

## THE PEOPLE’S OPINION ON THE “GOLDENBERG AFFAIR”

### I. INTRODUCTION

The economic, financial and political events that developed in the Republic of Kenya in the 1990s and came to be known as the Goldenberg Affair were the brainchild of a Kenyan citizen named Kamlesh Mansukhlal Dhamji Pattni. In his late 20s and without substantial schooling, Kamlesh Pattni conceived a financial scheme which was to facilitate the stealing from the national coffers in Kenya of substantial amounts of money—running into millions of dollars. This scheme involved people high up the political ladder in Kenya who in one way or another stood to gain from it and thus provided the much needed protection and cover for the scheme to take place and eventually succeed. How this scheme was conceived, who was involved, and its general effects on economic and political governance in Kenya were the subject of a judicial inquiry. The Commission of Inquiry into the Goldenberg Affair (hereinafter referred to as the Bosire Commission) was set up by notice in the Kenya Gazette of February 24, 2003 by the President of Kenya, H.E. Mwai Kibaki, and placed under the Chairmanship of Hon. Mr. Justice Samuel Elkanah Onderi Bosire of the Court of Appeal of Kenya.

The Bosire Commission held public hearings for a period of almost two years. It began work on 14<sup>th</sup> March, 2003 and conducted its final public session on 10<sup>th</sup> February, 2005. Over that period, about 102 witnesses were called to testify; 188 exhibits were tendered; and oral and documentary evidence was adduced. The *Hansard* of the sittings of the Commission ran to over 18,000 pages. Over 55 advocates appeared before the Commission. While the majority of them represented various people who had been adversely mentioned—some of who appeared and others who chose not to—yet others were invited as *amicus curie* to assist the Commission in its deliberations.

The Goldenberg Inquiry has been one of the longest single inquiries in the history of Kenya. Moreover, it has not been cheap to the taxpayer. According to one source, the inquiry cost an average of KShs. 15 million per month.

## **The Commission and its Terms of Reference**

At inception, the Commission was composed of the following persons:

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|--|--------------------------------|
| 1. Justice S.E.O. Bosire               | Chairman                       |
| 2. Justice D.K. Aganyanya              | Vice Chairman                  |
| 3. Mr. Peter Le Pelley, Senior Counsel | Commissioner                   |
| 4. Hon. Amos S. Wako                   | Attorney-General               |
| 5. Mr. Dan Ameyo                       | Joint Secretary                |
| 6. Mr. William Ouko                    | Joint Secretary                |
| 7. Mrs. Dorcas A. Oduor                | Joint State Counsel            |
| 8. Mr. Waweru Gatonye                  | Joint State Counsel            |
| 9. Mr. Ahmednasir Abdullahi            | Chairman, Law Society of Kenya |

Hon. Mr. Justice Aganyanya was replaced by Mr. P. Nzamba Kitonga as Vice-Chairman and the two Joint Secretaries (Messrs. Ameyo and Ouko) were replaced by Mr. George Kegoro. Also, the two State Counsel were joined by Dr. John Khaminwa as Lead Assisting Counsel and Dr. Gibson Kamau Kuria as Senior Assisting Counsel.

The Terms of Reference of the Commission were broadly given as:

1. To investigate the allegations of irregular payments of export compensation by the Ministry of Finance to Goldenberg International;
2. To examine payments made by the Central Bank of Kenya to the Exchange Bank in respect of “fictitious foreign exchange claims and other related matters”; and
3. To investigate the origins of acceptance and implementation by the government of the proposal to award export compensation for gold and diamond jewellery under the Local Manufacturers (Export Compensation) Act, 1987, Chapter 482 of the Laws of Kenya.

4. At the end of July, 2003, President Kibaki expanded the Commission's mandate authorizing it, *inter alia*, to seize all assets acquired using Goldenberg money.

It is important to point out that the initiation of the Commission did not take place without a hitch. At the commencement of public hearings, preliminary objections were raised touching *inter alia* on the competence of members of the Commission to entertain the proceedings. The preliminary objections were over ruled and the Commission proceeded to an examination of the merits of the case. The manner in which counsel sought to serve its objections on the members of the Commission, and the tenor and content of those objections, reflected part of an attempt to prevent the world in general, but more specifically the Kenyan public in particular, from hearing the whole truth of the affair.

## II. A BACKGROUND NOTE TO THE GOLDENBERG AFFAIR

In 1987, long before the Goldenberg Affair commenced, the Commissioner of Mines and Geology recommended *inter alia* that there be an increase in the compensation offered for gold and gold product exports from 20% to 40%. As a result of this proposal, an Inter-Ministerial Committee was established to review the matter. Simultaneously, recommendations were made by the Ministry of Environment and Natural Resources that the Government pay a special export bonus to *bonafide* exporters of approximately 18% to 20%, over and above the 20% export compensation normally paid under the law.

It appears that on the strength of these recommendations, on October 8, 1990, Goldenberg International Limited (GIL) requested the then Vice President and Minister for Finance (Prof. George Saitoti) for a monopoly grant conferring sole rights to export diamond and gold jewellery out of Kenya for a period of five years with an option of renewing the concession for an extra five years. GIL also requested to be granted 35% export compensation on diamond and gold exports and that due to the ensuing numerous cash transactions on a daily basis, it be allowed to operate a financial Company namely Goldenberg Finance Limited. The Vice President and Minister for Finance gave his approval for the request save for conferring a monopoly on GIL. As a result, a number of dealings took place which appeared *prima facie* illegal. By the time the additional 15% export

compensation was revoked by the Minister, a tremendous loss had been caused to the Kenyan economy with far reaching consequences that are still felt in the country to-date.

### **III. THE CONTEXT OF THE PEOPLE'S OPINION**

In June 2005, Kituo Cha Katiba (KCK) commissioned two retired East African judges and two academics to review the records of the Bosire Commission and to identify and analyze the key issues emerging from the proceedings. The persons requested to carry out this task were:

Hon. Justice Samuel William Wako Wambuzi, Chief Justice Emeritus of the Republic of Uganda; former President of the East African Court of Appeal and judge of Appeal in the Republic of Kenya;

Hon. Justice Dan P. Mapigano, Retired Judge of the High Court of Tanzania (who, unfortunately, was unable to attend due to indisposition);

Prof. Chris Maina Peter, Professor of Law at the University of Dar es Salaam, Tanzania; and

Prof. J. Oloka-Onyango, former Dean and Professor of Law at Makerere University, Kampala, Uganda.

The panelists were mandated to compile their findings on the basis of the proceedings and the evidence submitted to the Commission of Inquiry and to present individual 50 page academic judgments. They were also to make recommendations to the Government of the Republic of Kenya on how it should respond to the findings and judgment of the Commission. The present statement is the combined opinion of the three panelists. It is intended to critically reflect on the proceedings of the Commission and draw useful lessons that could be made available to the countries in the East African region and beyond.

As a preliminary matter, it is important to preface our opinion with the statement that what follows is, in the first instance, based on the documentary evidence that was provided. The

panelists did not attend the public hearings, nor were they availed the exhibits submitted to the Commission. Nevertheless, they reviewed the complete record of the Commission contained in the *Hansards* of the Commission, including the portions of exhibits which were read and recorded at the inquiry. To that degree, the issues addressed in this memorandum do not cover the full extent of the Inquiry, but only those where evidence was available. In this respect, the opinion given is not a ‘judgment’ in the traditional sense of the term, but rather Observations and Conclusions derived from an assessment of the evidence provided.

Part IV of this report summarises the issues we considered to be most pertinent to the Inquiry. Part V is our opinion and assessment of the evidence, specifically responding to the issues identified. In Part VI of the report we give our summary of the opinion on the evidence reviewed, while in Part VII we present a number of the general points that arise from the Goldenberg Affair that we regard necessary for consideration. Part VIII consists of General Conclusions, while in Part IX we make specific and general recommendations, and offer our views on the most appropriate response of the Government of Kenya to the Commission of Inquiry.

#### **IV. SUMMARY OF THE ISSUES**

The following opinion specifically encapsulates some of the issues as raised first of all in the letter of reference by KCK, in the terms of reference in the Legal Notice which set up the Commission of Inquiry, plus those which emerged during the course of examination of the testimony given.

The following are the fourteen issues identified by the panel for discussion:

1. What were the origins of, acceptance and the implementation by the Government of Kenya of the proposal to award export compensation in respect of exports of gold and diamond jewellery under the Local Manufacturers (Export Compensation) Act, 1987, Chapter 482 of the Laws of Kenya (hereinafter referred to as the LMECA)?

2. Did Goldenberg International Limited (GIL) fulfill the necessary conditions so as to entitle it to claim the 20% export compensation which could lawfully be claimed under the LMECA?
3. Does Kenya have Diamonds and/or Gold?
4. Did GIL actually deal in or export diamonds and gold?
5. If diamonds and gold were exported as alleged, what was the quantity and to whom was it exported?
6. If issue no. 3 above [*Does Kenya have diamonds and/or gold?*] is answered in the negative, where did GIL get the diamonds/gold it allegedly exported and were the purported exports properly processed through the Customs Department?
7. How did GIL acquire a license to export diamond and gold?
8. How did GIL secure the monopoly to export gold and what was the justification for granting GIL a monopoly?
9. Was money paid by the Ministry of Finance and CBK allegedly as export compensation and if so how much was paid?
10. What are the circumstances surrounding the payment of KShs. 5.8 billion to GIL which was allegedly made well after the withdrawal of the 15% and the revocation of the basic 20% export compensation?
11. What were the circumstances surrounding the payment of US \$ 210 million to Exchange Bank Limited (EBL), in respect of fictitious foreign exchange claims?

12. Did EBL, GIL, their shareholders and directors use the moneys paid to them jointly with Pan African Bank Limited, Delphis Bank Limited and Post Bank Credit Limited to defraud CBK through a fraudulent scheme of cheque-kiting or otherwise?
13. Were the moneys illegally obtained from CBK, the Customs Department and the Treasury utilized, in part or at all, to fund the campaigns of any political parties, and if so, which parties and to what extent?
14. What effect did the GIL-related civil and criminal litigation have on the administration of justice in Kenya?

## V. ASSESSMENT OF THE EVIDENCE AND RESOLUTION OF THE ISSUES

### Issue no. 1:

**What were the origins of acceptance and the implementation by Government of the proposal to award export compensation in respect of exports of gold and diamond jewellery under the Local Manufacturers (Export Compensation) Act (LMECA) 1987?**

In the first instance, we need to ask the question: *what exactly was export compensation?*

According to Evans Maturu (CW 3), an Assistant Secretary Grade 1 in the Ministry of Finance, export compensation was a payment that used to be given to local producers who were making goods for subsequent export. The aim was to compensate them for taxes they had paid on imported inputs used in producing the goods for export. The Local Manufacturers (Export Compensation) Act (LMECA) came into being in 1987 to realise this objective.

The Act was primarily meant to induce manufacturers to produce goods for export. The country would earn foreign exchange and there would be creation of employment. The country was shifting emphasis from traditional exports like coffee and tea to non-traditional

exports like shoes, fabrics, textiles and plastic items. The compensation was 10% of the value of exported goods FOB (Free On Board, no taxes) value or of the amount of foreign exchange received, whichever was less. At first the rate was 10%, rose to 18% and to 20% and then it dropped to 10%. There were criteria to be satisfied. For example, the goods had to have at least 30% of local value addition and at least 20% of duty of imported components.

The items eligible for export compensation were specified in the Second Schedule of the LMECA. A manufacturer would claim export compensation by making an application in a specified form with specified proof of having made the export. According to Maturu there were a number of export incentives. In 1991 there was the so-called manufacturing under bond administered within the Customs and Excise Act. This had similar objectives as the export compensation to promote exports but goods exported under one incentive did not qualify for the other. In other words, goods exported having been manufactured under bond were not eligible for export compensation.

Njeru Kirira (CW 24) more or less confirmed the evidence given by Maturu, but was emphatic that unless it was shown that duty of not less than 20% was paid on the imported components of the exported goods, those goods did not qualify for export compensation. According to the evidence of these two witnesses, the law relating to export compensation was amended from time to time. In the year 1989 there was an amendment to the Second Schedule of the LMECA through the Finance Act of 22<sup>nd</sup> September, 1989 which repealed the Second Schedule to the Act and replaced it with a new list comprising some 50 pages. It included classifications and descriptions of gold. The evidence of Kirira indicates that gold and diamond jewellery were in the eligible list for export compensation from the mid-1980s.

With specific reference to what can be described as the Goldenberg Phase of Export Compensation, GIL appeared in correspondence making normal export compensation claims but by a letter dated 19<sup>th</sup> December, 1990 signed by the Permanent Secretary, Ministry of Finance, Customs and Excise were told to pay to GIL 35% export compensation. It appears that the recommendations in this letter can be retraced to an 8<sup>th</sup> October 1990 letter written by GIL to the Vice President and Minister for Finance entitled "Diamond Export

from Kenya” in which the company requested to be granted the sole rights to export diamond jewellery and gold. It also requested to be granted 35% export compensation and to be allowed to operate a financial company.

Evans Maturu (CW 3) testified as to the items which were eligible for export compensation being as contained in the Second Schedule to the LMECA. According to the witness, the original Act did not provide for export compensation in respect of gold and diamond jewellery. The Act was amended in 1989 by replacing the Second Schedule with a new more extensive schedule which ran into 50 or so pages. The new schedule included various descriptions of gold and articles of jewellery. The new list in the Second Schedule must have been drawn by the Ministry of Finance.

According to Kirira (CW 24) there was an Export Compensation Committee consisting of someone from Customs and Excise, someone from the Central Bank of Kenya, somebody from the Ministry of Planning and National Development and another from the Ministry of Commerce and Industry. The main duty of the Committee was to regularly review proposals forwarded by the industry to the Treasury on matters relating to export compensation and make recommendations.

People who sought the inclusion of manufactured goods as eligible for export compensation or changes in rates, made proposals. The Customs and Excise Department was responsible for day-to-day operations of the Export Compensation Scheme, while policy matters were for the Ministry of Finance. The witness thought gold and jewellery must have been vetted by the Export Compensation Vetting Committee through the normal process. He could not remember who applied for these items to be included in the eligible list. All products that were put on the list were first vetted by the Committee.

In his report of the financial year 1990/1991, David Gicho Njoroge, the Comptroller and Auditor General had in effect said that in October 1990, a Nairobi Company requested the Ministry of Finance for the sole rights to export diamond jewellery and gold out of the country and also asked for a grant of 35% export compensation. The request was granted.

John Keen (CW 47) an Assistant Minister in charge of Internal Security wrote an undated letter to the Vice President and Minister for Finance suggesting export of gold from Kenya as a potential source of foreign exchange. Before writing the letter he discussed the matter with one Hezekiah Oyugi, the-then Permanent Secretary in charge of Provincial Administration and Internal Security and also with a gold exporter named Welensky. It was put to the witness that his letter was written about April/May of 1989. That at about the same time there was a letter from the Commissioner of Mines and Geology advocating the same matter and there was a meeting in the President's office attended by the Commissioner of Mines and Geology, and Oyugi which discussed the same issue. The witness said all these were coincidences.

Collins Yuda Ochieng Owayo (CW 10) was the Commissioner of Mines and Geology between November 1981 and April 1997. He prepared a document on formulation of gold policy dated 23<sup>rd</sup> November 1987. It was a brief to the Ministry of Environment and Natural Resources, on the problems that were facing the industry relating to mining sites, trading and export. Recommendations were made which included a proposal to increase export compensation from 20% to 40% for gold and gold products. The document was discussed at a ministerial meeting following which it was discussed in the Office of the President.

Terence Charles I. Ryan (CW 21) an Economics Consultant was the Director of Planning at the relevant time. He was assigned to deal with the proposal by Keen in his letter to the Minister for Finance to consider at the budget gold exports and trade from Kenya, to raise the export compensation from 20% to 50% so as to earn the much needed foreign exchange to eliminate smuggling and curb corruption.

Ryan recommended rejection of the proposal on grounds first, that such a step would be equivalent to devaluation of the Kenya shilling by 50%. Secondly, that as the export compensation was paid to the exporter and not to the seller of gold, it would not eliminate smuggling.

It appears also that one Naginchandra Odhavji Jivanlal Pattni (CW11) (a cousin to Kamlesh Pattni) claimed to have put to the authorities the idea to export gold and earn foreign currency and enhanced export compensation. He appeared to have been trading as Aurum (K) Limited. Nagin claimed to have applied for a licence to export gold as a project but the licence was instead issued to GIL. It appears that there was considerable rivalry in the field involving Keen, Nagin and others who apparently had the same sort of idea.

Charles Stephen Mbindyo (CW 96) was the Permanent Secretary to the Treasury at the material time. Vice President and Minister for Finance Saitoti gave him an application which he said was approved by the Government and was to be implemented as it was. The application was from GIL and contained three necessities. Necessity one was sole rights to export gold and diamond jewellery. Necessity two was payment of export compensation at 35%. The third necessity was for a bank licence. James Kanyotu, Kamlesh Pattni of GIL, and Prof. Ryan were present at the meeting.

Mbindyo had concerns about the scheme so he consulted the late Oyugi who did not want to be involved in matters where the Governor of the Central Bank of Kenya (CBK) was interfering with Government ministries and warned that they should contain the Governor. He also consulted Mr. Leting, the then Secretary to the Cabinet, who advised that he should obey the Vice President's instructions. The Office of the President did not confide in him that this was a Government decision. He was aware that Government decisions were ordinarily contained in Cabinet decisions which were reflected in Cabinet minutes. Such was not the case here.

