality and discrimination.
- (v) The bearing of political impasse in regard to the implementation of the Constitution.

CONSTITUTIONALITY OF THE NOMINATION TO THE OFFICE OF THE CONTROLLER OF BUDGET

FIDA Kenya informed the Committee that:-

- (i) The process of appointment is set out in Article 228 of the Constitution but the Article must be read together with the

provisions of Section 29 of the Sixth Schedule of the Constitution which provides that, the appointment be made by H.E. the President subject to the National Accord & Reconciliation Act, and after consultation with the R. Hon. Prime Minister, and with approval of the National Assembly.

- (ii) The process of nomination was not inclusive and therefore Articles 129 and 131(2) of the Constitution were not upheld, and favoured only men while discriminated against women. Therefore, approving the nominations will not be in the spirit of the Constitution.
- (iii) Article 10 of the Constitution which sets out the national values and principles were disregarded while undertaking the nomination.
- (iv) Article 27 of the Constitution provides for equality and freedom from discrimination but the nomination process did not afford equal opportunity to both men and women.
- (v) The nomination process was flawed even if a woman was among those four nominees because the process was not competitive, transparent and participatory.
- (vi) Any violation of the Constitution by any arm of the Government will undermine the fundamentals of constitutionalism in the country and continue to destroy public confidence in the Executive, Judiciary and the Legislature's ability to implement of the new Constitution.

2.6.2 LAW SOCIETY OF KENYA (LSK)

LSK presented a written submission (**Annex 13**) and informed the Committee that:-

- (i) The Constitution does not define the expression "**in consultation**" but the term "**after consultation**" which is used in Section 24(2) of the Sixth Schedule of the Constitution of Kenya is also used in the interim constitution as well as the present Constitution of South Africa and it is defined as "**such decision shall be taken in good faith after consulting and giving serious consideration to the views of such functionary**".
- (ii) The actual degree of consultation will depend on the prevailing political circumstance and the political style of the President but it should be noted that consultation does not mean concurrence.
- (iii) The recent nominations for constitutional offices were done without public participation as required by Article 10(2) (a) of the Constitution.

2.7 SUBMISSION BY NATIONAL MUSLIMS FORUM (NAMLEF)

NAMLEF presented a written memorandum (**Annex 14**) and submitted its position on the nomination to the office of the Controller of Budget that:-

- (i) H.E the President did not follow the constitutional process in the appointment and that Article 228 should be read in the spirit of the National Accord & Reconciliation Act, which is an integral part of the Constitution and which requires consultation between the two Principals in order to ensure harmony.
- (ii) The appointments are in contravention of Article 250(4) which provides that the appointments to commissions and independent offices shall take into account the national values contained in Article 10 and the principle that the

composition of the commissions and offices taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya. This will be violated as the Chairperson of Revenue Allocation Commission is from the same region and same ethnic community as that of the proposed Controller of Budget.

- (iii) The appointments to public offices must adhere to the requirements of Article 232(h) which demands representation of Kenya's diverse communities, regional, ethnic and religious balance.
- (iv) The appointments must conform also to other critical constitutional requirements relating to transparency, citizen participation and gender balance.

2.8 SUBMISSION BY INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK) - (Annex 15)

The Committee received a written submission from ICPAK which stated its position on the nomination to the office of the Controller of Budget that:-

- (i) The appointment to the Constitutional Offices should be undertaken in accordance with the spirit and the letter of the Constitution. The process of appointment of all holders of public offices must be in a transparent and accountable manner, providing equal opportunities to all Kenyans with the requisite competence to occupy these positions.
- (ii) One of the values espoused in the Constitution is transparency and this must be respected. Therefore, the Institute is proposing that such positions should be advertised so as to allow Kenyans to express their interest and provide a wider pool of professionals to select from.

- (iii) The criteria set out in section 228(2) prescribe that to qualify to be nominated as Controller of Budget, one needed to have accumulated ten (10) years experience in auditing public finance management. Therefore, by extension this section alludes to the fact that the Controller of Budget should ideally be a professional accountant who has undertaken extensive auditing work and has knowledge of public finance management.
- (iv) The Constitution further envisaged the Office of Controller of Budget as being a key office in fighting corruption and ensuring greater transparency and accountability in Government spending. Therefore, it is fitting that the Controller of Budget should be a member of a professional body that has a Code of Ethics for its members and has a robust disciplinary process to enforce adherences to its critical values.
- (v) It is for this reason that the Institute proposes that the Controller of Budget and indeed all offices that deal with accounting and auditing matters such as the Auditor General, be held by professional accountants who are members of ICPAK.

3.0 COMMITTEE'S OBSERVATIONS

Mr. Speaker did in his ruling of 3rd February 2011 filter certain issues for the Committees to make recommendations on. This Committee has extracted the following issues from the ruling that are relevant to its mandate. These are:

1. What is the status, import and weight to be attached to the opinion of the Commission on the Implementation of the Constitution on a matter such as this;

2. Were there consultations between the President and the Prime Minister as contemplated by section 29(2) of the Sixth Schedule to the Constitution; tied to this point, are a number of other questions including what the minimum threshold of consultation should be and if consultation denotes concurrence, consensus or other measure of agreement. Additionally there is the further point of what was intended by the drafters of the Constitution in providing for consultation as they did;
3. What is the import of making the consultations subject to the National Accord and Reconciliation Act;
4. Do the nominations meet the constitutional requirements of regional balance and gender parity;
5. Do the questions raised on the nomination of office-holders amount to a dispute within the meaning of the Political Parties Act;
6. And finally, whether or not the correct approach to the questions raised on the propriety of the nominations can be resolved by a vote in this House to approve or disapprove the nominees?

In addition to the above issues, and from the evidence adduced before it, the Committee has distilled the following legal issues requiring recommendation to the House:-

1. What are the Constitutional requirements for the process of nomination of a person to the office of Controller of Budget? This question has several parts:

(a) Does the President require to consult with the Prime Minister in the process of nomination of a person to the office of Controller of Budget?

(b) Does the Constitution place any prerequisites on the President and the Prime Minister in the nomination process?

(c) If a competitive nomination process is required, was the competitive process adopted in this case sufficient?

(d) If consultation is required, what is the level of consultation required of the President and the Prime Minister and in the circumstances presented to the Committee was the Constitutional requirement of consultation attained?

(e) Did the communication on the nominations to the National Assembly meet Constitutional requirements?

2. Were the legal requirements for the process of nomination for appointment of a person to the office of Controller of Budget met?

3. If the legal requirements for the process of nomination have been complied with, is Mr. William Kipkemboi Kirwa a suitable person for appointment as Controller of Budget?

1. WHAT ARE THE LEGAL REQUIREMENTS FOR THE PROCESS OF NOMINATION OF A PERSON TO OFFICE OF CONTROLLER OF BUDGET?

(a) Does the President require to consult with the Prime Minister in the process of nomination of a person to the office of Controller of Budget?

There appeared to the Committee unanimity from all persons concerned that Article 228(1) is, in the transition stage, tempered by Section 29 of

Schedule 6 of the Constitution of Kenya. Section 29 of the Sixth Schedule states as follows:

“New appointments

29 (1) The process of appointment of persons to fill vacancies arising in

consequence of the coming into force of this Constitution shall begin on the effective date and be finalised within one year.

(2) Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.”

It was therefore clear that the President requires to consult the Prime Minister in nominating a person to the office of Controller of Budget.

(b) Does the Constitution place any prerequisites on the President and the Prime Minister in the nomination process?

Article 228(1) of the Constitution merely provides that there shall be a Controller of Budget who shall be nominated by the President, and with the approval of the National Assembly, appointed by the President. The Committee, from the representations made before it, established that there are two schools of thought on the matter, one based on executive power and the other based on a competitive process. They can be summarized as follows:

(i) Executive Power

One school of thought put forward to the Committee is that the President and Prime Minister are not restricted in making a choice of a person to nominate to the position of Controller of Budget. They are free to headhunt and after consultation nominate the person. This is part of Executive power, derived by the President (and Prime Minister) from the people, upon election. This Executive power is founded upon Article 1(3)(b) that states as follows:

“1(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

- (a) Parliament and the legislative assemblies in the county governments;
- (b) the national executive and the executive structures in the county governments; and
- (c) the judiciary and independent tribunals.”

Article 228(1) does not place any prerequisites on the nomination process and the exercise of Executive authority should not be unnecessarily fettered. This is common in other countries with a Presidential system such as the United States of America where the President is free to headhunt for Presidential appointees such as Judges of the Supreme Court, the Attorney General, the Secretary of State and other similar positions then forward the names to Congress for approval. This is the same Executive power granted to a President to appoint members of his/her Cabinet. In no country in the world does a President advertise for applications from persons interested in becoming members of his/her Cabinet. The same principle therefore applies to the nomination of a person to the office of Controller of Budget.

(ii) **Competitive Process**

The other school of thought put forward to the Committee is that the President and Prime Minister should use a competitive process in selecting the person to be nominated. This school of thought relies on the following provisions of the Constitution to support this position:

Article 10 of the Constitution provides as follows:

“National values and principles of governance

2. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes, or implements public policy decisions.
- (2) The national values and principles of governance include—
 - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.”

The portion of this Constitutional Article to emphasize is that relating to the participation of the people, equity, social justice, inclusiveness, equality, non-discrimination, protection of the marginalized, good

governance, integrity, transparency and accountability. These national values and principles must be reflected in the nomination process. A competitive process shall therefore afford all qualified Kenyans an opportunity to apply for nomination for the position of Controller of Budget and ensure the national values and principles of governance are respected.

Article 27(3) of the Constitution which provides as follows:

“27(3) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.”

Chapter Six of the Constitution and in particular Article 73(2)(a) which states as follows:

“73(2) The guiding principles of leadership and integrity include-

- (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;”

Chapter Thirteen of the Constitution and in particular Part 1 which deals with the values and principles of public service. The relevant portions are:

“Values and principles of public service

232. (1) The values and principles of public service include—

- (a)
- (b)
- (c)
- (d)
- (e) accountability for administrative acts;

- (f) transparency and provision to the public of timely, accurate information;
- (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
- (h) representation of Kenya's diverse communities; and
- (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.”

Article 258 of the Constitution provides that in construing the Constitution it should be interpreted in such a manner that promotes its purposes, values and principles. It should also be interpreted in a manner that promotes good governance and the rule of law.

To enable there to be fair competition, participation of the people and to enable there to be a pool of applicants to enable equal opportunity for appointment of men and women, members of all ethnic groups and persons with disabilities the process of nomination of a person to the office of Controller of Budget should be done by advertisement or other competitive method(s).

There is need to distinguish nominations that are the unrestricted prerogative of the President under our Constitution and those that require advertisement. Under Article 152 (though suspended until after the next General Elections) the President shall nominate and with the approval of the National Assembly appoint Cabinet Secretaries. The

President is free, under Article 152(5), to re-assign or dismiss a Cabinet Secretary. A Cabinet Secretary therefore largely serves at the pleasure of the President. If a person serves at the pleasure of the President it is only logical that the President is given a free hand to select the person to nominate to the position of Cabinet Secretary. The President is however still under an obligation to observe the national values of principles of governance as he head hunts the persons for nomination as Cabinet Secretaries. On the other hand, under Article 228(2) the Controller of Budget holds office for a period of eight years and is not eligible for re-appointment. The Controller of Budget is an independent office as set out under Article 248(3) of the Constitution. The Controller of Budget, under Article 251, may only be removed from office upon the recommendation of a Tribunal appointed to investigate his/her conduct. The nomination of a person to such an independent office with security of tenure should be done with public participation and through a competitive process. This is particularly in light of the fact that the duties of the Controller of Budget require the holder to work independently and not under the direction of any person or authority. This is set out at Article 249(2)(b) which provides that the holder of an independent office shall not be subject to direction or control by any person or authority.

The Committee considered the above two schools of thought and came to the conclusion that for purposes of good governance the nomination of a person to office of Controller of Budget should be done through a competitive process.

(c) If a competitive nomination process is required, was the competitive process adopted in this case constitutionally sufficient?

The Committee was informed that the name of the nominee to the position of Controller of Budget was selected from persons who had previously applied for the position of Commissioner in the Commission

on Revenue Allocation as established under Article 215. Article 215 provides as follows:

- “215 (1) There is established the Commission on Revenue Allocation.
- (2) The Commission shall consist of the following persons appointed by the President—
- (a) a chairperson, who shall be nominated by the President and approved by the National Assembly;
 - (b) two persons nominated by the political parties represented in the National Assembly according to their proportion of members in the Assembly;
 - (c) five persons nominated by the political parties represented in the Senate according to their proportion of members in the Senate; and
 - (d) the Principal Secretary in the Ministry responsible for finance.
- (3) The persons nominated under clause (2) shall not be members of Parliament.
- (4) **To be qualified to be a member of the Commission under clause (2) (a), (b) or (c), a person shall have extensive professional experience in financial and economic matters.”**

The Committee found that the name of Mr. William K. Kirwa appears in Kenya gazette number 14183 dated 19th November 2010 in which Amb. Francis K. Muthaura Permanent Secretary, Secretary to the Cabinet and Head of Public Service published the names of applicants to the then declared vacancy of Chairperson of the Revenue Allocation Commission. The Committee noted that the qualifications for a person to be appointed a Commissioner for Revenue Allocation are extensive professional

experience in financial and economic matters. However the qualifications for a person to be appointed Controller of Budget are extensive knowledge of public finance or at least ten years experience in auditing public finance management. The Controller of Budget must have extensive knowledge of public finance and not simply financial matters generally. The qualifications for Commissioner of Revenue Allocation are therefore different from those for Controller of Budget.

The Committee further found that it is not right to use the qualifications for Commissioner of Revenue Allocation to shortlist candidates for the position of Controller of Budget as the two positions are distinct and the work to be performed in the two offices different in nature and scope. It is noteworthy that even the tenure of the two offices is different as the Controller of Budget is in office for a term of eight years while a Commissioner is in office for a term of six years as set under Article 250(6)(a).

The Committee also found that this nomination procedure is not fair as there could be qualified persons interested in the position of Controller of Budget who were not interested in the position of Commissioner of Revenue Allocation and therefore did not apply. The nomination procedure used would therefore have knocked out such interested qualified persons.

The Committee therefore came to the conclusion that the competitive process adopted in this case did not meet the legal requirements.

(d) If consultation is required, what is the level of consultation required of the President and the Prime Minister and in the circumstances presented to the Committee was the Constitutional requirement of consultation attained?

Again the Committee received two different interpretations of the Constitutional threshold for consultation. It is important to note that the Constitution does not expressly define the word "consultation". The first interpretation established a low threshold based on the ordinary dictionary meaning of the word "consultation". The Committee was referred to the Shorter Oxford English Dictionary which defines "consult" as *inter alia*, to take counsel together, deliberate, confer while "consultation" is said to mean, *inter alia*, "the action of consulting or taking counsel together, deliberation, conference. In Webster's New Universal Unabridged Dictionary "consultation" is defined as a meeting of persons to discuss, decide or plan something. Readers Digest Universal Dictionary defines consultation as a conference at which advice is given or views are exchanged.

This interpretation of consultation connotes that consultation does not necessarily lead to concurrence and indeed consultation is not concurrence. Once there is engagement, exchange of views and deliberation, then consultation has taken place. Concurrence may or may not take place.

The other interpretation relies on the provision of section 29(2) of the Sixth Schedule of the Constitution which states as follows:

"29(2) Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly."

It is therefore argued that the definition of the word “consultation” must be read in the context of and subject to the National Accord and Reconciliation Act.

The preamble to the National Accord and Reconciliation Act states as follows:

“AN ACT of Parliament to give effect to the Agreement on the Principles of Partnership of the Coalition Government, to foster national accord and reconciliation, to provide for the formation of a coalition Government and the establishment of the offices of Prime Minister, Deputy Prime Ministers and Ministers of the Government of Kenya, their functions and various matters connected with and incidental to the foregoing.”

Section 9 of the National Accord and Reconciliation Act states as follows:

“9. In this Act, the Agreement on the Principles of Partnership of the Coalition Government means the Agreement set out in the Schedule.”

The 1st Schedule to the National Accord and Reconciliation Act sets out the agreement on the principles of partnership of the coalition Government (***Annex 16***)

“Consultation” within the meaning of our laws has therefore taken on a special meaning. The Committee understands section 29(2) of the Sixth Schedule as putting forward the following sequence of events:

- 1) The President shall first take cognizance of the National Accord and Reconciliation Act.
- 2) Consult with the Prime Minister in accordance with the National Accord and Reconciliation Act.
- 3) Nominate the person.
- 4) Seek approval of the National Assembly.

5) Appoint the person.

The Committee observed that there were consultations between the principals on 6th and 27th January 2011. However, taking the evidence from both the principal's technical staff, it appears that the level of consultation was inconclusive. The threshold for consultation is high. The two Principals must commit themselves to work together in good faith as true partners, through constant consultation and willingness to compromise.

(e) Did the communication on the nominations to the National Assembly meet Constitutional requirements?

An issue arose as to whether the process of communicating the nomination of Mr. William K. Kirwa to the National Assembly met legal requirements. The letter communicating the nomination, along with those for the position of Chief Justice, Attorney General and Director of Public Prosecutions, is dated 31st January 2011 and written by Amb. Francis K. Muthaura Permanent Secretary, Secretary to the Cabinet and Head of Public Service. It is addressed to Mr. Patrick G. Gichohi, Clerk of the National Assembly. The body of the letter read as follows:

“RE: PARLIAMENTARY APPROVAL FOR NOMINATIONS FOR STATE OFFICERS BY HIS EXCELLENCY THE PRESIDENT”

Following consultations with the Rt. Hon. Amolo Raila Odinga, EGH, MP, the Prime Minister of the Republic of Kenya and in accordance with the Constitution, His Excellency President Mwai Kibaki has made the following nominations of person to fill the respective state offices for approval by the National Assembly.

1. Chief Justice: The Hon. Justice Alnashir Ramazanali Magan
Visram
2. Attorney General: Professor Githu Muigai

3. Director of Public Prosecutions: Mr. Kioko Kilukumi, and

4. Controller of Budget: Mr. William Kipkemboi Kirwa

Accordingly, I have been directed by His Excellency the President to forward these nominations to the National Assembly. I am therefore requesting you to facilitate the consideration of the nominations by the National Assembly.

C.V.s of the nominees are attached herewith.”

The Committee noted that Article 135 of the Constitution of Kenya provides as follows:

“A decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal and signature of the President”

The Committee further noted that the above Article 135 of the Constitution of Kenya is one of the provisions of the Constitution that is suspended under section 2(c) of the Sixth Schedule of the Constitution and shall only come into effect upon the final announcement of all the results of the first elections for Parliament under the new Constitution. Amb. Francis K. Muthaura, in his letter dated 31st January 2011 states that he has been directed by the President to forward the nominations to the National Assembly. The Committee therefore came to the conclusion that, Article 135 having been suspended and given Amb. Muthaura's position in Government, the communication on the nominations to the National Assembly was lawful and proper.

2. Were the legal requirements for the process of nomination of a person to the office of Controller of Budget complied with?

The unanimous view of the Committee is that there were actions by both His Excellency the President and the Right Honourable the Prime Minister to comply with the Constitution of Kenya in the process of

nomination of a person for the position of Controller of Budget. The Committee has however come to the conclusion that the Constitution, adopted by Kenyans on 4th August 2010 and promulgated on 27th August 2010 sets a higher threshold than the actions of His Excellency the President and the Right Honourable the Prime Minister.

