

CONSTITUTION OF KENYA REVIEW COMMISSION

(CKRC)

Verbatim Report of

**MEETING BETWEEN CKRC COMMISSONERS AND MEMBERS OF THE
PARLIAMENTARY SELECT COMMITTEE HELD IN COUNTY HALL,
NAIROBI, ON**

ON

March 25, 2003

**PROCEEDINGS OF MEETING BETWEEN CKRC COMMISSIONERS AND MEMBERS OF THE
PARLIAMENTARY SELECT COMMITTEE HELD ON 25TH MARCH, 2003 AT COUNTY HALL, NAIROBI.**

PRESENT - CKRC

1. Prof. Ahmed Idha Salim	-	First Vice-Chair
2. Mrs. Abida Ali-Aroni	-	Vice Chairperson
3. Prof. W.H.O. Okoth Ogendo	-	“
4. Dr. Abdirizak Arale Nunow	-	Commissioner
5. Mr. Issac Lenaola	-	“
6. Ms. Nancy Baraza	-	“
7. Pastor Zablon Ayonga	-	“
8. Dr. Mosonik arap Korir	-	“
9. Dr. M.A. Swazuri	-	“
10. Mr. Domiziano Ratanya	-	“
11. Dr. Charles Maranga	-	“
12. Al Hajj Ahmed Isaack Hassan	-	“
13. Mr. John Mutakha Kangu	-	“
14. Ms. Kavetsa Adagala	-	“
15. Bishop Bernard Kariuki Njoroge	-	“
16. Mr. Ibrahim Lethome Asman	-	“
17. Hon. Mrs. Phoebe Asiyó	-	“
18. Mr. Paul Musili Wambua	-	“
19. Ms. Salome Wairimu Muigai	-	“
20. Mr. Githu Muigai	-	“
21. Mr. Zein Abubakar	-	“
22. Prof. Wanjiku Kabira	-	“
23. Mrs. Alice Yano	-	“
24. Mr. Keriako Tobiko	-	“
25. Mr. Amos Wako	-	Ex-Officio
26. Mr. PLO Lumumba	-	Commission Secretary

Apologies:

1. Prof. Yash Pal Ghai	-	Chairperson
2. Mr. Riunga Raiji	-	Commissioner
3. Dr. Andronico Adede	-	“
4. Mr. Riunga Raiji	-	“

PRESENT: PARLIAMENTARY SELECT COMMITTEE:

1. Hon. Paul Muite	-	Chairperson
2. Hon. Moses. M. Wetangula		
3. Hon. Simeon Nyachae		
4. Hon. Joseph. J. Kamotho		
5. Hon. Bonaya Godana		
6. Hon. Yusuf Haji		

7. Hon. Joseph Matano Khamisi
8. Hon. Moses Cheboi.
9. Hon. Uhuru Kenyatta
10. Hon. Henry K. Kosgey
11. Hon. William Ruto
12. Hon. Kiraitu Murungi
13. Hon. Kijana Wamalwa
14. Hon. Kibutha Kibwana
15. Hon. Francis Ole Kaparo
16. Hon. Mutula Kilonzo
17. Hon. Christopher Murungaru
18. Hon. Kipkalya Kones
19. Hon. Kalonzo Musyoka

Meeting was called to order at 10.15 a.m. with Hon. Paul Muite in the Chair .

Hon. Muite: I would like to call the meeting to order and to welcome all of you members of CKRC. When we met last week as the Parliamentary Select Committee we thought we should hold a consultative meeting with the Commissioners in order to, first of all, touch base and hear your views with regard to the launching of this Process, hear your view with regard to fixing the date for the Constitutional Conference, we hear your views on the issue of extending the mandate of the Commission which, as you know in terms of the Act, there are two views whether it is Section 33 or Section 26. But anyway, the Committee would like to hear your views with regard to extending your mandate in terms of the time that you require.

I see your Chairman is not here. Mr. Secretary, has he been informed?

PLO Lumumba: Mr. Chairman, the Chairman was informed of this meeting, he has subsequently sent me an e-mail message asking me to communicate his apologies. He is unable to attend today's meeting; he is aware of it.

Hon. Muite: Where is he?

PLO Lumumba: The Chairman is away in Hong Kong.

Hon. Muite: So, those are the issues on which we would wish to have this consultative meeting on; we want to hear your views regarding when you think it is practical to hold the Constitutional Conference, we want to hear your views on the extension of your mandate, we want to hear your views on the way forward as a Committee so that we can be able to make reasonable recommendation to Parliament. As you know we are only a Committee of Parliament and we ought to be informed before we make our views known to Parliament.

So, over to you. I suppose the Vice Chairman is there.

Com. Salim: Thank you very much, Mr. Chairman. We are, as a Commission very grateful to you and your Committee for so expeditiously contacting us on two very, very important issues and we are here in response to your invitation to address the Committee on the points you raised.

Let me begin by first congratulating you and the Committee for your appointment to this very, very important Committee and also to express the Commission's appreciation of two statements made by your Committee soon after the first meeting. The first being that Commission's membership shall remain intact and secondly, that the PSC has agreed to indeed extend our time of work.

On the first point, Mr. Chairman, allow me to state with a bit of frankness that we welcome that assurance, that the Commission will remain intact with the number of Commissioners appointed from the outset. Why I say that is because there were times earlier this year when we, Commissioners, were rather perturbed by reports – maybe unfounded – that there plans and suggestions that the Commission should be drastically reduced in number or dismissed altogether. Mr. Chairman, this Commission as a whole, in totality, worked a great deal to bring the Process this far, almost to the last stage. We feel, Mr. Chairman, that that idea of reducing our numbers or getting rid of us is akin to parents conceiving a baby, making sure that the baby in pregnancy remains healthy and then on the even of the birth of that baby, being cleared out of the delivery room and told “now you have done your work, leave this baby to us”. That, we felt at the time, was unfair, hence our great appreciation of the assurance given to us by the PSC after its last meeting that the Commission membership shall remain intact.

The second decision, Mr. Chairman, that the PSC took was also to recommend an extension of our time. Mr. Chairman, let me assure you that the Commission has never asked for more time than it deemed necessary at all stages of our work. You should remember that we worked within a political environment and more often than not our work was affected and more so our timetable for the completion of our work was affected by other exigencies, most not political exigencies.

Mr. Chairman, the dissolution of Parliament, for example, was not calculated within our timeframe. But Parliament was dissolved as you all, I am sure, know, almost on the even of our starting our Conference at Bomas of Kenya. As a result we had to go back to the drawing board and drew up another work plan and decided to apply for an extension after the 31st of July. Our application sent on the 9th of December to the Clerk of the National Assembly, before the Elections but after the dissolution of Parliament, tried its best to take into consideration all possible scenarios and in approximating dates and therefore arriving at a date to finish the work, namely the 31st of July, 2003. We had to bear in mind that the 9th Parliament had to meet, there would be the swearing in of Parliamentarians, there would have to be an appointment of the Select Committee and so and so forth. But as things happened, the dates we had in mind when we applied on the 9th of December, for all these very, very important landmarks affecting our work, changed more towards delaying our work. Therefore, as a result, Mr. Chairman,

again we felt that it was necessary to review our timeframe and reach a new date for completing our work. Therefore, we very much welcome the PSC now inviting us to tell the Honourable Members of the Select Committee what sort of new dates we have in mind for completing our work and what are the specifications even of the new date we have in mind.

These, Mr. Chairman, are my introductory remarks leading to the answers to those questions and here I would like to hand over to my colleague, Prof. Okoth Ogendo, Vice-Chairperson of CKRC, to brief you on the new timeframe we are proposing.

Thank you, Mr. Chairman.

Com. Okoth Ogendo: Thank you, Mr. Chairman. Let me also add my voice to the congratulatory message which has been given to you as Chair and the PSC as a whole by the First Vice-Chairman. We are, as a Commission, never complete until there is a PSC in place and that is part of the statutory mandate which we are to operate with. As has happened in the past we always consult very closely with the PSC and I think we will continue to do that.