There were other pending applicants, such as Aurum (K) Limited, and there had been an inter-ministerial meeting on the matter but there had been no follow up. The Vice President tried to allay Mbindyo's concerns by stating that the scheme would be implemented by the Governor of the CBK which was clear from the application.

Mbindyo further testified that there was a lengthy meeting between the Vice President, himself and the Governor, at which the latter accepted his role as administrator of the scheme as outlined by the Vice President. The Governor suggested a simple letter to GIL

conveying the Minister's approval and he said he would sign an agreement between GIL and the CBK, guaranteeing a minimum earning of US \$ 50 million every year. Mbindyo wrote the letter to GIL which did not include the bank licence.

Jacinta Wanjala Mwachofi Mwatela (CW 32) testified to the effect that she was forced to write a letter to GIL granting the company sole rights to export gold and diamond jewellery and export compensation at the rate of 35% and the company was to guarantee a minimum foreign exchange of US \$ 50 million a year for five years renewable. According to this witness, from the documents handed to her, the Governor of the CBK, the Permanent Secretary Ministry of Finance, and GIL knew what was going on.

Eliphaz Riungu (CW 63) who was the Deputy Governor and Former Head of the Exchange Control Department, stated that around November 1990, Governor Kotut informed him that somebody from GIL would get in touch with him and he gave him two letters from the Treasury addressed to GIL. This is the origin of GIL dealings with CBK. He said that he was told that the purpose of GIL was to curb smuggling and increase foreign exchange earnings. He confessed to having prepared a memo for the Governor concerning gold and diamond exportation by GIL. According to the documents, GIL had been granted a five-year concession and another five years option to facilitate exportation of gold and diamond as GIL had guaranteed an annual export earnings in excess of US \$ 50 million.

Kamlesh Mansukhlal Dhamji Pattni (CW 76) testified at great length. He dealt in gold and diamonds as he belonged to the Pattni family who were traditional jewellers, goldsmiths and minerals dealers. He had clientele in the Democratic Republic of Congo, Rwanda, Sudan, Tanzania who brought in raw gold and rough brut diamonds.

Kamlesh Pattni conceived a plan to export gold, diamonds and jewellery officially as opposed to the smuggling which prevailed at the time and to earn for the country the much needed foreign exchange. He required payment of export compensation at the rate of 35% and sole export rights in those items. He would undertake to earn a minimum of US \$ 50 million per year in foreign exchange for the country. With the assistance of James Kanyotu, the Director of Intelligence, he had the scheme approved by the then President, Daniel

Toroitich arap Moi, who at the suggestion of Kanyotu received KShs. 5 million as *Harambee*. GIL was incorporated with the then President Moi and Kanyotu taking 50% of the shares and Pattni taking the other 50%. The scheme was implemented by the then Vice President and Minister for Finance, Professor Saitoti who also, and again at the suggestion of Kanyotu, received KShs. 1 million as *Harambee*.

The link between Kamlesh Pattni and Kanyotu was also testified to by Francis Nzioka (CW 68), an employee of First American Bank of Kenya, who stated that GIL sought to open an account with the Bank. James Kanyotu and Kamlesh Pattni were the directors of this company and the nature of the business was trading in imports and exports. Kamlesh Pattni was the sole signatory of the account, while Kanyotu was a non-executive director.

Evans Samuel Osumo (CW 8) of the Department of Mines and Geology, testified that his department through the Ministry of Environment and Natural Resources recommended the establishment of the 20% total export compensation, and the 15% addition. Prof. Terry Ryan (CW 21) testified that the-then Vice President and Minister for Finance, Prof. George Saitoti told him that extra export compensation would stop gold produced in the country from being smuggled out and would channel it through official channels. In this way, the quite serious problem of foreign exchange constraints the country was facing at the time would be overcome.

The witness further testified that one James Kanyotu, Director of Intelligence of the Republic and Charles Stephen Mbindyo, Permanent Secretary to Treasury from 1986 to 1991, were present at the meeting where the scheme was discussed, but did not say anything. Ryan nevertheless stated that he understood that the two government officials were promoting the proposal, as 'lobbyists.' There was no mention of the Company putting forward the proposal. Prof. Ryan's understanding was that the Minister was considering paying extra compensation to an organization not named, which would ensure that unrecorded gold available in the country would not be smuggled out and thereby increase the foreign exchange available to assist in addressing the balance of payments crisis. There was no position paper or other written documents presented to evaluate the scheme, nor was it clear exactly how the scheme was going to work. The witness testified that he did not

know whether they were talking of smuggled gold. The Minister approved the proposal on 19<sup>th</sup> October, 1990. The letter had no Treasury stamp. Normal procedure would have entailed the Minister taking the proposal from the lobbyist (Kanyotu) and telling him that we would look into it and then mark it for further action or evaluation for advice to one of the Officers. There was also no paper when the technical staff of the Treasury evaluated the proposal subsequently put forth by GIL.

Mrs. Zilpah Emma Ntemel Sunkuli (CW 2) gave testimony as to the operation of the scheme. CD 3 Forms were obtained from CBK by Commercial Banks, which were held accountable for them. Intending exporters would obtain the same from their Commercial Banks and if the intended exportation did not actually take place, the exporters were under an obligation to return them to their Commercial Banks for cancellation. The witness tendered the CD 3 Forms in evidence and explained how they were used. They were issued in five different forms namely CD 3A up to CD 3E. According to the witness, after the Export Control Section of the Commercial Bank had received the export products or Foreign Currency (local currency was unacceptable under the scheme), the Commercial Bank would stamp box 28 of the CD 3 C Form.

The form would be submitted together with several items. Among them were the Export Products/Foreign Currency and the Remittance Forms (showing that the money had been remitted from a foreign country) and a credit slip to indicate that the money was credited to the customer's account. Evidence was also required of the sale of the export products. The Foreign Currency came in from the consignee/country to which the exporting was directed. Once the exporter had exported the goods, s/he indicated the consignee/the country s/he was exporting to.

This meant that if foreign currency was not actually remitted to CBK, the Exporter's Commercial Bank was answerable, because it was mandatory that the foreign currency had to come in through the Commercial Bank once the exporter filled in the forms. Mrs. Sunkuli testified that the Commercial Bank was responsible for selling the foreign currency to CBK after which the Commercial Bank would pay the exporter the equivalent in local currency and the Commercial Bank would debit the CBK account and credit the exporter's

account with local currency. CBK never communicated directly with the exporter in regard to exportation matters. The witness averred that payment by the importer was by telegraphic transfer, or draft, and at times cash. At the end of the whole transaction, CBK would have all the documents and the foreign currency married together in the Computer.

Francis Chelelgo Cheruiyot (CW 27) referred to a letter written by Mbindyo, the Permanent Secretary, Treasury, addressed to Customs which referred to the increase in export compensation payable to GIL and the agreement signed between the Central Bank of Kenya and the Company. There were legal obstacles to the payments by Customs so a decision was taken that Customs would pay the legal rate of compensation to GIL and the difference would be paid by the Treasury.

Njeru Kirira (CW 24) testified that by the end of 1990 the rate of export compensation was 20%. During his time at the Treasury (1980 to 1993), there was no product put on the eligible list without first being vetted by the Export Compensation Committee. However, the first time he learnt about GIL and its 35% export compensation was from one Phillip Mureithi, a colleague on the Export Compensation Committee in 1991. He stated that Mureithi called him and asked him why his office had approved 35% for GIL. The witness testified that he told Mureithi that he knew nothing about it and that the letter granting GIL 35% had not passed through his office. Mureithi informed him that the letter had the PS's signature. In the ensuing discussion the witness made it clear that they could not switch the rate of export compensation administratively. He would have to consult the Attorney General and suggested that Mureithi forward the letter to one Arthur Buluma, Chief Parliamentary Counsel who was also part of the Technical Budget group Kirira was coordinating at the Treasury.

Kirira further testified that he asked Buluma whether it was possible for them to raise the rate of export compensation to 35% for a single company and Buluma told the witness that it could not be done. The witness then asked Buluma to advise Customs and Excise Department and also informed him that he had asked one Philip Muli Mulili (CW 17), retired Deputy Commissioner of Customs and Excise to send him a copy of the letter. Mulili and one Gabriel Mbigholi, a member of the Export Compensation Committee from

the Department of Customs and Excise, prepared a Legal Notice and sent it to Buluma. Buluma reiterated that the proposal was unlawful. Mulili subsequently called Kirira and informed him that Buluma's opinion was that the whole scheme was *ultra-vires*. Buluma advised Mulili to move Parliament to amend section 3 of the Act so as to enable the Minister make an Order providing for different rates of export compensation payments. Kirira further testified that he never got a copy of the PS's letter to the Commissioner on the payment of the enhanced export compensation at 35% to GIL.

According to Kirira, when he received Buluma's reply, Mulili was uncomfortable because taking up Buluma's advice, would in effect be "disobeying orders" outlined in a letter signed by the then PS Treasury, Charles Mbindyo. The witness said that he promised Mulili that he would talk to the PS about it. He further averred that he told PS Mbindyo that it was impossible to amend the rate, and even if they attempted to do so, they would require the concurrence of several offices. Among those offices were Customs and Excise, the Internal Auditor, and the Comptroller and Auditor General. Furthermore, the Parliamentary Accounts Committee (PAC) would later question their actions. Kirira stated that the PS talked to Buluma who sounded disappointed about Treasury's insistence on the matter, but nevertheless stood his ground. Buluma said that they had to go to Parliament with a Bill for the amendment and promised the PS that he would get back to him but never did. Kirira further testified that Mulili kept on calling him about the issue. The PS later told him that the matter was "a done deal." The witness testified that he, Buluma and Mulili agreed that it could not be done except by way of an *ex-gratia* payment because the final responsibility went to Treasury if the law was not followed. Their worry was paying one entity extra and the reasons they would later have to provide in order to justify such a decision.

Kirira testified that when he talked to Mbindyo about the illegality of the whole matter, he simply laughed it off. Later, Kirira wrote to the Vice President and Minister for Finance recommending that the amount be paid *ex-gratia*, which he said meant "paying from the goodness of my heart"; in other words, as a gift. According to Kirira, up to that point, nobody knew where the pressure for payment of the extra 35% was coming from. Moreover, the matter had not come through the Export Compensation Committee because Mulili, Buluma and Mbogholi who were the critical people on that body would have known

of it. Kirira went on to testify that there were no criteria for the *ex-gratia* payment and that they knew they had “hit the rock” and a way had to be found of saving themselves. In other words, they were facing a *fait accompli*, that is to say it was as if a decision had been made and payment would have to be effected one way or the other. The witness also testified that he later heard Mulili complaining that they were having trouble with “these people”. Kirira stated that there was nothing on record except the Memo authorizing an *ex-gratia* payment, simply stating ‘approved save for monopoly’.

The GIL proposal was never evaluated. After the decision had been made they all got curious as to where all the pressure was coming from and tried to establish the source, and eventually saw a letter in one of the mining files, marked to Prof. Ryan for his comments. The letter was from Collins Owayo, former Commissioner of the Mines and Geology Department. There was also a letter in the file from one Mr. Genga, the Deputy Treasury Secretary in 1990. The witness said that he had the impression the letters came from the same source. The letter was filed close to Owayo’s letter to the PS of May 30, 1991 and said “thank you very much for accepting our recommendations and implementing them.” Apparently the Office of the Vice President and Minister for Finance authorized payment of 15% to GIL *ex gratia*. As a result, Customs and Excise paid 20% export compensation under the law and the Treasury paid 15% export compensation to GIL which was called *ex gratia*. The directive to pay 35% export compensation to GIL was being implemented.

According to the records of the Customs of paid returns, up to about halfway through 1991, there were no recorded imports of gold or diamonds and yet they were allegedly being exported from the country. No duties had been paid and so the *ex-gratia* payment amounted to a direct subsidy. No Customs Department Officer could have sworn that they actually saw that gold jewellery was being exported. They never went through the normal process to actually see whether the jewellery was in fact being exported. They only saw gold bars, which were obviously not jewellery.

Export compensation was to be paid on final goods. One of the criteria in the scheme was that it should not be the basic raw material exported. Gold bars thus did not qualify, although gold jewellery did. Kirira testified that he knew that Customs and Excise were not

in favour of the payment, but were only bending to pressure. Eventually a Draft Bill was made and forwarded to the Attorney General, who nevertheless told them that they could only regularize payments from December 1990 to September 1991. Nobody followed up the matter and the efforts never materialised. The Attorney General was asked to amend the law, but Buluma refused to accept a draft backdating payments already made to the company. Since there was nobody to justify to the draftsman why the amendment was necessary it died a natural death.

Mulili and Mbogholi the technical persons at the Budget Team were worried that no one knew what exactly was contained in the boxes which GIL claimed had gold. Moreover, the boxes could not be opened at random after Commissioner Owayo had sealed them. So, in June 1992, it was decided that the Customs and Excise Department be free to open the boxes whenever they deemed it necessary.

There was an incident involving a box of gold that was brought into the country from the Democratic Republic of Congo, and testimony to the effect that there was a struggle between the Customs Officials and the importer of that gold, who was Kamlesh Pattni.

Subsequently, a meeting had been held with Kamlesh Pattni who said he wanted to import gold and diamonds, but did not want to pay any duty but instead do some work on it, export it and receive export compensation for it. He did not want to go through excess foreign exchange control procedures but wanted to declare to Customs and was wondering when the regulations would be in place.

Kamlesh Pattni came to see Mbindyo the PS who referred him to Kirira, who testified that he refused to talk to him on his own, fearing the possibility of having his words interpreted to Pattni's advantage. According to Kirira the gold impounded at Wilson Airport was 32 kilograms and had been released without proper documentation because the Commissioner asked that it be released on the strength of a letter of exemption that never came. The witness asked Pattni to return the following day and then called Mr. Mbogholi and Mr. Mitei from CBK and told him that under the law, gold was a prohibited import and that it was not possible to make a law for one person. Kirira pointed out that it was irregular of the PS to

send Kamlesh Pattni to him, because Pattni wanted the Minister to allow him to bring in gold but not to pay taxes on it. He did not want to declare it under the then Exchange Control Act, Chapter 113 of the Laws of Kenya. Kamlesh Pattni argued that if somebody sold gold to him, he should be allowed to use the money he paid him to purchase goods here and export them without having to worry about the foreign exchange allocations or even about export regulations. After being advised by the witness that it would not be possible, Kamlesh Pattni left.

Upon cross-examination, the witness whose evidence remained unshaken averred that the reason he took the stand he did in the letter to the Comptroller and Auditor General was because he was bound by what the Minister had decided. All decisions by the Minister unless done without consultation were binding government decisions. The decision to grant GIL monopoly to export gold and diamonds was done without consultation of the Fiscal and Monetary Affairs Department but still, he could not give his own opinion in the report. He said that there was no application for the 20%, but rather it was for 15%.

Henry Hillary Njoroge (CW 71) Head, Development Division, CBK testified that CBK did not have the means and capacity of examining the credibility of exporters, manufacturers or traders since the responsibility was left with the Commercial Banks independently. CBK had no control over the whole export process to ensure that the exports actually left the country, but only relied on documentation from Commercial Banks. This opened the door for abuse since some of these banks were established for this specific purpose.

There was also no coordination between the various departments of CBK. He stated that compensation claims and Bills of Exchange from Kamlesh Pattni's Bank used to be processed after 5:00 p.m., the close of a normal working day. He said that he knew that the transactions were illegal, and at one time had asked where the gold and diamonds had come into Kenya from, in order to warrant the millions of shillings being paid out. He further stated that within the documents from Customs and Excise Department and the Department of Mines and Geology, the same CD 3 Forms were being submitted upto four times and would be used to withdraw different amounts of money. Whereas the scheme was

for manufactured goods or goods with value-added, some money for pre-shipment went to financing the export of live animals such as sheep, cattle, goats and camels.

Eric Kotut (CW 60) Governor of CBK from 1988 to 1993, explained that GIL had preferential treatment from other exporters because it dealt with CBK directly. He said that Pattni complained that item number V which required CBK to acknowledge receipt of export proceeds, was stifling his business since he claimed that some tourists would come to Kenya and were buying from him directly. Clause V specifically stated that,

... your bank will surrender copy C of the CD 3 Form when the proceeds of the exports are received. In this regard, it will be necessary for your bank to obtain specific acknowledgement of the copy C from CBK. Considering that the export compensation being granted is on special basis, your bank shall ensure that the claim is accompanied by the acknowledgement obtained from the Central Bank.

Under this provision, one could not obtain export compensation from Customs unless CBK was convinced that foreign exchange had actually been received in the country. They waived this regulation and cash got from anywhere was later accepted and described as “export proceeds.” Pattni exploited this loophole to get money from CBK and recycle it and thereafter claim that it was export proceeds in order to secure export compensation.

Bhupendra Kumar Shah (CW 33) was a Managing Director of a Forex Bureau. He knew Kamlesh Pattni of GIL and sold him large amounts of United States dollars which he bought from businessmen from the neighbouring countries and also from those in Kenya. He knew that this was against the Exchange Control law. The witness did not know what Pattni did with the money.

A letter by the Senior Accounts Controller Oyula (CW 28) to the PS, dated July 3, 1991, a year after payments had been effected to GIL, stated that by the time they started making payments, they did not have funds in the estimates for the same. The Ministry of Finance had during the Supplementary Estimates provided Kenya Pounds 8 million under Item 191, Customs Refund, Head 135. Oyula was worried that if he got a request for payment he would not have a budget line and he did not want to go back into an illegal situation if he

were to make such a payment. The PS told him “my instructions are that the payments should be effected as they get approved by the Customs. Regularize the payments under supplementary.” In other words, on the orders of the then Permanent Secretary, Mbindyo, money was paid from other votes, pending regularisation. The matter was ostensibly regularised later by supplementary estimates which described the payments as ‘customs refunds’ for which, on the evidence, GIL did not qualify again under the financial regulations. According to the witness, a total of KShs. 12,788,487 had been paid to GIL when the payments were suspended.