All Kenyans, particularly those in leadership positions, are grappling to come to terms with the very high standards set by the Constitution. Similarly, we are all struggling to come to a common understanding of the principles set out in our Constitution. This was particularly evident from the divergent interpretations of the Constitutional provisions that the Committee received from both lawyers and non-lawyers. The people of Kenya are now beginning to enjoy the provisions of Article 1(1) of the Constitution that provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.

It is an important learning step that shall set a good precedent for high Constitutional standards for future nominations by the Executive. It is not a moment for apportioning blame but for learning and finding an appropriate framework for future Constitutional appointments.

3. If the legal requirements for the process of nomination have been complied with, is Mr. William Kipkemboi Kirwa a suitable person for appointment as Controller of Budget?

The Committee did not address itself to the question of Mr. William Kipkemboi Kirwa's suitability as it found that the stringent legal requirements for his nomination under Articles 10, 27, 73 and 232 had not been addressed. If the National Assembly finds, contrary to the opinion of the Committee, that the nomination of Mr. William Kipkemboi Kirwa met the stringent legal requirements the Committee shall proceed to vet the nominee and recommend to the House accordingly.

3.1 OTHER OBSERVATIONS

1. It is important to note that this nomination related to one post only and a mechanism¹ needs to be put in place for ensuring that there is a fair representation of Kenya's diverse communities when all public sector appointments are taken as a totality. This mechanism must deal with the questions of how to take into account participation of the people, equity, gender balance, fair representation of Kenya's diverse communities, non-discrimination, good governance, equality, integrity, transparency, accountability and protection of the marginalized. It is an onerous task but the people of Kenya demand it and must receive it.
2. The Committee did not find the issues herein as amounting to a dispute between political parties within the meaning of the Political Parties Act. The issues raised were simply an interpretation of the Constitution.
3. The Committee received representations from the Commission for the Implementation of the Constitution as established under section 5 of the Sixth Schedule of the Constitution. This is the Constitutional organ established to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution. It is required to work with each constitutional commission to ensure to ensure that the letter and spirit of the Constitution is respected. The Commission informed the Committee that, with regard to the issues raised over nomination of the Controller of Budget, its role is mainly advisory. The Committee concluded that the Commission for the Implementation of the Constitution is required to give its opinion on this matter and that its opinion must be given due and weighty consideration.

4. The High Court delivered a ruling on this matter. The Judiciary and Legislature have separate and distinct roles to play in the Constitution. The Judiciary cannot injunct Parliament from performing its Constitutional role. The Judiciary can however declare action taken by Parliament to be unconstitutional. It would therefore be advisable for parties interested in matters that Parliament is seized of to take advantage of the various fora for public participation available in Parliament before moving to Court. If after Parliament has pronounced itself on a matter any person is still aggrieved, he/she can then proceed to Court to seek an interpretation of the Constitution. In other words, let the Judiciary check Parliament after Parliament has acted and not attempt to supervise Parliament as Parliament acts.
5. The Departmental Committees of Parliament are the proper place to test the propriety and legality of nominations but the final determinant of Constitutionality in the House vests in the Speaker of the National Assembly as provided for under Standing Orders 47(3) and 104.
6. The Committee recommends that in all formal meetings of public officers, comprehensive minutes should be taken for purposes of ensuring good governance. The Committee was concerned that only draft minutes as opposed to confirmed minutes were available of some meeting involving very high ranking public officers.

4.0 COMMITTEE'S RECOMMENDATION

Subsequent to the foregoing, the Committee recommends that pursuant to Article 228(1) of the Constitution of Kenya the nomination of Mr. William Kipkemboi Kirwa for the position of Controller of Budget be returned to the two Principals for

nomination in a manner that meets the stringent legal requirements and in particular those set out under Articles 10, 27, 73 and 232 of the Constitution.

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APPENDIX (1)

(Annex 1-16)



AGENDA

CONSULTATION BETWEEN HIS EXCELLENCY THE PRESIDENT AND THE RT. HON. PRIME MINISTER

1. Fast tracking of appointments necessary for the establishment of a Local mechanism for the trial of post-election violence suspects.
 - Gazette Notice advertising the Post of Director of Public Prosecutions;
 - Identification of a nomination for the post of Chief Justice;
 - Deputy Chief Justice to be recommended by the Judicial Service Commission which is already in place.
2. Advertisement for the post of Controller of Budget
 - Gazette Notice
3. Renewal of contract for the Director General, NSIS.
 - Contract ends on 16th January, 2011.
 - Being recommended for renewal to ensure continuity as it will run for the remaining period of the current President and end in two years of the successor President.
4. To attend to urgent legislation and vet and approve nominations of persons to fill State offices.
5. Draught crisis (funds to be made available)
6. ID Cards & E-Visa Project
7. Any other Business.

6 January 2011

• **MINIA**

**RELEVANT MINUTES ON CONSULTATION BETWEEN HIS EXCELLENCY
THE PRESIDENT AND THE RT. HON. PRIME MINISTER ON AGENDA
ITEMS 1 AND 2 OF THE MEETING OF 6TH JANUARY, 2011**

The two Principals considered the fast tracking of appointments necessary for the establishment of a local mechanism for the trial of post-election violence suspects.

These nominations were:

- Post of Chief Justice;
- Director of Public Prosecutions;
- Controller of Budget; and
- Deputy Chief Justice

The two Principals agreed that the nomination of the Deputy Chief Justice was to be done through the Judicial Service commission but the others were to be done directly by the Principals through consultations as provided for in the Constitution.

The technical team was authorized to facilitate identification of the persons through Consultations.



ANNEX 2

CONSULTATIONS BETWEEN H.E. THE PRESIDENT AND THE RT. HON. PRIME MINISTER

Proposed Agenda

1. Updates by the Rt. Hon. Prime Minister
 - (i) Update on measures being taken to counter effects of drought.
 - (ii) AU Mediation on Cote D'Ivoire
2. Update on H.E.'s Special Envoys to selected regional Heads of State on the ICC Process.
3. Exchange of views on AU Summit.
5. Constitutional appointments:
 - (i) Chief Justice
 - (ii) Deputy Chief Justice
 - (iii) Director of Prosecutions
 - (iv) Attorney General
 - (v) Controller of Budget
5. Any Other Business

Thursday, January 27, 2011

ANNEX 1

**MINUTES ON AGENDA ITEM NO. 5 ON CONSULTATIONS
BETWEEN THE PRESIDENT AND THE PRIME MINISTER -
THURSDAY, JANUARY 27TH, 2011**

His Excellency the President presented the attached list on appointments to various positions which had been compiled out of consultations between the Office of the President and the Office of the Prime Minister.

After consultations the Principals referred the list to the technical team comprising Amb. Francis Muthaura, Dr. Mohamed Isahakia, Prof. Nick Wanjohi and Mr. Caroli Omondi to scrutinize the list and prepare a harmonized position.

His Excellency the President indicated that he needed to make the nominations by the following day before his departure for the AU meeting in Addis Ababa. Therefore, the technical team was directed by the Principals that they should present the harmonized list later in the afternoon.

APPOINTMENTS TO VARIOUS POSITIONS

PROPOSALS

Following wide consultations, the following are the persons have been identified for nomination to various constitutional positions toward implementation of the Constitution:

POSITION	PROPOSED PERSON FOR NOMINATION	CURRENT POSITION	COUNTY
CHIEF JUSTICE	Justice Paul Kihara Kariuki	High Court Judge	Kiambu
DEPUTY CHIEF JUSTICE	Justice Hannah Okwengu	High Court Judge	Homah Bay
ATTORNEY GENERAL	Mr. Fred Ojiambo	Private Practice	
DIRECTOR OF PUBLIC PROSECUTIONS	Mr. Kioko Kirukumi	Private Practice	
CONTROLLER OF BUDGET	Mr. William Kirwa	MD ADC	
KENYA ANTI-CORRUPTION COMMISSION	Dr. PLO Lumumba	Director, KACC	

27th January, 201

Technical Team made of:-

Amb. Francis Muthaura

Dr. Mohamed Isahakia

Prof. Nick G. Wanjohi

Mr. Calori Omondi

The Technical Team met to harmonise the attached list as directed by the principals.

The team agreed on all other names except the proposals for the Chief Justice.

Agreed

To forward separately to the principals three names for the Chief Justice with request that the principals assist in selecting one name for nomination. The names were Justice Paul Kihara Kariuki, Justice Riaga Omolo and Justice Magan Visram.



ANNEX 3

CONSULTATIONS BETWEEN H.E. THE PRESIDENT AND THE RT. HON. PRIME MINISTER

Proposed Agenda

1. Review of the Nominations to fill Constitutional offices.
2. Review of Government approach in localizing the ICC process.
3. Any Other Business

Monday, February 07, 2011

2 AMOBY



PRESS STATEMENT

His Excellency Mwai Kibaki, the President and Commander in Chief of the Defence Forces of the Republic of Kenya and the Rt. Hon. Raila Odinga, Prime Minister of the Republic of Kenya have had extensive consultations today on matters of concern to the nation.

The matters discussed by the two Principals were:

- (a) the ICC process;
- (b) the nominations to fill the Constitutional offices;
- (c) resettlement of all IDPs; and
- (d) Acting Ministerial appointments.

In regard to the ICC process, the two Principals reiterated the position of the Government that Kenya has always preferred that the cases be dealt with through a local legal mechanism. To that end, the Grand Coalition Government has embarked on the critical appointments in the Judicial system to ensure that the country has a credible local Judicial mechanism to competently and comprehensively deal with the cases relating to post election violence.

Furthermore, the Grand Coalition Government is undertaking diplomatic and legal initiatives with the UN Security Council and the ICC with an appeal that the cases currently being handled by the ICC be deferred for one year and thereafter referred to a competent local mechanism. The one year deferment will give the country the necessary time to establish the local mechanism as envisaged in the ongoing Constitutional Reforms. This process will be handled through a Grand Coalition bipartisan Cabinet Committee.

On the Issue of the nominations to fill State offices currently under consideration by Parliament, the two Principals agreed to respect the ongoing parliamentary process and its outcome.



Furthermore, the two Principals assured Kenyans that they will observe the letter and spirit of the Constitution in implementation of the Constitution including the appointment to State Offices.

His Excellency the President and the Right Honourable Prime Minister also reviewed the ongoing IDP resettlement affecting the remaining 5,000 families from the Post Election Violence, 3,000 families from Mau and 3,000 families from Embubut. They acknowledged that 14,000 acres have been identified and the process of purchase was under way. In that connection, they directed that the purchase of land be speeded up so that the three categories of IDPs are settled simultaneously.

At the same time, and after consultation with the Rt. Hon. Prime Minister, H.E. Mwai Kibaki, the President and Commander in Chief of the Defence Forces of Kenya has appointed:

1. Hon. Dalmas Otieno, Minister of State for Public Service to be Acting Minister for Medical Services.
2. Hon. Amason Jeffah Kingi, Minister for Fisheries Development to be Acting Minister for Industrialization.

PPS

7 February 2011

ANNEX 4

LEGAL OPINION ON THE NOMINATION PROCESS OF THE CONTROLLER OF BUDGET (COB) BY H.E. THE PRESIDENT OF THE REPUBLIC OF KENYA

1. The nomination of the Controller of Budget (CoB) is provided for by Article 228(1) of the Constitution. It states:

'There shall be a Controller of Budget who shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.'

2. Article 228(2) provides for the qualifications of the Controller of Budget as follows:

'To be qualified to be the Controller, a person shall have extensive knowledge of public finance or at least ten years experience in auditing public finance management.'

3. It is the President's constitutional duty to nominate the person qualified to be eventually appointed to be Controller of Budget. After the approval of the nominees by the National Assembly, the President appoints the nominee as Controller of Budget.

4. Under Section 29(2) of the Sixth Schedule, the President is required to consult with the Prime Minister on the name that the President proposes as Controller of Budget. The section provides:

"Unless this Schedule prescribes otherwise, where this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and

Reconciliation Act appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.'

5. Article 259(11) describes, inter alia, the meaning of consultation. The Article provides:

'If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.'

6. Regarding consultation under Article 259 (11), the President is required:

- (a) To identify a name for the position of Controller of Budget who is qualified according to Article 228(2).
- (b) Invite the Prime Minister for consultations regarding the nominee.
- (c) To forward the nominee's particulars to the Speaker of the National Assembly for the process of Parliamentary approval.

It should be noted that consultation does not mean concurrence. However the value of consultation is to help the President access any vital information regarding any nominee before his ultimate decision on the suitability of the nominee.

7. Apart from Chapter 12 which deals with the office of the Controller of Budget, Chapter 15 on 'Commissions and

independent offices' also applies to the Controller of Budget. The relevant articles provide as follows:

248 (3) the independent offices are:...

(b) the Controller of Budget.

250(3) to be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.

(4) Appointments to commissions and independent offices shall take into account the national values referred to in Article 10 and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya. (Emphasis added).

Article 10(2) describes national values and principles of governance to include –

'(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.'

8. Article 260 defines state office to include 'holder of an independent office to which Chapter Fifteen applies.'
9. An independent office cannot be dealt with by the Public Service Commission because (a) the Constitution

covers it in a different part that is Chapter 15 (The Public Service is covered by Chapter 13). Moreover Article 249 (2) (b) provides:

'The commissions and the holders of independent offices –

are independent and not subject to direction or control by any person or authority.'

10. To remove the Controller of Budget from office, Article 251 establishes an independent tribunal for the task, as opposed to disciplinary procedures of the Public Service Commission under Article 234.
11. Article 234(3) clearly stipulates that functions and powers of the Public Service Commission do not apply to any of the following offices in the public service.
 - (a) state offices (the Controller of Budget is such an office).
12. In a presidential system such as Kenya's system under the Constitution of Kenya 2010, the President is mandated to search for state officers' appointees whom the President is authorized to nominate and eventually appoint after necessary National Assembly approval if so required by the Constitution and ordinary law.
13. Kenya's unique position in which a Prime Minister will be in existence until the next general election also requires that before the President makes any nomination to an office requiring National Assembly approval, he must consult with the Prime Minister.
14. If the President refused to consult the Prime Minister where consultation is required, the purported nomination

by the President will be null and void. However the Constitution does not provide for a situation where the Prime Minister does not, for any reason, make himself available for consultation. The Constitution seems to have considered this impossible.

15. When the President presents names to the Speaker under his hand in which the President confirms consultation has taken place, it is not the duty of the Speaker to question the President's action. Any dissatisfied party can challenge the matter in any appropriate legal fora.
16. In the case of the Controller of Budget, the President:
 - (a) nominated an individual qualified under Article 228(2) and Article 250 read together with Article 10 (2).
 - (b) Had in mind that previous appointments to commissions had reflected balancing on basis of diversity and gender
 - (c) Will continue to further realize the requisite balancing of diversity and gender as the state offices and commissions are continuously filled in the future.
 - (d) Is aware that diversity and gender considerations will become apparent only when the entire Controller and Auditors department is looked at in its totality. It is now premature to make such a determination since only one position is being filled currently.
 - (e) Consulted with the Prime Minister on the following dates December 16th 2010, January 6th 2011, January 27th 2011, and January 28th 2011 (by

phone) regarding a nomination to the office of the Controller of Budget and other constitutional offices.

(f) Duly forwarded the name of the nominee of the Controller of Budget Mr. William Kirwa among other names.

17. Although the Auditor General will continue to discharge the duties of the Controller of Budget according to Section 31(6) of the Sixth Schedule until the latter is appointed, it makes sense to fill in the substantive holder of the office in readiness for the preparation of the Budget due to be read in June, 2011.

18. In my humble opinion, Parliament should expedite the passage of an omnibus legislation anticipated under Article 250 (2) (a) which provides:

'The chairperson and each member of a commission, and the holder of an independent office shall be – identified and recommended for appointment in a manner prescribed by national legislation.'

19. Further Parliament should consider expeditiously passing a law which lays down the procedure of approval of nominees by the National Assembly.



PROF. KIVUTHA KIBWANA
ADVISOR, CONSTITUTIONAL REVIEW
OFFICE OF THE PRESIDENT

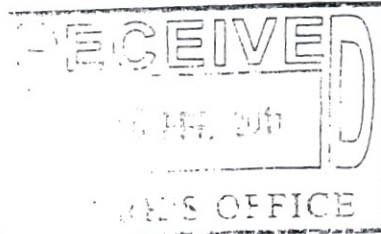
7/2/2011

Office of the Prime Minister

PMO/NEW.CONST/112/VOL.II

February 8th, 2011

Mr. Patrick Gichohi, CBS,
Clerk of the National Assembly,
Parliament Buildings,
NAIROBI



Dear Patrick,

**SUBJECT: NOMINATIONS TO THE OFFICES OF CHIEF JUSTICE,
ATTORNEY-GENERAL AND DIRECTOR OF PUBLIC
PROSECUTIONS**

Your Letter of February 7, 2011 under Ref. NA/DCH/JLA/2011/4 on the captioned matter and addressed to the Permanent Secretary in this Office refers.

I wish to confirm the following with regard to the three requests made in your letter:

- (i) Attached hereto are copies of the proposed agenda items for the Meeting between the President and the Prime Minister held on January 27, 2011. The blue copy is the proposed agenda from the Office of the President while the cream copy is the proposed agenda from the Office of the Prime Minister.
- (ii) **There are no minutes of the Meeting of January 27, 2011 between the President and the Prime Minister.** As you will notice from the two draft agenda items, none commences with the items, "Adoption of Agenda" or "Confirmation of Minutes". No minutes of these meetings have been kept to the best of my knowledge.
- (iii) **There are no minutes of, and there is no report of the Technical Committee on this matter.**

The Principals had agreed that a Panel (Committee) be established comprising representatives of the Office of the President, Office of the Prime Minister, Law Reform Commission, Law Society of Kenya, Judicial Service Commission and the Public Service Commission to identify and recommend to the Principals three (3) candidates for each

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position. This Panel was to be constituted and chaired by the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service. However, when this Panel met for the first and only time, he invited the President's Private Secretary to chair on his behalf. There were no representatives of the Law Reform Commission, Law Society of Kenya, Judicial Service Commission and the Public Service Commission invited to that meeting.

Please note that the Panel, comprising the President's Private Secretary, the Permanent Secretary in the Ministry of Justice, National Cohesion and Constitutional Affairs, the Permanent Secretary, Ministry of State for Provincial Administration and Internal Security, the Solicitor-General and the undersigned met once to deal with only preliminary aspects of this matter. This Committee discussed the criteria and options for appointing a Chief Justice. On the criteria, the Committee agreed that the key factors be:

- Seniority
- Competence
- Integrity
- Reform - mindedness

On the process for appointment, the Committee agreed that the new Chief Justice could be appointed from:

- The Commonwealth; or
- The Judiciary in Kenya; or
- Private Practice in Kenya

The Committee did not discuss any nominees to the position of the Chief Justice.

The Committee agreed that the Judiciary would be invited to provide a list of the serving Judges so as to establish their seniority. Indeed, the Permanent Secretary for Justice, National Cohesion and Constitutional Affairs, while still in the meeting, called the Registrar of the High Court and asked her to make this list available to the Committee.