Mr. Chairman, the Review Process has dragged on perhaps for much longer than was intended under the Review Act and the primary reason and as the First Vice-Chair has indicated is that political interest and postures have kept on changing and, therefore, it has been impossible to define and to adhere to a clear and uninterrupted programme. We believe that time has arrived for all organs of review and that means the Commission and other organs or review, to define and adhere to a clear programme for the completion of the Process. We believe that we must finish this exercise within a time frame which accords with the aspirations of the Kenyan people. The CKRC is ready to perform its statutory functions in that regard.

Mr. Chairman, as the First Vice-Chair has indicated, on December 9 2002, and pursuant to a resolution of the 61st Plenary of the Commission, we transmitted a memorandum requesting extension of the mandate of the Commission as defined by Section 26(1), from January 3rd to July 31st, 2003. That memorandum is on your file as Appendix A. The Commission had also presented a detailed work plan for the period up to July 31st, 2003, and that work plan consisted of a number of things, the completion of documentation required by the Act to be prepared by the Commission. We also indicated that we had received extensive comments from the public and that as a Commission we wanted to address our minds to those questions without changing the original draft which we had put out. We also said that we would prepare a number of working documents which the Conference will need and also to continue with civic education which, under Section 24 of the Act, we are required to conduct throughout the Review Process. And let me at this point, Mr. Chairman, point out that Section 24 is not subject to Section 26(1) and therefore civic education is one those aspects of the Commission's work which is not constrained by the definition of work under 26(1).

We also indicated that we would make advance preparation for the National Constitutional Conference including the process of verification and revalidation of the delegates list in the light of changes that have occurred in the political spectrum: the question

of preparation of the Conference venue so that it would be delegate-friendly; preparation and publication of the Conference brochure and programme, printing of all statutory and working documents of the Conference and all necessary logistical arrangements. As a Commission, we sat down again and looked at that work programme and re-defined it as indicated in Appendix B to this request.

The Commission had expected that the House would be able to respond to that request within the month of January or February and although that did not happen the Commission continued to execute its work as anticipated in that request and a progress report to that effect, which will be presented by Com. Kangu, is contained in Appendix C to the document you have.

Since the submission of that report and as we are all aware, a lot of changes have taken place. A Select Committee, which is crucial to the re-starting of the Process, was not established until recently and therefore we were not able to get back on course in the months of January and February.

So what we are suggesting, Mr. Chairman, is that we are proposing a variation in the programme of work of the Commission as contained in our December 9 memorandum, in terms of two scenarios. Scenario one is that the National Constitutional Conference commences on April 28, that is 28th of next month. The reason we have arrived at that date includes time under the regulations that it takes to give notice of the Conference. It puts us to April 28th and we are all aware that there is Easter intervening at that point and that once the Conference starts it should run uninterrupted until it is finished, and if that happens we should be able to complete the Conference at the outside in two months. It is possible that the Conference can be run within one month but as Prof. Kabira will indicate in our planning for the Conference itself, we believe that it might take longer than a month. Under that scenario the Review Process would be completed – and when I say the Review Process is completed I am talking about the Conference, the revision of the Report and the Draft Bill, its submission to the Attorney General and Bill enactment in Parliament – by the end of June if there is no Referendum. In the event that there is a Referendum the Act as it stands now states that the Referendum must be held within one month of the completion of the Conference, which brings us to the end of August if there is a Referendum.

The Commission would prefer that first scenario: start on April 28, move in uninterrupted version until the end of the exercise.

Scenario number two contemplates the possibility that there could be interruptions, interruptions relation to other important national issues, for example, the calendar of Parliament, the budget and the Appropriations Bill might cause interruptions. Under scenario two, we are saying that we should still start on April 28 and move on perhaps for five weeks and then adjourn to allow the National Assembly to complete other national business and then resume. And if that happens, then the Conference would resume in August and in that event the entire process would be completed by the end of October if there is no Referendum; if there is a Referendum it would add another month which would take you to the end of November.

As I have indicated, the Commission would want to go with scenario one. But we have presented these two scenarios for several reasons. One is that we think realistically that the Conference might take longer than one month and Appendix D is a very preliminary outline of how the Conference might move to the anticipated 10 weeks and Prof. Kabira will lead us through that.

Although the Act says that a Referendum if necessary must be held within 30 days of the Conference, our consultations with Electoral Commission indicate that it might take up to three months to organize a Referendum and, therefore, again what we have given you in App. E, which is a revised work plan, is perhaps the minimum period that realistically might be used to organize the Referendum.

I want to emphasise, Mr. Chairman, that the Commission is painfully aware that once the Conference starts under either scenario, the responsibility for completing the review process will not longer be entirely in the hands of the Commission. That responsibility will be shared by the people of Kenya through delegates they have appointed to the Conference, through the people's representatives in Parliament and also will be shared by the position which the political establishment as a whole thinks of this particular Process. In other words, whereas we are reasonably certain that we need four months from the 28th of April to complete this process we also know – and this has happened in the past – that there could be interruptions to that process.

In the light of this, Mr. Chairman, we think that it may be prudent for the PSC to recommend to Parliament that the extension of the mandate of the Commission under Section 26 should be done in terms which are not only coincident with the requirements of that Section 26, but that Section as read together with Section 33 of the Act which provides that the entire Process is completed when a new Constitution is enacted by Parliament and when that happens the Commission stands dissolved. In other words we are asking in this supplementary memorandum that the Commission's mandate be extended from January 3rd, 2003 up to and including such time as will enable the Review Process to be concluded as contemplated by Section 33 of the Act. That would obviate the necessity of coming back to the National Assembly for extension should there be interruptions that are not foreseen by the programme that we have presented.

Mr. Chairman, each scenario you will notice, Mr. Chairman, has an (a) and a (b), the (a) part is without a Referendum and the (b) part with a Referendum.

Mr. Chairman, to complete my presentation, I would want, with your permission to ask Commissioners Kangu and Prof. Kabira to present Appendixes C and D briefly.

Thank you, Mr. Chairman.

Hon. Muite: Thank you very much, Prof. Okoth Ogendo. Before Com. Mutakha Kangu takes over I would like to welcome

the Vice President of the Republic of Kenya, Hon. Michael Wamalwa Kijana, who came after we commenced and I would also want to welcome very much the Speaker of the National Assembly, who is with us, again he came in after we started.

Com. Mutakha Kangu.

Yes, Bwana Speaker; I have your authority to throw out anybody with those things that you call mobiles!

Hon. Ole Kaparo (Speaker of the National Assembly): Yes, and you may wish to begin with yourself if you have one.

Mr. Chairman, I have another meeting at 11.00 a.m. It looks to me that this presentation may take quite some time and I would like get from you what it is you wanted of me because I have to leave to go and discharge some other duties, if that is acceptable to all of you.

Hon. Muite: Mr. Speaker, when the Parliamentary Committee met last time and decided to have a consultative meeting with CKRC it was felt that in fixing the date for the Constitutional Conference which, as you are aware, will be attended by all the Members of Parliament, it may be useful for you to be with us because Parliament is in your hands and you may wish to give some guidance to the Commissioners and the Committee regarding the timetable of Parliament so that we fix times taking into account – factor in – the timetable of Parliament.

There are two scenarios which have been outlined by Prof. Okoth Ogendo. It looks to me, thinking aloud – and of course I seek the guidance of my fellow Honourable Members of Parliament here – that in either case one is talking about eating into perhaps the period when Parliament might expect to debate the Budget. So we wanted to have your input in terms of whether perhaps the Conference can be interrupted, how you think we should go about fixing the date, Mr. Speaker.