Oyula was trying to point out that they were exceeding the Parliamentary lines and creating a big deficit that was excessively damaging to the economy as a whole thus necessitating looking at the revenue capacity and getting revenues so as to control that deficit. Obviously, he was ignored.

In correspondence from the Public Accounts Committee (PAC) for 1992/1993, it was noted that since the extra 15% export compensation was approved under the customs refund item, although meant for export compensation, their hands were tied in that the amount so paid had received Parliamentary approval. Consequently, all the parties concerned were compelled to cooperate and the moneys payable lodged by the Company by claim before the abolition of the export compensation should be settled as soon as practicable. This report was adopted by the whole House and became a report of Parliament. They were pointing out that the export compensation had been irregularly described in the Supplementary Estimates as Customs Refund. Parliament did not regularize this, as a payment under the Act for this would have required an amendment to the Law. Parliament later realized their mistake and cancelled the approval so that whatever was approved was no longer valid for anything in the future.

Kirira wrote to Joseph Mbui Magari (CW 19), the PS, enclosing a draft proposal for the amendment of the Export Compensation Act but recommended that there was no need to increase the rate to 35%. This was because, *inter alia*, it was very difficult for the exporters to prove that they had paid duties and furthermore, if the law was amended to provide for the 35%, other exporters would complain of discrimination and there would not be enough

funds to cater for all these exporters. Kirira pointed out that legalizing what had already been paid would tarnish the credibility of the government, more so, given the increasing demand for transparency. He also argued that some gold could be smuggled into the country. Throughout October, payments to GIL had amounted to nearly US \$ 9 million for the year and the total revenue cost was likely to reach close to US \$ 27 million. By the time the 15% payment was ended, KShs. 255,769,740 had been paid under the 15% export compensation scheme. The *ex-gratia* payments were ended on January 14 1992. KShs. 109.79 million had been paid up to January 2, 1992 but there were some amounts still pending. In fact, according to the witness, more money (between KShs. 142 and 143 million) was paid after termination of the schemes. The total is in excess of KShs. 500 million.

On his part Joseph Maero Oyula (CW 28), stated that he first heard of the *ex-gratia* payments made to GIL in January 1991 when he saw a letter written by the PS Treasury to the Vice President and Minister for Finance accepting to pay GIL. The PS's communication was that the payments would be made after the Customs and Excise Department will have paid the export compensation at 20%. Based on the communication from the Customs and Excise Department, the Ministry of Finance would pay an extra 15% as *ex-gratia*. The 15% was to be voted and paid from the Ministry of Finance Vote. This witness testified that the initial payment vouchers were signed by the Financial Secretary (Ali) who later declined to sign and referred him directly to the PS (Mbindyo). The PS then took over the signing before either the witness or any of the Accounting staff authorized to could do so. Unfortunately, Ali died in September 1991. Oyula further averred that ordinarily, the PS would not sign the vouchers because he had appointed the Accounting Officer who was responsible for all the expenditures of the Ministry.

In his report for the financial year 1991/1992, David Gicho Njoroge, the Comptroller and Auditor General in effect made the following findings and observations:

1. The agreement by the Ministry of Finance to pay 35% export compensation was irregular, because the current rate by law was 20%.

2. There was no evidence that the gold and diamond jewellery qualified for export compensation.
3. The payment by the Treasury of 15% export compensation as ex gratia was irregular.
4. The payment by the Treasury of the 15% export compensation as customs refund was irregular.
5. When seeking approval, Parliament was not informed that the customs refund was in fact payment of export compensation to GIL.
6. In paying the 15% export compensation other accounts were irregularly debited.

**Observations and Conclusions:**

The combined testimony and evidence provided suggests that the origin, acceptance and implementation of the export compensation payments were orchestrated by high-level Government officials. We did not see the evidence of former President Daniel Moi, but in a submission by his Counsel it is denied that he approved the Kamlesh Pattni scheme and that he received the *Harambee*. However, there are several reasons to query this denial in general, and specifically the assertion that President Moi did not give his explicit or tacit approval of the scheme and to the payments made to GIL.

In the first instance, testimony was given by a number of witnesses that previous proposals of a similar nature to that made by GIL had been presented to Prof. George Saitoti, the then Vice President and Minister for Finance, but they had been unanimously rejected. Those individuals, it was attested, enjoyed fairly close ties with the Vice President and Minister for Finance, but this relationship did not secure them his approval. As second-in-command in the state hierarchy, and the in-charge of a powerful and sensitive ministry, there must have been cogent reasons as to why those proposals were rejected. Secondly, it is important to recall that there was only one individual more powerful than Saitoti was, and who could either counsel or overrule him and order implementation of such a scheme and payment. That individual was President Moi.

Thirdly, it is clear that the only reason the scheme went through was because of the close nexus between Kamlesh Pattni and certain well-connected state officials. Specifically, James Kanyotu, the Director of Intelligence—who all the evidence suggests was acting on behalf of the then President, Daniel Toroitich arap Moi—was key in the origin and the acceptance of the Goldenberg Phase of the scheme. Our fourth observation is that the main engine of the scheme—GIL—was the embodiment of two constituent parts—Kamlesh Pattni and his family on the one hand, and Kanyotu and President Moi, on the other. Which part was the head and which the body is a matter of conjecture.

On his part, the then Vice President and Minister for Finance was key in fine-tuning the design and implementation of the scheme, and giving it official approval. At a minimum, the evidence shows that he personally ordered payment of *ex gratia* to GIL in complete and wanton disregard of the law. We find that such action by itself points to abuse of office. More generically, Prof. Saitoti's overall sanctioning and supervision of the scheme adds to his culpability.

It is also clear to us that several other officials in the Civil Service were apparently in collusion with GIL, which explains why the scheme received such little scrutiny and the great personal attention paid to payments by certain Public officers. Technical staff who tried to resist the scheme (particularly Messrs. Arthur Buluma, the Chief Parliamentary Counsel, Njeru Kirira at Treasury and David Todera Munyakei at CBK) ended up being harassed and intimidated while others ultimately lost their jobs.

There was also evidence that Parliament could have been misled into thinking that it was authorising a Customs refund which was in fact additional export compensation. Once again, this implies both political and technocratic responsibility of those officers with a duty of overseeing the public interest in these offices.

The manner in which the scheme was introduced and implemented suggests involvement of the Executive. Most certainly direct responsibility belongs with the

Ministry for Finance which was responsible for the budget, and which went out of its way to supplement the current rate of export compensation of 20% by an extra 15% of *ex gratia* at first and customs refund later.

It is also fairly clear that while the intention of the export compensation may have been motivated by genuine concern for the state of the economy and the need to raise scarce foreign reserves, implementation of the scheme was tainted with fraud and illegality. Furthermore, the scheme only managed to survive as long as it did because of the forces that were behind it. This also made it impossible for officials in the departments of Mines and Geology and Customs and Excise who may have had all the intention to do so, to properly appraise GIL's exports or documents.

We are thus inclined to conclude that the proposal to award export compensation for gold and diamond jewellery originated from traders in these commodities who wished to cash in on export compensation, most probably from Pattni. We also find that there is evidence that the matter was discussed in the President's office as well as in the Ministry for Finance, and that key officials in both offices were central to the origins, acceptance and implementation of the scheme.

Issue no. 2:

**Did Goldenberg International Limited (GIL) fulfill the necessary conditions so as to entitle it to claim the 20% export compensation which could lawfully be claimed under the Local Manufacturers (Export Compensation) Act (LMECA), Cap. 482?**

This issue calls for an examination of the substantive requirements under the LMECA and the procedural requirements as laid down by CBK and in subsidiary legislation. Export Compensation under the LMECA was a payment made to local producers of goods subsequent to exportation with the aim of compensating them for the taxes paid on imported inputs used to produce the goods for export. It was paid for specific items meeting certain criteria and listed in the Second Schedule to the LMECA. Under the

LMECA, in order to qualify for export compensation, the first criterion was that the value of the items or of the inputs that are required and the ones that are supposed to be sourced from the domestic market should be at least 30% of the total value of the item to be imported. The exporter was expected to know all the items imported and their value, exclusive of taxes payable, plus the listings of all the items bought from the local market including their values. This is so because there is a presumption that at the time of importation, the exporter must have paid taxes (Import Duty) for the goods. Under the Act, there was a proviso permitting the Customs Officers and exporters to agree on an appropriate accounting system to verify the percentages. The rates were being applied uniformly across the board under Schedule 1 of the Act.

Since, as pointed out by Evans Osumo (CW 8), there was no import license on record for the minerals in question issued to GIL, it cannot obviously be stated with certainty that GIL imported the products it claimed to. Osumo maintained the record of licenced gold exporters between 1989 and 2002. For the years 1991 and 1992 only GIL was licenced to export gold. Others were not licenced because GIL in effect had a monopoly.

Secondly, the goods should have inputs imported with the Customs Duty element. The tax liabilities or total taxes that are due and payable with respect to the imported items should attract at least 20% duty. To this effect, a product with inputs locally obtained was disqualified. As the testimony of several witnesses averred, Kenya did not have diamonds and the gold available was very little. Given the fact that there were no import licenses on record, it is highly probable that GIL was not actually importing anything.

Thirdly, the goods that were being exported or supposed to have been exported or those that one intends to export are supposed to be goods not having any trade restrictions. Gold and diamonds do not *prima facie* have any restrictions. However, all smuggled goods are considered illegitimate by law. Fourthly, the Laws of Kenya should not prohibit such goods for exportation. Smuggled goods as already noted went against the Laws of Kenya. Lastly, smuggled goods do not qualify for export compensation because they do not have the import documentation to prove that they have been imported, among other things. The fact that Pattni was found by Police Constable Naftali Langat (CW 16) and other Customs

Officers with 32 kilograms of gold purportedly smuggled from Bunia in the Democratic Republic of the Congo disqualified the Company from benefiting from the scheme.

Fifthly, the goods should not be the subject of royalties or export taxes. Trade restrictions are different from export taxes because they are usually not structured. They depend on the priority of the country at any given period. According to Evans Maturu (CW 3), once one had made an export with all the documents to prove that exportation had taken place, s/he would submit an application form referred to as “Export Compensation 2” (EC 2 Form), completed in triplicate. Each exporter had to indicate *inter alia*, the number of the export license, the units of measure of the quantity of items to be exported and the point of exit.

Additionally, s/he would declare the description of the goods to be in conformity with the description provided under the tariff classification and the CD 3 number and date. There is also a column for a description of the raw materials imported and information on the quality and value in Kenyan Currency of the finished product. Here, even if the goods were smuggled, they would still be part of the finished product. The exporter also had to give the details of all imports used to produce gold showing the percentages of the imported and local proportions. Cumulatively, the total must not exceed 70% under ‘A’ and 30% under ‘B’. The critical point is that there must have been some local value added, usually associated with some other benefits or the so-called trickle down effect; in other words, benefits to the rest of the economy.

Form C 29 is the “Export Entry” form used for the purpose of declaring the goods which one intends to export from the country. Column 34 of Form C 29 was the official part requiring ‘a Proper Officer’ of the Customs and Excise Department to verify the contents of the document. Such Officer was trained and had all the powers to conduct the duties of a Customs Officer. If the Officer was for any reason dissatisfied with the contents of the document, s/he was supposed to inform the exporter and refuse to stamp the documents. Unstamped forms are not authentic and one cannot prove exportation if this is the case. It is mandatory that the intending exporter fills in the C 29 Form and the requirements therein have to be strictly complied with more so because of the duty that has to be paid and for the purpose of export compensation.

Under the procedural aspect of this issue, there were the Customs Declaration Forms (hereinafter referred to as CD 3 Forms) which until 1994, were the documents used by exporters exporting their goods or services outside the country. They were issued in five different forms namely CD 3A upto CD 3E. One of the roles of these forms was to ensure that those who applied for export compensation complied with the law and its requirements. These forms were introduced in evidence by Mrs. Sunkuli as exhibit number 4.

The witness went on to explain that the CD 3D Form was designed for export compensation, and given to exporters who would export the goods with a certain content manufactured in Kenya. Once the exporter received the proceeds from his/her Commercial Bank, s/he would fill in this Form and return it to his/her Commercial Bank, which would forward it to the Customs Department in the same bank. This Department would secure clarification from CBK that the foreign currency had actually been received. The Commercial Bank would then send the CD 3D Form to CBK which would send it back to the Customs Department for clarification and stamping. CBK would then computerize the same and marry it with the CD 3A, CD 3B, and CD 3C Forms already in the Computer system. The Exporter would then claim for export compensation from Customs. According to Maturu (CW 3), CD 3 Forms are important especially where the exporter has an intention to claim compensation after exportation. If foreign currency did not come through the banking system, as evidenced by these documents, you were not eligible for export compensation.

Jacinta Wanjala Mwachofi Mwatela (CW 32) worked in various positions in the CBK. She explained how CD 3 Forms were used to monitor exports and foreign exchange earnings. She referred to the responsibilities of the CBK, the Commercial Banks, Customs and the exporters in the exercise. Payment of foreign exchange would be by letter of credit (LC) or in cash. Permission granted to GIL to accept foreign currency between 8<sup>th</sup> April 1991 and 8<sup>th</sup> April 1992 by the CBK was irregular. The witness testified to programmes which were intended to promote exports to earn foreign exchange which included pre-shipment financing, Forex Cs and retention accounts. As far as GIL was concerned there were violations of circulars in handling exports. There were instances of transactions where GIL

had no firm buyer. There were requests for pre-financing through the bank which did not handle any CD 3 Forms. Of the CD 3 Forms seen by the witness none indicated that a letter of credit had been established, all indicated cash on delivery.

There was evidence of funds sold as relating to Forex Cs but later converted to actual export proceeds. This witness was moved around on various assignments apparently because of her views on the irregular activities of GIL.

**Observations and Conclusions:**

The evidence available suggests that GIL did remit some foreign exchange to CBK pursuant to the intention of the CD 3 Forms. However, going by the evidence on record, GIL did not fulfill the conditions necessary to entitle it to the 20% compensation. In the first instance, there was no evidence to show that GIL was actually exporting the products qualifying under the LMECA. Secondly, GIL had no import license to show that they imported and paid duty on the products and no evidence to prove that there was any local content in the products they were purportedly dealing in. Since the CD 3 Forms were passing through their own Commercial Banks and the Company was dealing directly with CBK, they abused the system of CD 3 Forms and never followed the correct procedure. Thirdly, there was evidence that some gold had also been smuggled into Kenya by GIL.

On the evidence reviewed, we come to the conclusion that some gold might have been exported from Kenya. There are indications that some could have been exported to countries such as Denmark, France, the United Kingdom, and the United States of America.

It is also possible to conclude that some gold and diamond jewellery could have been processed through customs as required. It is also apparent that there were some declarations and remittances of some foreign currency earnings but there appears to have been much play with documents. There is evidence of GIL buying foreign currency locally and paying it in as export proceeds.

**Some foreign currency earned was cleared and remitted to the Central Bank of Kenya. However it would appear that there was a large-scale manipulation of figures in banks allegedly representing foreign exchange earnings.**

**Issue No. 3:**

**Does Kenya have Diamonds and/or Gold?**

According to the evidence of James Odhiambo Ochieng (CW 1), the Acting Chief Geologist in the Ministry of Environment, Natural Resources and Wildlife in charge of the Geology Division and responsible for mineral exploration and geological mapping in Kenya, the country had never produced any diamonds.

There is no doubt from the testimony and other evidence collected by the Commission that gold indeed existed in almost all parts of Kenya, with the discovery of the precious mineral dating back to 1892 while the last 'gold rush' took place in 1993. Exhibit number 1 which provided a list of gold production between the years 1985-2002 shows that the last production of gold in Kenya was in 2002. The same witness also tendered exhibit number 3 which was a map from his department showing the principal gold mining in areas of Kenya. This evidence was well corroborated by that of Evans Osumo (CW 8), the Warden of the Department of Mines and Geology. The same witness also testified that diamonds had never been mined in Kenya.

The presence of small amounts of gold in Kenya was further pointed out by Philip Kipserem Bor (CW 15), the Principal Chemist, Department of Mines and Geology. Njeru Kirira (CW 24) confirmed that Kenya did not have diamonds. He also gave testimony to the effect that Kenya had no known gold mines. According to his testimony, the Commissioner of Mines and Geology Collins Owayo (CW 10) was not being truthful in stating that there was a lot of gold in the country, because he could not visualize where the gold was. This witness stated that the only way he could think of the presence of gold in Kenya was by smuggling.

**Observations and Conclusions:**

**Given the totality of the testimony given, together with the documentary evidence provided to the Commission, the answer to issue No. 3 is twofold: diamonds have never existed in Kenya. Gold does exist in the country, but only in negligible quantities. Our conclusion is that, the diamonds and gold alleged to have been exported by GIL so as to deserve export compensation could not have been from Kenya.**

**Issue No. 4:**

**Did GIL actually deal in or export diamonds and gold?**

The question as to whether GIL was actually exporting anything is one that can best be addressed by considering the evidence as to whether the Customs Department saw anything at the point of exit. The LMECA, already referred to, makes provision for Form C 29 entitled “Export Entry” for the purpose of declaring the goods which one intends to export out of the country. The procedure followed is that the exporter completes the form when the goods or the consignment is ready to be conveyed to the border point. The exporter usually carries the form and the practice is that it is supposed to physically accompany the goods being exported to the border.