On the position of Director of Public Prosecutions, the Committee agreed that candidates will be identified from private practice, prosecution service and from the judiciary. While various members mentioned various names of prominent criminal law practitioners, there was no discussion on the suitability of any nominees.

The Committee did not discuss the position of the Attorney-General. The Committee did not discuss the position of Controller of Budget as there was no representative from the Treasury of Kenya present at the Meeting.

There are no minutes of the meeting of the Committee.

The Committee did not produce any joint report.

The Committee has not met again after its first and only meeting.

The Committee never reported back to the Principals.

- (iv) The records of the entire Serena Process are available at www.dialoguekenya.org or by googling "KNDR Agreements". The Agreement on the Principles of Partnership of the Coalition Government (The National Accord), as signed by the Principals is attached hereto together with Agreements on Waki Commission, Kriegler Commission, etc.

The undersigned remains available to offer any further assistance or clarification as the Committee may require on this matter.

With best regards,


Caroli Omondi
CHIEF OF STAFF

Encls.

LIST OF JUDGES IN THE JUDICIARY - KENYA

CHIEF JUSTICE:

<u>Name</u>	<u>Station</u>	<u>Address</u>
Hon. Mr. Justice J. E. Gicheru, E.G.H.	Nairobi	30041-00100

COURT OF APPEAL JUDGES:-

PRESIDING JUDGE:

<u>No.</u>	<u>Name</u>	<u>Station</u>	<u>Address</u>
1.	Hon. Mr. Justice Riaga S. C. Omolo	Nairobi	30187 -00100

2.	Hon. Mr. Justice Philip K. Tunoi	Nairobi	30187-00100
3.	Hon Mr. Justice Samwel E. O. Bosire	Nairobi	30187-00100
4.	Hon. Mr. Justice Emmanuel O' Kubasu	Nairobi	30187-00100
5.	Hon. Mr. Justice Moiyo Ole Keiwua	Nairobi	30187-00100
6.	Hon. Mr. Justice Erastus M. Githinji	Nairobi	30187-00100
7.	Hon. Mr. Justice Philip Nyamu Waki	Nairobi	30187-00100
8.	Hon. Mr. Justice John Walter Onyango Otieno	Nairobi	30187-00100
9.	Hon. Mr. Justice D.K.S. Aganyanya	Nairobi	30187-00100
10.	Hon. Nr. Justice Alnashir Ramazanali Magan Visram	Nairobi	30187-00100
11.	Hon. Mr. Justice Joseph Gregory Nyamu	Nairobi	30187-00100

ANNEX 6

HIGH COURT JUDGES:-

PRINCIPAL JUDGE:

<u>No.</u>	<u>Name</u>	<u>Station</u>	<u>Address</u>
1.	Hon. Mr. Justice A. Mbogholi Msagha	Nairobi	30041-00100

2.	Hon. Mr. Justice John W. Mwera	Nairobi	30041-00100
3.	Hon. Lady Justice Roselyne Nambuye	Nairobi	30041-00100
4.	Hon. Lady Justice Mary A. Ang'awa	Nairobi	30041-00100,
5.	Hon. Mr. Justice Hatari Peter George Waweru	Machakos	145
6.	Hon. Lady Justice Kalpana Hasmukhrai Rawal	Nairobi	30041-00100
7.	Hon. Lady Justice Jeanne Wanjiku Gacheche	Nairobi	30041-00100
8.	Hon. Mr. Justice David Onyancha	Busia	161
9.	Hon. Mr. Justice Nicholas Randa Owano Ombija	Nairobi	30041-00100
10.	Hon. Mr. Justice Muga Apondi	Milimani	30420-00100
11.	Hon. Lady Justice Jessie Wanjiku Lesiit	Meru	118
12.	Hon. Mr. Justice Joseph Kiplagat Sergon	Nyeri	70
13.	Hon. Lady Justice Hannah M. Okwengu	Nairobi	30041-00100
14.	Hon. Lady Justice Joyce N. Khaminwa	Nairobi	30041-00100
15.	Hon. Mr. Justice Leonard Njagi	Milimani	30420-00100
16.	Hon. Mr. Justice George B. M. Kariuki	Kericho	69
17.	Hon. Mr. Justice Mohammed K. Ibrahim	Mombasa	90140
18.	Hon. Lady Justice Martha K. Koome	Kitale	641
19.	Hon. Lady Justice Roseline P.V. Wendo	Nakuru	61

20.	Hon. Mr. Justice Jackton Boma Ojwang	Mombasa	90140
21.	Mr. Justice Paul Kihara Kariuki	J.T.I	30041-00100
22.	Mr. Justice David Kenani Maraga	Nairobi	30041-00100
23.	Mr. Justice George Matatia Abaleka Dulu	Nairobi	30041-00100
24.	Hon. Lady Justice Mary Muhanji Kasango	Meru	118
25.	Hon.Mr. Justice Daniel Kiio Musinga	Nairobi	30041-00100
26.	Hon.Mr. Justice Isack Lenaola	Kakamega	22
27.	Hon.Mr. Justice Mathew John Anyara Emukule	Nakuru	61
28.	Hon.Mr. Justice Festus Azangalala	Eldoret	141
29.	Hon. Lady Justice Murugi Geteria Mugo	Milimani	30420-00100
30.	Hon.Mr. Justice Fredrick Andago Ochieng	Nairobi	30041-00100
31.	Hon.Mr. Justice Milton Stephen Asike Makhandia	Kisii	69
32.	Hon.Mr. Justice Luka Kiprotich Kimaru	Nairobi	30041-00100
33.	Hon.Mr. Justice Mohamed Abdulahi Warsame	Nairobi	30041-00100
34.	Hon.Mr. Justice William Ouko	Nakuru	61
35.	Hon. Lady Justice Wanjiru Karanja	Embu	256
36.	Hon. Lady Justice Ruth Nekoye Sitati	Kisii	69
37.	Hon. Mr. Justice Joseph R. Karanja	Eldoret	141
38.	Hon. Lady Justice Hellen A. Omondi	Malindi	2
39.	Hon. Lady Justice Philomena Mbeti Mwilu	Eldoret	141

40.	Hon. Lady Justice Aggrey Otsyula Muchelule	Nairobi	30041-00100
41.	Hon. Lady Justice Florence Nyaguthii Muchemi	Bungoma	141
42.	Hon. Lady Justice Maureen Akinyi Odero	Mombasa	90140
43.	Hon. Lady Justice Abida Ali - Aroni	Kisumu	126
44.	Hon. Mr. Justice Said Juma Chitembwe	Kakamega	22

REGISTRAR, HIGH COURT:

<u>Name</u>	<u>Station</u>	<u>Address</u>
Mrs. Lydia A. Achode	Nairobi	30041

CHIEF COURT ADMINISTRATOR:

<u>Name</u>	<u>Station</u>	<u>Address</u>
Mr. Stephen M. Kibunja	Nairobi	30041 - 00100



REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY OF KENYA

DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING AND TRADE

NOMINATION TO CONSTITUTIONAL OFFICES

1. Role of the Speaker

Since the constitutionality of the nominations has been challenged within and outside the House, the Speaker has the duty, competence and exclusive jurisdiction to rule on the constitutionality of the nominations.

Determination of the constitutionality of the nominations is not a matter for the House to vote upon. It is a matter of constitutional interpretation by the Speaker. Constitutional interpretation is not to be rendered through voting by the Members. In other words, whether or not a matter before the House is constitutional or otherwise is not to be determined by division in the House.

2. Role of the Committees

The first question to be determined by the Committees is the "constitutionality of the nominations". This question must be determined by the competent Committee first before any other Committee may proceed with any business regarding the nominations.

3. Role of CIC and the Courts

The CIC has a duty "to ensure that the letter and spirit of [the] Constitution is respected". CIC must report to the House on "progress" and "any impediments" in the implementation of the Constitution.

Consequently, its opinion on the constitutionality of the nominations carries the weight of its responsibilities. Its opinion is not just persuasive but binding.

4. Role of Judicial Service Commission

While the Constitution does not require the Judicial Service Commission (JSC) to participate in the nomination process for new Chief Justice pending the next general elections, nothing precludes the Executive from engaging the JSC to help with the identification of candidates through a competitive process for purposes of nomination. Indeed, engaging the JSC in this process will be in consonance with, and in furtherance of our national values and principles of transparency, merit and competitiveness in making appointments to public offices.

5. Consultations

Appointments, under the Constitution, are subject to the National Accord, which is premised upon “real power-sharing”, “consultations”, and “willingness to compromise”. “Real power-sharing” connotes equality and parity in making the appointments. “Consultations” require that the parties consulting: (i) “offer each other sufficient opportunity to exchange views”, (ii) “share sufficient information available on each nominee on the basis of full disclosure of accurate information”, (iii) “act reasonably”, (iv) “must be free and frank in exchanging their views, and (v) “must receive views exchanged with an open mind”. Consultation must be undertaken when the proposals are still in their formative stages without any fixed views all through to the end. Consultation must not be treated “perfunctorily or as a mere formality”.

Consultation must be practical i.e conducted within a time period sufficient for views to be exchanged fully and matters to be thoroughly interrogated. The time required depends on the seriousness of the matter. Urgency is no substitute to sufficient time for practical consultations.

“Consultations”, within the framework of the National Accord therefore mean “compromise” between the Principals as the basis of any decisions. This implies “consensus ad idem” or the “meeting of the minds” on a matter under consideration.

Further, the appointments are to be made subject to the provisions of the National Accord which establishes a Grand Coalition Government based on shared power. Consequently, any nomination must be made jointly, i.e. by both coalition partners.

Consultations under the Constitution during the transitional period is therefore an act of power sharing, an act of compromise, and an act that requires good faith.

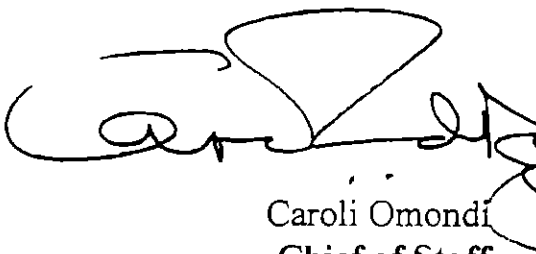
It is not consultation in its ordinary meaning.

6. *Serving Judge*

No serving Judge, until vetted and found to be fit to continue serving in the Judiciary, is eligible to be nominated and appointed as Chief Justice. A serving Judge who fails the suitability test under vetting is to be removed from the Judiciary.

7. *National Values and Principles*

The nominations breach the constitutional requirements of regional balance and gender parity. No woman was nominated. The nominee for the Office of the Attorney-General, if accepted, will put majority of all the senior positions within State Law Office under one ethnic group. Further, the nominee for the position of Director of Public Prosecutions, if accepted, will undermine the Independence of the Prosecution Service in prosecuting pending cases of grand corruption in which the nominee has been defence counsel.



Caroli Omondi
Chief of Staff

OFFICE OF THE PRIME MINISTER

8th February, 2011

ANNEX 8



REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY OF KENYA

DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING AND TRADE

Clarifications to the Statement made by Vice President and Minister for Home Affairs

On Tuesday, 1st February, 2011, the Vice President and Minister for Home Affairs issued a Statement in the House regarding consultations over the nominations made by the President to the positions of Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget. In this Statement, the Vice President and Minister for Home Affairs:

Alluded to “technical meetings” and “technical teams”: The correct position is that there was only one technical team which held only one meeting.

Mentioned that the Prime Minister expressed the view that we should have a foreign Chief Justice: The correct position is that the Prime Minister suggested that a transitional Chief Justice be appointed from the Commonwealth on a fixed non-renewable term of three (3) years for the following reasons:

1. That it was important to get a new Chief Justice from a functioning Judiciary. Such Chief Justice would be able to identify the shortcomings of our Judiciary and offer best international practices in reforming our Judiciary.

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2. That a Commonwealth Chief Justice would bring the credibility needed in establishing a local mechanism to deal with post-election violence matters and to negotiate with ICC a referral of the pending cases.
3. That such Chief Justice would not be seen as bias or partisan or beholden to any interests in the country.
4. That the transition period would allow the country to assess newly appointed or promoted judges and identify a suitable successor.
5. That a local candidate appointed from outside the judiciary was likely to experience resistance within the judiciary and thus undermine the reform process.
6. That the current serving judges had not been vetted as required by the New Constitution and were thus ineligible for appointment.

Mentioned that the Prime Minister would insist on Justice Omolo to be nominated to the position of Chief Justice: The correct position is that at no time did the Prime Minister propose the name of Justice Omolo. The Honourable Judge is ranked the senior most judge after the Chief Justice. It is in this respect that his name came under consideration. He had also been subjected to vetting by the National Assembly as a Member of the Judicial Service Commission.

Referred to a team comprising Ambassador Muthaura, Mr. Mohammed Isahakia, Prof. Nick Wanjohi and Mr. Caroli Omondi as "the technical team": The correct position is that the technical team in this matter comprised Ambassador Muthaura, Prof. Wanjohi, Permanent Secretary for Justice, Permanent Secretary for Internal Security, Solicitor-General and the undersigned. The other members of this team who were to be drawn from Law Reform Commission, Judicial Service Commission, Law Society of Kenya and Public Service Commission were never invited to join the team. This team met only once.

It did not produce a report. It never presented any report to the Principals. It never discussed any nominees.

Mentioned that Mr. Fred Ojiambo was replaced by Prof. Githu Muigai because the former did not have higher post-graduate qualifications: The correct position is that this was not a consideration before the Committee.

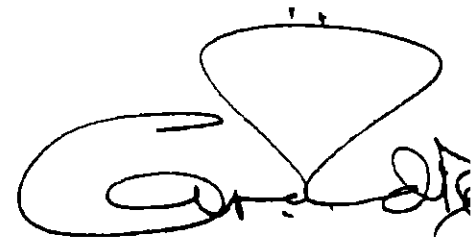
Mentioned that the Prime Minister left for Addis Ababa on January 28th, 2011: This trip was known to Amb. Muthaura and Prof. Wanjohi well in advance as it was discussed in the consultative meeting of January 27th, 2011, it was on the Agenda of the AU's Peace and Security Council of which they had notice, and the undersigned had discussed with them the clearance of the plane that would transport the Prime Minister to Addis Ababa.

It is true as stated by the Vice President under point No.8 that as at January 27th, 2011 the matter had not been finalized and further consultations were planned by the parties. But at no time did the parties agree that Friday, January 28th, 2011 would be the final date for the consultations.

That the Prime Minister would be consulted by phone while in Addis: The correct position is that at no time was there an agreement that consultations would be by way of phone. Indeed the Prime Minister had proposed in writing that the consultations be held face to face the following week.

That the proposal to nominate Justice Visram to the position of Chief Justice was communicated to the Prime Minister: The correct position is that at no time was this proposal communicated to the Prime Minister and at no time was this proposal discussed by the technical team.

That when the Prime Minister was called by the State House Comptroller, Mr. Caroli Omondi answered the Prime Minister's phone and after consulting said that the Prime Minister was busy and would call back after one and half hours: The correct position is that the Comptroller of State House called on Mr. Omondi's phone at around 6.30 p.m. While he said that the President wished to talk to the Prime Minister, he did not divulge the subject matter. At this point the Prime Minister was attending the AU's Peace and Security Council Meeting with other Heads of State and Government, a meeting that started at around 4.00 p.m. and ended shortly before 11.00 p.m. in the night. No aide was allowed into the meeting. By the time the Prime Minister took a break from the meeting for refreshments, the media were announcing that nominations had been made to these positions. It was not until around 11.30 p.m. back at the hotel that I had the opportunity to inform the Prime Minister that the President had wished to talk to him but I was not aware of the subject matter.



Caroli Omondi
Chief of Staff

OFFICE OF THE PRIME MINISTER

8th February, 2011



OFFICE OF THE PRESIDENT
PERMANENT SECRETARY, SECRETARY TO THE CABINET
AND HEAD OF THE PUBLIC SERVICE

Telegraphic Address: "Ras"
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P.O. Box 62345-00200
NAIROBI, KENYA

When replying please quote

Ref No **31st January, 2011**
and date

H.E. Hon. Stephen Kalonzo Musyoka, EGH, MP
Vice President and Minister for Home Affairs
NAIROBI

Your

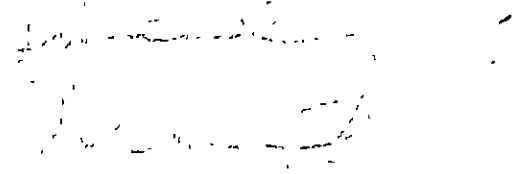
**REPORT ON THE CONSULTATIVE PROCESS BETWEEN HIS EXCELLENCY
PRESIDENT MWAI KIBAKI AND THE RIGHT HONOURABLE PRIME
MINISTER RAILA ODINGA ON THE NOMINATIONS TO FILL STATE OFFICES**

1. The subject of Judicial appointments was first discussed at a meeting between the President and the Prime Minister held before Christmas, on December 16th 2010. During the meeting, the President felt that it would be better if the issue was revisited after the New Year
2. The item of the appointments was subsequently placed in the agenda and discussed on January 6, 2011, at Harambee House between H.E. the President and The Rt. Hon. Prime Minister. The meeting agreed on the procedure to be followed in the appointments:
 - a) The identification and consultations on the nominations by the two principals and submission to parliament by H.E. the President for approval.
 - b) It was agreed that the law did not require the selection of the candidates by either the Judicial Service Commission or Public Service Commission.
 - c) The technical team was instructed to identify suitable candidates to facilitate further consultations. In the technical meetings it was observed that
 - i. The Prime Minister had expressed the view that we should have a foreign Chief Justice.
 - ii However, His Excellency the President insisted that at close to 50 years of independence we have very qualified Kenyans and to search for a Chief Justice outside Kenya would be improper and would send

imperative that the proposals were made before the African Union's Heads of State meeting in Addis Ababa. This was made clear to the Prime Minister.

9. On Friday morning, January 28, 2011, the Prime Minister sent a letter signed by Mr. Caroli Omondi addressed to Amb. Muthaura saying that the Prime Minister had left for Addis Ababa and that consultation should be held the following week.
10. The Prime Minister was informed that because the matter needed to be concluded before the President left for Addis Ababa, consultations could be facilitated through the phone. The President then made the proposal of having Justice Visram as Chief Justice, who hails from a minority community to accommodate the Prime Minister's concerns of neutrality. The proposal was communicated to the Prime Minister. In response, the Prime Minister said he had no problem with Prof. Githu Muigai as Attorney General but insisted on Justice Omollo being nominated as Chief Justice.
11. The Prime Minister was asked to call the President from Addis Ababa so that they could finalize. The Prime Minister said he would call the President. The President waited at Harambee House from 12:30 pm until 3 pm but the Prime Minister did not call.
12. The President left for Statehouse for lunch at 3 pm, and a telephone number to reach the President at Statehouse was communicated to the Prime Minister so that he could call the President. The Prime Minister did not call.
13. At 6pm, the Statehouse Comptroller called the Prime Minister for the President to speak to him. Mr. Caroli Omondi answered the Prime Minister's phone. After consulting, Mr. Caroli Omondi said the Prime Minister was busy and would call back after one and a half hours.
14. The President then felt that he had consulted extensively and had accommodated the Prime Minister and had fulfilled the constitutional requirements and therefore, made the announcement on Friday, January 28th 2011 at 8 30pm.