Hon. Ole Kaparo: Thank you very much. Ordinarily the House goes on a short recess in May between two to three weeks. This time round we discussed and agreed it was necessary to make it longer to enable what was stipulated in the Act, that there will be a Constitutional Conference for one month. We had anticipated that if we followed the Act and have debate as stipulated in the Act for thirty days, we had thought that the House could go on recess on the 2nd of May and resume after one month, having availed thirty or so days required by the Act for Members to participate in the Constitutional Conference. The 1st is a Public Holiday and that is why we thought the Conference could begin on the 2nd, so we thought we would adjourn the House on the 29th, I believe that is a Thursday, and then resume one month thereafter in June because all of you are aware that under the Constitution of Kenya the National Estimates must be presented to Parliament before the 20th of June every year. So we had said we could avail all Members from the 2nd to the first week of June, thereafter Members must return to Parliament because they must discharge their Constitutional mandate of approving the National Estimates. I heard the Honourable Chairman quoting the date of 28th, that is not bad at all as Parliament because we were going to adjourn anyway the very

following day, the 29th. The only reason we thought of the 2nd is because 1st is a Public Holiday. But if they do think their programme would be better suited if we availed Members on the 28th, then that is fine with us. The Leader of Government Business is here, I know a lot of Members sitting here are also members of the House Business Committee which decides when the House will go on recess or what Business of the House will be taken. If that will help, we could actually adjourn the House on the 27th and the Conference could begin then but we cannot, it is not possible to give away the month of June. We cannot because the National Budget must be presented and the House ordinarily resumes at least one week before the National Budget.

So that is the kind of time frame we have and I think, speaking on my own, one month or one month and a week – something like that – in my view would be adequate time to deliberate on the Draft Constitution at the Conference. I truly believe that one month, one month and a week or a month and a half is adequate. Those are my views. But if you want to know why we are there, we have a lot of Bills which will take us to the 27th if that is the date you want. We have The Ethics Bill which is almost complete but it is still there, we have The Constitution of Kenya Amendment Bill which is still pending, we have The Code of Conduct for Members of Parliament which we cannot delay to October because under The Ethics Bill comes my organization which is Parliament. Once that Bill is passed, we must also pass the conduct of Members within thirty days and, therefore, the Members of Parliament must be there; I cannot make those rules on my own and gazette them as is required elsewhere; those rules are under The Powers and Privileges Act and must be approved by the Act. So for those we cannot wait beyond the Sitting because we will be offending another Bill.

Then we have a Motion on Aids which was brought by the Minister for Health. As we all know Aids is a devastating disaster to Kenya. Then there were supplementary estimates and The Supplementary Appropriation Bill which must be passed before the House goes on Recess and I estimate that it is possible to deal with the bulk – if not all – of these issues between now and the end of next month. So roughly the period Prof. Okoth Ogendo had in mind will just be about the time we can all have contributed and be able to release the Members.

Those are my views but Members of course can decide not to debate at all and we pass everything tomorrow and we are all available. After that it is not experience I have. Thank you.

Hon. Muite: Before we release the Speaker because of the other engagement he has, are there any comments or questions on the views expressed by the Speaker from either the Members of the Parliamentary Committee or the Commissioners? Clarification?

Hon. Nyachae: Thank you, Mr. Chairman, for this opportunity. I would have wished that the Speaker probably would indicate to the Commissioners what happens once the Budget discussion has started. Does he expect discussion without interruption on the Budget will continue so that whatever is postponed can then be resumed? When could that be done?

Because at least on my part I do not see everything being concluded by the beginning of June; there could be work remaining and once we start the Budget there are certain discussions which have to continue without interruption and then we can adjourn to go to the business of the Constitution again. I think that time frame also needs to be indicated so that by the time we are taking a decision as to the timetable for the Constitutional Review, it will be clear to all of us.

Thank you.

Hon. Ole Kaparo: May I respond to that, please?

Hon. Muite: I was thinking, Mr. Speaker, maybe you could deal with all the points together.

Hon. Kibutha Kibwana: Thank you, Chair. I need a clarification from the Commission which I think also would help the Speaker in terms of scenario one because they propose that we should begin on 28th April and continue up to the end of June, 2003. How were they thinking we would also handle the Budget in that event because I am sure that decision also took into account how we would handle the Budget.

Secondly, what is the minimum time according to the law that we must have the National Conference and according to their own approximate of reality, so that again also all the Members are aware of those parameters?

Hon. Ole Kaparo: Well, I think I can only answer about our own calendar and Mr. Nyachae did, in fact, raise a fundamental issue, that is after June, because Budget is a process beginning in June and must end on October 31st. So as far we are concerned, August is free because the House will be in Recess, July is not available at all and I believe also three quarters of June will not be available at all. September is not available because we are in Recess, that is the time that the watch dog committees do their jobs, that Public Accounts and Public Investment, they do their job in August and September. We then resume early October and the Budget must continue, but must end on 31st of October. So the only legislative period available will then be November and the first half of December. So October is certainly out to release Members; we cannot release Members because they must continue with the Budget in October. They could be released if you have not finished in May/early June, they could be available in August/September but again you must also realize that if the whole of August is taken, it means that the watch dog committees may not be able to do their jobs, that of scrutinizing Government accounts, which is again a Constitutional obligation and responsibility of Parliament. How we marry this is something that this Committee must weigh very carefully taking into account the necessity of having a new Constitution for Kenya and also the requirement of Parliament discharging its Constitutional obligations. So October is not available at all, July is not available at all, I think June is available, maybe latest to the 10th because we must return to get ready for the Budget and somehow I do not know how we will juggle with our various obligations. If you cannot finish by May/June then you should not adjourn for a period exceeding two weeks because then you will completely again disorientate the Parliament in its role as a watch dog.

Thank you.

Hon. Muite: Unless there are any other comments I think we can release the Speaker and also the Vice President, he wants to go and come back. What I hear the Speaker saying is that May is available, probably a week in June. Here we are speculating, because it may well be that when Kenyans meet at the Constitutional Conference they will be able to agree within two weeks and then a lot of the difficulties that we are anticipating here may not be there. On the other hand when you are planning and you are the ones hosting, I think it is fair for you to plan on the basis of a worse scenario case. So what I hear the Speaker saying, take May, take one week in June. If you finish well and good, if not, three weeks in June are not available, July is not available, perhaps two weeks in August. I think that is the summary.

Thank you very much, Bwana Speaker.

Com. Mutakha Kangu: Thank you very much, Mr. Chairman, the Honourable Members and my colleague Commissioners. I am happy once again to be in this room; the first I came in was in the year 2000 when this Process still had a lot of problems.

Annexure C is the one that is talking about progress in terms of work that the Commission has made between the period of November, 2000 and 2002. We are noting that since the National Constitutional Conference that had been planned to take place starting 28th October, 2002 was put off following the dissolution of Parliament, the Commission has been busy performing a number of activities which constitute part of its mandate under the Act. I want to note, as Prof. Okoth Ogendo said, that there are certain activities of the Commission, or certain mandates of the Commission, that are not captured by the time limitations envisaged in Section 26 of the Act. Some of these mandates have been finalized, others are still ongoing and the first activity I would like to refer to is the one in regard to preparation for the National Constitutional Conference.

In this regard the Commission's position has been that there ought to be certain Conference documents that should be made ready and among them is what we call Statutory Documents and the Commission in this regard has been finalizing the Report of the Commission in a number of Volumes.

Volume I of the Commission's Report is what we describe as the main Report that seeks to analyse the views of the Kenyan people, to analyse the Constitutional issues that we were mandated under the Act to address and of course arrive at recommendations that form the basis of the Draft Bill.

Volume II of that Report is the Draft Bill itself which, of course, is in public domain and most of the Members, if not all, I believe have copies of it.

Volume III is the part that addresses the method of work that the Commission has used in conducting its activities; this is where we give details of even internal organization of the Commission, the outreach activities in the Districts and the Constituencies, the Constituency Committees and so on, and we are saying that this is an extremely important exercise in our country and for the future it is important that we keep records of how we worked so that future generations can refer to know how we went about it if at a later stage they may want to do another review.

Volume IV is dealing with the Constituency Constitutional Reports and these are provided for under the Act and we have attended to that and Volume V contains the Technical Appendices. That deals with the edited papers that were presented in some of the workshops that we organized.

We are saying that all the Volumes except Volume III are completed; Volume III deals with Method of Work which will have to include even what took place at the Conference so it will be the last Volume to be completed.

The other aspect of the documents concerns working documents which Okoth Ogendo referred to and under these we have the Short Version of the Main Report which was described as “The People’s Choice”, there is Draft Constitution at a Glance, some kind of summary so that someone can have a quick look at it.