The Form CD 3B was then issued to the exporter to accompany his/her goods to the point of exit. The Customs Officers check all the goods against the Form in order to satisfy themselves that the description of the goods tallies with the information provided in the forms. The Officers then stamp Box 25 to certify that the goods meet the regulations of Exchange Control. They would then attach all the necessary documents including the Export Entry, the Airway Bill/Cargo Manifest/the documents used for the rail and road transportation. Once the officer has done this, s/he stamps Box 30.

Both these forms help in determining whether goods were indeed exported from the country. But, there is no evidence on the record from the Customs Officers or from anyone else who witnessed the exit of these exports to conclusively establish the truth about what actually took place regarding the alleged exportation of diamond and gold from Kenya by GIL. The evidence on record testifying to this issue is only ascertainable from witnesses other than those belonging to the Customs Department. For example, James Odhiambo (CW 1) testified that the last Company to get involved in gold mining was called Malcader in 1969. Since then, a number of major companies had been involved in gold exploration, however GIL was not among them. To support his testimony on this issue, he produced a list of companies which had been exploring for gold in Kenya in the past as exhibit number 2 from the Department of Mines and Geology.

Naftali Langat (CW 16) a police constable posted at Wilson Airport testified to an aircraft arriving late at Wilson Airport from Bunia, Zaire. One of the seven passengers on the aircraft named Pattni K. refused to declare his luggage. Asked to open his briefcase the passenger became hostile and attempted to move out uncleared. Eventually the brief case was opened and found to contain gold. Pattni made a number of telephone calls. Ultimately the witness was asked to receive one telephone call by the then Director of Criminal Investigations Department (CID), Noah arap Too, who told the witness to release the gold. The Commissioner of Mines and Geology, Owayo, also arrived at the Airport and said the goods should be released because the business was "known to the bosses." Livingston Kipkoech arap Ruto (CW 41), a Security Officer at Wilson Airport, more or less confirmed the evidence of Langat as regards what took place and in relation to Pattni's behaviour. Eventually Chief Inspector Michueka arrived, and the gold was sealed and taken to Jomo Kenyatta International Airport under escort. The witness was shown a letter signed by the PS Treasury, Mbindyo, to the effect that Pattni was a gold dealer and that he should be assisted.

Cheruiyot, the then Commissioner of Customs and Excise, testified that he learnt of the above incident but feared to exercise his powers as Commissioner because of the personalities involved and he did not want to "burn his fingers."

According to Njeru Kirira (CW 24), Kenya did not have any diamonds. Comparing the rate of duty on diamonds, he argued that there was no way somebody could import diamonds for export purposes, pay duties and taxes and declare that he was trading in diamonds. He suspected that the GIL claim on diamonds could not be right. Osumo (CW 8) of the Department of Mines and Geology testified that the department had never licensed any company to mine gold. Furthermore, he stated that the mining of gold took place from the colonial days up to 1969, and a few indigenous people had been doing some gold mining. The witness pointed to an unsigned letter from GIL to the effect that the Company was buying gold and diamonds from tourists who could not accept any mode of payment other than cash and that local dealers too were insisting on cash payments. On its part, GIL was asking for an exemption from transacting both purchases and sales without any documentation whatsoever in regard to the filing of returns. This was contrary to the Diamond Industry Protection Act, 1991, Chapter 310 of the Laws of Kenya. In reply, Owayo informed GIL that it was normal practice for such sellers to demand cash and that this would be taken into account when examining the Companies purchases and documentation. He pointed out that this was on October 12, 1993 but that as far as his department was concerned, GIL had stopped exporting diamonds on March 12, 1993. The witness tendered into evidence exhibit number 24, which were documents relating to the alleged import of gold from Zaire.

Phillip Kipserem (CW 15), Principal Chemist, Department of Mines and Geology, testified that on February 20, 1991, he went to the premises of GIL to weigh gold bars. The purpose of the exercise was to determine whether the gold was genuine and to establish its purity, the total weight of the bars and the reported value for the quotations submitted to CBK in order to provide the necessary verification to support the compensation claim. Kipserem testified that he had been asked to perform the exercise by the Commissioner of Mines and Geology, Collins Owayo (CW 10). The witness revealed that he was not allowed to examine the gold in order to secure a representative sample. The gentlemen who were there simply cut two bars with a pair of scissors at the corner and gave them to him. He said that he did not have any option but to take the samples assuming that they were representative samples for the bars. The witness confessed that he did not verify how many bars were there, neither did he establish their exact weights. He also stated that he was not allowed to see each bar and

decide on how to sample them. The witness therefore could not testify as to whether the other boxes actually and genuinely contained gold.

According to Bernard Metzger (CW 22), the General Manager of Trans Kenya Limited, and a Swiss national, the figure of KShs. 39,057,000/= looked rather high for the 389 grams of diamond necklaces that GIL was allegedly exporting. He also testified that when dealing with a Swiss Company, you cannot deal in Kenya shillings. You must deal in either Swiss Francs or US dollars. Even so, by the time of the transaction in question, he did not think the Kenyan shilling was convertible in Switzerland. The witness further testified that according to exhibit 100B, CBK was presented with the headed paper of a company called Servino Securities Inc., but with two different addresses sent on the same date to GIL and CBK.

In his view, the fact that the contract was signed on September 21, 1992 and received the following day is next to impossible because at the time of the alleged transaction, there were no e-mail facilities, and a DHL shipment takes at least two days to arrive.

The same witness pointed out that exhibit 100B comprised purported contracts and orders from Servino Securities dated January 7. However, the invoice was dated February 5, meaning that between the date of the contract and one month later the transaction, delivery, invoicing and payment and the order took place on September 21, 1992. The invoice could have been backdated but how could it have been approved by CBK? According to the witness, this looked extremely suspicious. Furthermore, there were mixed up dates on the stamps of the Geological Department, as compared to those of the CBK.

The witness was referred to a number of documents relating to exports to Servino Securities where the exporter claimed he intended to claim export compensation. One of them can be cited as an example,

“CD 3 No. 633745

Invoice number GIL/D30/039/92 KShs. 62,602,580

Exporter GIL of P.O Box\_\_\_\_

Consignee Servino Securities Inc. PUT  
Swiss 9CH 1295 MIC  
Geneva Switzerland...”

The witness’s comments on the documents were:

1. The address shown as that of the consignee was indicated in the book, *Swissness 1000*, as that of the Printing Firm which published the book in 1991.
2. The witness did not deal in diamonds, gold or jewellery and the publishing company did not deal in those items either.
3. The consignee is described as Servino Securities Inc., meaning “incorporated”. In Switzerland companies are not referred to as Inc. The expression used is SA which stands for “Societe Anonym”.
4. The name “Servino” does not sound Swiss it sounds Italian and of course “Securities” is English.
5. The currency is expressed in Kenya shillings. It should have been in Swiss francs or US Dollars. At that time Kenya shillings could not be found in Swiss banks.

Documentary evidence was shown to the witness indicating claims for export compensation which had been paid, those which were ready to be paid and those that had been queried (exhibits 100, 100A). The documents appeared to bear the required official stamps.

The witness was taken through Servino Securities Contracts and orders in exhibit 100C but denied knowledge of any of the transactions. Some of the telephone and fax numbers referred to in the documents were either for his printing company or publishing company which printed and published the *Swissness 1000*. The two companies did not deal in diamonds, gold or jewellery. The witness averred that he was not nor were any of his companies involved in any transaction of gold, jewellery or diamonds.

From documents shown, it appeared at one stage that a large sum of money (US \$ 1,197,412) had been remitted to Kenya but the witness denied his knowledge or that of his

companies of the moneys remitted. The witness knew nothing about vast sums of money sent by telex to GIL by banks in Switzerland and America.

Metzger met a Kenyan named Niru Pattni in Geneva in 1990, who gave him telephone numbers of his relatives in Kenya. He contacted Rohit Pattni and ultimately they did business together. He opened an account at Exchange Bank together with Rohit Pattni into which sums of money were deposited. Either through him or from the book, Swissness 1000, Kamlesh Pattni could have seen these addresses, telephone and fax numbers which appeared in connection with the Servino Securities export documents. The book was available in Kenya as copies had been given to Kenya Airways.

In his cross-examination by Mr. Kibet, Nagin Pattni (CW 11) appears to have said in his evidence that he carried out investigations in respect of exports by GIL and found out that between 1991 to 1993, Solitaire, Servino and possibly World Perfumeries were absent consignees. Those companies existed but did not receive any jewellery purportedly consigned to them by GIL. He says he established this through the Swiss Embassy in Nairobi.

The evidence on this matter was buttressed by the testimony of Arthur Abong'o Ndegwa (CW 54), Senior Mining Engineer attached to the Department of Mines and Geology. Ndegwa stated that the Identification and Valuation Department never did a good job because non-existent exports became the basis for claiming export compensation. There was information that the alleged gold and diamond jewellery purportedly exported to Dubai were not actually sent. Even some of the companies purported to have been receiving the exports never existed.

Furthermore, Anthony Kipng'etich arap Koech (CW 56), Deputy Commissioner, Customs and Excise Department in charge of the Northern Region in 1990, testified that he received a piece of "gold" as a gift from Kamlesh Pattni of GIL which later turned out not to be genuine.

Mishack Mwebia Kiambati (CW 30), the Principal Internal Auditor in the Efficiency Monitoring Unit of Customs and Excise explained the documentation required in a claim for export compensation which included:

- (a) EC 2 Form;
- (b) CD 3 Form;
- (c) Export Entry Form C29;
- (d) Commercial Invoice;
- (e) Evidence of transfer of export proceeds;
- (f) Permit to export gold or diamond jewellery; and
- (g) Airway bill.

He testified to one of the claims, No. MC/166/92 in respect of GIL being queried as to ownership. Some evidence was produced that the gold had been purchased from various people in Kenya by GIL which was unsatisfactory. The matter was referred to the Financial Secretary who ordered payment of export compensation to be made, ignoring the advice of the Principal Internal Auditor. The queried claim was paid.

The witness had seen the Comptroller and Auditor General's report of 1992 to the effect that no evidence had been seen to confirm that the gold and other precious materials claimed to have been exported and for which compensation was paid originated and were processed in Kenya, nor was there evidence of some of the named criteria for eligibility for export compensation and the validity of payment of Kenya Pounds 12,639,064,014.60 and of additional export compensation of KShs. 16,852,087,012.95 was doubtful under the law.

Anne Wangeci Muoki (CW 64) of the Deposit Protection Fund stated that GIL did not do any export business through Post Bank. All foreign currency received by Post Bank in favour of GIL was not related to export compensation, pointing to the fact that there was no export transaction through the Post Bank as claimed by GIL. Farouq Kamau Mungai (CW 87), Manager Operations in the Kenya Commercial Bank, handled CD 3 Forms for GIL. Of the 33 CD 3 Forms processed by KCB, foreign exchange came through the bank in respect of 28 CD 3 Forms and was remitted to the CBK. In respect of 4 CD 3 Forms

processed by the bank, foreign exchange came through another bank, Post Bank Credit. The four CD 3 Forms totalled about US \$ 2.7 million.

Finally, with respect to this matter, Kamlesh Pattni himself admitted that in his first two consignments of diamond jewellery, Servino and Solitaire were not the actual consignees and that the actual addresses of the consignees were not revealed for security reasons.

**Observations and Conclusions:**

**Given the totality of the testimony together with the documentary evidence on file, the answer to issue number 4 must be that there is some evidence showing that GIL actually exported gold and diamonds from Kenya. However, there is also evidence to conclusively demonstrate that GIL did not and could not have exported diamonds and gold in the amounts claimed. The available evidence also points to incidences of smuggling of these items by the officers of the Company into the country.**

It is also clear that the elaborate schemes put in place such as the prevention of access to the said minerals, the creation of fictitious consignees and the rotation of the required documentation led to considerable inflation of the amounts that were claimed to be exported. In this respect, it can be concluded that GIL 'dealt' in gold and diamonds, but it is questionable whether the company actually exported any gold or diamond jewellery in terms of the requirements of the LMECA. It is our conclusion that considerable suspicion must be cast on the genuineness of a high percentage of the export transactions.

**Issue no. 5:**

**If diamonds and gold were exported as alleged, what was the quantity and to whom was it exported?**

Evans Samuel Osumo (CW 8), the Warden of Mines in the Department of Mines and Geology, stated that the source of his statistical information was the general file on production statistics from the Mines and Geology Department. He provided the following figures as representing the quantity of gold production between the years 1990 and 1993:

**TABLE 1**

**Gold Production**

<b>YEAR</b>	<b>AMOUNT (Grams)</b>	<b>VALUE (KShs.)</b>
1990	47,724	12,782,600/=
1991	15,100	4,952,120/=
1992	15,700	5,627,106/=
1993	20,000	7,181,860/=
<b>TOTALS</b>	<b>98,524</b>	<b>30,543,686/=</b>

All of the production was ascribed by the witness to GIL.

**TABLE 2**

**Gold Exports**

<b>YEAR</b>	<b>AMOUNT (Grams)</b>	<b>VALUE (KShs.)</b>
Feb 20 1991	59,716	17,521,860/=
Mar 13 1991	76,617	23,278,730/=
Mar 27 1991	1,730,490	576,075,324/=
1992	1,781,675	584,100,725/=
1993	1,149,552	612,556,286/=
<b>TOTALS</b>	<b>4,857,766</b>	<b>1,813,532,925/=</b>

The witness stated that the Department noticed that the figures did not tally but could not explain the big discrepancy in the records with regard to production and export.

In regard to diamonds exported between 1990-1993, the witness testified as follows:

**TABLE 3**

**Diamond Jewellery Exports**

<b>YEAR</b>	<b>AMOUNT (Grams)</b>	<b>VALUE (KShs.)</b>	<b>DESTINATION</b>
1990	1751	154,250,000/=	Switzerland
1991	12,297.09	1,547,958,401/=	Switzerland
1992	62,480.99	12,335,939,141/=	Switzerland and United Arab Emirates
1993	19,050	4,602,198,253/=	

According to the general file in Osumo's office, the diamonds were being sent to the World Duty Free Company in the United Arab Emirates and the rest to a company called Servino in Switzerland. In 1993, the total was 19,049.80 grams valued at KShs. 4,602,198,252. According to the witness, these figures tally because only GIL was allowed to export diamonds.

Bernard Antoine Metzger (CW 22) stated that before he became a resident of Kenya, he was living in Switzerland. While there, he operated a company called Aria SA that published a list of the 1000 leading companies in Switzerland with addresses, turnovers, employees and locations. This was a database in form of a directory, the first edition of which came out in 1985. The book was called the "Business Guide to Geneva". Producing exhibit number 100D which was his book, the witness testified that Servino Securities Inc., one of the

Companies which was purportedly the importer of the minerals for GIL did not exist in Switzerland. The witness testified that he had never heard of it and that it did not appear anywhere in his directory of companies. The witness went on to reveal that the address of Servino Securities Inc., appeared familiar and similar to the one he saw in his book. However, the witness averred that the address belonged to the printing firm of Swissness 1000, which was the name of the Directory. This Printing Company printed his book in Geneva. He pointed out that the words 'Geneva' and 'Switzerland' do not appear on the address of the company in issue.

The witness pointed out that Swiss Companies did not use the word 'Inc.' at all but instead used the initials 'S.A'. 'Inc.' is used by American Companies. The name 'Servino' was not Swiss, according to the same witness. He stated that the name sounded Italian, while the word 'security' was definitely an English word. He pointed out that in his directory, there was no company with the appellation 'Inc.' attached to its name. Indeed, he stated, even American Companies in Switzerland used the initials 'S.A' which stand for "Societe Anonym". Furthermore, the witness testified that the diamonds that GIL was reported to have exported to Servino Securities Inc. were to the address of a printing company in the directory Swiss 1000. He also stated that he could not understand why a Swiss Aircraft number appears with a Kenya Airways number at the back of the exhibit.

The witness went on to opine that even if Switzerland was quite a liberal country and could have accepted the word 'Inc.' in the name of a company it would have nevertheless added an indication of where the company was registered. In his view, it was possible to register a foreign Company as a representative of an affiliate Company but it had to be registered with the company house. In cross-examination, Metzger denied that he had agreed to the use of his telephone contacts in case someone wanted information that he would provide and even expressed shock when he found out that his contacts were being used for the purposes of soliciting or obtaining business.

Francis Nzioka (CW 69), an employee of First American Bank of Kenya, stated that GIL export proceeds were initially remitted by telegraphic transfer, but later Kamlesh Pattni started bringing in cash, claiming that his agents were in Nairobi, and that they came with

cash. The cash brought to the bank was in various currencies but had no supporting documents. He said that when they contacted their counterparts in Switzerland to establish the operations of the company GIL claimed to be exporting to, the purported Company in Switzerland was not registered there and was therefore non-existent. As a result of receiving this information, the Bank became uncomfortable with GIL and asked it to stop using the Bank.

Sajay Keshavji Vaya (CW 31), a former Cashier of GIL, testified that GIL's main operations were to export gold and diamond jewellery to London and Dubai. He stated that people from Zaire (now the Democratic Republic of Congo) brought in gold and diamonds and that gold also came from Machakos and Kakamega. According to Arthur Ndegwa (CW 54) there was information that the alleged gold and diamond jewellery purportedly exported to Dubai was not actually despatched. He also stated that even some of the companies purported to have been receiving the exports never existed.