Yours


AMB. FRANCIS K. MUTHAURA, EGH
PERMANENT SECRETARY, SECRETARY TO THE
CABINET AND HEAD OF THE PUBLIC SERVICE

Paper C. last Omondi



ANNEX

Republic of Kenya

Office of the Prime Minister

27th January, 2011

Amb. Francis M. Muthaura, EGH
Permanent Secretary, Secretary to the
Cabinet and Head of Public Service
Office of the President
Harambee Avenue
NAIROBI.

Dear Ambassador,

SUBJECT: CONSULTATIONS

I have been instructed to advise you that the Rt. Hon. Raila A. Odinga, EGH, MP, Prime Minister of the Republic of Kenya, will be traveling to Addis Ababa, Ethiopia, tomorrow, January 28th, 2011 to present his Report on the Côte D'Ivoire Crisis to the African Union's Peace & Security Council.

Consequently the consultations between H. E. Mwai Kibaki, C.G.H. MP, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, and the Prime Minister on the appointments of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget should be held sometime next week on a date convenient to both Principals.

Best regards

Carol Omondi
Chief of Staff

10-10-10

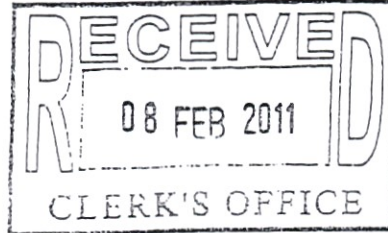
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10-10-10

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION
P. O. BOX 48041-00100
DELTA HOUSE, WAIYAKI WAY, WESTLANDS

CIC/3/1Vol.1/(65)

8th February, 2011



Mr. Patrick G. Gichohi, CBS
Clerk of the National Assembly
Kenya National Assembly
NAIROBI

Dear Mr. Gichohi,

OPINION OF THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)-
ON THE PROCESS RELATING TO THE APPOINTMENT OF THE CHIEF JUSTICE OF THE
REPUBLIC OF KENYA, THE ATTORNEY GENERAL, THE DIRECTOR OF PUBLIC PROSECUTIONS
AND THE CONTROLLER OF BUDGET

Please find enclosed three (3) sets of the CIC's Opinion on the above matter.

The Commission will be obliged if you could deliver the same to the Hon. Speaker of the National Assembly, the Hon. Chair of The Parliamentary Departmental Committee on Justice and Legal Affairs, and the Hon. Chair of The Parliamentary Departmental Committee on Finance, Planning and Trade.

Yours

Sincerely,

Charles Nyachae
Charles Nyachae
CHAIRPERSON

Mrs Abonyo
Please inform
the chair of the
Committee
Mungu
8/2/11

D/Comm
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OPINION OF THE COMMISSION FOR THE IMPLEMENTATION OF THE
CONSTITUTION (CIC)- ON THE PROCESS RELATING TO THE APPOINTMENT OF THE
CHIEF JUSTICE OF THE REPUBLIC OF KENYA, THE ATTORNEY GENERAL , THE
DIRECTOR OF PUBLIC PROSECUTIONS AND THE CONTROLLER OF BUDGET

Introduction

Following the ruling by the Speaker of the National Assembly Hon Kenneth Marende on the 3rd of February 2011, in which the matter of nominations to the offices of Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget, were forwarded to the Parliamentary Committee of Justice and Legal Affairs and the Committee of Finance Planning and Trade, the Commission for the Implementation of the Constitution (CIC) would like to give the following opinion on the Constitutional provisions relating to the said nominations.

CIC is giving this opinion in pursuance of its general mandate contained in Article 249 (1) of the constitution to

- a) protect the sovereignty of the people;
- b) secure the observance by all State organs of democratic values and principles including those articulated in Article 10 and Chapter 6 of the Constitution particularly respect for the rule of law, participation of the people, integrity, good governance , transparency and accountability;
- c) promote constitutionalism.

With respect to the appointment of the Chief Justice CIC is mandated to work with each constitutional commission (of which the Judicial Service Commission is one) to ensure that the letter and spirit of the constitution is respected.

A. Provisions relating to the Appointment of the Chief Justice

Article 166(1) (a) of the constitution provides that

the President shall appoint the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and

Section 24 (2) of the Sixth Schedule provides that:

A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.

Section 29 (2) reinforces this provision by providing that all appointments that will be made prior to the first elections under the constitution and that require approval by the National Assembly shall, be made by the President after consultation with the Prime Minister.

It is the opinion of CIC that before the first elections under the constitution, these three provisions should be read and construed together when dealing with the appointment of the Chief Justice. This position is based on the following grounds:-

- (i) Article 166 is not suspended under Section 2 of the Sixth schedule.
- (ii) Article 24 (2) which deals with the appointment of the first Chief Justice under the Constitution does not expressly exclude the application of Article 166.
- (iii) The Judicial Service Commission is already established and is operational. One its primary roles is to recommend persons to be appointed as Chief Justice.

In view of the above and pursuant to its mandate, CIC would like to submit as follows:

- (a) That Article 166 (1) contemplates that the appointment of the Chief Justice of the Republic of Kenya shall be a shared responsibility among the three arms of government namely the Judiciary (through the Judicial Service Commission -JSC), the Executive (through the President) and the Legislature (through the National Assembly).
- (b) That in carrying out the mandate of appointing the new Chief Justice prior to the first elections under the constitution, the President shall consult the Prime Minister.

In view of the above, it is the position of CIC that the letter of the Constitution as provided for in Article 166 read together with Sections 24 and 29 of the Sixth schedule require that the appointment of the Chief Justice by the appointing authorities should be as follows:

- I. That the process of appointment should commence with recommendations by the Judicial Service Commission to the President who in turn should consult the Prime Minister, after which the President forwards the name of the nominee to the National Assembly for approval before final appointment by the President.
- II. That the role of the Judicial Service Commission in the appointment of the Chief Justice should be respected and that Commission allowed to undertake the function reserved to it by the constitution.

It is important to note the High Court of Kenya in HCPET (Nbi) No 16 of 2011 has restated this position and declared any process that excludes the Judicial Service Commission in the appointment of the Chief Justice to be unconstitutional.

B. Provisions relating to the appointment of the Attorney General, the Director of Public Prosecutions and the Controller of Budget.

The offices of the Attorney General, the Director of Public Prosecutions and the Controller of Budget and the process of their appointment is set out in Articles 156, 157 and 228 of the constitution respectively. In the case of these offices the appointment of the office holders is shared by the Executive and the Legislature

Under the aforesaid Articles the three Constitutional office holders are to be nominated and eventually appointed by the President subject to the approval of the National Assembly.

In the period before the first election this section must be read together with the provisions of Section 29 of the Sixth Schedule, which provides as follows:

- (1) *The process of appointment of persons to fill new offices and vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalised within one year.*
- (2) *Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.*

Consequently, such appointments being made prior to the first elections, require the President to consult the Prime Minister prior to appointment, subject to the National Accord and Reconciliation Act. The process of appointment should also reflect the letter and spirit of the constitution.

We trust that this opinion will help in clarifying the issues in contention. We remain available to discuss and/or clarify any of the issues raised herein.

DATED THIS

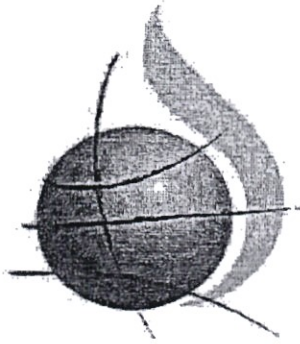
8th

DAY OF

February 2011

Manley J. Zue

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION.



THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURIST'S MEMORANDUM ON NOMINATIONS
IMPASSE

BACKGROUND

The Speaker of the National Assembly, Honorable Kenneth Marende, and yesterday 3rd February 2011 declined to make a ruling on the Constitutionality of the nominations to the Constitutional offices of Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget by H.E President Kibaki. The speaker referred the matter to the two house committees –Justice and Legal Affairs and Finance Planning and Trade to deliberate and report on this issue to parliament by 10th February 2011.

[At the same time a petition filed in the High Court to determine the constitutionality of the nomination process was heard and determined on 3rd February 2011. The High Court held that the nominations were unconstitutional and the nominees should not be processed further for their proposed offices.]

In view of the foregoing we hereby submit this advisory opinion to you.

1. JURISDICTION

The Parliamentary Departmental Committees do not have jurisdiction to decide matters the Courts have already determined

[The Constitution in Chapter 10 article 165 sub article 3d(ii) gives the High Court exclusive Jurisdiction to hear any question regarding the interpretation of the Constitution. This Article further specifies that such interpretation includes the determination of whether anything said to be done under the authority of the Constitution, is constitutional or not. An appeal from such a decision lies in the Court of Appeal and finally the Supreme Court.]

The Judicial ruling by the High Court on **PETITION NUMBER 16 OF 2011** with regards to the Constitutionality of the nominations to these constitutional offices was properly heard and determined. Article 160 (1) of the Constitution further buttresses this position as it states that such decision is not subject to the control or direction of any person or authority.

This provision in law is important and should be respected in order to prevent anarchy. In the Kenyan case the 2007-2008 post poll violence erupted because neither party went to court to have their matter determined. The

Courts mandate as a final arbiter on Constitutional Interpretation ensures the upholding of the rule of law. Otherwise everyone will Interpret the Constitution as they dim fit.

In borrowing from different Jurisdictions In the case¹ of *Marbury v. Madison* (1803)¹ the Supreme Court of the United States of America established that the Court would be the sole interpreter of the Constitution and laid down several important ground rules of interpretation which are:

- The rules in the Constitution are to be regarded as supreme
- In cases of conflict, inferior rules must give way to superior rules
- In cases of dispute, it is the role of the judiciary to determine what rules should apply

Should the departmental committees therefore proceed to determine the Constitutionality of the nominations therefore they would be in breach of the Constitution.

2. SEPERATION OF POWERS.

The Constitution in chapter 8, 9 and 10 provides for the separation of powers as it divides the arms of government into Legislature, Executive and Judiciary respectively. It ensures diffusion rather than a concentration of power within the state ensuring that powers are not abused thereby protect the rights and liberties of citizens. The Legislature in Chapter 8 legislates; the Executive in Chapter 9 is tasked with implementation of the law whereas the Judiciary interprets the law. Without such distinction or respect for the independence of each arm of government then there is no rule of law and anarchy can and will break out as there is no authority in place. In light of its assurances to the International community of its intent to prosecute perpetrators of Post Election Violence, the government is revamping the Judiciary. It would be important to see if decisions from this Judiciary are respected if at all. Otherwise such revamping would be superficial and we cannot rule out future post election violence as aggrieved parties would also not respect Court decisions.

Further and alternatively:

3. THE NOMINATIONS ARE UNCONSTITUTIONAL

- i) For the office of the Chief Justice the nomination was in violation of the Constitution.
- a) The President failed to include the Judicial Service Commission in the nomination process. The Constitution in article 166(1) b instructs the President to appoint the Chief Justice and his deputy upon the recommendation of the Judicial Service Commission. In the transitional clauses, the Sixth

¹ The Jurisprudence of Constitutional Interpretation: <http://faculty.ncwc.edu.mstevens> accessed :4/2/2011

Schedule clause 24 of the Constitution provides that a new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister and with the approval of the National Assembly. The Sixth Schedule however lists the Constitutional provisions which are suspended pending transition. Chapter 10 of the Constitution where article 166 falls is not listed as such and therefore became operative immediately the constitution was promulgated on Friday August 27th 2010. The President therefore is required to appoint the new Chief Justice in line with Article 166 of the Constitution as read with clause 24 of the Sixth Schedule. It is incumbent upon the President therefore to appoint the new Chief Justice upon the recommendation of the Judicial Service Commission and after consultation with the prime minister and with the approval of the National Assembly.

- b) The President violated the spirit of the Constitution by excluding Public Participation. Articles 10 (2) a and (c) of the Constitution provide that the entire Constitution shall be given effect through participation of the public, good governance, integrity, transparency and accountability. Articles 69, 118, 196 and 201 of the Constitution provide for Public Participation in governance. The process of nominating the Chief Justice, Attorney General and Director of Public Prosecution should therefore be a competitive open accountable and transparent process. These Constitutional offices should be **publicly advertised, publicly shortlisted** and publicly nominated. The public ought to have been informed of every step of the nominations process. Constitutional offices cannot be legally filled behind closed doors and still be in compliance with these provisions.
- c) Due process was not followed as the consultation process is in doubt. In the Sixth Schedule clause 24 of the Constitution, a new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the prime minister. Further Clause 29 of the same schedule also requires the President to consult with the Prime Minister in making any appointments to new Constitutional offices or those that fall vacant. The nominations of the Attorney General, the Director for Public Prosecution and the Controller of Budget, legally require a consultative process between the two principals as well. Consultation in various case laws and jurisdictions has been accepted as

*"such decision shall require the concurrence of such other functionary: Provided that if such functionary is a body of persons it shall express its concurrence in accordance with its own decision-making procedures"*²

² Constitution of the Republic of SA 200 of 1993 s 233(3).

Under the National Accord and reconciliation Act the two principals are equal partners in the governance of this country and the new Constitution also takes cognizance of this. The assertions by the Prime Minister that he was not consulted are grave and should be ventilated prior to nominees from such a process being accepted.

In view of the foregoing we strongly urge the committee to:

1. **Declare the nomination process unconstitutional in solidarity with the High Court**
2. **Render the process back to the President and the Prime minister for proper nomination in accordance with the Constitution.**

We attach hereto a recommended framework for the nomination process



**LEGAL OPINION ON THE CONSTITUTIONALITY OF NOMINATION OF THE OFFICE OF
THE CONTROLLER OF BUDGET**

Submitted to
PARLIAMENTARY COMMITTEE ON FINANCE, PLANNING AND TRADE

By
Federation of Women Lawyers (FIDA-Kenya)

Contact Person
Grace Maingi-Kimani
Executive Director
Federation of Women Lawyers in Kenya
Amboseli Road, off Gitanga Road Lavington
P.O. Box 46324-00100 Nairobi, Kenya
Tel: 3873511, 3870444, 3876954
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19-10-1944

BACKGROUND

The Federation of Women Lawyers - Kenya (FIDA-Kenya) is the leading women's human rights organization in Kenya. It was established in 1985 to improve the legal status of women, to increase access to justice for women in Kenya and to enhance public awareness and understanding on their rights. FIDA Kenya is a membership based organization of women lawyers and women law students.

On 4th of August 2010 over 70% of registered voters turned up to vote on the then Proposed Constitution that was published by the Attorney General on the 6th of May 2010.

This was indeed a great turning point for Kenya as the country had at this juncture matured in its interactions on constitutional matters and was able to have a spirited campaign based on issues. The results of the referendum were overwhelmingly in favour of the Proposed Constitution which was thereafter promulgated by the President on the 27th of August 2010.

On 28th of January 2011, the Office of the President announced the nomination for approval and appointment of persons to the office of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget.

The announcement was contested by the Prime Minister on the basis that the said nominations were unconstitutional as there were inadequate consultations in accordance with the principles of the National Accord and Reconciliation Act of 2008 and Section 24 of the sixth schedule of the Constitution of the Republic of Kenya. In addition there have been widespread calls for withdrawal of the nominations by a cross section of civil society leaders and the public due to the controversy around the same.

OFFICE OF THE CONTROLLER OF BUDGET

Through this legal opinion FIDA Kenya has considered the following issues:

1. The ruling of Hon. Kenneth Marende, Speaker of the National Assembly dated and delivered on the floor of the house on the 3rd of February 2011.
2. The Ruling of Justice Daniel Musinga, Judge of the High Court of Kenya dated and delivered on the 3rd of February 2011 in respect of NRB HCC PETITION NO: 16 OF 2011 (a copy herewith attached for perusal and ease of verification).

3. Whether the letter and the spirit of the Constitution was adhered to in the nomination process.
4. Did the process of nominations accord both men and women of Kenya equal treatment which includes right to equal opportunities in political, economic, cultural and social sphere as envisaged under Article 27 of the Constitution of Kenya.
5. What are the implications of not having a transparent, participatory, competitive process for constitutional office bearers and more specifically the current nominations.
6. What is the historical background in respect of equality and discrimination.
7. What is the bearing of political impasse in regard to the implementation of the constitution to the Kenyan citizenry.

FIDA-Kenya has relied on article 2(1), article 3, article 10, article 27, article 129, article 131, and article 259 of the Constitution of the Republic of Kenya in this opinion.

As FIDA-Kenya we believe;

1. That the process of nominations was not inclusive and therefore Article 129 and 131(2) of the Constitution were not upheld.
2. That Article 10 of the Constitution which sets out the national values and principles were disregarded whilst undertaking the nominations.
3. Article 27 of the Constitution provides for equality and freedom from discrimination however the nomination process that was undertaken did not afford equal opportunity to both men and women. The nominations proposed favored only men and therefore discriminated against women.
4. Any violation of the Constitution by any arm of Government will undermine the fundamentals of constitutionalism in the Country and continue to destroy public confidence in the Executive, Judiciary and the Legislature's ability to implement the new Constitution.

The office of the Controller of Budget and the process of appointment is set out in Article 228 of the Kenyan Constitution which states that the constitutional office holder is to be nominated and eventually appointed by the President subject to the approval of the National Assembly.

This article must be read together with the provisions of Section 29 of the Sixth Schedule of the Constitution, which provides as follows:

- 1) *The process of appointment of persons to fill new offices and vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.*
- 2) *Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.*

FIDA-Kenya is of the considered opinion that the process of appointment ought to be as follows;

- 1) The Executive must call for applications from qualified and interested persons.
- 2) The Executive should then proceed to shortlist and interview the persons.
- 3) The Executive will make recommendations to the President as to persons suitable for this position.
- 4) Upon receipt of the forwarded names, the President following consultations with the Prime Minister shall nominate at least 3 persons of whom one third should be of either gender.
- 5) The names of the nominees shall be forwarded to the National Assembly for approval.
- 6) Following approval by the National Assembly, the final appointment shall be made by the President.

In view of the foregoing submissions on the position of the office of the Controller of Budget, we firmly believe that any attempt to approve the name presented so far will not be in the spirit of the Constitution.

The present nomination process if allowed to continue will derogate from the right to equal opportunities accorded to both women and men and marginalized communities; it will be in disregard to the national values and principles of governance and ultimately disregard Article 259 of the Constitution that provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits for the development of the law and contributing to good governance.

We humbly submit that to enhance constitutionalism in our nation there is need to reconsider these nominations and proceed in a manner that upholds the spirit of the Constitution that the women of Kenya so overwhelmingly passed.



LAW SOCIETY OF KENYA

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Gitanga Road
P.O.Box 72219-00200
NAIROBI
Tel 387 4664
0720 904983

**MEMORANDUM
AFFAIRS TO
THE PARLIAMENTARY DEPARTMENTAL COMMITTEE ON
ADMINISTRATION OF JUSTICE AND LEGAL**

*Nomination to the Offices of the Chief Justice, Attorney General and the
Director of Public Prosecution*

*Apollo Mboya,
Secretary/CEO
Law Society of Kenya
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P O Box 72219 - 00200 Nairobi | Kenya
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Website, www.lsk.or.ke*

21 7044A

The Law Society of Kenya

The Law Society of Kenya is 8,654 member body corporate established by the Law Society of Kenya Act Chapter 18 of the Laws of Kenya. One of its statutory objects as provided for in section 4 of the Act is to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya.