Hon. Ruto: On a point of order, Mr. Chairman. Sorry, Mr. Kangu, I did not mean to interrupt you at all but I think, Mr. Chairman, really what we are going through now is basically detail in terms of how the Process will go after we have made certain decisions. And I think, Mr. Chairman, that those details will not change if we make the decision either way. So I think, Mr. Chairman, we have sufficient information as far as the First Vice-Chair and the Vice-Chair have given us to be able to make a decision as to how we want to proceed and the input that has been made by the Speaker of the National Assembly. I want to request, Mr. Chairman, that the presentation on Annex C, D and E be left out because those are basically details depending on which decision we make and I do not think that those details will change either way.

Hon. Muite: I think, Com. Mutakha Kangu, what Hon. Ruto is saying – and I get the sense that he is speaking on behalf of quite a number of Members of the Parliamentary Committee – is that we have read the documents and those who have not read them are going to read them and the major point he is making is that those details are not going to affect one way or the other decisions which we are going to make. We have enough information. So, shall I give you another two, three minutes perhaps to emphasise what you need to highlight, then we go to Prof. Wanjiku Kabira.

Com. Mutakha Kangu: I stand guided, Mr. Chairman, so there are the working documents. We have attended to the re-validation of the Conference delegates, filling vacancies, we have also been working on Conference projects and programmes which Wanjiku will be addressing, then the Regulations of the Conference have been finalized and they are pending gazettment, the logistical arrangements are going on and finally there is the question of the Referendum. We have started

looking at the Regulations on the question of the Referendum and it is in that context that Okoth Ogendo said we have consulted with the Electoral Commission as required by Section 34 of the Act and we are in the process of trying to see how those Regulations will look like.

Thank you very much.

Hon. Muite: Thank you very much. The Regulations, you say, are now pending gazettment; are they in the Appendix here?

Com. Mutakha Kangu: They are not in these documents but they are pending with the Attorney General's office for gazettment and we have prepared them in terms of Section 34 of the Act. Under the section, the Act gives mandate to the Commission to make Regulations to be used in various stages and one of the stages that is mentioned under Section 34, Subsection 2(b)(iv) is Regulations to govern the Conference.

Hon. Muite: Thank you. Prof. Wanjiku Kabira.

Com. Kabira: Thank you. Since you have the documents in the file, I will just take one minute. We have budgeted for close to 10 weeks for the National Conference and the reason why we did this was, first of all we met the delegates in the Conference that aborted, the one that was supposed to start in October, so we actually know the kind of delegates we have.

Number two, in our preparation of the Draft – and we were familiar with most of the issues – we actually took five weeks and even then a lot of things were still left pending when we were in Mombasa and we came back and took almost an extra two weeks to agree on some of the basic issues. I think based on those two experiences, we looked at the Draft and came up with this programme.

Basically we are saying that two weeks will be spent with familiarization of the Draft Bill, understanding of how this work has taken place, the method of work, looking at the Rules and Procedures, understanding how the Conference is going to be managed and also making decisions on some of the issues that may need consensus or at least a full appreciation of these particular issues. And we think that is very important because we are saying that we would like the Conference delegates to make decisions from an informed position and that they should be able to defend every single article when the Draft is adopted.

So, we have given only two weeks to the presentation of the twenty chapters of the Bill and you know some of the chapters are quite detailed. For instance, the one on Devolution may take longer than the time we have given it and we are saying those chapters will be presented, debated in Plenary and then for one week the delegates will break into committees and make decisions on each of those chapters and then come back to Plenary where they make the presentation which will be debated in Plenary and adoption of the various articles will take place. We have given one week to look at outstanding issues.

I think the 8 weeks in our own estimate is the least we may spend on this Process and if we want the delegates to make informed decisions, I think the programme we have put together will be useful to make sure that we do not have some people disowning the document towards the end. So we have given it two months.

I think that is all, Mr. Chairman.

Hon. Muite: Thank you very much. I would wish to hear the views of my colleagues here, Honourable Members of Parliament. I was going to suggest that if there are any points you wish to raise with the Commissioners, this is a good opportunity to do so, otherwise we should release them and then consult amongst ourselves and agree on what recommendations we are going to make to Parliament.

So are there any questions, any clarifications, first of all from Honourable Members here before I come to the Commissioners? Any comments?

Hon. Kiraitu Murungi: Thank you, Mr. Chairman, I have two issues. In view of the various changes that have taken place, I would like Prof. Okoth Ogendo to tell us if we are to extend the mandate of the Commission – which we have agreed in principle to do – what date do you want us to extend it to? Should we fix a date or should we not fix a date, or should we be tied to Section 33? We need a clear understanding on that.

Secondly, Mr. Chairman, I have been under a lot of trouble from various quarters saying that the Minister for Justice and Constitutional Affairs wants to hijack the Constitutional Review Process and I am very happy that the right Committee has now been formed to be having a meeting with the Commission and that this is going to be a truly people-driven Process and that the Government is not going to play any role in either fixing dates, hijacking the Process or slowing it down. Yesterday I was summoned by the Ufungamano Group because they thought that I was drawing the Rules of Procedure for the Conference and that in those Rules I was assigning the Government a bigger role in driving the Process and taking it away from the delegates. I assured them that I have not even seen those rules and when I came to consult the Attorney General, I understand there are more than one set of rule which have been sent to his office for publication. Could the Commission throw some light on the Rules of Procedure and what process of consultation has gone into making those Rules because again the Conference itself has to be driven by the people and we want to avoid any accusations of hijacking by any quarter.

Hon. Muite: Prof. Okoth Ogendo, you can comment on the two issues raised by the Hon. Kiraitu, the Minister, you do not need to comment on hijacking; I can assure him that the Parliamentary Committee will absolutely not allow him to hijack the Process.

Hon. Ruto: On a point of order, Mr. Chairman. Hon. Kibutha Kibwana had raised a very fundamental issue; he had asked

the Commission to give us an indication of what is the least time possible in terms of notice for us to be able to convene the Constitutional Conference. We have heard a presentation about the 28th of April; is it that we need a month's notice to be able to start the Conference? That is what, I think, Hon. Kibutha Kibwana had asked, so maybe in his response, Mr. Chairman, he can also shed some light on that.

Hon. Muite: Thank you, Mheshimiwa Ruto, it is quite true that is an important point. So you have three issues, Prof. Okoth Ogendo, maybe you could deal with two and somebody else could deal with the point raised by Mheshimiwa Kibutha Kibwana.

Com. Ogendo: Thank you, Mr. Chairman. I understand Prof. Kibwana to be asking what is the minimum time or maximum time under the Act that the National Conference must take. I think that was his question, not the time that it takes to give notice to convene the Conference. I think Hon. Ruto has asked a new question.

Hon. Muite: Then there are four points. I think Mheshimiwa Ruto is asking, when is the earliest date on which we can have the Constitutional Conference? Must it be the 28th or can it be earlier? Then there is the point raised by Mheshimiwa Kibutha Kibwana, if you can deal with those four points.

Com. Ogendo: Mr. Chairman, on Hon. Ruto's question, I would like the Secretary to respond to that because we do have Rules which have been gazetted that require us to give notice to delegates before we call the Conference and I think the Secretary will clarify that.

Prof. Kibwana's question, the answer is that the Act does not specify how much time the Conference should take. We, as a Commission, decided last year that we wanted to do it in thirty days but the Act does not say it must be done in thirty days or we need a hundred days or one day. So it is a question of what happens and I think that was done for a very good reason: National Conferences everywhere else have taken periods that vary, it depends on what the contention is, how long people take and so on and so there is no minimum time limit under the Act. What it is saying here is that in our own planning we think it might take more than thirty days.

Hon. Kibwana also asked the question, how did we expect to handle this issue of budget under scenario one. The answer to that question is that there is a view that says that once the Conference starts and as long as there is a quorum, the process should continue. That is one of the underlying principles in scenario one. We take no particular view about it, it is simply saying that when you run a Conference the rules of the Conference say that you can run it with a quorum and therefore you do not have to worry about some of those externalities. But we are offering scenario two because we do know that realistically and politically those exceptionalities are important for this country.