Anthony Simiyu Muchanga (CW 4) was involved in writing the Economic Survey of 1994 and was specifically in charge of writing Chapter 7 which covered the statistics on international trade and the balance of payments. Records from the Customs Department showed that in 1993, 53,325 grams of jewellery and other precious and semi precious metals were exported. The value was KShs. 4,733,837,415/= . During analysis of the report it was found that the figures on exports of jewellery and other precious and semi precious metals were abnormal in comparison to those of 1992 and 1991. It was concluded that the figures were not genuine and were accordingly omitted from the Survey. Edward Albert Okeyo (CW 5), Principal Economist Statistician, headed 3 sections at the Ministry of Planning and National Development, Central Bureau of Statistics - External Trade, Balance of Payments and Money Banking. He also agreed that the figures of gold, diamonds and precious metals for the year 1993 showed an abnormal jump in the industry.

The witness checked the records on imports of precious stones and gold from 1990 to 1994 and found no diamonds had been imported. For the same period he found and indicated amounts and value of imports of precious and semi precious stones.

Observations and Conclusions:

There are serious disparities in the evidence available regarding the actual amounts of gold and diamond exported. For example, the export of gold over the three-year period attested to by the Warden of Mines is nearly 60 times more than the production. The official compiler of statistics (Economic Survey) felt so uncomfortable with the figures as to prefer to omit them.

Obviously, the same kind of creative energy was invested with respect to the fabrication of consignees of the jewellery. For example, it is quite clear that Servino Inc.—a Company GIL itself submitted to have been one of their importers—was actually non-existent. Pattni himself conceded that the addresses of the companies had been fabricated, ostensibly for “security reasons”. The testimony from First American also pointed to the very high possibility that several of the consignees did not actually exist at the material time.

Given the weight of the evidence adduced on this particular issue, we must conclude that there is serious doubt as to whether the amounts of gold and diamond alleged to have been exported actually were. Furthermore, the discrepancy in statistics between minerals allegedly produced and that which was exported also raises a number of questions about the authenticity of the claims made by GIL. Our definitive conclusion on this issue is that while some gold and diamond jewellery may have been exported from Kenya, there can be little doubt that it was not in the quantities claimed by GIL and for which it was paid export compensation.

Issue no. 6:

If issue no. 3 [*Does Kenya have diamonds and/or gold?*] is answered in the negative, where did GIL get the diamonds/gold it allegedly exported and were the purported exports properly processed through the Customs Department?

As issue no. 3 was answered in the negative, in other words, that Kenya does not (and did not at the time with which the inquiry was concerned) have significant gold or any diamonds, there is a need to answer the query of where GIL got the gold and diamonds it claimed to have exported. According to Police Constable Naftali Langat (CW 16), on October 22, 1991 he was working at Wilson Airport Police Station, specifically at the Criminal Branch based at the airport terminus. His duties were to check all aircraft arriving and leaving as well as the passengers in those aircraft, which activity was always undertaken in the company of customs officers.

The witness testified that on the day in question he was performing his duties as usual within the terminus. At about 8:30 p.m., the only aircraft that had not yet arrived was Registration Number 5YZYS operated by Safari Air and piloted by one Captain Rasul, flying in from Bunia in the-then Zaire made its landing. When it arrived, they checked the luggage that had been off-loaded. However, one passenger by the names of Kamlesh Pattni refused to declare his luggage. The Customs Officer-in-Charge (one Mrs. Opondo) requested him to move in and request the passenger to open his briefcase so that they could see the entire luggage and get him cleared. The witness reported that Kamlesh Pattni became hostile and attempted to move out of the terminus uncleared. Langat stopped him and he got very annoyed. He abused the policeman, but the witness stated that he persisted and insisted that Pattni open his brief case. When Pattni finally did so under a lot of pressure, the brief case was found to be full of gold. On seeing the gold the witness testified that he called Mrs Opondo. It was later verified that the weight of the gold was 32 kilograms.

This evidence is corroborated by Cheruiyot Frances Chelelgo (CW 27), former Commissioner of Customs and Excise who confirmed that on October 22, 1991, he received a call at about 9:30 p.m. to 10:00 p.m. from Wilson Airport from Mr. Collins Owayo. Owayo asked him to assist Kamlesh Pattni and secure the release of 32 kilograms of gold which the witness's officers had impounded. Chelelgo further testified that he was informed by the Senior Preventive Officer that the gold was from Zaire (Congo).

Another suspicious thing according to Chelelgo is that with the knowledge that there was no actual gold being produced in the country, it was strange that when GIL lodged their first

claim, they invoiced in Kenyan shillings and yet they were supposed to be invoicing in a foreign currency. The witness stated that he knew that one normally made a contract in currencies in which s/he requires to be paid. He testified that he asked Kamlesh Pattni about this who told him that the Treasury and CBK had allowed him to invoice in Kenya Shillings. He also asked Francis Thuraniara, the Principal Collector to find out if CBK allowed invoicing in Shillings. The witness testified that he had seen the circulars of CBK and so wrote to GIL and told them to stop invoicing in Shillings. The witness testified that there was a 'tug-of-war' for sometime, but GIL eventually ceased to invoice in Kenyan Shillings.

The witness further testified that he wrote to GIL asking them to reveal the source of their gold. On September 22, 1992, the Financial Secretary wrote saying that the Senior Internal Auditor had declined to certify a voucher for the payment of the gold on the grounds that the exporters had not provided documentary evidence of the source of the gold. The Company had indicated in writing that they bought the gold from several local vendors and that Pattni had attached the names of the Companies and a copy of an agreement signed between GIL and the said vendors. The witness tendered exhibit number 105 as the sources given to them by GIL for their gold. Surprisingly, according to the witness, the Commissioner of Mines and Geology who is an advisor to the Kenyan Government on gold had stated that both gold and diamonds were available and had given his Certificate to that effect. The witness confessed that he did not satisfy himself whether gold or diamonds had actually been exported.

Finally, with regard to this issue, one Lawrence Chelimo Butaki (CW 55), the Warden of Mines in the Ministry of Environment and Natural Resources stated that gold traders used to supply GIL with gold and that diamond was secured from Tanzania. He nevertheless testified that the source of gold and diamonds seemed to be extremely elusive. He believed that the quantity of gold had not come from Kenya because it was higher than expected.

**Observations and Conclusions:**

The source of GIL's gold and diamonds is shrouded in mystery. Whereas there is evidence that some gold could have been smuggled from the Congo and further witness testimony indicated that it came from Tanzania, it is highly inconceivable that all the amounts claimed came into Kenya in this fashion. Furthermore, given the fact that there was no import license on record issued to GIL for the importation of gold or diamonds, the actual source of the gold and diamonds was not established by the evidence tendered to the Commission. Coupled with the fairly clear fact that the appropriate procedures for the processing of the purported exports were thoroughly violated, what becomes clear is that if GIL indeed imported gold and diamonds, they were obviously smuggled from neighbouring countries by GIL officers or associates, or otherwise accessed from within Kenya by other dubious third party means.

**Issue no. 7:**

**How did GIL acquire a license to export diamond and gold?**

From the evidence submitted to the Commission, it is clear that there were two types of licenses that an exporter needed to acquire in order to engage in the business of exporting the minerals in question. There was the dealer's license which, according to Osumo (CW 8), was issued to GIL in 1991. According to this witness, GIL was the only exporter of gold in both 1991 and 1992. A diamond dealer's license was issued to the same company from 1990-1993. The other license that GIL had was an exporter's license. One of the conditions attached to the grant of a license was that the licensee had to maintain a register showing whatever he had received and dispatched. The same witness testified that if goods were being sent to one destination, you did not need to process many export permits even if they were several boxes. All you needed was one export permit. However, in the case of GIL, there were as many as eight export permits issued on one occasion. The witness admitted that this was abnormal but cast responsibility for this anomaly on the Department of Mines and Geology.

The witness pointed out several irregularities in the issuance of both licenses. First, he averred that when Kamlesh Pattni applied for a buying and trading license for GIL he did not indicate the source of the gold. Owayo (CW 10), the Commissioner, signed the license. Ndegwa (CW 54) witnessed the Commissioner's signature and it is the same person who sealed the purported exports. There was another application by GIL for a dealer's license that was issued by the Commissioner, Owayo. This was an obvious duplication but the officer was acting on the instructions of an Officer of the Vice President and Minister for Finance who had directed that this be done. The witness obviously did not exercise his discretionary powers. The anomaly was compounded by the fact that the witness's department fell under the Ministry of Environment and Natural Resources and yet the directive came from the Ministry of Finance and did not follow the proper chain of command.

Another strange thing according to the witness was that GIL never filed any returns throughout the period 1991-1993 when it held the three licenses, which was contrary to the Diamond Industry Protection Act, 1991, Chapter 310 of the Laws of Kenya. The penalty would have been to cancel the license but this was not done. Instead, the Commissioner renewed their licenses not only for the exportation of diamonds in 1993, but also of gold. This renewal took place when there were letters on record that GIL had not contributed any foreign exchange to the country's coffers, and in fact it was quite probable that the Company had caused a great loss to the country by its illegal activities. Another fact is that the proper procedure was that payment was supposed to be made first before a license could be issued. However, Commissioner Owayo allowed Kamlesh Pattni to collect the license and pay later. There is further evidence that the payments were actually made on March 4, 1992, for a license that had expired on December 31, 1991 - three months later.

The application for the renewal of the gold license for the same year, 1993 was received after the expiry date. This time, Owayo asked for returns and the renewal fee to be paid upfront. Although there is no evidence that the returns were received prior to the issue of the license, the fee was paid and there is a receipt to that effect. All licenses under Section 11 of Cap. 310 expire in December of each year and should be renewed thereafter. In the case of GIL, the renewal was being made in February 11, 1993 (the following year) for both licenses of

gold and diamond exportation. Osumo went on to point out that according to the record, there is no evidence to show that there was payment for the licenses issued in 1991 to GIL. Arthur Ndegwa (CW 54) admitted that the valuers from his department were not really experts in this field and would rely on the information supplied to them by the exporters. They could not verify whether what was alleged to be exported was pure diamond, gold or some other substance. And yet the dealer's license would have been issued.

**Observations and Conclusions:**

The manner in which GIL acquired and even went on to maintain the exporter's license for three years was unlawful. It is clear from the evidence that one of the key players in the process was the Vice President and Minister for Finance who issued the directive to the Commissioner of Mines and Geology, Collins Owayo, that the licenses be issued. Obviously, Owayo himself should have known better that the chain of command in as far as this matter was concerned did not come from the Vice President and Minister for Finance, but from the Minister for Environment and Natural Resources.

Furthermore, Owayo continued renewing the licenses in spite of the glaring irregularities committed by GIL that would have called for a cancellation of the license or, at a minimum, a denial of its renewal. The normal procedure for awarding or renewing licenses was never followed. Another person involved was Arthur Ndegwa who witnessed Owayo's signature and should on that account be held responsible for appending his signature in authentication of a transaction that he knew (or should have known) was illegal.

Issue no. 8:

How did GIL secure the monopoly to export gold and what was the justification for granting GIL a monopoly?

According to Njeru Kirira (CW 24), GIL requested 35% export compensation and the monopoly to deal in gold. The Minister approved the 35% but rejected the monopoly, and told GIL to liaise with CBK on the matter. Under the Restrictive Practices, Monopolies and Price Control Act, 1990, Chapter 504 of the Laws of Kenya (hereinafter referred to as the Monopolies Act), the only way somebody could secure a monopoly was by approval of the Minister.

The Minister had refused to grant GIL a monopoly. However, the Department of Mines and Geology granted GIL a sole licence and Treasury PS Mbindyo acknowledged that the monopoly existed. In his letter to GIL dated Nov 1, 1990, the PS stated that the Vice President and Minister for Finance had agreed on an experimental basis to grant GIL the monopoly and 35% export compensation as requested in their letter. The truth was that the Minister in his first correspondence dated October 19, 1990 had not permitted the monopoly. After the PS's letter, there was seemingly no alternative for the implementing officers but to agree. The witness testified that he had problems with the monopoly issue because a law had been passed forbidding it.

**Observations and Conclusions:**

**It is clear that according to the evidence on record, the Minister did not grant GIL a monopoly to deal in gold but they managed to secure “a sole licence” which actually amounted to a monopoly from the Commissioner of Mines and Geology, Collins Owayo, whose action in this regard was acquiesced to by Mbindyo. The grant was purportedly made under the Mines and Geology Act and in total disregard of the Monopolies Act.**

**Issue no. 9:**

**Was money paid by the Ministry of Finance and CBK allegedly as export compensation and if so how much was paid?**

According to Prof. Terry Ryan (CW 21), GIL started operations in December 1990 and lodged its first claim around the same time. By the time payments were stopped in early 1992, some KShs. 255,769,740/= had been paid under the Export Compensation scheme. On February 7, 1992 Pattni applied for an extra 20% to the then PS, Dr. Wilfred Koinange (CW 59). Surprisingly, Owayo, in his capacity as Commissioner for Mines and Geology also wrote to the Treasury seeking an additional 20% in line with Kamlesh Pattni's request. Dr. Koinange's response was to state that there was a problem with the International Monetary Fund (IMF) on the issue, which was that the government was in effect running two different exchange rates. The government was paying way above the world price of gold to GIL. According to Prof. Ryan (CW 21) it would have been cheaper to import gold and re-export it.

It is also clear that KShs. 7 billion, had been paid out under the pre-shipment scheme, and could not be tied back to the CD 3 Forms, which had traversed through Exchange Bank. Pre-shipment was a facility created by the World Bank with the view to assisting exporters to readily secure credit. The process was such that every time CBK discounted a CD 3 Form, an asset was created in CBK's books and money was disbursed, yet there was evidence of companies through their banks presenting the same forms more than twice to CBK. Each time, CBK would discount the CD 3 Form. As a consequence of this operation, CBK receives a piece of paper which is the discounted bill and at the end of 30 or 90 days, the lender not only receives payment of the money lent but also interest. Yet the circular did not require CBK to verify whether the claimant actually exported anything or not. You could have a CD 3 Form presented, discounted and then get the same through a Commercial Bank at the end, pay the money back and have the use of that money for the period. There was no facility to monitor what the exporter was actually doing with that money over the period.

There was also evidence that some of the beneficiaries of the moneys paid to the recipient banks were persons who occupied prominent positions in the Kenyan political establishment. Leah Ida Wambete (CW 65) stated that Pan African Bank (PAB) lent out a lot of money to various companies owned by Hon. Nicholas K. Biwott (then a Cabinet Minister) which he never paid back. It also lent out a lot of money to many other government officials, Ministers and Members of Parliament, as well as bank directors. All

these loans were unsecured. As a result, the Bank became insolvent and was unable to continue its operations as a going concern. Wambete said that CBK exercised no supervision over PAB as it should have done under the law.

Furthermore, although the Bank was insolvent as of 31<sup>st</sup> March, 1992 it was allowed to continue with banking operations. The witness stated that among the shareholders of PAB was HEDAM (which in her view stood for ‘His Excellency Daniel arap Moi’) and Roirie Investments owned by the then Vice President, Hon. Mwai Kibaki. Wambete said that shareholders in PAB were more or less a “who was who” in Kenya. As of 1<sup>st</sup> September 1993, Mukesh Yaya, HEDAM and Pansal Investments Limited were shown as the shareholders of Uhuru Highway Development, which at the same time owned the Grand Regency Hotel.

Wambete stated that Post Bank at one time approved two bills amounting to KShs. 481 million which was guaranteed by one Augustine Okori Mwasame, who was Kamlesh Pattni’s driver at the time, and who had no other income. Wambete also discovered that some pre-shipment finance facility was used for the export of live animals. She observed that funds would be withdrawn and immediately thereafter Panther Investment Limited would be credited and deposits made to GIL’s account with Exchange Bank Limited (EBL). The prices of exports were quoted in Kenyan Shillings, which is not an internationally convertible currency. The witness admitted that GIL did not do any export business through Post Bank. All foreign currency received by Post Bank in favour of GIL was not related to export compensation. It was therefore fraudulent in the opinion of the witness for GIL to claim export compensation.

Tito Kiprono Birech (CW 78), Exchange Controller, CBK, stated that GIL did not always adhere to the regulations given by CBK regarding the use of pre-shipment finance yet it was not struck off the register. He told the Commission that he was told to even pay compensation on cash received from GIL as it claimed that such money came from visitors and tourists, which in his opinion was clearly irregular. Peter Mutuku Mukanda (CW 83), Assistant Manager, Exchange Bank Ltd stated that although the bank was opening accounts, account holders were not presenting themselves. He said that the amounts in these accounts

were quite abnormal, and that the money in GIL accounts were transfers from other commercial banks and from CBK. He testified that Exchange Bank would receive documents from GIL and would be asked to certify as true copies of the original without actually seeing the original copies. That they would be forwarded to CBK and credit would go to such accounts.

**Observations and Conclusions:**

From the evidence given to the Commission, it is clear that money was paid as export compensation. The recipients of the money comprised a number of beneficiaries, who, in the first instance, comprised a set of Commercial Banks associated with Kamlesh Pattni, as well as GIL. There is no evidence (save in a few instances where the beneficiary was GIL and related companies) as to precisely who the recipient banks actually paid the money, although there was a labyrinth of high-ranking government officials who were receiving moneys that was deposited with banks as export compensation.

It is our considered opinion that the payments for export compensation to GIL were manifestly irregular for the following reasons:

1. The exported goods did not qualify for export compensation. There was no evidence that the goods satisfied the criteria laid down under the law.
2. The claims for export compensation were not made in accordance with the procedure laid down under the scheme.
3. The claims for 35% export compensation were in excess of the legal rate of 20%. Some of the claims were in excess of even the claimed 35%.