Pursuant to this mandate, the Law Society among other things circulates Bills to its members for comments, collates those comments and engages with relevant arms of the Government including Ministries and Departmental Committees of Parliament with a view to ensuring that any proposed legislation is drafted to achieve its desired goal of promoting the Rule of Law.

The Council is the governing body of the Law Society of Kenya. It comprises a Chairman, a Vice-Chairman and ten other members, all of whom must be members of the Law Society of Kenya. Council members are elected annually by the members of the Society by means of a postal ballot conducted in accordance with the Law Society of Kenya Act. Currently the Council comprise of:

- (i) Kenneth Okide -Chairman
- (ii) Florence Kajuju- Vice Chairman
- (iii) Joseph Munyithya-Member
- (iv) Isaac Wamaasa-Member
- (v) Eric Mutua-Member
- (vi) George Ochich-Member
- (vii) John Mburu-Member
- (viii) Roselyne Odede-Member
- (ix) Lillian Omondi-Member
- (x) Justus Munyithya-Member
- (xi) Alfred Ochieng-Member
- (xii) Faith Waigwa-Member

In the performance of its mandate, the Law Society of Kenya invites comments from members on legal issue, collates those comments before engaging with relevant arms of government and other stakeholders.

INTRODUCTION

On 28th January 2011 a dispatch from Presidential Press Service said the President "*after consultation with the Prime Minister of the Republic of Kenya Raila Odinga*" has nominated Justice Alnashir Visram for the Chief Justice, Pro. Githu Muigai as the Attorney General, Mr. Kioko Kilukumi as the Director of Public Prosecutions and Mr William Kirwa as Controller of Budget. The Prime Minister on 29th January 2011 pronounced his shock and dismay of the nominations without due consultations as required by the Constitution.

Stand of the Judicial Service Commission

The Judicial Service Commission (JSC) in a statement issued on 30th January 2011 demanded a transparent, competitive, flawless, free and fair process devoid of partisan politics and which would win public confidence that entails a withdrawal of the nominations and a fresh start. The Attorney General who is the principal legal advisor signed the joint statement of the JSC to that effect and being highly learned and experienced in law, the President ought to take his advice.

Article 172(1) state that the Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.

Stand of the Commission on Implementation of the Constitution

The Commission on Implementation of the Constitution (CIC) also followed suit on 30th January 2011 and stated *inter alia* that the letter of the Constitution as provided for in Article 166 read together with Sections 24 and 29 of the Sixth schedule require that the appointment of the Chief Justice by the appointing authorities should be as follows:

- That the process of appointment should commence with recommendations by the Judicial Service Commission to the President who in turn should consult the Prime Minister after which the President forwards the name of the nominee to the National Assembly for approval before final appointment by the President.

- That the role of the Judicial Service Commission in the appointment of the Chief Justice should be respected, and the Commission allowed to undertake the function reserved to it by the Constitution

On the nominations of the Attorney General, the Director of Public Prosecutions and the Controller of Budget, CIC said the process of their appointment is set out in Articles 156, 157 and 228 of the Constitution respectively. Though the stated Articles require that the three office holders be nominated and appointed by the President, subject to approval by the National Assembly, the current situation calls for due recognition of the National Accord and Reconciliation Act, meaning the PM must be fully consulted.

The CIC further observed that in the period before the first election, this section must be read together with the provisions of section 29 of the Sixth Schedule of the Constitution, which provides that *the process of appointment of persons to fill new offices and vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date, and be finalised within one year.*"

Transmission of the names of the nominees to the Speaker

Despite the statements from the JSC and the CIC, the Head of Public Service by a letter of 31st January 2011 transmitted the names of the nominees for processing by Parliament.

Ruling of the Court

On 3rd February 2011 Justice Daniel Musinga in a High Court Petition No. 16 of 2011 issued a Ruling that the nominations did not comply with Article 166 read together with Section 24(2) of Schedule 6 and that Article 27(3), was violated since there was no woman nominated in any of the four positions.

Article 166(1) of the Constitution states: *"The President shall appoint the Chief Justice and Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly."*

Section 24(2) of Schedule 6 provides that *a new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.*

Article 27(3) states that *Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

The Justice Musinga further observed that:

“ the National Assembly will be perpetuating an unconstitutional act unless the Speaker of the National Assembly points out the unconstitutionality of the intended action and thus disallows the process of approval, this court is under obligation to make an appropriate declaration and bring it to the attention of the National Assembly and declared that it would be unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on January 28th 2001.”

Ruling of the Speaker to the National Assembly

On 3rd February 2011 the Speaker declined to make a determination as to whether or not the nominations transmitted to him by the Office of His Excellency the President were or were not constitutionally arrived nor whether there was no or was not consultation within the meaning of the Constitution, nor whether or not ethnic diversity and gender equality were observed. The speaker also withheld the determination or comment on the veracity and weight to be accorded to the letter received from the Prime Minister.

The Speaker directed that the two letters from the President and the Prime Minister be forwarded to the Departmental Committees on Justice and Legal affairs and Finance, Planning and Trade according to their respective mandates for disposal as provided for in the Standing Orders and the law.

The constitutionality of the nomination having been addressed by the High Court Ruling in Petition No. 16 of 2011(See annex 1), this memorandum therefore concentrates on the following outstanding issues:

1. What consultation means in the context of Section 24(2) of Schedule 6 of the Constitution.
2. Suitability of the nominees. In view of the stage of the nominations and due to the fact that there is no other opportunity to address the issue of suitability if the nominees were to be appointed, the Law Society takes the opportunity to converse on the issue.

WHAT IS CONSULTATION

The Constitution does not define the expression consultation. However the expression **"in consultation"** and **"after consultation"** have been examined in other jurisdictions such as South Africa where in the Interim Constitution it was defined:

*"such decision shall require the concurrence of such other functionary: Provided that if such functionary is a body of persons, it shall express its concurrence in accordance with its own decision-making procedures"*¹

By using the expression **"In consultation"**, the legislature attempted to *"describe the joint action of the head of government and the members of the Cabinet as it exists in the Westminster system."*

The expression is used in the 1996 Constitution of South Africa but is no longer defined. It is used in relation to the second category of Presidential powers referred to above. In the 1996 Constitution, the expression **"together with"** is used and the new terminology does not change the constitutional position. The actual degree of consultation will depend on the prevailing political circumstances and the political style of the president. However, it is a strong form of consultation.²

The term **"after consultation"** which is used in Section 24(2) of Schedule 6 of the Constitution of Kenya is also used in the interim constitution of South Africa as well as the present Constitution of South Africa.³ It is defined by requiring that *"such decision shall be taken in good faith after consulting and giving serious consideration to the views of such functionary."*

¹ Constitution of the Republic of South Africa of 1993, Section 233(3)

² Klaaren and Chaskalson in Constitutional Law of South Africa 3-10

³ See Constitution of the Republic of South Africa 108 of 1996 section 174(3) dealing with appointment of judicial officers.

SUITABILITY OF THE NOMINEES

Due to the fact that the nominations were done without public participation and there is no other forum to determine the suitability of nominees, the Law Society of Kenya forwards the following information.

Justice Alnashir Visram

1. In the Nairobi Civil Appeal No. 9 of 2007, the judge is a respondent in a matter for failure to remit the proceeds of a sale totaling Ksh 14,167,080. In the matter the judge has sworn an affidavit to the fact that he resigned as a partner in the law firm of Messers Veljee Devshi & Bakrania Advocates on 1st August 1998 (see page 81 in the bundle annexed).

This contradicts the declaration accompanying application for practising certificate for the year 1998 and 1999 filed with the Law Society of Kenya in which the judge stated that he was the Employer in the said law firm (See page 94 a & b)

2. In Nairobi Court of Appeal Civil Application No. 265 of 2009 the judge sitting in a bench comprising two other judges took out a matter from a cause list and denied a hearing to a litigant on the basis of extraneous issues *inter alia*:
 - That the litigant is not happy appearing before all judges in the Republic of Kenya
 - That the litigant according to press reports filed a complaint in the UN Human Rights Committee in Geneva against his brother Judge.

(see Judgment annexed to this memorandum).

Mr. Kioko Kilukumi

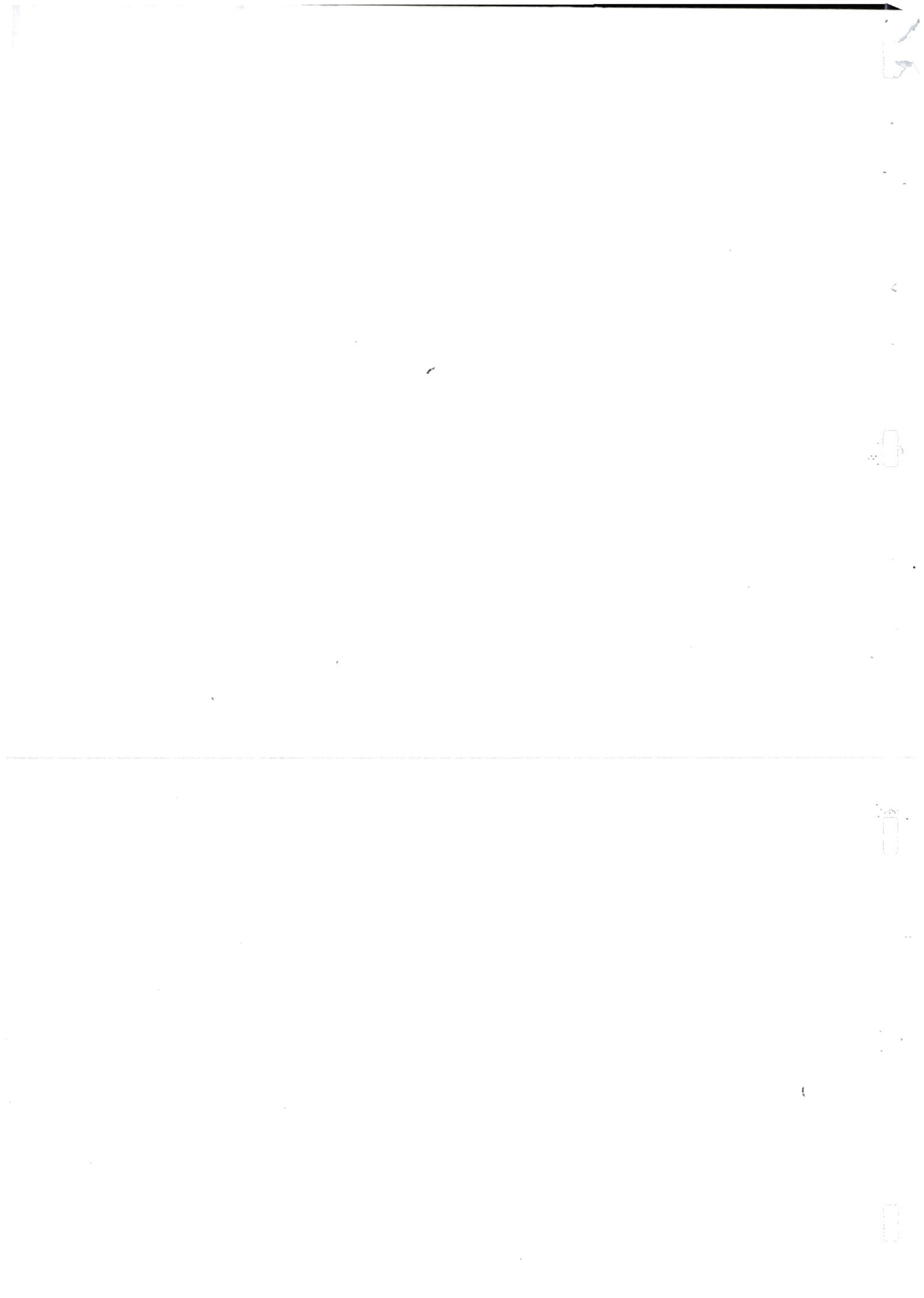
1. It is public knowledge that Mr Kilukumi has been acting for a client facing investigation by the International Criminal Court (ICC). This is likely to bring conflicts of interest since Kenya is actively campaigning to defer the ICC process and put in place a domestic process for the prosecution of perpetrators of 2007 post-election violence. That Process will to a great extent depend on the Director of Public Prosecution for which Mr. Kilukumi has been proposed.

2. Mr Kilukumi was one of the beneficiaries of the Ksh 72 million paid by the State Law Office through the law firm of Waweru Gatonye Advocate in contravention of the Government financial regulations on the following account:

- The payment voucher was signed by Mr. Wanjuki Muchemi, Solicitor General as a signatory as the accounting officer and the AIE Holder(Authority to Incur Expenditure) which is contravention of the Government financial regulations
- The said payment was for six Advocates and there is no evidence of the amount of payment each received since the payment was done to one advocate for distribution to others for reasons that are yet to be explained.

(see copy of the payment voucher annexed to this memorandum).

3. The issues canvassed herein and any other that may be within the knowledge of the public can only be canvassed if there is public participation in the nomination as required by Article 10(2) (a) of the Constitution of Kenya.



February 9, 2011

The Chairperson
Departmental Committee on Finance, Planning and Trade
Kenya National Assembly
Nairobi, Kenya

Dear Sir

Re: NOMINATION TO THE OFFICE OF CONTROLLER OF BUDGET

As Kenyans we believe that his Excellency the President did not follow constitutional process in the appointment of the Controller of Budget. As per the constitution Article 228 (1) it is stated that there shall be a Controller of Budget, who shall be nominated by the President and, with the approval of the National Assembly appointed by the President. This Article should be read in the spirit of the National and Reconciliation Accord which is an integral part of the constitution and which requires consultation between the two Principals in order to ensure harmony.

Further more if the said nomination were to succeed, this action would contravene the constitutional requirement as per Article 250(4), which states that 'appointments to commissions and independent offices shall take into account the national values mentioned in Article 10, and the principle that the composition of the commissions and offices taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya' will be violated because the Chair of Revenue Allocation Commission is from the same region and same ethnic community as that of the proposed Controller of Budget.

Further it is important to note that in making public appointments the process must meet the values enshrined in Article 10 of the Constitution of Kenya, there must be transparency, social justice inclusiveness, non discrimination among other values and this entails that all citizens must be allowed to participate and in essence therefore appointments to public offices cannot be done only by the two Principals without giving every Kenyan the opportunity of applying for these public offices.

It is further important to note that appointments to commissions which are public offices as a whole must adhere as per the requirements of the Constitution Article 232 (h) which demands representation of Kenya's diverse communities, regional and ethnic balance which also includes religious balance.

If this action of the President is accepted, it will set a very dangerous precedent because nothing will stop the current or any future Presidents from duplicating his/her actions in the appointment of other constitutional and independent offices including that of the Independent Electoral and Boundaries Commission. This would have serious impact on the credibility of the 2012 elections, just like it did with the unilateral appointments of the defunct Electoral Commission of Kenya that blatantly disregarded the recommendations of the Inter-Parties Parliamentary Group (IPPG). A discredited judiciary and election commission were principle contributors to the 2007 chaos.

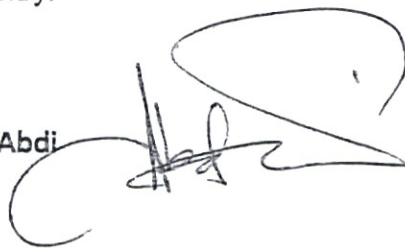
It is our submission that the process is flawed beyond repair and it needs to be restarted afresh and must conform with the other critical constitutional requirements relating to transparency, citizen participation, gender, regional and ethnic balance.

We must not allow Kenyans to be dragged along the same path of impunity, disregard of the opinion of Wananchi and unconstitutional approach to critical national issues.

We thank the Committee for giving us the opportunity to contribute and to hear us on matters affecting our beloved country.

Signed

**Abdullahi Abdi
Chairman**



NATIONAL MUSLIM LEADERS FORUM

Institute of Certified Public Accountants of Kenya,
CPA Centre, Ruaraka, Thika Road.
P. O. Box 59963 - 00200 Nairobi, Kenya
Tel: (020) 2304226/7; 8068570/1
Mobile: (+254) 727531006 / 733856262 / 721469796
Fax: (020) 8562206
Drop in box no. 164 Revlon Professional Plaza



11th February 2011

Hon Chris Okemo,
Chairman,
Parliamentary Committee on Trade, Finance and Planning
National Assembly, Parliament Buildings
Nairobi.

Dear Sir,

RE: PRESIDENTIAL APPOINTMENTS TO VARIOUS CONSTITUTIONAL OFFICES

We, The Institute of Certified Public Accountants of Kenya, have followed keenly, the events surrounding the nomination by the President to various constitutional offices: that of the Chief Justice of the Republic of Kenya, the Attorney General, the Director of Public Prosecutions and the Controller of Budget

We wish to reiterate the need to respect the New Constitution that was overwhelmingly and enthusiastically voted for by the people of Kenya. To ensure that the Institutions created by the Constitution serve the purpose for which they were intended it is important that their establishment and any appointments to them is done through a process that is inclusive and is accepted by all Kenyans. This will give these Institutions credibility and allow them to function properly.

Appointments to Constitutional Offices

It is our considered view that the appointment should be undertaken in accordance with Constitution, both in the spirit and to the letter. The process of appointment of all holders of public offices must be in a transparent and accountable manner, providing equal opportunities to all Kenyans with the requisite competence to occupy these positions. Indeed one of the values espoused in the Constitution is transparency and this must be respected. We propose that such positions should be advertised so as to allow Kenyans to express their interest and provide a wider pool of professionals to select from.

The Speaker of the National Assembly by his ruling on Thursday, 3rd February 2011, indeed provided the two Principals with an opportunity to redeem the We wish to categorically state that in as much as we do not cast any aspersions at the character or personalities of the presidential appointees process and image of their offices. We urge President Kibaki and Prime Minister Raila Odinga to address the current stalemate and in doing so distance themselves from any form of political machinations and offer much needed leadership at this critical point in time.

Controller of Budget

While we respect and do not in any way cast aspersions on the character and personality of the proposed appointee to the Office of the Controller of Budget, we wish to point out that the nominations criterion set out in Section 228 (2) prescribes that to qualify to be nominated by the President, one needed to have accumulated ten (10) experience in auditing public finance management. By extension therefore this Section alludes to the fact that the Controller of Budget should ideally be a professional accountant who has undertaken extensive auditing as well as has knowledge of public finance management. The role of managing expenditure release is traditionally an accounting function and as such we recommend that the public sector adopts the same practice and ensure that the Controller of Budget is an qualified accountant.

The Constitution further envisaged the Office of Controller of Budget as being key in fighting corruption and ensuring greater transparency and accountability in Government spending. It is therefore fitting that the Controller of Budget should be a member of a professional body that has

a Code of Ethics for its members and has a robust disciplinary process to enforce adherence to its ethical values. Such a professional body also prescribes standards of practice and professional work that guide its members so as to ensure that their work is up to standard and serves the public interest.