Hon. Kiraitu is asking two questions: one, what specific date? I think we are saying if, as a Committee, you accept scenario one then we are asking for end of August without Referendum. In other words under scenario one we are asking for September, under scenario two we are asking for October. But we are saying that some of those externalities can be unavoidable and, therefore, we are saying to the Committee, exercise your powers, advise Parliament to exercise its powers under Section 26(2) in such a way that it becomes unnecessary to come back to Parliament for further extension. Last year when we were here I argued before the Select Committee that, look, even if you gave the Commission five months, six months or one year, the minute that the Constitution is enacted, Section 33 says that the Commission stands dissolved and it appears to me at that point that it may have been more rational to say “you have time to finish and what we all want is a new Constitution” and at that point the Process will terminate. So I am saying that perhaps you want to craft it in such a way that, first of all, you do not have a Commission that continues indefinitely and at the same time you do not have a situation where there tremendous externalities and you have to come running back and have a meeting like this again and ask for an extension because that also has its costs and its interruptions.

On the question of the Rules of procedure, the power to draw up the Rules is in the Commission, that is what Section 34 says, that is what Com. Kangu has indicated. We had passed Rules in the Commission and then something happened to those Rules between the time Plenary passed them and the time they land at the Attorney General’s office. When we discovered this, we recalled those Rules and we restored the Rules as originally passed by the Commission and, therefore, the Attorney General should not have more than one set of Rules; as far as the Commission is concerned there is only one set of Rules from the Commission.

PLO Lumumba: Mr. Chairman, under the Regulations we are required to give a two-weeks notice for the Conference so I will be giving a two-weeks notice once it is agreed and that, therefore, should be factored on the starting time.

Hon. Kamotho: Mr. Chairman, can the Commission confirm to us whether the composition of the delegates to the Conference, apart from Members of Parliament who in any case had not been sworn in, remains the same or there are any changes which are going to be done by the Commission from the lot that attended the aborted National delegates conference last year?

Hon. Muite: While responding to that particular issue you may wish to enlighten Members of Parliamentary Committee on the procedures that you adopted when electing, appointing or selecting the representatives from the districts and the county councils? How was that done? Of course we know there had been elections in the local authorities; how are you factoring that in? Is it the former councilors or is it the new councilors? How are you going about verifying and what criteria did you follow when you were appointing those delegates?

Hon. Kibutha Kibwana: I think, Mr. Chairman, when one looks at Section 27, subsection 2 of the Act which says “the

National Conference shall consist of----“ then subsection 2 © “ three representatives of each districts at least one of whom shall be a woman and only one of whom will be a councilor elected by the respective county council in accordance with such Rules as may be prescribed by the Commission”. I am looking at “respective county councils” because one needs a clarification; the previous councils had less people in terms of composition than what elected in 2002. So are we talking about the same county council which elected then and which exist today?

Hon. Members: There were more.

Hon. Muite: I think last time there were more.

Hon. Kibutha Kibwana: There were more last time, they are less now . My argument is there is the possibility that in terms of composition, we have a different type of county council now as opposed to the county council which elected then so that nobody can bring in legal matters to say that if we go by the old ones, the people who elected them are different from the people who are councilors now. Because of the numbers we changed the structure of the county councils in terms of making them less. So that needs that clarification so that nobody goes to court saying that if we go by the old delegates elected by the county council it is a different type of county council which elected and now there is a different one.

Hon. Muite: Thos are the issues which I trust the Commission will clarify. These are issues of concern particularly taking into consideration also that the elected county councils which had elected their representatives have changed. So, are you organizing fresh elections through the county councils or what? These are the issues that we would like to have your clarifications on.

Hon. Wetangula: Mr. Chairman, I believe that the last Conference that did not take off was simply postponed and there were people who were elected by the county councils to come and attend; the Commission should organize fresh elections. For example, in Bungoma I was elected and now I am in Parliament; they should elect somebody to replace me. But those who are still there, to make the work easier, should simply come and attend the Conference.

Hon. Muite: I think what we are asking the Commissioners to clarify is how they are addressing that issue because, of course, there are different views as you can begin to see and I am sure you are hearing from the crowds also different views. It is a happy coincidence that Mheshimiwa Wetangula had been elected on a KANU ticket, he is still there. There are people who may feel differently from the ground that they now want to elect a different delegate.

Hon. Nyachae: I think, Mr. Chairman, there are two things on which I would like to get clarification from Commissioners because after the meeting two things are going to happen. First, the Business Committee will have to review their calendar and it has to take into account how the Constitution Review is going to proceed.

The second point which, I think, should be taken into account when responding to this is the quorum that Prof. Ogendo has talked about. I think it is a very dangerous thing to think in terms of a quorum when you know how sensitive the Constitution Review is to the whole country and this quorum could mean going ahead in the absence of Members of Parliament and this could spark a lot of trouble if certain decisions are reached in the absence of Members of Parliament who would then say “we do not accept it”. This would bring problems to the whole review. I would like to encourage the Commissioners to be very candid on the timetable, taking into account what the Speaker said. Personally – and I am not speaking on behalf of anybody here, not even the Committee – I would prefer to see a successful Review more than restricting ourselves to a timetable which could create feelings out there in the country that Kenyans have been bulldozed because of the timetable. I think people should be given as much time as possible at the Conference so that they go away having steamed out all their feelings and focused towards a consensus for the whole country. So I would like them to react particularly in light of the message they got from the Speaker about the calendar of the House.

Thank you.

Com. Salim: Thank you very much, Mr. Chairman. Maybe on the issue of delegates and who should be there or not and also on the issue of cases like the one of Hon. Moses Wetangula, I would like to call our colleague, Com. Dr. Swazuri, who heads the Accreditation Committee that has been throughout scrutinizing the list of delegates, to explain to your good selves what the position is regarding the delegates and perhaps the Secretary could also come in to touch on the legalities related to that issue.

Com. Swazuri: Thank you, Mr. Chairman. As you have already pointed out we have had to replace some delegates, for example, we are to replace delegates who died, we have also had to get new names of the Members of Parliament, we have also had to replace delegates like Hon. Wetangula who were elected district representatives but now they have been elevated to positions of being Members of Parliament. We have had to do that. In terms of the civil society, there have also arisen some vacancies, either because of the non-compliance with our Regulations or because of moving out of that group; we have done that. We have not done any replacements for Commissioners because they are still intact. We are still scrutinizing the list of observers which we think we shall finalise by the end of next week. There is also another element and that is the political parties; we have finalized that list except for one political party, that is KANU, which has not given us its nominee in that respect.

So we almost have the final list ready, we also have some of the replacements ready except for Lamu which is holding its elections on 26th, that is tomorrow, so we shall get their replacement.

In terms of the legality of the councilors who lost and who were delegates, I think my colleague Com. Hassan has been dealing with that, so I would like with your permission to invite Com. Hassan to respond to that.

Com. Hassan: Mr. Chairman, I am sorry but this is something which the Secretary would have easily answered, I do not why my colleague says I should do it. But in the meeting with you I explained the law which my learned teacher of Constitutional Law, Prof. Kibutha Kibwana, talked about. Section 27, subsection 2(b) is very clear; it says that you elect three delegates from the district, one of them must be a woman – that is a categorical obligation – the other 2 or one of them *may be* a councilor. So those who were elected and were councilors at that time, even though now they have lost the elections and are no longer councilors, legally speaking they are still delegates because when they were being elected they were being elected not because they were councilors; the fact that they were councilors was purely coincidental because the law says all the other persons or one of them *may be* a councilor. The words used were *may be* and, therefore, in my humble submission, I think all those who were elected from the districts and were councilors, if they have lost elections, they will still come as delegates. That is the bottom line. I know it may not be politically good speaking outside there because the people in the district and everywhere else know that whenever an MP has been defeated then the new MP goes to the Conference as a delegate and therefore that when a councilor loses he should also automatically get out of the way as a delegate. That is the mentality out there, but the law is that that person was not elected because he was a councilor, he was elected because he was a delegate.

Hon. Muite: I thought that the question that was being addressed to the Commission was, how did the Commission go about electing these three delegates from each district?

Com. Hassan: The elections were held by the county councils; a county council was constituted into an electoral college. If a county council had 30 councilors, those were the voters and therefore people applied from the district, the returning officer as the District Coordinator from the Commission, and the councilors then voted. Although they were told “one of the people who you are going to vote for must be a woman and of the other 2, one of them maybe a councilor” the county council truly believed that one of them must be a councilor , so everywhere they brought in a councilor.