**Issue no. 10:**

**What are the circumstances surrounding the payment of KShs. 5.8 billion to GIL which was allegedly made well after the withdrawal of the 15% and the revocation of the basic 20%?**

In a surprise transfer Dr. Wilfred Koinange (CW 59) was moved to the Treasury as Permanent Secretary. In his verbal handing over, his predecessor, Magari, told him “If you do not pay this compensation promptly you will be in trouble with your father.” Magari advised him that “father” was the President.

Koinange explained the background to the payment of approximately KShs. 5.8 billion to GIL. He referred to a call from Professor Philip Muinde Mbithi, Head of the Civil Service, who told him that the President had instructed Mbithi to tell Koinange to pay all outstanding claims to the GIL amounting to KShs. 5.8 billion.

Koinange telephoned the President about the message and the President’s reply was “I have spoken to Professor Mbithi about it.” After the conversation with the President, Koinange started paying but he first consulted Mbithi who advised him to consult the Governor CBK and find a way to comply with the instructions. Governor Kotut drafted a letter which he advised should be written to him and he would effect the payment. The letter was signed, handed to the Governor who handed it to Deputy Governor, Riungu, and told him to comply. The President was advised by Koinange of the payment of the 1<sup>st</sup> installment but the President said nothing. However, later on Koinange was recalled from leave by Mbithi who told him the President was angry because he had not finished paying GIL. Koinange wrote the second letter to effect payment. It was put to him that the use of KCB was because it was a big bank with great volume movement in order to avoid drawing undue attention to the transaction and thus conceal the payment. It should be noted that Koinange earlier denied knowing anything about GIL, but upon cross-examination admitted having briefed other Permanent Secretaries on GIL during a meeting in the President’s office in June 1992.

Eric Kotut (CW 60) then CBK Governor, denied any knowledge of the payment of KShs. 5.8 billion on the authority of letters that had been written by Koinange the-then PS Treasury, addressed to the Governor, CBK or any information regarding the transactions effected on the basis of the letters. He stated that the letters were ridiculously short for the purpose they were supposed to be serving, gave no background or reason for the transfers and yet they related to very large sums of money. They bore no stamp of the CBK to indicate they had been received there.

As Deputy Governor of the Central Bank of Kenya, Riungu testified that he actually discussed with Governor Kotut and PS Koinange how to pay the KShs. 5.8 billion. They agreed on a plan and Riungu gave instructions to effect the first payment on instructions contained in a letter.

Riungu's evidence coincides with that of Koinange to the effect that he was called to the Treasury on April 19<sup>th</sup>, 1993 to meet the Governor, Eric Kotut in the office of the PS to the Treasury. He told the Commission that upon arrival at the Treasury, he was briefed by the Governor about the President's directive to pay KShs. 5.8 billion to GIL. He said that the Governor cautioned him that the payment should be very secretive, and that that is when he was given a very brief letter from the PS addressed to the Governor directing the transfer of KShs. 1.8 billion to KCB. The Governor told him to comply.

The witness further told the Commission that upon arrival back at CBK, he ordered Mr. Werunga to effect the transfer and debit it on the Paymaster General (PMG) account. He confessed he was aware that that transaction was illegal since it had no parliamentary approval, but went ahead with the transfer since the Governor instructed him to do so. He further said that the second payment of KShs. 2.8 billion was done without directly seeing the Governor though the letter was addressed to him. He also said that he never saw the third letter but was aware that the transaction took place.

Oyula (CW 28) said in his evidence that he was aware of the payment of KShs. 5.8 billion to GIL by the CBK. At the time he was Principal Accounts Controller in charge of the Ministry of Finance Accounting Unit. His officers pointed out that they had some debit

notes reflecting certain amounts in the Ministry's Bank Statement which had not been produced at the PMG office. A letter dated 19/04/93 by Permanent Secretary, Koinange having no reference and stamped "secret" and not copied to anybody was addressed to the Governor of the CBK. It read:

Please credit KCB with the sum of KShs.  
1.8 billion and debit PMG.

Two other letters in the same form specified various amounts and the three letters totalled KShs. 5.8 billion. These three letters were instructions to withdraw monies from PMG.

Philip Muinde Mbithi (CW 45), former Head of the Civil Service, testified that he received a telephone call from former President Moi instructing him to tell PS Koinange to transfer through the CBK KShs. 5.8 billion urgently by 5.00 p.m. that day. He did not tell him what the money was for or where it was to be transferred to. It appeared Dr. Koinange was in the know. The witness passed on the message and Dr. Koinange said he would speak to the President. The witness understood that Dr. Koinange did go to Mombasa to see the President over the matter. The witness could not remember the date but stated that it was definitely 1992 or 1993.

In his evidence, Elijah Kipng'eno arap Bii (CW26), former General Manager of Kenya Commercial Bank, described how money is transferred between the Central Bank of Kenya and the Commercial Banks and also between the Commercial Banks themselves through a voucher system. He referred to verbal telephonic instructions given to him on April 19<sup>th</sup>, 1993 by the Permanent Secretary in the Ministry of Finance, Dr. Koinange, to disburse moneys placed in the Kenya Commercial Bank account with the Central Bank of Kenya. The witness stated that he had no objections since it was a normal thing to do, nor did he suspect anything sinister. Two days later, the witness went to Koinange's office and found Deputy Governor Riungu and Kamlesh Pattni being ushered out. Koinange allegedly told Bii that government wanted to effect certain payments and that Kamlesh Pattni of GIL would give him the details of how to disburse the money to the beneficiaries when it reached their account. Bii acted accordingly.

The witness further testified that he did wonder as to why the government had not used Kamlesh Pattni's account straight to credit the money by way of cheque which would have been a more direct route and instead was paying through the bank. The first instalment that came in from the government was for KShs. 1.8 billion. The bank received the money on the 19<sup>th</sup> and the letter from GIL requesting payment was dated the same day. GIL requested the transfer of KShs. 430 million to National Bank of Kenya (NBK), KShs. 400 million to Trans-National Bank, KShs. 470 million to Delphis Bank and a sum of KShs. 500 million to Post Bank. The witness called the PS for his confirmation as soon as the money had been received but was told that there was no need to call him and it was Kamlesh Pattni to give Bii the information on the beneficiaries. The witness requested Kamlesh Pattni to write an authorization letter copied to the PS Treasury and when he had done so, the witness called the PS to inform him of this and to request on how to proceed. All the transactions were concluded in one day. The witness testified that this was fast but not out of order. Bii stated that the money paid to Delphis Bank was paid to Panther Limited (a company owned by Kamlesh Pattni and Philip Moi, son to the then President, Daniel Toroitich arap Moi).

Another witness, Magari (CW 19) was shown a letter dated 14<sup>th</sup> April 1993 addressed to the Governor Central Bank of Kenya by Dr. Koinange in the following terms:

Settlement of Amount owed to NBK Ltd. by the Government

The Government has decided to settle some of the debts owed to the NBK by various Government agencies totalling KShs. 1.5 billion. An additional amount of KShs. 500 million is to be paid as a Government Capital contribution to the NBK Ltd. bringing the total amount to be paid to KShs. 2 billion only.

I would appreciate if you could make arrangements to pay the amounts to the NBK Ltd immediately and debit the amount to the Pay Master-General (PMG) account.

Magari's remarks on this were:

I hope the Governor of the Central Bank of Kenya never acted on it. Because the proper procedure Dr. Koinange should have... written a cheque accompanied by a payment voucher which showed the amounts being paid to whom and the reasons thereof...

The Treasury has got its own cheques.

Daniel Leparan Ng'atuny (CW 67) of the Deposit Protection Fund (DPF), CBK, testified that money was released from DPF to Trade Bank Limited, and among the beneficiaries of this money were Hon. Nicholas Biwott and one Augustine Okori Mwasame (who turned out to be the driver of Pattni). Ng'atuny testified that Koinange went ahead to pay export compensation despite Legal Notice No. 88 dated April 15<sup>th</sup>, 1993 from the Minister, stopping gold and diamond from those in the schedule qualifying for export compensation. Moreover, at no time during the payment of the above amount did Koinange receive authority from Customs confirming the export of those items. The payment also contravened Regulation No. 5.27 requiring the approval of the Treasury before the payment of unusual amounts. Koinange did not even get written authority later either from the President or from Mbithi as required by Regulation No. 5.28. The witness could not explain how he came to a figure of KShs. 5.8 billion but insisted that it was purely on instructions from the President. In his letter to CBK, he ordered the payment to KCB but did not mention the account of GIL in KCB. It was put to him that this payment was done so secretly because in fact it had nothing to do with export compensation.

Tom Kilalya Werunga (CW 53) Assistant Principal, Banking Division of CBK confirmed that the KShs. 5.8 billion was paid in three tranches. The first one was of KShs. 1.8 billion and that this one was paid owing to Koinange's letter. He said that the instructions to process this payment were given to him by Deputy Governor Riungu. He said that the second letter came on 30<sup>th</sup> June, 1993 ordering CBK to pay KShs. 2,821,080,943. This followed the same order as the first. The witness testified that he was simply carrying out orders although he knew that such orders were irregular. He also said that the letters did not show the account from which the money was to be drawn or paid. In July 1993, he processed the payment of KShs. 2.8 billion and that this time he got the instructions directly from the PS to the Treasury, Koinange himself, and never bothered to consult the Governor or his deputy. He stated that these transactions had now become 'a trend' and therefore he saw no need to seek approval from anybody. He said that the working environment in CBK at the time was not very good as some people were being arrested and that those who queried some of the transactions were removed and transferred arbitrarily. He said that this

irregular withdrawal of large sums of money was done without using cheques but by three letters signed by the PS to the Treasury. He confirmed that all this money was transferred to KCB and later transferred to other banks on the instructions of Pattni.

Joseph Macro Oyula (CW 28) Financial Secretary Treasury, stated that he was aware of the payments of KShs. 5.8 billion through CBK by the Treasury to GIL. The first time he learnt of the payments was when the officers doing the bank's reconciliation for the Ministry pointed out that they had some debit notes reflecting certain amounts in their bank statement which had not been produced at the PMG Office. Koinange's letter to the Governor CBK to credit KCB with KShs. 1.8 billion was not copied to anyone, had no reference at all, was marked "secret" and was very short. Contrary to the regulations, it did not mention the Vote the money was being withdrawn from. At that time there was one PMG Account from where Ministry Accounts were credited. There were many accounts within the PMG Account. The letter did not also disclose to whose credit the money going to KCB was for. The purpose of the withdrawal was not mentioned. There was no voucher which was mandatory in order to transfer money from a government account to any beneficiary. The same applied to all the cheques amounting in total to KShs. 5.8 billion. There was also no Parliamentary approval or Voted provision for the amount. The witness averred that the PS withdrew more than 10% of the revenue accruing to the government of Kenya without the authority or a Vote. The amounts were not supported by any budget line and were thus unconstitutional.

To crown it all, Koinange was not signatory to the PMG Account with CBK. According to Banking Rules and Treasury Regulations, CBK should not have honoured the letter. Oyula stated that CBK should have asked the PS to get the withdrawals formalized through the proper channels by getting some cheque drawn against the respective account and paying the beneficiary and not just to direct the bank to transfer funds from an account which was specified. In this case, there was no Vote indicated on the letter, instead it was a general debit against the PMG Account.

#### **Observations and Conclusions:**

The circumstances surrounding the payment of the KShs. 5.8 billion were riddled with irregularities and manifest illegalities. The following were of particular concern:

- On the evidence, the amount of KShs. 5.8 billion was paid to GIL apparently on a Presidential order.
- Those instructions were irregular because:
  - (i) They did not specify the budgetary Vote against which the monies would be withdrawn. There were many accounts in the PMG account;
  - (ii) The letters did not say who was the recipient in the KCB;
  - (iii) The purpose of the payments was not indicated (save the verbal indication that Kamlesh Pattni would direct KCB accordingly);
  - (iv) There was no corresponding voucher to any of the withdrawals. A voucher was mandatory in order to transfer money from a government account to any beneficiary;
  - (v) The payments were not supported by any budget line;
  - (vi) The speed with which the transfer was made (in light of the amount involved); and
  - (vii) The payments were not authorized.
- In summary, CBK should not have acted on the letters *per se*. We find it particularly odd for CBK to have done so given the utmost secrecy surrounding the transaction.

It is our considered opinion that this whole transaction amounted to a massive and willful plunder of public resources, which was not only illegal, but manifestly unconstitutional.

**Issue no. 11:**

**What were the circumstances surrounding the payment of US \$ 210 million to Exchange Bank Limited (EBL) in respect of fictitious foreign exchange claims?**

Michael Onesmus Wanjihia (CW 74), Senior Superintendent at the CBK Foreign Department, stated that to the best of his knowledge, banks related to GIL, that is, EBL, Delphis Bank Limited, Post Bank Credit Limited, PAB and Trans-National Bank, had defaulted on their contracts amounting to US \$ 240 million. They took the Kenyan Shillings but did not deliver the equivalent in US Dollars. He said that the Governor was aware of this problem. He further stated that it would have been a grave matter if a monumental amount of US \$ 240 million had in fact not been delivered, and that putting it in writing would have been very risky particularly if such information had leaked to the press or public. He stated that at the time he was in this department, the environment at CBK was rife with suspicion and mistrust among its staff. KANU had just won elections with less than 40% of the total votes cast. Press freedom had begun to take root and close monitoring by the IMF caused staff to be worried and thus highly secretive. He said that the discrete style of CBK top management did not help matters and caused staff to easily fall prey to economic predators outside CBK.

Wanjihia said that under the contract entries and as a way of hoodwinking the IMF and World Bank, they arranged for the alleged sale of US \$ 210 million to CBK by EBL. EBL claimed that the money received was deposited on foreign banks (which was not actually the case) and EBL received KShs. 13.5 billion as the equivalent. Wanjihia stated that on 9<sup>th</sup> August 1993, they were ordered by the new Governor, Mr. Cheserem to reverse the above entries. Instead, together with Mr. Kilach, they cleared the entries from the CBK books by fraudulently purporting to sell back the non-existent US \$ 210 million to EBL but at a reduced price. This transaction caused a loss to CBK of KShs. 3.6 billion as exchange loss, and caused the account of EBL at CBK to end up with a reduced balance. This transaction was not a simple banking episode but it was executed with impunity, and in effect sanctioned the open theft of the people of Kenya. It was also an abuse of office on the part of the new CBK Governor, Mr. Cheserem.

The witness said that when he signed the agreement with Banque Indosuez Aval and American Express Bank, he was under the impression that the agreement had been approved by the Governor since it was signed in the presence of the Deputy Governor. He said that they never saw any sinister motive as it did not involve any cash outlay. He stated that he did not see EBL in the picture as a beneficiary of the agreement and never inquired about the presence of Mr. Taheri, the Managing Director of EBL during its signing. Micah Cheserem (CW 72) stated that CBK had advanced EBL KShs. 13.5 billion yet the US \$ 210 million which was supposed to be the exchange was fictitious and had not been delivered. He said that there must have been collusion and economic sabotage behind the transaction. Pattni was paid KShs. 13.5 billion for the alleged sale of US \$ 210 million. He invested the “export proceeds” in the Treasury Bills which he later sold to CBK at a profit.

Dickson Obel Otondo (CW 36) Manager Human Resources in the CBK went through the organization of the CBK. On 18<sup>th</sup> May, Otondo received 4 vouchers relating to the purchase of dollars from four banks which included Exchange Bank. In all four cases the equivalent in Kenya shillings was credited to the accounts of the various banks in the CBK and the dollars were to be received by the Federal Reserve Bank in New York. In all four cases no dollars were received and the CBK officials changed the instructions to pay the dollars in London by the American Express Bank. The money was not received in London either. Two or so months later the entries of the relevant accounts of the banks were reversed but at the same time the CBK entered into a total of eleven spot contracts with Exchange Bank amounting to US \$ 210 million (KShs. 13.5 billion), for delivery to a CBK account with the American Bank in London and also with Banque Indosuez Sugem Aval Limited also of London. The reversals by the CBK were purported recovery of amounts previously paid. However, Otondo received five vouchers purportedly showing that the CBK had purchased US \$ 100 million from EBL the equivalent of KShs. 6,354,740,000. EBL was credited with this amount.

It was expected that on the same day EBL would credit the CBK account with Banque Indosuez with US \$ 100. Apparently there were 6 spot contracts in this transaction bringing the figures to US \$ 110 million (equivalent to KShs. 7,174,471,000). Correspondence

between the CBK and Indosuez indicated that no funds were to be transferred and they would make only book entries. This means on the facts that, although the CBK advanced the Kenyan shillings to Exchange Bank, there was no corresponding credit of the CBK account with dollars. There was some attempt by CBK officials to indicate that Exchange Bank had fulfilled its obligations under the contracts.

The above testimony was corroborated by Riungu, former deputy Governor, CBK, who told the Commission that at one time, Eric Kotut, CBK Governor told him to contact Pattni of GIL on how he could assist them in connecting CBK to a foreign bank where an account could be opened that would show book entries in foreign reserves. This was intended to mislead the IMF that the government was actually meeting its targets. According to Riungu, this was the origin of the controversial US \$ 210 million and KShs. 13.5 billion and the agreement between Banque Indosuez Aval and American Express Bank and CBK. This evidence is in agreement with that of Kamlesh Pattni on the above subject.