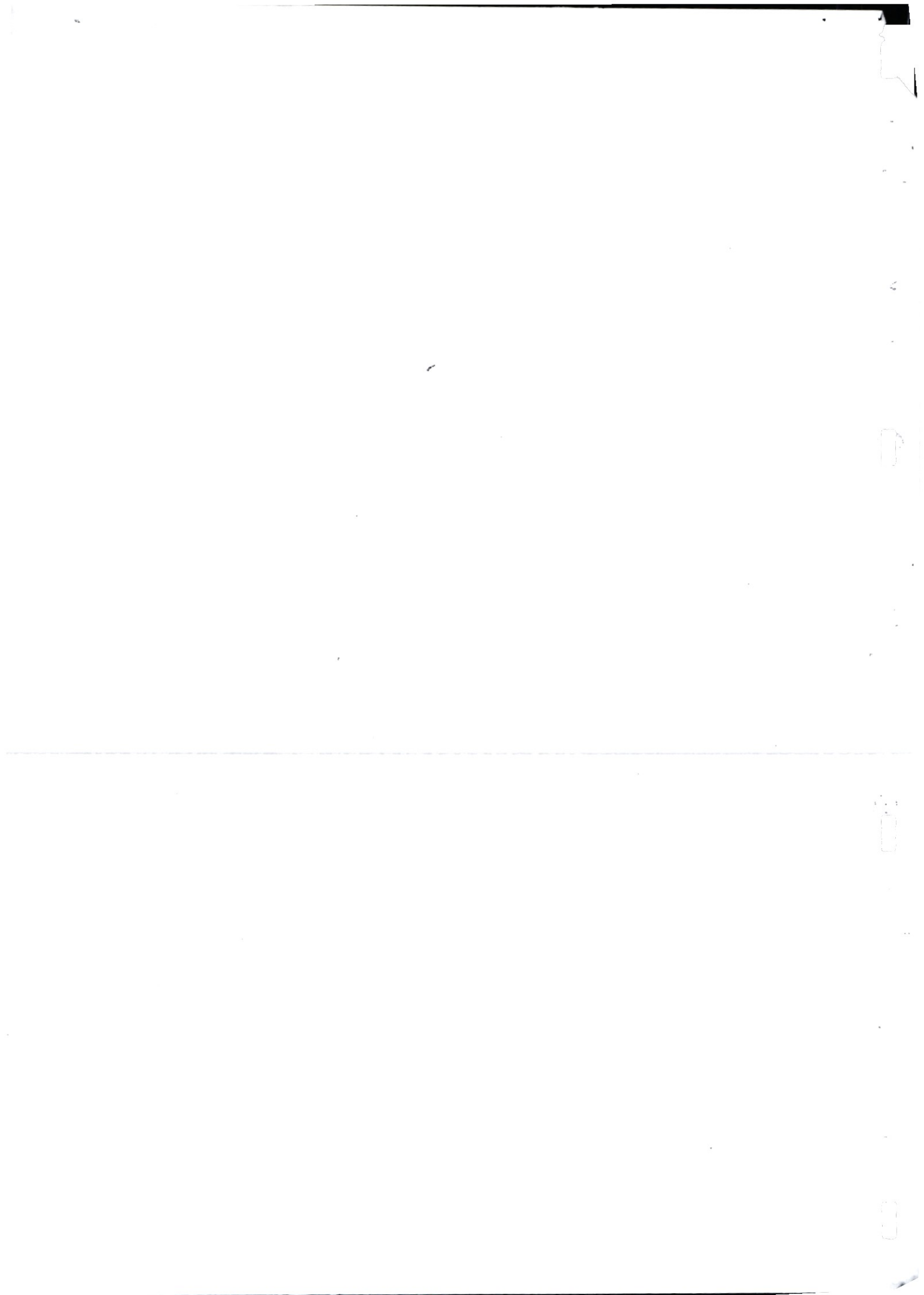
It is for this reason we propose that the Controller of Budget and indeed all offices that deals with accounting and auditing matters such as the Auditor General should be held by professional accountants who are members of the Institute. The nomination and appointment of a professional to this critical office with introduce professionalism within the management of public finances. It is only in this way that the process will have the credibility it deserves.

Yours faithfully,



**Michael M. Itote,
Chairman,**

The Institute of Certified Public Accountants of Kenya (ICPAK) is the professional organization for Certified Public Accountants in Kenya established in 1978 by the Accountants Act, CAP 531. Since then, ICPAK has been dedicated to development and regulation of the accountancy profession in Kenya so as to enhance its contribution and that of its members to national economic growth and development.



**“ACTING TOGETHER FOR KENYA,
AGREEMENT ON THE PRINCIPLES OF
PARTNERSHIP OF THE COALITION
GOVERNMENT”**

Preamble:

The crisis triggered by the 2007 disputed presidential elections has brought to the surface deep-seated and long-standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country. The Kenyan people are now looking to their leaders to ensure that their country will not be lost.

Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process.

With this agreement, we are stepping forward together, as political leaders, to overcome the current crisis and to set the country on a new path. As partners in a coalition government, we commit ourselves to work together in good faith as true partners, through constant consultation and willingness to compromise.

This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all.

Handwritten text at the top of the page, possibly a signature or name, appearing as "H. H. H." or similar characters.

To resolve the political crisis, and in the spirit of coalition and partnership we have agreed to enact the National Accord and Reconciliation Act, 2008, whose provisions have been agreed upon in their entirety by the parties hereto and a draft copy thereof is appended hereto.

Its key points are:

- There will be a Prime Minister of the Government of Kenya, with authority to co-ordinate and supervise the execution of the functions and affairs of the Government of Kenya.
- The Prime Minister will be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party does not command a majority.
- Each member of the coalition shall nominate one person from the National Assembly to be appointed a Deputy Prime Minister.
- The Cabinet will consist of the President, the Vice President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers. The removal of any Minister of the coalition will be subject to consultation and concurrence in writing by the leaders.
- The Prime Minister and Deputy Prime Ministers can only be removed if the National Assembly passes a motion of no confidence with a majority vote.
- The composition of the coalition government will at all times take into account the principle of portfolio balance and will reflect their relative parliamentary strength.

- The coalition will be dissolved if the Tenth Parliament is dissolved, or if the parties agree in writing; or if one coalition partner withdraws from the coalition.
- The National Accord and Reconciliation Act shall be entrenched in the Constitution.

Having agreed on the critical issues above, we will now take this process to Parliament. It will be convened at the earliest moment to enact these agreements. This will be in the form of an Act of Parliament and the necessary amendment to the Constitution.

We believe by these steps we can together in the spirit of partnership bring peace and prosperity back to the people of Kenya who so richly deserve it.

Agreed this date 28 February, 2008.

H. E. President Mwai Kibaki

Government/Party of National Unity

Hon. Raila Odinga

Orange Democratic Movement

Witnessed By:

H.E. President Jakaya Kikwete

President of the United Republic of

Tanzania and Chairman of the African Union

H.E. Kofi A Annan

Chairman of the Panel of

Eminent African Personalities”

APPENDIX (2)

(Minutes)

MINUTES OF THE FOURTH SITTING OF THE DEPARTMENTAL COMMITTEE (F) ON FINANCE, PLANNING AND TRADE HELD ON MONDAY 7TH FEBRUARY 2011, IN COMMITTEE ROOM NO. 7, MAIN PARLIAMENT BUILDING AT 2.30 P.M.

PRESENT:

Hon. Chrysanthus Okemo, EGH, M.P. – **(Chairman)**
Hon. (Prof.) Philip Kaloki, M.P. - **(Vice Chairman)**
Hon. Musikari Kombo, M.P.
Hon. Lucas Chepkitony, M.P.
Hon. Ntoitha M'Mithiaru, MP
Hon. Ahmed Shakeel Shabbir, M.P.
Hon. Nelson Gaichuhie, MP
Hon. Nkoidila Ole Lankas, M.P.
Hon. Jakoyo Midiwo, MGH, M.P.
Hon. Sammy Mwaita, M.P.
Hon. Lenny M. Kivuti, M.P.

IN ATTENDANCE:

Hon. Martin Ogindo, MP
Hon. Fred Outa, MP

KENYA NATIONAL ASSEMBLY

Patrick Gichohi	-	Clerk of the National Assembly
Consolata Munga	-	Deputy Director, Committee Services
Jeremiah Nyengenyne	-	Principal Legal Counsel
Florence Atenyo-Abonyo	-	First Clerk Assistant/Committee Secretary
Abdullahi Ali Aden	-	Third Clerk Assistant
Rose Mudibo	-	Committee Secretary

MIN. NO. 12/2011

PROCEDURE FOR EXECUTING THE TASK REFERRED TO THE COMMITTEE ON THE NOMINATION PROCESS

1. The Committee resolved to consider all aspects of the proposed nomination, including compliance with the constitution and all relevant enabling and incidental laws.

2. In executing the task referred to it by the Speaker, the Committee resolved to:-

- (i) Deliberate in the matter in the following sequence:-
 - (a) Consider the constitutionality of the nomination process;
 - (b) Consider the suitability of the proposed nominee; and
 - (c) Make recommendations.
- (ii) Adopt the two (2) letters received from both the Office of His Excellency the President and the Rt. Hon. Prime Minister as reference materials.
- (iii) Issue a press conference to invite the public to submit written memorandum on the subject matter to ensure inclusiveness and public participation.
- (iv) Invite the following persons/institutions to appraise the Committee on the subject matter:-
 - Representatives of both the office His Excellency the President and Rt. Hon. Prime Minister regarding the letters from the two offices;
 - Attorney General;
 - Minister for Justice & Constitutional Affairs;
 - Commission on the Implementation of the Constitution;
 - Judicial Service Commission;
 - Law Society of Kenya;
 - International Commission of Jurists (K);
 - National Council of Churches; and
 - Muslims

HIGH COURT RULING

The Committee was informed that there is the doctrine of separation of powers and that the Ruling of the High Court on 3rd February, 2011 declaring the nominations unconstitutional does not prevent the Committee from discharging its mandate. Furthermore, the Court itself acknowledged that Parliament could not be stopped from discharging its constitutional functions.

ADJOURNMENT

The Chairman adjourned the meeting at thirty minutes past Eleven O'clock until Monday 7th February at 2.30 p.m.

Signed
(Chairman)

Date 12/2/2011

MINUTES OF THE FIFTH SITTING OF THE DEPARTMENTAL COMMITTEE (F) ON FINANCE, PLANNING AND TRADE HELD ON TUESDAY 8TH FEBRUARY 2011, IN COMMITTEE ROOM NO. 7, MAIN PARLIAMENT BUILDING AT 10.00 A.M.

PRESENT:

Hon. Chrysanthus Okemo, EGH, M.P. - **(Chairman)**

Hon. (Prof.) Philip Kaloki, M.P. - **(Vice Chairman)**

Hon. Musikari Kombo, M.P.

Hon. Lucas Chepkitony, M.P.

Hon. Ntoitha M'Mithiaru, MP

Hon. Ahmed Shakeel Shabbir, M.P.

Hon. Nelson Gaichuhie, MP

Hon. Nkoidila Ole Lankas, M.P.

Hon. Jakoyo Midiwo, MGH, M.P.

Hon. Sammy Mwaita, M.P.

Hon. Lenny M. Kivuti, M.P.

IN ATTENDANCE:

Hon. Martin Ogindo, MP

Hon. Fred Outa, MP

INTERNATIONAL COMMISSION ON JURISTS (K)- ICJ

Priscilla Nyokabi - Council Member, ICJ-K

Chris Gikari - Programme Officer

Esly Sainna - Programme Officer

Anne Nderi - Programme Officer

OFFICE OF THE PRESIDENT

Amb. Francis Muthaura, EGH - Permanent Secretary/ Secretary to the Cabinet and
Head of Public Service

Prof. Nick Wanjohi, CBS - Private Secretary to the President

Prof. Kibutha Kibwana, EGH - Advisor, Constitutional Review

Mr. Kennedy Kihara, EBS - Secretary/ Liaison, Parliament and Commissions

KENYA NATIONAL ASSEMBLY

Anthony Njoroge - Legal Counsel
Samuel Karura - Legal Counsel
Florence Atenyo-Abonyo - First Clerk Assistant/Committee Secretary

MIN. NO. 15/2011

SUBMISSION BY THE ICJ

The ICJ informed the Committee that:-

- (i) Article 165(3)(d)(i) gives the High Court exclusive jurisdiction to hear any question regarding the interpretation of the Constitution. The Article further specifies that such interpretation includes the determination of whether anything said to be done under the authority of the constitution is constitutional or not.
- (ii) A petition filed in the High Court to determine the constitutionality of the nomination process by the H.E. the President for the constitutional offices of the Chief Justice, the Attorney General, the Director of Public Prosecution and the Controller of Budget was heard and determined on 3rd February 2011, that the nominations were unconstitutional and that the nominees should therefore not be processed for their proposed offices.
- (iii) In the light of its assurance to the International Community of its intent to prosecute perpetrators of post-election violence, the government is revamping the Judiciary. Therefore, it would be important to respect the decisions of the Judiciary, otherwise such revamping would be superficial and it cannot be ruled out if post election violence perpetrators would also not respect the court decisions as aggrieved parties.

The ICJ informed the Committee that:-

- (i) Clause 29 of the Sixth Schedule require H.E. the President to consult with the Rt. Hon. Prime Minister in making any appointment to new constitutional offices or those that fall vacant. Therefore, the nomination of the Attorney General, the Director of Public Prosecution and the Controller of Budget legally require a consultative process between the two Principals
- (ii) Consultation in various case laws and jurisdiction has been accepted as, ***“such decisions shall require the concurrence of such other functionary; provided that if such functionary is a body of persons, it shall express its concurrence in accordance with its own decision making process”***.
- (iii) Under the National Accord and Reconciliation Act, the two Principals are equal partners in the governance of the country and the new constitution also takes cognizance of this. Therefore, the assertions by the Rt. Hon. Prime Minister that he was not consulted are grave and should be ventilated prior to nominees for such process being accepted.
- (iv) Articles 69, 118, 196, and 201 of the Constitution provide for public participation in governance. Therefore, H.E. the President violated the Constitution by excluding public participation. The public ought to have been informed of every step of the nomination process as constitutional offices cannot be legally filled behind closed doors and still be in compliance with these provisions.

In view of the foregoing, the ICJ recommended to the Committee the following:-

- (i) To declare the nomination process unconstitutional in solidarity with the High Court and render the process back to H.E. the President and the Rt. Hon. Prime Minister for proper nomination in accordance with the Constitution.
- (ii) That the nomination process of the Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget should be competitive, transparent and accountable. Therefore, these constitutional offices should be advertised, shortlisted and nominated publicly.

SUBMISSION BY THE PERMANENT SECRETARY/
SECRETARY TO THE CABINET AND HEAD OF PUBLIC
SERVICE

He informed the Committee that the consultative meetings between H.E. the President and the Rt. Hon. Prime Minister on the nomination process took place as follows:-

6th January, 2011

The agenda on consultations between H.E the President and the Rt. Hon. Prime Minister had the following items:-

1. Fast tracking of appointments necessary for the establishment of a local mechanism for the trial of post-election violence suspects.
 - Gazette Notice advertising the post of Director of Public Prosecutions.
 - Identification of a nomination for the post of Chief Justice.

- Deputy Chief Justice to be recommended by the Judicial Service Commission which is already in place.
2. Advertisement for the post of Controller of Budget.
 - Gazette Notice
 3. Renewal of contract for the Director General, NSIS
 - Being recommended for renewal to ensure continuity.
 4. To attend to urgent legislation, vet and approve nominations of persons to fill state offices.

(i) The Minutes on Agenda items 1 and 2 of the Meeting of 6th January, 2011 states that:-

(a) The two Principals considered fast tracking of appointments necessary for the establishment a local mechanism for the trial of post-election violence suspects and the nominations were:-

- Chief Justice
- Director of Public Prosecutions
- Controller of Budget
- Deputy Chief Justice

(b) The two principals agreed that the nomination of the Deputy Chief Justice be done through the Judicial Service Commission while the others were to be done directly by the Principals through consultations as provided for in the Constitution.

(c) The Technical Team was authorised to facilitate identification of the persons through consultations.

(ii) The Committee was further informed that:-

(a) The two Principals disagreed with the proposal by the Technical Team to advertise for the positions and on the basis of legal advice received from Prof.

Kivutha Kiwona, agreed not to advertise for the positions but to consult in accordance with the Constitution and agree on the names.

(b) The Ministry of Finance was requested but did not submit nominees for the position of Controller of Budget and Mr. William Kirwa was settled on from the list of applicants for the position of Chairperson of the Commission on Revenue Allocation. The National Security Intelligence Service also gave a clean report on Mr. Kirwa to the Head of Public Service verbally.

(ii) 27th January, 2011

1. Item 5 on the proposed agenda was constitutional appointments of:- Chief Justice, Deputy Chief Justice Director of Prosecutions, Attorney General, and Controller of Budget.

2. The Minutes on Agenda item 5 on consultations between the Office of the President and the Rt. Hon. Prime Minister states that:-

(i) H.E. the President presented a list of the following persons which had been compiled out of consultations between the 2 Principals for appointments to various positions.

POSITION	PROPOSED PERSON FOR NOMINATION	CURRENT POSITION	COUNTY
Chief Justice	Justice Paul Kihara Kariuki	High Court Judge	Kiambu
Deputy Chief Justice	Justice Hannah Okwengu	High Court Judge	Homa Bay
Attorney General	Mr. Fred Ojiambo	Private practice	
Director of Public Prosecutions	Mr. Kioko Kirukumi	Private Practice	
Controller of Budget	Mr. William Kirwa	MD, Agricultural Dev. Corporation	
Kenya Anti-corruption Commission	Prof. PLO Lumumba	Director, KACC	

- (ii) The Principals referred the list after consultations to the Technical Team comprising: Amb Francis Mathuara, Dr. Mohammed Isahakhia, Prof. Nick Wanjohi, and Mr. Caroli Omondi to scrutinize and prepare a harmonized position.
- (iii) H.E. the President indicated that he needed to make the nominations by the following day before his departure for the AU meeting in Addis Ababa and therefore the Technical Team was directed by the Principals to present a harmonized list later in the afternoon.
- (iv) The Technical Team met to harmonize the list and agreed on all the names except for the proposals for Chief Justice. The Technical Team agreed to forward separately to the Principals the following three names for the position of Chief Justice with request that the Principals assist in selecting one name for nomination.
- Justice Paul Kihara
 - Justice Riaga Omolo
 - Justice Magan Visram

(iii) 7th February, 2011

The proposed Agenda included the following items:-

- Review of the nomination to fill constitutional offices.
- Review of government approach in localizing the ICC.

The press statement issued by the Presidential Press Unit after the meeting stated that, the two Principals agreed to respect the on-going parliamentary process and its outcome on the issue of the nominations currently under consideration by Parliament.

MIN. NO. 19/2011

SUBMISSION BY PROF. KIBUTHA KIBWANA ON THE NOMINATION OF CONTROLLER OF BUDGET

He presented a written submission and informed the Committee that:-

- (i) The nomination of the Controller of Budget is provided for by Article 228(1) of the Constitution which states that, there shall be a Controller of Budget who shall be nominated by the President and with the approval of the National Assembly, appointed by the President.
- (ii) It is the President's constitutional duty to nominate the person qualified to be eventually appointed to be Controller of Budget.
- (iii) Under Section 29(2) of the Sixth Schedule, the President is required, subject to the National Accord and Reconciliation Act, to consult the Rt. Hon. Prime Minister on the name that the President proposes as Controller of Budget.
- (iv) Article 259(11) describes, inter alia, the meaning of consultation but it should be noted that consultation does not mean concurrence as the value of consultations is to help the President access any vital information regarding any nominee before his ultimate

decision on the suitability.