Hon. Nyachae: Chairman, I think the legal aspect as explained may be okay but I think it is very important for the Commissioners to take into account the fact that when people have replaced a councilor and they have brought in another person they have elected their spokesman in that area. So if you argue that somebody who the people have rejected in the last elections can still come in because he had been appointed, I think you might find yourselves antagonizing the people in that area and they would say “that fellow is not speaking for us.”

Hon. Yusuf Haji: Mr. Chairman, I just want to add one view. In view of the fact that we are so many parties in the country and things have changed because of the elections and people have defected from one party to another, we might find a situation whereby either KANU or NARC is very strong in one area or very weak in one area, yet they are being represented by people who do not belong to that party and people will not be very happy about that. That also should be taken into consideration.

Hon. Muite: I think what I am hearing is that the Members are expressing political views here; you are telling us what the law is. The law was enacted to achieve political expectations, so you need to re-think that issue of the delegates, we do not want to go to the Conference tukute vita huko.

Hon. Kones: Mr. Chairman, the fact that, as the Commissioner said, according to these delegate lists from the districts, every district ended up nominating a councilor even though it was not a must that they had to, should actually give the Commission an indication that there was a serious need for a councilor to represent that district and therefore there is need for us to review that position again so that you do not end with people who are totally unpopular at home.

Hon. Hassan: Mr. Chairman, just to summarise that point, we are actually looking through the delegate lists of the districts and we are looking the elections have affected the councilors and the council delegates and I do not think there is a big number. As a Commission, we are going to deal with that issue, but we understand what you have said. Thank you.

Hon. Muite: What I am hearing, is it very difficult, would it take a lot of time for your to ask the local authorities which are now in place with the mandate of the respective areas, to give you delegates?

Com. Hassan: The problem, Mr. Chairman, is that if you as Paul was elected by Embu County Council as a delegate to represent the district and then you lost elections as a councilor and then we said “now that you have lost elections as a councilor we want the Embu County Council to again bring us a delegate who is a councilor”. They bring a new person. You, as the elected councilor, will have a right to go to court and challenge the Commission because you were elected as a delegate last year. So we are also actually in a very difficult position.

Hon. Godana: Mr. Chairman, I must say I am perturbed that as a senior counsellor you would support the argument that we are talking politics and therefore we should be prepared to bend the law. I think Com. Hassan is right; if the law is that clear I think this is the foremost place where we have to respect the law. If there has been changes to the profile of the local authorities suggesting that particular delegates elected before the elections have lost the council positions, I think you may use other procedures maybe to appeal to them to step down to facilitate replacements. But I do not think this Commission or this Committee should be the one saying when the law is bendable, let us bend it. I think we have to respect the law.

Hon. Muite: I am not taking any position as the Chairman, I am merely trying to guide discussions so that we can arrive at a consensus and I do hear concerns from a number of Members on this side of the issue of the district delegates. So I was really posing the question to the Commission here, the example you used of able county council; is it very difficult to ask able county councils to verify whether they still wish to be represented by that particular delegate. That was the only issue I was raising.

Hon. Kibutha Kibwana: Chair, maybe my point was not understood because I do not think it is a political point. I was simply

saying that the county councils have been restructured so that we have a different kind of county council because the people who were elected last time, we have found a lot of situations where a lot of the wards were merged. Therefore, the question is, could somebody go to court and say that the councils which elected are different and therefore whoever is now coming to the National Conference is not the legitimate person because there is a new structure in terms of the county council. And I was just inviting the Commission to satisfy itself that we do not have too much of a different creature in terms of our county councils. So that was not a political point.

However, I think we must appreciate as Mzee Nyachae has said that this is a political process; constitution making is both legal and political. So if you were to bring people who, when they were elected were elected to represent, for example, party A, and now you bring them and they are supposed to be in a different party or representing nobody, things like those are going to be questioned. So we just need to satisfy ourselves that the National Conference will not be bottlenecked by considerations of that kind. We will have a problem with time because we will quarrel for one week or so.

Com. Mutakha Kangu: Thank you, Mr. Chairman. I got Hon. Kibutha Kibwana. The position we took in the Commission was that a reference to a county council in the legislation is a reference to an institution just the same way reference is made to Parliament as an institution. We then said that in as far as the membership of the Conference is concerned, for Parliament the legislation is very specific that Members of Parliament shall be members of the Conference and when you read the legislation on filling of vacancies, the legislation even says that if for a delegate who became a delegate by the fact of being a Member of Parliament ceases to be a Member of Parliament, then he ceases to be a delegate. If a Commissioner who became a delegate by virtue of being a Commissioner ceases to be a Commissioner, then he ceases to be a delegate. That is not said about the district representatives. The county councils are referred to merely as an electoral college.

We also considered the fact that we want the process to move on and we have operated under a lot of pressures and we have been told time and again to try and avoid any approach that will bring controversies that will lead us into losing more time. So as Hassan has said, we said if we are going to say because there are new county councils can we elect delegates for the districts afresh, we are bound to get into disputes that may delay the process further. That was the reasoning, but listening to you, Members of Parliament, speak we are also getting the message from Hon. Kibutha Kibwana that other disputes may arise even on the approach we have taken. And so we hear you and we may have to say that this is an issue that we have to re-think.

Hon. Nyachae is also saying that there could be disputes of people saying, “look, you no longer represent our interests”. So, between this Commission and this Committee, I think the truth of the matter is that a huge issue is coming on the table which we must address in a manner that can take the process forward.

Hon. Muite: The example you are giving is, say, for example, if Moses Wetangula had not won elections - it is very good that he won the elections, he is a staunch NARC supporter - if he had not won elections and if he remained in NARC he would

come there as a representative of KANU. These are some of the difficulties.

Hon. Mutula Kilonzo: Thank you, Mr. Chairman. Very brief comments. One, I think it is fair that we acknowledge that there were no new county councils created in the country prior to the elections; in fact, all county councils remained the same. The only mergers were wards in certain areas in order to reduce the number of councilors. Therefore, it is vital to bear that in mind.

The second point I wish to make very briefly also is, it occurs to me that the law is very clear that in fact if a delegate was elected, the election of that delegate was not pegged to the last elections held in 2002, that was an election pegged to the Constitutional Review Process. That by almost unanimous consensus in the country extends over elections. Therefore, I tend to agree with the Commission - in fact my learned friend has put it very clearly and also Hon. Godana - that we must be careful about the law because I do not think there was a procedure for changing district delegates and if you change them haphazardly you can get into trouble.

I am not basically a serious politician like the Hon. Chairman, I have not sought election, but I do share the concern expressed by Hon. Nyachae and others that in some areas there was almost a total revolution and you changed people automatically. Therefore the Commission should be sensitive to those areas and if you find that a delegate is willing to step down on his own then perhaps you arrange a re-election. But the law is the law and I think, as Hon. Godana has said, we must apply it. There is no procedure for changing delegates once elected until the Constitutional Review Process is complete.

Thank you.

Hon. Muite: Mheshimiwa Kiraitu, I think we need to wind up discussions on this issue of delegates; if it can this joint meeting that long to discuss one issue you can begin to see the interest that the delegates at the Conference might take.

Hon. Kiraitu: Mr. Chairman, I think we should be alive to the fact that constitution making is a political process and we should not be too legalistic, this is not a court of law.

Mr. Chairman, I tend to agree with Hon. Nyachae that we should be sensitive especially to local politics. In fact, although Section 24(2) reads that “3 representatives of each district at least one of whom shall be a woman and only one of whom may be a councilor elected by the respective county council” as a matter of fact what happens on the ground is that the council met, elected one woman, one councilor and another person. So out of the three one of them is a councilor; although the law says “may” on the ground they brought a councilor and there will be a lot of kelele from down if they do not see any councilor being represented from certain county councils. I do not think we are too much tied by the law because it says “such rules as may be prescribed by the Commission”; so there is no reason why the Commission cannot change these Rules for review by the

councilors. I think if we are to avoid trouble - and I do not think it will cost too much time – we should think of sending a notice to the county councils telling them to look at their list of delegates and see whether they want to change the representatives so that at least a councilor is elected to represent the local authority. We are looking at the flash point, this is likely to be one of them.