Riungu further stated that Governor Kotut continued referring Kamlesh Pattni to him to assess his outstanding foreign exchange in form of export proceeds and to speed up the receipts. He confessed that CBK would at times run to Kamlesh Pattni to “rescue” them with foreign exchange. He admitted that no measure was put in place to ascertain whether foreign exchange was actually coming into Kenya as alleged by GIL or whether it was money simply being recycled. That the pre-shipment finance scheme had no adequate monitoring mechanisms to ensure that rediscounting was done on real exports. There were no letters of credit or invoices to accompany the request for rediscounting. This led to its abuse by, for instance, using it to build Yaya Centre in Nairobi. On his part, Kotut denied everything to do with the above transaction.

Riungu also stated that the dealings between CBK on one hand and GIL/EBL/Kamlesh Pattni on the other were on a “back-to-back” arrangement; in other words, book entries with foreign banks (Indosuez Aval) would show money being entered on CBK accounts yet in actual fact, there would be no money. He said that this was “a gentleman’s agreement” in which it was agreed that “you don’t take yours and I don’t take mine.” He said that under this arrangement, Kenya was able to survive a two-year embargo on aid by the IMF, the

World Bank and other donors. He further said that EBL and Pattni acted as conduits and a means to achieve the monetary targets required by IMF and the World Bank. Riungu said that Kamlesh Pattni had a good relationship with Kotut, but the latter preferred to delegate most of these dealings to Riungu.

Riungu also stated that some banks continued to overdraw their accounts with the CBK against the advice of the IMF. Although the pre-shipment finance scheme was abolished, some GIL-related banks continued with the scheme. Riungu said that Kilach's services as Director of Banks Supervision were terminated on March 24<sup>th</sup>, 1994 on account of having participated and signed an agreement with a foreign bank meant to deceive the Government of Kenya and the IMF that CBK held a purported deposit of US \$ 210 million with the said foreign banks. Yet Kilach said that he was not at any time involved in these negotiations except in executing the agreement at the request and in the presence of the Deputy Governor and on confirmation and advice of the Governor. He said that it was brought to his attention that GIL had within five days rediscounted CBK bills of exchange amounting to KShs. 553.5 million through three banks. He said that the company appeared to have been financing its own operations solely from borrowing and made no effort to plough back its profits. Pre-shipment financing was being used for the purposes of extracting money from CBK.

The same witness also admitted that pre-shipment finance went towards the purchase of cattle, goats and sheep, the construction of Yaya Centre, the purchase of Treasury Bills, overnight lending and into deposit accounts for the purposes of earning interest. This shows the extent to which the scheme was abused. In short, it went to finance projects it was not intended for.

Riungu said that there was a "gentleman's agreement" between CBK and Banque Indosuez Aval to transfer US \$ 100 million and KShs. 6.3 billion between each other and no money would actually be transferred. But as a result of this agreement, KShs. 6.3 billion was advanced to EBL. He stated that Kotut would pass on verbal instructions that he would later deny when put in writing. He said that it happened with Joseph Mumelo who got verbal instructions from Kotut to pass some cheques relating to some banks. When he later

put it into writing, Kotut disowned it. The same also happened to Francis Waliaula Lukorito (CW 42), a former CBK Employee, in relation to pre-shipment finance to GIL.

Riungu said that he knew nothing about KShs. 13.5 billion until April 1994, when he was charged with stealing the said money in criminal case No. 2271/1994 in the Chief Magistrate's Court which contained 44 counts. He confessed that it later turned out that no gold was being exported as alleged earlier by GIL. He also said that the proceeds from the alleged sale were fictitious. He said that the accounts with American Express bank and Banque Indosuez Aval were also fictitious and used primarily to perpetuate fraud.

#### **Observations and Conclusions:**

The evidence on record shows that the equivalent of US \$ 210 million (KShs. 13.5 billion) was paid to Exchange Bank, which in effect was a GIL conduit. We are unable to say how the money was utilised or whether any passed to third parties. We nevertheless are of the considered opinion that examination of the documentary evidence may establish how the money was utilised and whether any of it was passed to third parties and their identity.

What we can say with certainty was that the payment was irregular and designed essentially as a cover-up or an attempted 'bail-out' of EBL which had been involved in fraudulent transactions. This money clearly belonged to Kenyan taxpayers' which never came back to national coffers. The public, the IMF, the World Bank and others were effectively deceived through elaborate banking games between Nairobi, the United States of America and Europe. In essence, the money was stolen.

Issue no. 12:

Did EBL, GIL, their shareholders and directors use the moneys paid to them jointly with Pan African Bank Limited, Delphis Bank Limited and Post Bank Credit to defraud CBK through a fraudulent scheme of cheque-kiting or otherwise.

Micah Cheserem (CW 72) stated that cheque-kiting happened where some banks brought cheques to CBK on the date of issue and were extended direct credit for those cheques over the counter. The debits would not be effected against payments made on those cheques until the following day, meaning that such banks received unsecured short-term credit until such time as the transactions were regularised.

Charles Muchene (CW 80) stated that some companies, including GIL, benefited from mismatched inter-bank transactions. He said that whereas a cheque would be credited on a company's account immediately it reached CBK, the corresponding debit would not be done for some days and such companies got interest-free facilities (cheque-kiting). He said that on 20<sup>th</sup> April, 1993 four banks – EBL, Post Bank Credit, Pan African Bank and Delphis Bank - entered into a forward contract to sell US \$ 116 million to CBK. This money was not delivered on the exchange date but the banks were credited with KShs. 8.8 billion, which was then invested in Treasury Bills at 65%. According to Muchene, CBK lost KShs. 558 million on this transaction, while the four banks were the primary beneficiaries of the monies.

The witness also testified that EBL, Delphis Bank and Post Bank used to acquire foreign exchange from CBK at official rates which was later resold to CBK at market rates for the credit of GIL. GIL would also claim export compensation on such transactions.

Peter Mutuku Mukanda (CW 83) Assistant Manager, EBL, stated that they were opening accounts at the bank but account holders were not presenting themselves to the bank. He said that the amounts in these accounts were quite abnormal. He further stated that deposits in GIL accounts were transfers from other commercial banks and CBK. EBL would receive documents from GIL and be asked to certify as true copies of the original without having seen the original copies. That they would be forwarded to CBK and credit would go to such accounts.

David Todera Munyakei (CW 35) worked in the Development Department of the Banking Division in the CBK. He handled the pre-shipment finance scheme and advances and

discounts to commercial banks. The pre-shipment scheme was meant to finance the locally manufactured goods for export through commercial banks. The witness dealt with GIL which was supposed to export gold and diamonds. He knew Kamlesh Pattni as a Director of the Company and who owned EBL which handled banking business of the company. The Company was about the only customer of the scheme. He was struck by the large credits running at about one billion Kenya shillings daily and wondered whether Kenya had all that gold and diamonds to warrant that much money. He was nevertheless told by his supervisors to deal with the company's affairs promptly and without question. He noticed that the relevant documents were delivered after 5.00 p.m. when all other workers were going home. He noticed that in some respects the same CD 3 Forms were presented several times over requesting for different amounts. He became suspicious of the goings on and leaked information to some Members of Parliament with a view to drawing attention to what was happening. His services at the CBK were eventually terminated.

Antonina Masbari Aura (CW 77) held various managerial positions in the NBK. She described dealings between NBK, Exchange Bank and the CBK in respect of the pre-export finance and the export compensation schemes. With regard to the pre-export finance scheme, Aura said NBK processed two applications for GIL. The first was for KShs. 229 million which was not repaid in time and the CBK refused to extend the time during which GIL had to repay the loan. As the loan was not repaid, the CBK debited the account of the NBK with the amount due. In the meantime, the second application for KShs. 265 million by GIL had been approved. Instead of the NBK passing the money on to GIL, the same was used to settle the first loan. After that GIL did not make applications for pre-export funding through the NBK. The NBK did not receive any export earnings by GIL in respect of the first loan but evidence was provided that foreign exchange was received through EBL and Post Bank Credit Limited

As regards the second loan, the NBK did not provide any funds to GIL. That notwithstanding, the NBK received a total of US \$ 30 million purporting to be export earnings by GIL from Citibank, New York and Citibank, London. The foreign exchange was sold to the CBK. The witness did not see any shipping documents in respect of those purported earnings. Aura testified that GIL applied for export compensation through the

NBK to the tune of KShs. 281 million. She confirmed that exactly the same CD 3 Forms which were being surrendered under the pre-export finance scheme obtained from the CBK were tendered to Customs for claims for export compensation. The NBK certified all CD 3 Forms. NBK handled export compensation claims for GIL totalling some KShs. 281.7 million. Not one of the entire lot was supported by any shipping document. Of the KShs. 281 million, only KShs. 52 million passed through NBK. The witness did not know whether or not the balance was paid and if paid through which bank. The witness also testified to the NBK purchasing Forex Cs on behalf of the CBK to the tune of over US \$ 18 million.

Charles Muchene (CW 80) of PriceWaterhouse Coopers carried out a special audit of four banks, viz., EBL, Delphis Bank, Pan African Bank and Post Bank Credit. The four banks were well co-ordinated in their activities. Muchene saw evidence of a transaction under which EBL was supposed to deliver US \$ 100 million to the CBK. He saw evidence of EBL getting the shillings equivalent of that US \$ 100 million but saw no evidence of US \$ 100 million being delivered to the CBK. EBL was active in buying forex in the local market, which was transferred into accounts in corresponding banks before being sold to the CBK and designated as export proceeds from GIL. In some cases CD 3 numbers were quoted but the forms themselves were not available to ascertain whether EBL stamped them to indicate receipt of export proceeds. The CD 3 Forms which were available had discrepancies.

**Observations and Conclusions:**

**The cheque-kiting scheme was part of the overall plan of fraud that GIL, EBL and related banks hatched in order to defraud the CBK. It is quite clear from the evidence reviewed that several millions were lost as a result of the scheme. In addition, the rates of interest charged on the Treasury Bills sold appeared exceptionally high.**

**Issue no. 13:**

**Were the moneys illegally obtained from CBK, the Customs Department and the Treasury utilized, in part or at all, to fund the campaigns of any political parties, and if so, which parties and to what extent?**

Morris Morgan Muthamia Mwariama (CW 66) stated that he was the Chairman of the Forum for the Restoration of Democracy (FORD) sub-branch at Kenyatta University. He claims that he was approached by Vice Chancellor Prof. George Eshiwani who told him to organise members of the opposition at the University to demonstrate against FORD up to State House. Six hundred students together with the Vice Chancellor and a few lecturers met the President at State House and denounced the opposition and joined KANU. He said that the President gave them KShs. 800,000 as "*chai kidogo*". They were told to mobilise 1000 students to conduct campaigns on behalf of KANU.

According to Mwariama the head of the secretariat where they were distributing money was Prof. Everett Standa, the current Vice Chancellor of Kenyatta University. He further said that students joined KANU because of money and others under threat of expulsion. Their leader (the witness) was promised KShs. 2 million and a job if he crossed over to KANU. He alleged that money for KANU campaigns came from Steadfast Limited account in Post Bank to Prof. Eshiwani. Steadfast was a GIL-related company. Post Bank also loaned out money to print campaign materials. Philip Muinde Mbithi (CW 45) the then Permanent Secretary/Secretary to Cabinet and Head of Public Service testified that when he was Vice-Chancellor of the University of Nairobi, he used to receive some money, together with other Vice-Chancellors of other public universities, from President Moi ranging from KShs. 20,000 to 40,000 as *chai*. Mbithi also testified that university students would go to the Head of State and he would give them some money.

Arising from the testimony of Kamlesh Pattni was the allegation that he gave former President Moi KShs. 5 million as *Harambee*. Kamlesh Pattni also testified that Prof. George Saitoti received KShs. 1 million. This testimony amounted to adverse evidence given against former President Moi and Prof. Saitoti.

Observations and Conclusions:

Although the testimony about *harambees*, the alleged bribery of student leaders and other acts, reflected the kind of patronage politics that existed in Kenya at the time, there is no direct evidence on record to connect the receipt of monies by students, lecturers and administrators at Kenyatta University to the monies defrauded from the government in the Goldenberg affair. However, in our considered opinion the incidents recounted above raise a number of questions:

- (i) Where did the monies come from? Was there a vote for this kind of ‘facilitation?’
- (ii) Was the President aware that bribery constituted a criminal transgression, and that particularly within the context of electoral politics, such action could be grounds for court-related action of both a civil and a criminal nature?
- (iii) If the allegation that Kamlesh Pattni paid the President and his Vice *harambee* in order to facilitate the GIL scheme was true, this amounted to an impeachable offence.

We raise these queries because it is our strong belief that they go to the core of the problem of which the Goldenberg Affair was just symptomatic. That problem is the culture and practice of impunity by which the political leadership of our countries are informed. Indeed, it is the culture of impunity which not only allowed Goldenberg to be initiated, but for it to extend for so long and for the sanctions against the culprits in the scheme to have been so delayed in evolving.

Former President Moi and former Vice President Saitoti were served with adverse notices. In the case of former President Moi, we have seen and reviewed a submission made to the Commission by his lawyer. We are aware that the former President failed and/or refused to appear in person before the Commission. In the submission by the former President’s Counsel it is in effect denied that the former President issued any instructions to pay to GIL KShs. 5.8 billion as export compensation. It was submitted that:

the testimony by the above mentioned Permanent Secretaries in the Treasury alleging that our client telephoned them at one time or another is not true....

It appears that the former President's lawyer used the statement apparently made by James Kanyotu to answer allegations made against him as a basis to deny involvement of the former President in the affair. In other words, it is a denial that the former President authorized implementation of the Goldenberg Scheme or the KShs. 5.8 billion payment, or that the former President received KShs. 5 million and that the former President and James Kanyotu had a 50% share-holding in GIL.

James Kanyotu likewise failed and/or refused to testify in person to the Commission. Nevertheless, there is ample evidence to show that Kanyotu acquired an interest in both GIL and in EBL. He was named as a Director in both companies.

What we can thus say in conclusion on this issue is that on the face of the evidence, Kanyotu is an accomplice as he was affected by the allegations against the former President. He was the one who solicited the payments. He was the one who provided Kamlesh Pattni with *entré* to the Presidency, and facilitated access to the key institutions of economic governance that was necessary to institute his scheme. Kanyotu was the one who provided the cover and muscle when Kamlesh Pattni run afoul of the law and the authorities. In light of all the testimony that was given against him, we can only state that we are not sure that Kanyotu's statement—which we did not see—can help much to clear the air. Moreover, if Kanyotu's evidence is discredited, then the former President did not defend himself against the allegations and an adverse inference could be drawn against him depending on the circumstances. We would say the same thing in respect of the then Vice-President and Minister for Finance, Saitoti, whose evidence we did not have the opportunity to review either.

Our conclusion is that while we cannot say with certainty that the monies looted from the events surrounding the Goldenberg Affair was extended to political rivals

and turncoats, there can be no doubt that it allowed the type of patronage to which some testimony was given, to take place.

**Issue no. 14:**

**What effect did the GIL related civil and criminal litigation have on the administration of justice in Kenya?**

Mohammed Noor Haji Saleh (CW 48), Paralegal Officer at the Nairobi Law Courts stated that the Goldenberg prosecution started on June 2, 1994. Kamlesh Pattni, Eliphaz Riungu and Lazarus Wanjohi were charged in Criminal Case Number 2271 of 1994, in the Chief Magistrate's Court. The last two were charged with theft by persons employed in the Public Service. The case was later withdrawn and consolidated with Criminal Case Number 4053 of 1994, and continued until 24<sup>th</sup> February, 2003 when a *nolle prosequi* was entered by Horace Okumu, State Counsel on behalf of the State.

Job Kilach and Michael Onesmus Wanjihia (CW 74) were also later charged in Criminal Case Number 2348 of 1994 in the Chief Magistrate's Court with theft of KShs. 13.5 billion. Saleh (CW 48) further testified that Kamlesh Pattni and Charles Mbindyo were charged on 22<sup>nd</sup> May, 1995 vide Criminal Case Number 1902 of 1995 on counts of obtaining money by false pretence. The case was withdrawn and later consolidated with Criminal Case Number 2208 of 1995, this time including Dr. Wilfred Koinange, Eliphaz Riungu, Michael Onesmus Wanjihia and GIL. He stated that these cases were never heard after the Chief Magistrate, Mrs. Unitar Kidullah, was elevated to become the DPP and the prosecutor, Mr. Bernard Chunga, became the Chief Justice. He said that there was also a private prosecution by the Law Society of Kenya (LSK). At the time of the Commission hearing, none of the prosecutions had been successfully concluded.

**Observations and Conclusions:**

It is our considered opinion that the aforementioned incidences reflected poorly on the administration of justice in Kenya, particularly since there appeared to be sufficient evidence on hand to successfully institute and complete prosecutions against several of the individuals involved in the fraudulent scheme. Obviously, the Commission of Inquiry intervened to make further prosecution of the offences *sub judice*, in the explanation given by the Attorney General. This does not however, explain the failure to show movement on the issue before the institution of the Commission. Indeed, that failure greatly undermined the people's trust in a fair and impartial justice system. It is our view that the way the above-listed cases were handled indicate that those people who "co-operated" in facilitating theft and fraud under Goldenberg continued to enjoy "protection" from prosecution by those in high office for whom they were working and hence the lack of movement in the cases. Moreover, the courts were apparently clogged with cases without intention for a final decision or determination.

## **VI. SUMMARY OF THE OPINION ON THE EVIDENCE REVIEWED**

Our humble view of the proceedings of the Bosire Commission of Inquiry, manifest that a massive scheme was hatched to siphon off colossal sums of money from the CBK. It is our considered conclusion that GIL was designed to do exactly that. The scheme took advantage of the withholding of funds by donors from the Government which created a severe shortage and desperate need to earn foreign exchange.