- (v) Kenya's unique position in which the Rt. Hon. Prime Minister will be in existence until the next General Election requires that, H.E. the President must consult with the Prime Minister before he makes any nomination to an office requiring National Assembly approval.
- (vi) If the H.E. the President refused to consult the Rt. Hon. Prime Minister where consultation is required, then the purported nomination by H.E. the President is null and void.
- (vii) When the President presents names to the Speaker of National Assembly under his hand in which the President confirms that consultations have taken place, it is not the duty of the Speaker to question the President's action. Any dissatisfied party can challenge the matter in any appropriate legal fora.

MIN. NO. 20/2011

ADJOURNMENT

The Chairman adjourned the meeting at thirty minutes past Two O'clock until this afternoon at 3.00 p.m.

Signed 
.....
(Chairman)

Date12/2/2011.....

MINUTES OF THE SIXTH SITTING OF THE DEPARTMENTAL COMMITTEE (F) ON FINANCE, PLANNING AND TRADE HELD ON TUESDAY 8TH FEBRUARY 2011, IN COMMITTEE ROOM NO. 7, MAIN PARLIAMENT BUILDING AT 3.00 P.M.

PRESENT:

Hon. Chrysanthus Okemo, EGH, M.P. - **(Chairman)**
Hon. (Prof.) Philip Kaloki, M.P. - **(Vice Chairman)**
Hon. Musikari Kombo, M.P.
Hon. Lucas Chepkitony, M.P.
Hon. Ntoitha M'Mithiaru, MP
Hon. Ahmed Shakeel Shabbir, M.P.
Hon. Nelson Gaichuhie, MP
Hon. Nkoidila Ole Lankas, M.P.
Hon. Jakoyo Midiwo, MGH, M.P.
Hon. Sammy Mwaita, M.P.
Hon. Lenny M. Kivuti, M.P.

IN ATTENDANCE:

Hon. John Mbadi, MP

OFFICE OF THE RT. HON. PRIME MINISTER

Mr. Caroli Omondi - Chief of Staff
Head of Public Service
Mr. Miguna Miguna - Constitutional Advisor
Mr. Mugambi Imanyara - Legal Advisor

KENYA NATIONAL ASSEMBLY

Anthony Njoroge - Legal Counsel
Samuel Karura - Legal Counsel
Florence Atenyo-Abonyo - First Clerk Assistant/Committee Secretary

OFFICE OF THE PRIME MINISTER

Mr. Caroli Omondi informed the Committee that:-

1. Consultative Meetings

There are no minutes of the Meeting of 27th January, 2011 between H.E the President and the Rt. Hon. Prime Minister and no Minutes of the meetings between the two Principals have been kept to best of his knowledge. This is confirmed by the two draft agenda from both the two offices which do not contain the items, "Adoption of Agenda" or "Confirmation of the Minutes".

2. Technical Committee on nomination

- (i) The Principals had agreed that a Panel (Committee) be established comprising representatives of the Office of the President, Office of the Prime Minister, Law Reform Commission, Law Society of Kenya, Judicial Service Commission and the Public Service Commission, to identify and recommend three (3) candidates for each position to the Principals.
- (ii) The Panel was to be constituted and chaired by the Head of Public Service/Secretary to the Cabinet. The Panel met for the first time and only time during which the Head of Public Service invited the President's Private Secretary to chair on his behalf.
- (iii) The Panel comprising the President's Private Secretary; Permanent Secretary, Ministry of Justice & Constitutional Affairs; Permanent Secretary, Provincial Administration and Internal Security; Solicitor General; and the Chief of Staff, Office of the Prime Minister, met only once to deal with only preliminary aspect of the nomination

matter. The Panel discussed the criteria and options for appointing a Chief Justice and agreed that the key factors on criteria be seniority, competence, integrity and reform-mindedness.

- (iv) The Committee agreed that:-
 - (a) The new Chief Justice could be appointed from the Commonwealth, both the Judiciary and the private practice in Kenya but the Committee did not discuss any nominee to the position of the Chief Justice.
 - (b) The Judiciary would be invited to provide a list of the serving Judges so as to establish their seniority.
 - (c) Candidates for the position of the Director of Prosecutions would be identified from private practice, prosecution service and from the Judiciary. While various members mentioned various names of prominent criminal law practitioners, there was no discussion on the suitability of any nominees.
- (v) The Committee did not discuss the position of the Attorney General and did not also discuss the position of Controller of Budget, as there was no representative from the Treasury present at the meeting.
- (vi) There are no minutes of the meeting of the Committee and the Committee has not met again after its first and only meeting. The Committee did not produce any joint report and never reported back to the two Principals.

THE NATIONAL ACCORD & RECONCILIATION ACT AND
THE NOMINATION PROCESS

Mr. Caroli Omondi informed the Committee that:-

1. CONSULTATIONS

- (i) Appointments under the Constitution are subject to the National Accord & Reconciliation Act, which is premised on “real power-sharing”, “consultations” and willingness to compromise. Real power-sharing connotes equality and parity in making the appointments.
- (ii) Appointments are subject to the provisions of the National Accord which established the Grand Coalition government based on shared power. Consequently, any nomination must be made jointly by both coalition partners.
- (iii) Consultations within the framework of the National Accord therefore mean “**compromise**” between the Principals as the basis of any decisions on a matter under consideration.
- (iv) Consultations require that the parties consulting offer each other sufficient opportunity to exchange views; share sufficient information available on each nominee on the basis of full disclosure of accurate information; act reasonably and must be free and frank in exchanging views.
- (v) Consultation must be undertaken when the proposals are still in their formative stages without any fixed views all through to the end and consultation must not be treated “**perfunctorily**” or as a mere formality.

- (vi) Consultation must be practical and conducted within a time period sufficient for views to be exchanged fully and matters thoroughly interrogated. The timeframe depends on the seriousness of the matter and urgency is no substitute to sufficient time for practical consultations.

2. NATIONAL VALUES AND PRINCIPLES

- (i) The nominations breached the constitutional requirements of regional balance and gender parity as no woman was nominated.
- (ii) The nominee of the office of the Attorney General, if accepted, will put majority of all the senior positions within State Law Office under one ethnic group
- (iii) The nominee for the position of Director of Public Prosecutions, if accepted, will undermine the independence of the Prosecution Service in prosecuting pending cases of grand corruption in which the nominee has been defence counsel.

MIN. NO. 23/2011

REACTIONS ON THE STATEMENT BY THE VICE PRESIDENT IN PARLIAMENT ON 1ST FEBRUARY, 2011

Mr. Omondi Caroli made the following reactions to the Statement by the Vice President in Parliament on the consultative process between H.E. the President and the Rt. Hon. Prime Minister regarding the nomination matter:-

1. Technical Team

There was only one Technical Team which held only one meeting and therefore there were no "*Technical meetings*" or "*Technical Teams*" as alluded to by the Vice President.

2. Foreign Chief Justice

The Prime Minister did not express the view that we should have a foreign Chief Justice as alluded to by the Vice President, but only suggested that a transitional Chief Justice be appointed from the Commonwealth of a fixed non-renewable term of three (3) years for the following reasons:-

- (i) That it was important to get a new Chief Justice from a functioning Judiciary as such Chief Justice would be able to identify the shortcomings of our Judiciary and offer best international practices in reforming our Judiciary.
- (ii) That a Commonwealth Chief Justice would bring the credibility needed in establishing a local mechanism to deal with post-election violence matters and to negotiate with ICC, a referral of the pending cases.
- (iii) That such Chief Justice would not be seen as biased or partisan or beholden to any interest in the country.
- (iv) That the transition period would allow the country to assess newly appointed or promoted Judges and identify a suitable successor.
- (v) That a local candidate appointed from outside the Judiciary was likely to experience resistance within the Judiciary and thus undermine the reform process.
- (vi) That the current serving Judges had not been vetted as required by new Constitution and were therefore ineligible for appointment.

3. Justice Riaga Omolo as the Prime Minister's preference

The Prime Minister did not at anytime propose or insist on the choice of Justice Omolo as alluded to by the Vice President, but the Hon. Judge is ranked as the senior most Judge after the Chief Justice. It is in this respect that his name came under consideration in addition to having been vetted by the National Assembly as a Member of the Judicial Service Commission.

4. Mr. Fred Ojiambo

That Mr. Fred Ojiambo was replaced by Prof. Githu Muigai because the former did not have higher post-graduate qualification is incorrect because this was not a consideration before the Technical Committee.

5. Prime Minister's trip to Addis Ababa

The Rt. Hon. Prime Minister left for Addis Ababa on 28th January 2011, and the trip was known to both Amb. Francis Muthaura and Prof. Nick Wanjohi well in advance as it was discussed in the meeting of 27th January, 2011 under the agenda on the AU's Peace and Security Council. The clearance of the plane that would transport the Rt. Hon. Prime Minister to Addis Ababa was also discussed during the meeting.

6. Finalization of the consultations on nomination

- (i) The matter had not been finalized as at 27th January, 2011 as stated by the Vice President and further consultations were planned by the parties but the parties did not agree that Friday 28th January, 2011 would be the final date for the consultations.

(ii) There was no agreement that the Prime Minister would be consulted on phone while in Addis Ababa. Indeed the Prime Minister had proposed in writing that the consultations would be held face to face the following week vide the letter dated 27th January, 2011 to Amb. Francis Muthaura.

(7) Proposal to nominated Justice Visram

The proposal to nominate Justice Visram to the position of Chief Justice was never communicated to the Prime Minister as alluded to by the Vice President and the proposal was not discussed by the Technical Team.

(8) State House Comptroller phone call to Mr. Omondi

(i) The Comptroller called his phone at around 6.30 p.m. and informed him that H.E the President had wished to talk to the Rt. Hon. Prime Minister but did not divulge the subject matter.

(ii) The Prime Minister was at time attending the AU's Peace and Security Council Meeting with the other Heads of State and Government that started at 4.00 p.m. and ended around 11.00 p.m. in the night.

(iii) No aide was allowed into the meeting and he only had the opportunity to inform the Prime Minister at 11.30 p.m. while back at the Hotel that the Comptroller had called and informed him that H.E. the President had wished to talk to the Rt. Hon. Prime Minister but he was not aware of the subject matter.

- (iv) The Prime Minister only learned from the media during refreshment break that the nominations had been made for these positions.

MIN. NO. 24/2011

SUBMISSION BY MR. MIGUNA & MR. MUGAMBI

1. Mr. Miguna informed the Committee that:-

- (i) It is not true that it is the President's constitutional duty to nominate the person qualified to be eventually appointed to be the Controller as stated by Prof. Kibutha Kibwana under item No. 3 of his submission, without taking cognizance of the National Accord & Reconciliation Act.
- (ii) The instructions from the two Principals to the Technical Committee to submit three (3) names for each position was not complied with.
- (iii) The legal opinion for the government on the nomination process of the Controller of Budget should have only been sought from the Attorney General as principal legal advisor to the government and not Prof. Kivutha Kibwana.
- (iv) The nomination process was unconstitutional and therefore null and void as confirmed by Prof. Kibutha Kibwana in his submission under item No. 14, as the position if the President refused to consult the Prime Minister where consultation is required.

2. Mr. Mugambi informed the Committee that:-

- (i) The nomination process was unconstitutional and the letter and the spirit of the Constitution should be respected in the nomination process. Both Article 27(3) on equality for men and women; and

Article 27(8) on gender balance should be respected.

- (ii) The subject letter forwarding the nominees to the National Assembly from the Office of the President was not under the hand of H.E. the President as provided for in the Constitution but was signed by Amb. Francis Muthaura not for or on behalf of H.E. the President.

MIN. NO. 25/2011

ADJOURNMENT

The Chairman adjourned the meeting at Six O'clock until Wednesday 9th February, 2011 at 10.00 a.m.

Signed 
(Chairman)

Date 12/2/2011

MINUTES OF THE SEVENTH SITTING OF THE DEPARTMENTAL COMMITTEE (F) ON FINANCE, PLANNING AND TRADE HELD ON WEDNESDAY 9TH FEBRUARY 2011, IN COMMITTEE ROOM NO. 7, MAIN PARLIAMENT BUILDING AT 10.00 A.M.

PRESENT:

Hon. Chrysanthus Okemo, EGH, M.P. – **(Chairman)**

Hon. (Prof.) Philip Kaloki, M.P. - **(Vice Chairman)**

Hon. Musikari Kombo, M.P.

Hon. Lucas Chepkitony, M.P.

Hon. Ntoitha M'Mithiaru, MP

Hon. Ahmed Shakeel Shabbir, M.P.

Hon. Nelson Gaichuhie, MP

Hon. Nkoidila Ole Lankas, M.P.

Hon. Jakoyo Midiwo, MGH, M.P.

Hon. Lenny M. Kivuti, M.P.

Hon. Sammy Mwaita, M.P.

IN ATTENDANCE:

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)

Mr. Charles Nyachae	-	Chairman
Dr. Elizabeth Muli	-	Vice Chairperson
Prof. Peter Wanyande	-	Commissioner
Mr. Kamotho Waiganjo	-	”
Mr. Kibaya Laibuta	-	”
Dr. Florence Omosa	-	”
Ms Catherine Muma	-	”
Mr. Philemon Mwaisaka	-	”

LAW SOCIETY OF KENYA

Marykaren Kigen	-	Deputy Secretary
Donald Kipkorir	-	Council Member
Alfred Opiyo Chieng'	-	”

FIDA KENYA

Claris Ogangah - Deputy Director
Christine Kungu - Legal Counsel

KENYA NATIONAL ASSEMBLY

Anthony Njoroge - Legal Counsel
Samuel Karura - Legal Counsel
Florence Atenyo-Abonyo - First Clerk Assistant/Committee Secretary
Abdullahi Aden - Third Clerk Assistant

MIN. NO. 26/2011

SUBMISSION BY THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)

The CIC presented a written submission (*Annex 10*) and informed the Committee that:-

1. The mandate of CIC as contained in Article 249 (1) of the Constitution is to:-
 - (i) Protect the sovereignty of the people;
 - (ii) Secure the observance by all state organs of democratic values and principles including those articulated in Article 10 and Chapter 6 of the Constitution particularly with respect for the rule of law, participation of the people, integrity, good governance, transparency and accountability; and
 - (iii) Promote constitutionalism.
2. CIC is mandated to work with each constitutional commission (of which the Judicial Service Commission is one) to ensure that the letter and spirit of the constitution is respected in the appointment.

MIN. NO. 27/2011

APPOINTMENT OF THE CHIEF JUSTICE

The CIC informed the Committee that:-

- (i) Article 166(1) (a) provides for the appointment of the Chief Justice while Sections 24(2) and 29(2) of the

Sixth Schedule reinforces this provision that the appointment will be subject to the National Accord and Reconciliation Act, and after consultation with Rt. Hon. Prime Minister and with the approval of the National Assembly.

- (ii) The three provisions should be read together in dealing with the appointment of the Chief justice based on the following:-
 - (a) Article 166 is not suspended under Section 2 of the Sixth Schedule.
 - (b) Article 24(2) which deals with the appointment of the first Chief Justice under the Constitution does not expressly excluded the Application of Article 166.
 - (c) The Judicial Service Commission is already established and is operational and one of its primary roles is to recommend persons to be appointed as Chief Justice.
- (iii) Article 166(1) contemplates that the appointment of the Chief Justice shall be a shared responsibility among the three arms of the government and in carrying out the mandate of appointment prior to the first elections; the President shall consult the Rt. Hon. Prime Minister.
- (iv) The letter and the spirit of the Constitution should be followed in the implementation of the Constitution and with regard to the appointment of the Chief Justice, the provision in Article 166 and read together with Sections 24 and 29 of the Sixth Schedule require that:-
 - (a) The process should commence with recommendations by the Judicial Service

Commission to H.E. the President who in turn should consult the Rt. Hon. Prime Minister, after which the President forwards the name of the nominee to National Assembly for approval.

- (b) The role of the Judicial Service Commission in the appointment of the Chief Justice should be respected and the Commission allowed to undertake the function reserved to it by the Constitution.

MIN. NO. 28/2011

**THE APPOINTMENT OF THE ATTORNEY GENERAL,
DIRECTOR OF PUBLIC PROSECUTIONS AND
CONTROLLER OF BUDGET**

The CIC informed the Committee that:-

- (i) The provisions relating to the appointment of the three constitutional offices are set out in Articles 156, 157 and 228 of the Constitution respectively.
- (ii) In the period before the first election, these Articles must be read together with the provisions of Section 29 of the Sixth Schedule which require H.E. the President to consult the Rt. Hon. Prime Minister prior to appointment, subject to the National Accord and Reconciliation Act. Therefore, the process of appointment should reflect both the letter and the spirit of the Constitution.

MIN. NO. 29/2011

SUBMISSION BY LAW SOCIETY OF KENYA AND FIDA-KENYA ON THE NOMINATION PROCESS

FIDA Kenya considered the following issues with regard to the nomination process:-

- (i) Whether the letter and the spirit of the Constitution was adhered to in the nomination process.

- (ii) Whether the nomination process accorded both men and women equal treatment which includes right to equal opportunities in political, economic, cultural and social spheres as envisaged under Article 27 of the Constitution.
- (iii) The implication of not having a transparent, participatory, competitive process for constitutional office bearers and more specifically the current nominations.
- (iv) The historical background in respect to equality and discrimination.
- (v) The bearing of political impasse in regard to the implementation of the Constitution.

MIN. NO. 30/2011

CONSTITUTIONALITY OF THE NOMINATION TO THE OFFICE OF THE CONTROLLER OF BUDGET

FIDA Kenya informed the Committee that:-

- (i) The process of appointment is set out in Article 228 of the Constitution but the Article must be read together with the provisions of Section 29 of the Sixth Schedule of the Constitution which provides that the appointment be made by H.E. the President subject to the National Accord and Reconciliation Act, and after consultation with the R. Hon. Prime Minister and with approval of the National Assembly.
- (ii) The process of nomination was not inclusive and therefore Article 129 and 131(2) of the Constitution were not upheld, favoured only men and discriminated against women. Therefore, approving the nominations will not be in the spirit of the Constitution.

- (iii) Article 10 of the Constitution which sets out the national values and principles were disregarded while undertaking the nomination.
- (iv) Article 27 of the Constitution provides for equality and freedom from discrimination but the nomination process did not afford equal opportunity to both men and women.
- (v) The nomination process was flawed even if a woman was among those four nominees because the process was not competitive, transparent and participatory.
- (vi) Any violation of the Constitution by any arm of the Government will undermine the fundamentals of constitutionalism in the country and continue to destroy public confidence in the Executive, Judiciary and the Legislature's ability to implementation of the new Constitution.

MIN. NO. 31/2011

ADJOURNMENT

The Chairman adjourned the meeting at thirty minutes past Two O'clock until this afternoon at 3.00 p.m.

Signed
[Handwritten Signature]
(Chairman)

Date
15/2/2011

MINUTES OF THE EIGHTH SITTING OF THE DEPARTMENTAL COMMITTEE (F) ON FINANCE, PLANNING AND TRADE HELD ON WEDNESDAY 9TH FEBRUARY 2011, IN COMMITTEE ROOM NO. 7, MAIN PARLIAMENT BUILDING AT 3.00 P.M.