Thank you, Mr. Chairman.

Hon. Wako (Attorney General): Thank you, Mr. Chairman. On the issue of interpretation of the Act let us not only think that it is political. The legal opinion expressed is one interpretation; there is also an alternative in the presentation of the same Act. Where you have two possible interpretations, then in taking into account some of the political considerations which have been expressed here, it is not necessarily that we are making it political, but we are just taking an interpretation which will move the process forward. My interpretation here as opposed to the interpretation which I am just putting forward – I am not saying it is mine – is this. Looking at the provisions of the Act in relation to the delegates from the districts, in as much as when they were elected it was pegged to the Constitutional Review Process, as far as councilors were concerned, by the use of the words “may be” it became an option on the part of that county council. So the county council in exercising its rights to elect delegates, exercised its options to elect one of its own, a councilor, as a delegate. That councilor was elected as a councilor. The exercise of that option was that man, as a councilor, going to represent that council in the delegates’ Conference. Therefore, if you take that into account, that it was an exercise of an option and that option was exercised, if you now go to, who are the other elected MP’s, then you can see that a spirit of the entire Act is that the people who have been elected should be the current people who have been elected to represent the district, Members of Parliament and so on in the Constitutional Review Process because it was recognized that the Constitution Review Process must take into account elected representatives.

I am fortified in this interpretation by the fact that it has been stated that all the county councils elected at least one councilor to be among the three delegates. In other words, it was up to them say “we do not want to be administrated by any elected councilor”, it was up to them to say that, but they exercised the option and said “we want an elected councilor to represent this council at the National Constitutional Conference.” Therefore, because of that exercise of the option, if that person is now no longer an elected—

Hon. Yusuf Haji: On a point of order, Mr. Chairman. I do not think the Act says elected councilor, he can even be a nominated councilor for that matter.

Hon. Wako: Yes, he can be, but a councilor, the person being elected in terms of the county council electing their councilor to the National Constitutional Conference, they opted to elect a councilor who was there, who was a member of that council, whether elected or nominated. Isn’t it? Once they have exercised that right they wanted a councilor from the county council to represent the county council at the National Constitutional Conference. Therefore, it appears to me that in the case of those

councilors who, by option of exercise, were elected as councilors and are no longer councilors, an opportunity should be given to the local authorities to elect a councilor or maybe somebody else. I think it is not only political but it can also be legal, in accordance with my own interpretation. So I would really urge the Commission to take that into account. We have been told by the Commissioner that actually there are very few councils involved but if they can forecast on that and give the opportunity to the local councils to elect.

Com. Githu Muigai: Mr. Chairman, I think that when Parliament in its wisdom formed both the Commission and your Committee, Sir, it was because of the realization that there are political questions that elected political leaders must make about the review process. For my part, I would defer – and would urge that the Commission should defer – to the sense of political judgement of the elected leadership because if this question was mishandled we may then have a political unraveling that we as the Commission cannot take responsibility for and you, the politicians, must take responsibility for. I do not see therefore that there is any harm whatsoever in revoking the nomination of all those persons who came in through this criteria and conducting the elections afresh, because, Sir, the legitimacy of who is at the Conference is very critical. Thank you.

Hon. Murungaru: Mr. Chairman, naturally I cannot argue so incisively as these learned people, but I wanted to say that I have come across statements that every law has got a letter and has a spirit. The spirit of this Act was that wananchi should be represented by the people they have elected. I believe that was the spirit and, therefore, Mr. Chairman, I would like to similarly urge the Commission to bring to the Conference councilors who have got a valid, current mandate to represent their people.

Hon. Muturi: Thank you, Mr. Chairman. I was just observing that it appears like some consensus is beginning to emerge that it is desirable that those who were elected at the local councils to the National Constitutional Conference were actually elected by their own councils because they were seen as having some valid and, then, current mandate. Therefore, Mr. Chairman, in terms of what appears in Section 27, subsection 2, paragraph ©, those elections of those councilors were to be done in accordance with rules formalgated by the Commission. Perhaps we may need to hear from the Commission whether indeed they ever made any such rules and if so whether they also have provision for this kind of exercise.

Hon. Kalonzo Musyoka: Mr. Chairman, first of all I apologise for coming a little late, I could not help it. Secondly, I have been listening, quite frankly, issues that do arise are important issues. But I am greatly persuaded by what Mutula Kilonzo said, and the question we must ask ourselves is really this, that were those people who got disbanded after Parliament was dissolved, properly at Bomas of Kenya because an election did take place? Mr. Chairman, let me just remind you that the reason we decided to meet the Commission last time, soon after we met, was so as to be able to agree expeditiously on a programme of work. Kenyans have been waiting to get this Process under way; a reconstituted National Constitutional forum is an urgent matter. Let me just remind all of us of that fact and I would, myself, want to assume that if we hear today that the Commission can constitute the National Constitutional forum in a month's time, then everything that needs to be done with regard to replacement of those names or no replacement must be done. We must also remind ourselves that those people are Kenyans

and they have a stake and they were properly elected. I think by the mere fact that they may have lost an election or whatever and that there is a changed constitutional mandate of the people, let us also bear in mind that they are Kenyans and they were properly elected and they can actually go to court over that issue. So, I think rather than lose time on this matter, these are Kenyans, let us get on with this exercise, Mr. Chairman, we call these friends to come and share with us how soon they are able to get on with the task of reconstituting because if we now say we have to go to the county councils and find out who are the people quarreling between themselves, we are going to talk about three months before we have a National Constitutional forum.

And this, Mr. Chairman, is a matter of great concern to Kenyans.

Thank you.

Hon. Muite: I think we need to wind up so I am going to ask Mheshimiwa Kosgey to comment, Hon. Ruto, Hon. Wetangula and you will be the last one, Mheshimiwa, and then we will leave the issue to the Commissioners. You have heard the views of Members, you are able to get the sense of it, you are able to decipher where the majority is inclined and we will leave the issue with you.

Hon. Kosgey: Thank you, Chairman. I want to agree with Hon. Kalonzo because if we open this argument, we open a Pandora's Box and soon we will be questioning the legality of the Commissioners as well.

Hon. Ruto: Mr. Chairman, I also do want to agree with Hon. Kalonzo on this matter because the politics has changed but Kenyans have remained the same and those people who were elected then – and a very good example was given, Mr. Chairman, of Hon. Wetangula-- He was elected then not even as a Member of Parliament but a member of Bungoma District. It was not basically a Kanu issue and it is confirmed subsequently that the people of Bungoma, although they moved to NARC, Wetangula was actually elected a Member of Parliament. So, basically, a majority of the people who were elected then were elected on the basis of their own credibility as Kenyans and, Mr. Chairman, we have to make a cut decision. We cannot afford to go half measure. If we are going to revoke the nomination of people to the delegates' Conference on the basis that they have ceased to be councilors and that we have a new political dispensation and that we have a new county council, then it could as well mean that we revoke all the rest. That is the story of the woman and the other person because the persons who elected them are not the same. So if we are going to cancel that of a councilor, we will be forced to cancel everything and elect delegates afresh from the districts and I think it will be neater that way. We have to make a cut decision that we elect afresh and deal with the court cases that will follow us or we stick to the law and tell whoever it is that these are Kenyans, properly elected; I do not think anybody will take us to court for doing that.

Hon. Cheboi: Thank you, Mr. Chairman. Unfortunately Mheshimiwa Ruto has touched most of what I wanted to say. I was just going to say that it is very important that we do not just look at the councilors because my view is that we seem to be centering so much on the councilors and forgetting that also the other two elected representatives to the Constitutional

Conference from the districts are done by the same old councils, half of which may have been voted out. My view would have been the only part which would be affected most about this issue is Part D where the issue of political parties is concerned so that if anybody would have defected maybe that would be the only issue. So I tend to agree that we should insist on the original list of the people elected and pursue this matter so that we can end it fast.

Hon. Wetangula: Thank you, Mr. Chairman. Looking at the Act I do not see any provision under which the Commissioners or anybody can revoke the election of a delegate. I take the point raised by Hon. Godana and Hon. Kalonzo and if there will be any issues that are tricky, we let the Commissioners handle them on a case by case basis, but where people were elected and they were properly elected, it does not matter whether the constitutions of the councils have changed or not, they are generally elected and they should be allowed to come to the Conference. In any event, as I said, from the beginning, the Conference was simply postponed, we are not going to a fresh Conference. We are going to the same, same Conference we would have had at that time and the composition should not be unnecessarily interfered with.

Hon. Nyachae: Mr. Chairman, I do not want to sound as disagreeing with these lawyers around here but I think we should think in terms of the consequences. Changes have taken place during the last elections in a very dramatic way; certain communities have taken certain directions. Before then, some of those areas were either Kanu ndamu and they are no longer Kanu ndamu, they are a ndamu somewhere else. Oh, yes, let us face these facts. Suppose we say we continue with those people and those communities they represent have dramatically changed from what they were and at that time when they elected representatives, there is no doubt that in certain places it was through political influence. Now that has changed. You come back now and say that the same people will represent and the community on the ground says “we changed our style of looking at politics in this country, these people are not our representatives, they are not our spokesmen”, what would be the consequence in the Process? Are you going to ignore that community? That is the question. I do not want an answer now, I think it is a point to take into account—

Hon. Ruto: Point of procedure, Mr. Chairman.

Hon. Nyachae: Mr. Chairman, we politicians here, all of us here-- As I listen to people speaking, some are trying to make reference to the law, it is politics at the back of their minds and let us take into account what is at the village level. What will be the reaction of the people if you continue? It is not for us to decide here now but I am posing that issue: what will be the consequence? Are you going to ignore those people when they say “so and so from our area is not speaking for us, if you have him as a delegate, yes, you can have him” and the people will say “that Constitution does not belong to us because we were not represented.?. What are you going to do?

Hon. Muite: I think we need to wind up that issue now. I think the Commissioners have heard. Practically every member of the Parliamentary Committee—

Hon. Mutula Kilonzo: Point of procedure, Mr. Chairman. It is a very simple point. I believe we are troubling the Commissioners for nothing. We are the legislators and if we are going back to report to Parliament and we feel that there is need, then we can amend this section, Mr. Chairman, to put a simple proviso provided that if there is any district that wishes to change its delegates, it can do so within a certain period of time. It is a simple clause we can insert in the law and we do not need to bother the Commissioners.

Hon. Muite: I thought, in fact, that the matter was covered under the regulations so we do not need to go amending the Act. In fact, the summary by Mheshimiwa Cheboi here and to some extent the Hon. Godana Bonaya here, is saying the Commission should go and be pragmatic and look on the ground, see where you need to have fresh elections in the districts. You do not have to cancel everything, but factor in those because the point that I think Mheshimiwa Simeon Nyachae is also raising is that we do not want ubishani when we go to the Constitutional Conference on the legitimacy of the delegates.

So, can we wind it up there and unless there are any other issues-- Yes, Secretary.

PLO Lumumba: I now see, Mr. Chairman, that you are about to ask us to leave to consider—

Hon. Muite: Yes, indeed.

PLO Lumumba: --the weighty issue of extension, but I think it is proper that you take into cognizance that there will be financial implications. We agonized over bringing a budget, but I thought that it would be premature to prepare a budget. I want very briefly to tell you that the budgetary allocation we have is up to the end of June this year and that, therefore, if our mandate is extended there will be need for budgetary allocation beyond June and further, Mr. Chairman, that if, as you said, you plan with the worse case scenario, you plan with a Referendum, there will be further, very humongous financial implications. Our initial interaction with the Electoral Commission tell us K.Shs 1.8 billion at the conservative level to do a Referendum. At a later date, once you have made the benchmark decision on extension, I shall cause a proper budget, properly well thought out, to be availed. But I want at this initial stages that you be alive to the budgetary implications.

Thank you very much.

Hon. Yusuf Haji: Mr. Chairman, my only concern is that we cannot have two sets of rules, so the Commission should decide whether they will stay the way they are, or if they are to change, the change should be all over.

Hon. Muite: I think we have agreed to leave that issue to the Commission to re-examine and unless there is anything else I was going to ask—

Hon. Murungaru: Mr. Chairman, I just need a clarification from the Secretary. You say that you have budgetary resources sufficient for up to June of this year. Do those resources include the expenditure on the National Conference?

PLO Lumumba: That is guardedly so. We have as at today available to us monies which, if we have the National Constitutional Conference for the programme period, would cover the Conference.

Hon. Muite: Programme period – that is one month?

PLO Lumumba: That is one month.

Hon. Muite: I would like with your permission then to release the Commissioners so that we can consult inhouse in terms of the extension, then we shall be communicating to you, but I think it was a very useful meeting.

Hon. Khamisi: I would like to raise a point of clarification here because when the good Professor went through the scenarios, he did mention that with scenario one, the process would be completed in June and with a Referendum this process will be extended to August. But later on I think there was a mention of September, and I just wanted to find out which are the correct dates. Are we talking about August with Referendum or September with Referendum?

Com. Ogendo: September (?)

Hon. Hamisi: Thank you.

Hon. Muite: Anybody else with a question to raise with the Commissioners before they go? I am going to give the floor to the Commissioners.

Hon. Kibutha Kibwana: Chair, I appreciate the fact that the Commissioners explained to us that time is of the essence and that in terms of the things we plan we must make sure that we respect time. I think it is also necessary for the Commission to assure us, as the Committee of Parliament on the Constitution, that internal conflicts within the Commission are going to be minimized because that is another source which can also steal a lot of time from the process. I do not know whether they have a conflict resolution mechanism but I think this time around, we really want to work very well together so that we do not have conflicts, they do not have conflicts, we do not go into their terrain so that this work is completed.

Thank you.

Hon. Muite: Would you like to respond to those two points? If you have any need for diplomacy we are going to second the Hon. Kalonzo Musyoka.

Com. Salim: Mr. Chairman, Hon. Musyoka was my boss at the Ministry of Foreign Affairs, so we will use all diplomacy possible to maintain good relations within the Commission. I may perhaps even say that it really takes two to tangle. We hope that everyone in the Commission will adhere to that principle of working in harmony. We have promised the Hon. Minister when we saw him some time back that we will work with harmony, but really it depends on all parties concerned within the Commission to do so. I am afraid, Mr. Chairman, sometimes my diplomatic stand tends to be slightly affected by the realities on the ground and the Committee have noted very, very clearly that we do not want to really be party to any internal conflicts.

But, Mr. Chairman, it is no secret that we have had problems with the Chairman and, therefore, since he is not here we hope Hon. Kibutha Kibwana will also bear in mind that he would probably have to agree with us that there is need to work in harmony. If indeed he is prepared to do so, we will be very happy to work with him. All of us in this room this morning do work in complete harmony except the odd one out and, hopefully, he will join us. Mr. Chairman, sometime it is important to speak candidly, but we do not want to embarrass you as a Committee by overdoing it, but I am sure that most of you are indeed aware of the reasons why there is the occasional disharmony. But we sincerely hope that they will be eliminated enough at least to allow us to complete our work. We are all extremely anxious to do that; we want to sincerely assure you, Hon. Kibutha Kibwana, that we are sincerely prepared to work in harmony and finish this and we, therefore, sincerely hope that you will help us to do so by acting once in a while as moderators at the slightest sign of trouble. We hope there will be none to need moderating.

Thank you.

Hon. Muite: There is a little point of clarification which was sought by Mheshimiwa Hamisi.

Com. Salim: We have answered it. We finish in September with the Referendum, August without Referendum.

Hon. Muite: Then let me thank all of you—

Com. Salim: Chairman, can I just add one more point. I am sorry to interrupt you. We have documents on the table there for your goodself as Chairman, we had no time to make copies for each and every member of the PSC, just to give an indication of the amount of work that we have managed to accomplish. It is not a complete indication, but some indication. Hopefully there will be a small cart outside to help you, Mr. Chairman, to cart it out of the room.

Hon. Muite: These are the three volumes?