PRESENT:

Hon. Chrysanthus Okemo, EGH, M.P. – **(Chairman)**
Hon. (Prof.) Philip Kaloki, M.P. - **(Vice Chairman)**
Hon. Lucas Chepkitony, M.P.
Hon. Ntoitha M'Mithiaru, MP
Hon. Ahmed Shakeel Shabbir, M.P.
Hon. Nelson Gaichuhie, MP
Hon. Nkoidila Ole Lankas, M.P.
Hon. Jakoyo Midiwo, MGH, M.P.
Hon. Lenny M. Kivuti, M.P.

ABSENT WITH APOLIGY

Hon. Musikari Kombo, M.P.
Hon. Sammy Mwaita, M.P.

IN ATTENDANCE:

NATIONAL MUSLIMS FORUM (NAMLEF)

Abdullahi Abdi - Chairman
Al Hajj Yusuf - Vice Chairman
Abubakar Said - Chief Executive
Salim Vayani - Secretary General

KENYA NATIONAL ASSEMBLY

Anthony Njoroge - Legal Counsel
Florence Atenyo-Abonyo - First Clerk Assistant/Committee Secretary
Abdullahi Aden - Third Clerk Assistant

MIN. NO. 32/2011

SUBMISSION BY NATIONAL MUSLIMS FORUM (NAMLEF)

NAMLEF submitted its position on the nomination to the office of the Controller of Budget that:-

- (i) H.E the President did not follow the constitutional process in the appointment and that Article 228 should be read in the spirit of the National Accord & Reconciliation Act which is an integral part of the Constitution and which requires consultation between the two Principals in order to ensure harmony.
- (ii) The appointments are in contravention of Article 250(4) which provides that the appointments to commissions and independent offices shall take into account the national values contained in Article 10 and the principle that the composition of the commissions and offices taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya. This will be violated as the Chair of Revenue Allocation Commission is from the same region and same ethnic community as that of the proposed Controller of Budget.
- (iii) The appointments to public offices must adhere to the requirements of Article 232(h) which demands representation of Kenya's diverse communities, regional, ethnic and religious balance.
- (iv) The appointments must conform also to other critical constitutional requirements relating to transparency, citizen participation and gender balance.

MIN. NO. 33/2011

ADJOURNMENT

The Chairman adjourned the meeting at Five O'clock until Thursday 10th February, 2011 at 10.00 a.m.

Signed
(Chairman)

Date 12/2/2011

MINUTES OF THE NINTH SITTING OF THE DEPARTMENTAL COMMITTEE (F) ON FINANCE, PLANNING AND TRADE HELD ON THURSDAY 10TH FEBRUARY 2011, IN COMMITTEE ROOM NO. 7, MAIN PARLIAMENT BUILDING AT 10.00 A.M.

PRESENT:

Hon. Chrysanthus Okemo, EGH, M.P. - **(Chairman)**
Hon. (Prof.) Philip Kaloki, M.P. - **(Vice Chairman)**
Hon. Lucas Chepkitony, M.P.
Hon. Ntoitha M'Mithiaru, MP
Hon. Ahmed Shakeel Shabbir, M.P.
Hon. Nelson Gaichuhie, MP
Hon. Nkoidila Ole Lankas, M.P.
Hon. Jakoyo Midiwo, MGH, M.P.
Hon. Lenny M. Kivuti, M.P.
Hon. Musikari Kombo, M.P.
Hon. Sammy Mwaita, M.P.

IN ATTENDANCE:

MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS

Hon. Mutula Kilonzo, EGH, MP - Minister

KENYA NATIONAL ASSEMBLY

Anthony Njoroge - Legal Counsel
Florence Atenyo-Abonyo - First Clerk Assistant/Committee Secretary
Abdullahi Aden - Third Clerk Assistant

MIN. NO. 34/2011

COMMITTEE'S REPORT ON THE NOMINATION PROCESS

In view of the fact that the Committee could not comply with the Speaker's deadline for tabling its report on Thursday 10th February 2011, the Committee resolve:-

- (i) To seek the indulgence of the House for extension of time upto to table its report on Tuesday 16th February, 2011

- (ii) To go for a report writing retreat from Friday 11th to Sunday 13th February, 2011.

MIN. NO. 35/2011

SUBMISSION BY THE MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS

Minister informed the Committee that:-

- (i) The Ministry of Justice and Constitutional Affairs is not a player in the current nomination process for the constitutional offices.
- (ii) Article 10, 73(2) and Chapter 6 of the Constitutions demands that the process of sourcing for constitutional offices be transparent, inclusive, non-discriminatory and allow for public participation. Article 10 principle of governance is not negotiable and is a mandatory requirement as regards public participation.
- (iii) Gazette Notice on the advertisement for the position of Chief Justice could not be done before setting up the Judicial Service Commission, because it is the Commission that is supposed to recommend nominees as per Article 166(2).
- (iv) The Court Ruling of 3rd February on the nomination process is interim as the case is on-going but the judicial decisions should be respected.
- (v) The Constitution provides for the current Chief Justice to vacate the office by 27th February, 2011 but there is no provision for the effective date for the in-coming Chief Justice. However, there cannot be a constitutional crisis because a precedent has been set before by having the senior most Judge as acting Chief Justice. The benefit of having a new Chief Justice by the said date is to assist in the vetting of Judges and setting up of the Supreme Court.

(vi) He welcomed the nominations as it allowed for public participation and for the reform process to move forward.

MIN. NO. 36/2011

ADJOURNMENT

The Chairman adjourned the meeting at Two O'clock until Saturday 12th February, 2011 at 9.00 a.m.

Signed
(Chairman)

Date 12/2/2011

MINUTES OF THE TENTH SITTING OF THE DEPARTMENTAL COMMITTEE (F) ON FINANCE, PLANNING AND TRADE HELD ON SATURDAY 12TH FEBRUARY 2011, IN CONFERENCE, SIMBA LODGE NAIVAHSA AT 9.00 A.M.

PRESENT:

Hon. Chrysanthus Okemo, EGH, M.P. - **(Chairman)**

Hon. (Prof.) Philip Kaloki, M.P. - **(Vice Chairman)**

Hon. Ntoitha M'Mithiaru, MP

Hon. Ahmed Shakeel Shabbir, M.P.

Hon. Nelson Gaichuhie, MP

Hon. Nkoidila Ole Lankas, M.P.

Hon. Jakoyo Midiwo, MGH, M.P.

Hon. Lenny M. Kivuti, M.P.

Hon. Musikari Kombo, M.P.

Hon. Sammy Mwaita, M.P.

ABSENT WITH APOLOGY

Hon. Lucas Chepkitony, M.P.

IN ATTENDANCE:

KENYA NATIONAL ASSEMBLY

Anthony Njoroge - Legal Counsel

Florence Atenyo-Abonyo - First Clerk Assistant/Committee Secretary

Abdullahi Aden - Third Clerk Assistant

MIN. NO. 37/2011

CONFIRMATION OF THE MINUTES

Minutes of the following previous Sittings of the Committee were confirmed by the Members present and signed by the Chairman.

- (i) Minutes of the Fourth Sitting held on Monday 7th February, 2011 were proposed by Hon. Jakoyo Midiwo, MP and seconded by Hon. Shakeel Shabbir, MP.

- (ii) Minutes of the Fifth Sitting held on Tuesday 8th February, 2011 were proposed by Hon. (Prof.) Philip Kaloki, MP and seconded by Hon. Nkoidila Ole Lankas, MP.
- (iii) Minutes of the Sixth Sitting held on Tuesday 8th February, 2011 were proposed by Hon. Lenny Kivuti, MP and seconded by Hon. Musikari Kombo, MP.
- (iv) Minutes of the Seventh Sitting held on Wednesday 9th February, 2011 were proposed by Hon. Ntoitha M'Mithiaru, MP and seconded by Hon. Nelson Gaichuhie, MP.
- (v) Minutes of the Eighth Sitting held on Wednesday 9th February, 2011 were proposed by Hon. Nkoidila Ole Lankas and seconded by Hon. Jakoyo Midiwo, MP.
- (vi) Minutes of the Ninth Sitting held on Thursday 10th February, 2011 were proposed by Hon. Sammy Mwaita and seconded by Hon. Ntoitha M'Mithiaru, MP.

MIN. NO. 38/2011

MATTERS ARISING

Under Minute No. 29/2011, the Committee noted that LSK presented a written submission and informed the Committee that.-

- (i) The Constitution does not define the expression "***in consultation***" but the term "***after consultation***" which is used in Section 24(2) of the Sixth Schedule of the Constitution of Kenya is also used in the interim constitution as well as the present Constitution of South Africa and it is defined as, "***such decision shall be taken in good faith after consulting and***

*giving serious consideration to the views of such
functionary*".

- (ii) The actual degree of consultation will depend on the prevailing political circumstance, and the political style of the President but it should be noted that consultation does not mean concurrence.
- (iii) The recent nominations for constructional offices were done without public participation as required by Article 10(2) (a) of the Constitution.

MIN. NO. 39/2011

DELIBERATION ON THE DRART REPORT ON THE
NOMINATION TO THE OFFICE OF CONTROLLER OF
BUDGET

The Committee deliberated on the Draft Report and recommended that:-

1. Subsequent to the foregoing, the Committee recommends that pursuant to Article 228(1) of the Constitution of Kenya the nomination of Mr. William Kipkemboi Kirwa be returned to the two Principals for nomination in a manner that meets the stringent Constitutional requirements and in particular those set out under Articles 10, 27, 73 and 232.
2. That enquiry into the suitability of Mr. William Kipkemboi Kirwa for appointment to the position of Controller of Budget be held in abeyance until the nomination of a person for the position of Controller of Budget is done Constitutionally,

The Chairman adjourned the meeting at Six O'clock unti
Monday 14th February, 2011 at 2.30 p.m.

Signed 

(Chairman)

Date 15/2/2011

MINUTES OF THE ELEVENTH SITTING OF THE DEPARTMENTAL COMMITTEE (F) ON FINANCE, PLANNING AND TRADE HELD ON MONDAY 14TH FEBRUARY 2011, IN COMMITTEE ROOM NO. 7, MAIN PARLIAMENT BUILDING AT 2.30 P.M.

PRESENT:

Hon. Chrysanthus Okemo, EGH, M.P. - **(Chairman)**
Hon. (Prof.) Philip Kaloki, M.P. - **(Vice Chairman)**
Hon. Jakoyo Midiwo, MGH, M.P.
Hon. Musikari Kombo, M.P.
Hon. Ntoitha M'Mithiaru, MP
Hon. Ahmed Shakeel Shabbir, M.P.
Hon. Nelson Gaichuhie, MP
Hon. Nkoidila Ole Lankas, M.P.
Hon. Lenny M. Kivuti, M.P.
Hon. Sammy Mwaita, M.P.
Hon. Lucas Chepkitony, M.P.

IN ATTENDANCE:

KENYA NATIONAL ASSEMBLY

Anthony Njoroge	-	Legal Counsel
Florence Atenyo-Abonyo	-	First Clerk Assistant/Committee Clerk
Abdullahi Aden	-	Third Clerk Assistant
Rose Mudibo	-	Committee Secretary

MIN. NO. 41/2011

MEDIA REPORTS ON COMMITTEE DELIBERATIONS

Members were dismayed by the reports which appeared both in the electronic and print media regarding the Committee's deliberations during the Retreat in Naivasha.

Members who had been contact by the media regarding the Committee's deliberations in Naivasha informed the Committee and clarified their response.

The Committee reiterated its position that no Member should divulge its deliberations before tabling its report pursuant to the Standing Orders and that Members should refer any enquires on the same from the media to the Chairman.

MIN. NO. 42/2011

ADOPTION OF THE DRAFT REPORT ON THE
NOMINATION TO THE OFFICE OF CONTROLLER OF
BUDGET

The Committee adopted the draft report with the following amendments:-

1. OBSERVATIONS

- (i) The Committee observed that there were consultations between the Principals on 6th and 27th January, 2011. However, taking the evidence from both the Principal's technical staff, it appears that the level of consultation was inconclusive. The threshold for consultation is high and the two Principals must commit themselves to work together in good faith as true partners, through constant consultation and willingness to compromise.
- (ii) The unanimous view of the Committee is that there were actions by both His Excellency the President and the Right Honourable the Prime Minister to comply with the Constitution of Kenya in the process of nomination of a person for the position of Controller of Budget. The Committee has however come to the conclusion that the Constitution, adopted by Kenyans on 4th August 2010 and promulgated on 27th August 2010 sets a higher threshold than the actions of His Excellency the

President and the Right Honourable the Prime Minister.

- (iii) The Committee did not address itself to the question of Mr. William Kipkemboi Kirwa's suitability as it found that the stringent legal requirements for his nomination under Articles 10, 27, 73 and 232 had not been addressed.

2. RECOMMENDATION

Subsequent to the foregoing, the Committee recommends that pursuant to Article 228(1) of the Constitution of Kenya the nomination of Mr. William Kipkemboi Kirwa for the position of Controller of Budget be returned to the two Principals for nomination in a manner that meets the stringent legal requirements and in particular those set out under Articles 10, 27, 73 and 232 of the Constitution.

MIN. NO. 43/2011

ADJOURNMENT

The Chairman adjourned the meeting at Fifteen Minutes past Seven O'clock until Tuesday 15th February, 2011 at 10.00 a.m.

Signed
(Chairman)

Date 15/2/2011

MINUTES OF THE TWELFTH SITTING OF THE DEPARTMENTAL COMMITTEE (F) ON FINANCE, PLANNING AND TRADE HELD ON TUESDAY 15TH FEBRUARY 2011, IN COMMITTEE ROOM, 7TH FLOOR, CONTINETNATL BUILDING AT 10.30 A.M.

PRESENT:

Hon. Chrysanthus Okemo, EGH, M.P. – **(Chairman)**

Hon. (Prof.) Philip Kaloki, M.P. - **(Vice Chairman)**

Hon. Jakoyo Midiwo, MGH, M.P.

Hon. Musikari Kombo, M.P.

Hon. Ntoitha M'Mithiaru, MP

Hon. Ahmed Shakeel Shabbir, M.P.

Hon. Nelson Gaichuhie, MP

Hon. Nkoidila Ole Lankas, M.P.

Hon. Lenny M. Kivuti, M.P.

Hon. Sammy Mwaita, M.P.

Hon. Lucas Chepkitony, M.P.

IN ATTENDANCE:

KENYA NATIONAL ASSEMBLY

Anthony Njoroge - Legal Counsel

Florence Atenyo-Abonyo - First Clerk Assistant/Committee Clerk

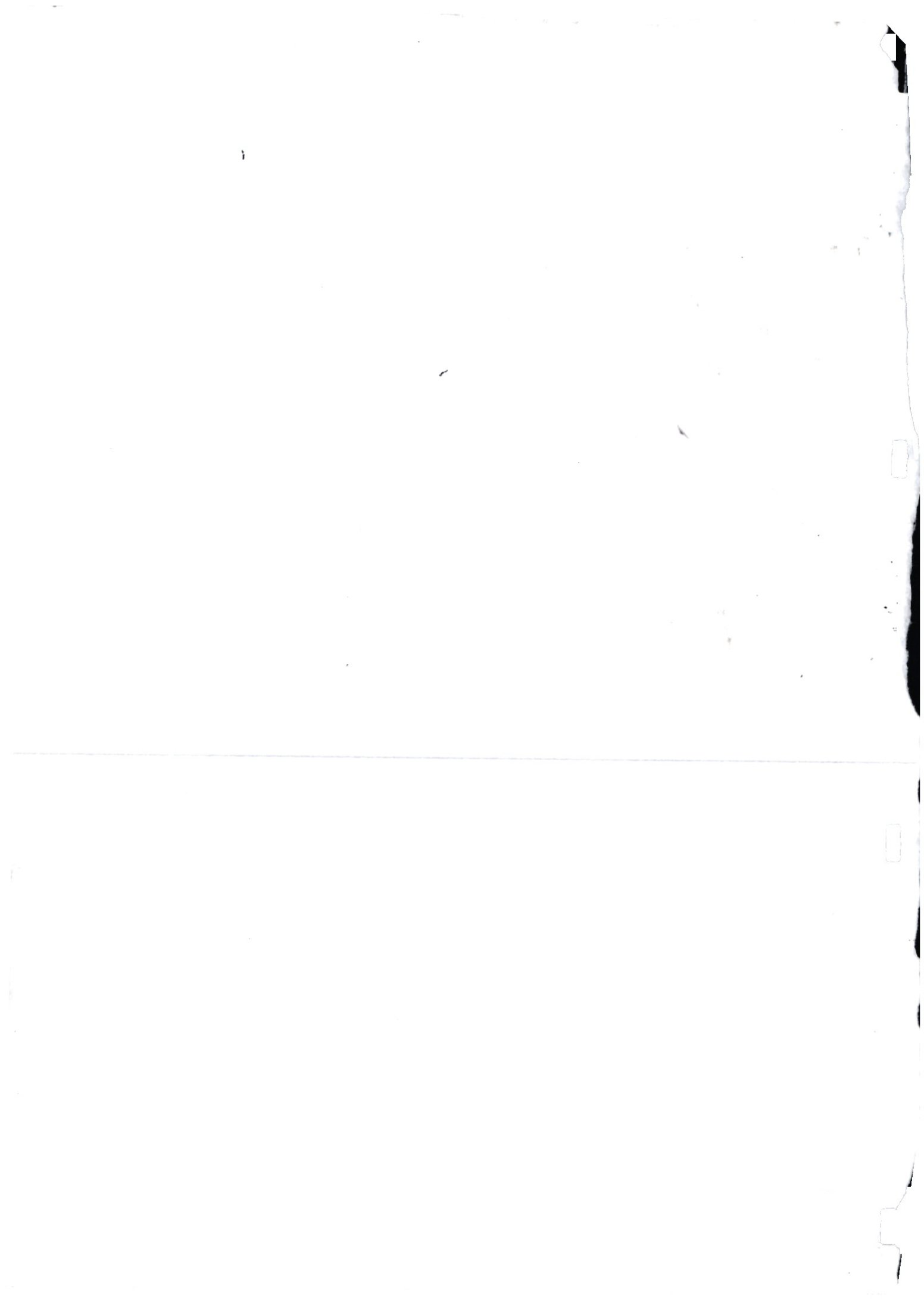
Abdullahi Aden - Third Clerk Assistant

MIN. NO. 44/2011

CONFIRMATION OF THE MINUTES

Minutes of the following previous Sittings of the Committee were confirmed by the Members present and signed by the Chairman.

- (i) Minutes of the Tenth Sitting held on Saturday 12th February, 2011 were proposed by Hon. Musikari Kombo, MP and seconded by Hon. Shakeel Shabbir, MP.



- (ii) Minutes of the Eleventh Sitting Monday 14th February, 2011 were proposed by Hon. Jakoyo Midiwo, MP and seconded by Hon. (Prof.) Philip Kaloki MP.

MIN. NO. 45/2011

ADOPTION OF THE REPORT ON THE NOMINATION TO THE OFFICE OF CONTROLLER OF BUDGET

The Committee unanimously adopted its report on the nomination to the Office of Controller of Budget.

MIN. NO. 46/2011

ADJOURNMENT

The Chairman adjourned the meeting at Fifteen Minutes past Twelve O'clock.

Signed
(Chairman)

Date 15/2/2011