The Kenya Government could have genuinely devised ways to earn foreign exchange through the various incentives such as pre-export funding, export compensation etc. In themselves they were mechanisms that were well-considered and positively intentioned. However, they were massively abused and exploited by GIL. The scheme included the formation of commercial banks such as EBL, and the influencing of others, like the NBK, which banks were, according to one witness “well coordinated in their activities.”

The promoters of the scheme like Kamlesh Pattni had access to and possibly influence on the top Executives, the President and Vice-President who also doubled as Minister for Finance. The evidence we reviewed showed that Kamlesh Pattni’s premises were provided with a hot line. There is also evidence that hot lines are not provided to just anybody. The CBK was penetrated. There is evidence of a Governor taking part in laying down the rights or conditions given to GIL at the beginning and there is also evidence of a Governor advising as to how moneys could be paid from the PMG. There is also evidence of persecution in the CBK of those who tried to point out things which were going wrong. The destruction of records by the CBK could be an attempt to cover up. Customs and Excise was also penetrated. There is evidence of customs officials sealing goods for export and stamping export documents but there is no firm indication that some of these goods ever left the country.

Our final opinion on the evidence reviewed is that although the above were criminal actions of an economic nature, they could only have succeeded with the necessary political backing they were provided with by officers of state who flagrantly violated the basic rules by which they were bound in virtue of their positions. In sum, it was because of the culture of

impunity. If that culture is to be brought to an end in Kenya, then there is a need for firm action to be taken against all those who have been implicated in this grand scheme of criminal malfeasance. If it has taken fifteen years for the whole truth to emerge, there can be no excuse for inaction now.

## **VII. BROAD ISSUES EMERGING FROM THE GOLDENBERG AFFAIR**

Having provided our main opinions and observations on the evidence submitted to the Commission of Inquiry, we believe that there is need to examine several broad issues that emerge out of the Goldenberg Affair. This will help to provide a better understanding of the impact and wider implications of this affair to the people of Kenya and the failure of their Government to protect their wealth and resources at a time of critical need and when accosted by economic saboteurs of the worst kind. It will also assist the people of the other countries of the Eastern Africa region to draw lessons about the failure of mechanisms of good governance and transparency and to improve their instruments of governmental operation and accountability.

In the first instance, the Goldenberg Affair was a process not an event. It was not like the forgery of a single cheque, which is essentially a solitary episode, however large the monies involved. Indeed, it was not even like a bank heist which although taking place at a single shot, is nevertheless the result of some degree of pre-planning and a little bit of external assistance. Goldenberg was delicately and deliberately contemplated and executed; it unfurled over a considerable length of time and in different mutations, and it involved a bewildering array of individuals and institutions, many of whom occupied positions of not only tremendous influence, but also of considerable public trust.

Secondly, the Affair had the backing—clearly demonstrated by the evidence we reviewed—of persons who held significant positions of power and influence in the government of the Republic of Kenya. Those individuals either demonstrated a callous disregard for the oaths that they swore upon taking office, or stood to gain much more than either their offices or their reputations could give them, or, quite simply, they were intimidated. The third general point that needs to be made is that it will be impossible to discern the full scale of the devastation caused by the Goldenberg Affair, regardless of the number of inquiries and investigations that will be conducted.

Unlike a war, where the casualties are strewn around the battlefield allowing for a body count, the effects of these events extend into every facet of Kenyan public life. Even if one

thinks of just the interest that could have accrued from the monies defrauded and what this could have meant in terms of medicine and health care; basic education; potable water and improved standards of living, the scale of the devastation eclipses many disasters—natural and human-generated. Indeed, in certain respects to describe the saga as a ‘scam’ is to somewhat minimize both the degree of its devastation and the scale of its deception. It is much more appropriate to describe it as the ‘Goldenberg Conflagration.’

The following are the broad issues that emerge from the totality of events that took place:

## **7.1 POLITICAL ACCOUNTABILITY**

There is no doubt that the scandal in the first instance reflected a massive failure in political accountability. An analysis of such accountability must commence by focusing on key policy-making bodies, mainly the Executive and Parliament. This kind of accountability arises with respect to the method by which the Export Compensation Policy was made; the mechanisms of policy formulation and communication utilized, and the need for their formalization. While there were obvious problems in the manner in which policy was formulated (the lack of supporting documentation, the dismissal of technical expertise, the failure to critically review the implications of proposed new policy formulation) it is clear that the most serious deficiencies were embedded in the processes of implementation.

### **7.1.1 Collapse of the System of Checks and Balances**

The checks and balances in place—which should have extended from the Treasury to the other government departments involved such as the Department of Mines and Geology as well as the Department of Customs and Excise—simply did not operate effectively. Given the scale of the collapse of those systems, plus the implication of policy makers at the highest possible level.

The whole affair appears to have been technically hatched and prepared in the Office of the Minister for Finance, who was also Vice-President, Prof. George Saitoti. It is in this office that most government officials were introduced to Kamlesh Pattni and asked to work with

him. Also, it was in this office that most senior officers of the government were introduced to the Affair and informed of their role and the importance of co-operating in carrying out this “Government Policy.” Nobody could question the plan and “policies” explained by the Vice President—who was the Assistant to the President. Even in the face of resistance by Government technocrats who could see through the many holes in the proposal, it was the Minister for Finance, Prof. Saitoti, who ensured that the deal promised to Kamlesh Pattni, Kanyotu and those “above” them went through. A good example is the decision by the Ministry to pay the 15% export compensation, *ex-gratia*. It is obvious to all that the Minister for Finance could not have had the courage to take this course of action which not only violated the law but also undermined the authority of Parliament and meant a loss of billions of shillings to Kenya without a nod from the top.

### **7.1.2 Hiding from Justice: Former-President Moi and Others**

It is unfortunate for the people of Kenya that the then President, Daniel Toroitich arap Moi, decided not to appear and testify before the Commission. Under a close examination and cross-examination by the lawyers assisting the Commission, there is no doubt in our minds that the truth would have eventually emerged. At the same time, it would have been an opportunity for him to clear his name, indeed, an opportunity the ex-President should have welcomed. On record, three Permanent Secretaries have named him as the person giving orders and expecting compliance. One of them, Dr. Wilfred Koinange testified that he even travelled to Mombasa to inform the then President that the first of the payments he was interested in had been effected. He was also named by Prof. Philip Mbithi, the Head of the Civil Service/Secretary to the Cabinet. Can we say with certainty that all these senior civil servants had an axe to grind against the former President? No reasonable person can believe such an assertion. That is all the more reason why—if he was a person of truth and veracity—he should have seized the opportunity offered by the Commission to clear his name and clear the political air around the role of his office in the Goldenberg Affair. Irrespective of whether or not the ex-President was actually directly involved in the Affair, he had an obligation, stemming from the position of public trust that he previously occupied, to give a more direct account of his role in events surrounding the Affair, whether by omission or commission.

We would like to point out that the appearance of a President or former President before a Judicial Commission of Inquiry is not an entirely novel phenomenon. The world has witnessed both sitting and retired heads of State being summoned before similar investigations and they have modestly responded to the call as a public duty. Former US President Bill Clinton appeared before a judicial commission headed by the then US Chief Justice the late William Rehnquist—a Commission impeaching him over the affair with the intern Monica Lewinsky. Retired South African President Nelson Mandela appeared before the Rugby Union Commission and made an important and lasting contribution to its work. That is not to mention the scores of important personalities—both White and Black—who on their own free will appeared before the South African Truth and Reconciliation Commission chaired by the respected Archbishop Desmond Tutu. Closer to home, the then Prime Minister, the late Apollo Milton Obote, of neighbouring Uganda, testified to a mid-1960s commission inquiring into allegations of the smuggling of gold and ivory from the then Congo. He did so even though several witnesses directly implicated him in the alleged smuggling.

It is rather unfortunate that after leaving office some African leaders play the role of the vilified victim. They assert that the new leaders and the people no longer respect them. With this comes the belief that there is some sort of obligation the people owe them. The main problem with this attitude is that the people and the new leaders fall into the trap of treating such retired leaders with kid gloves; this is the next step to condoning impunity. This should not be the case. The ideal situation is both truth and accountability. In the case of Kenya, there is no other situation that requires these two qualities as much as in the case of the Goldenberg Affair. Because such key figures failed to testify to the Bosire Commission, we shall have only part of the truth on record.

We further take note of the fact that at the end of the Inquiry all those mentioned adversely during the hearings were given the opportunity to apply and appear before the Commission in person. For those who chose not to take the opportunity, it can be legitimately concluded that they agreed with the testimony that had been tendered against them. In other words, they ran the risk of an invidious finding being rendered against them.

It is also unfortunate that others close to former President Moi followed his example and failed to accord the Commission its due respect and appear before it to answer testimony that was tendered against them. These include Prof. George Saitoti, the then Vice President and Minister for Finance; his successor in office Mr. Musalia Mudavadi, and Mr. James Kanyotu—the then Chief of Intelligence. It is our honest belief that had the then President, Daniel Toroitich arap Moi, decided to testify before the Commission, this would have provided a sterling example for others implicated by the proceedings to follow suit.

Our conclusion on this issue is that aside from the involvement of the President, it is quite clear that there were significant individuals in government whose responsibility, even if not personal, was certainly political. At a minimum, the events surrounding the Goldenberg saga represented an inordinate degree of the influence of business on politics.

### **7.1.3 Political Patronage**

By the same token, albeit in somewhat reverse consequence, the Goldenberg Affair demonstrated the influence of political patronage on business. From the proceedings, it appeared necessary for anybody to set up a successful business in Kenya to have a ‘godfather’ in high political circles in terms of both muscle and influence. It is quite obvious that although the evidence does not directly point to who the godfather was, his/her silent influence was apparent throughout the affair; the mess in economy was simply the symptom of the deeper malaise at the level of political governance.

This was manifest in the speed with which GIL and specifically Kamlesh Pattni was able to put together his fraudulent businesses, flouting several of the basic procedures for the establishment of business enterprise in the country. It was manifest in the “success” of those businesses within an intensely short time, and also their subsistence well beyond the point in time that the fraudulent premises on which they were constructed should have been unearthed.

More important is the fact that the scheme continued beyond the point when it could have been excused as a genuine failure of public policy formulation. That political support was obvious from the direct political involvement garnered by way of Kanyotu's shareholding in GIL, and his shadow-like presence in so many of the key proceedings in which the seeds of the Affair were planted and executed. It was also apparent in the link Kamlesh Pattni had with Phillip Moi (who can be described as the 'First son' and a proxy for his father) in *Panther*, one of the main beneficiary companies involved in the Affair. It is also clear that Ketan Somaia used some of the same links in order to acquire business empires in Kenya. The point is not so much that politicians and civil servants should not be involved in business; it is what business they decide to involve themselves in and how that involvement impinges on the fiduciary role they occupy as servants of the State.

#### **7.1.4 Political Corruption**

Under the framework of political accountability, there was also the issue of ***Political Corruption***, which for the purposes of the present analysis should be taken to mean the use of public office in order to derive individual political profit and/or benefit, albeit not necessarily of a financial kind. The Moi government seems to have thrived on buying opponents and rewarding supporters with money, jobs and business opportunities. This can be seen in the testimony of Kamlesh Pattni—albeit there was some obvious embellishment—about his contribution to *Harambees* and on money intended to influence the elections. University students used to get money from the President so as to support the government. It is astonishing that even Vice Chancellors of Public universities were not spared from this trade.

## **7.2 POLICY FORMULATION**

Related to the overall question of accountability is the manner in which policy formulation took place. The Goldenberg Affair elicited a marked weakness in the different government organizations at the policy level. Policy formulation in most developed economies is a serious function, which traverses several stages and models of design before it is unfurled for the consumption of the public. This is the case across the board (in Health, Education, or

Environment) but is particularly crucial in the arena of economic planning. Unless you have conducted a serious analysis of the problem and tested the various alternative solutions, it is an arena in which one should exercise exceptional caution before invading. Most importantly, it is not rank but expertise which should be key.

Indeed, it is not as if there were no voices who spoke out against various aspects of the policy formulation process that resulted in Goldenberg. However, those voices were simply ignored. Policies were passed with considerable haste and minimal reflection—not for the general good but for the interests of particular individuals and for immediate short-term gain. As the objective of the different individuals involved was varied, in other words, fear, personal security, avarice or greed, not much thought was put into possibility of implementation, leave alone the process of monitoring that implementation. There were obviously many weaknesses at the policy formulation level. Beyond that, the policy formulators failed in monitoring the implementation of that policy. Indeed, in relation to Goldenberg it would not have been in their interest to seriously address issues such as implementation and monitoring.

But the responsibility of policy makers cannot simply stop at the level of design. It must extend to the monitoring of such policy and its implementation in order to establish whether the policy has actually achieved efficacy: was it the cheapest, most effective and most transparent approach to the problem? The formulation of policy requires both the analytical capacity to assess whether it is really desirable, as well as a holistic approach that considers all facets of its operation. Consequently, at the stage of formulation, the initial design of the scheme should have been the effort of a more collective approach incorporating all the agencies to be affected by its operation. The formulation of the export compensation scheme—and particularly its Goldenberg phase—appears to have been primarily the design of officials in the Treasury, linked to a number of key actors in the Central Bank, and the Departments of Customs and Excise and Mines and Geology.

It is necessary to concede that all our countries are particularly prone to economic vagaries that have the potential to cause much greater social and political distress than is the case in more developed economies. Consequently, the fact that the policy-makers were constrained

to find different ways in which to respond to a situation of economic crisis should not be held against them. However, the more important question to ask is what are the available alternatives, and is the eventual course of action selected the most appropriate one? Although there were allusions to the problem as one of technical expertise, it is quite obvious that this was far from the case. From the Minister for Finance and Vice President down to virtually the whole set of *dramatis personae*, there can be little doubt about the availability of technical competence in the Public Service. Indeed, even if the matter were reduced to one of opinion, the choice of which one to take must necessarily be based on certain specified criteria. In the instant case, the criteria adopted appears to have been overtly political. At the same time the scheme put in place ended up impoverishing the country even more; in the pretence of fattening the starving cow, the end was to milk it further.

The political aspects of the problem were most manifest in the game of 'Musical Chairs' that took place in the office of Permanent Secretary to the Treasury, wherein the rotation of personalities clearly did not seem to follow a pattern designed to ensure continuity and stability. Once again, while the situation could have been one of crisis, the individuals responsible for playing the music must have been aware that causing these shifts in personnel could not be an enduring solution. The changes worked against the growth of both expertise and experience and the rapidity of turnover created a situation of manifest instability, and obvious trepidation for any of the people who were appointed to office. Once again, the objective could not have been to secure a stable environment for the execution of effective and diligent economic planning. It was to have people who could cooperate in the scheme—team players.

But in many respects, talking about the planning process is a little bit like crying over spilt milk; the more important question is what do you do when the milk has dried on the stove? And in this respect, there were additional failures that were manifest in the forensic actions adopted to respond to the crisis. For instance, the Comptroller and Auditor General evaluated Treasury's efficacy as the Financier of Government. His report was to the effect that there were some defects with the accounts and that Treasury should respond. However, the accounts arrived in Parliament and the affected Ministries three years after the event.

Obviously, this points to the need for timely accounts in order to ensure that a balancing of the books takes place within a space of time that stops the “kitty” from being cleaned bare. But to achieve this it is absolutely fundamental that the Auditor-General’s Office has enough staffing and resources to enable a proper forensic audit that is presented within a time-scale that is reasonable and not perfunctory. You also need people of integrity who are prepared to act professionally and not politically in response to reported rot. In this particular case, there was a lack of the will to act responsibly. It is also important to point to what appears to have been a determination to undermine the economy of the State for personal gain and political survival in the wake of Kenya’s first multiparty elections.

The Comptroller and the Auditor General’s Report on the issue of GIL came in four years after the issues had been dealt with. As one of the witnesses pointed out, many key players were already dead and thus such reportage would serve only historical or academic purposes. Indeed, some of the actions of the principal actors - particularly the unseemly hurry with which things were done - demonstrates that the key players knew that the mechanisms of oversight and accountability (such as the Comptroller and Auditor General’s Report) would be issued too late to stop the Affair.

### **7.3 TECHNOCRATIC ACCOUNTABILITY**

Technocratic accountability which means the accountability of officers in high level civil service affected the next level of governmental power, that is, the officers in charge of the technical operation of the Ministries and their bureaucratic arms such as the Departments of Customs and Excise and of Mines and Geology. It extends to the culpability of those in charge of public/parastatal bodies, such as the Central Bank of Kenya (CBK), and the Kenya Commercial Bank (KCB). Technocratic accountability in this particular instance related both to the issue of how these institutions responded to the method in which policy was formulated, as well as to its implementation. What is clear is that there was a massive failure on the part of the Public Officers charged with the fiduciary responsibility to oversee their particular dockets, and also to heed the advice of their subordinates on various aspects of the scheme. The technocratic liability of several individuals stands out with particular prominence. Among them were the following:

1. Mr. Eric Kotut, former Governor Central Bank of Kenya;
2. Dr. Wilfred Koinange, former Permanent Secretary, Ministry of Finance;
3. Mr. Collins Owayo, former Commissioner of Mines and Geology;
4. Mr. Evans Samuel Osumo, former Warden of Mines;
5. Mr. Francis Chelelgo Cheruiyot, former Commissioner of Customs and Excise;
6. Prof. Philip Mbithi, former Head of the Civil Service and Secretary to the Cabinet;
7. Hon. Amos S. Wako, Attorney General; and
8. Mr. James Kanyotu, former Head of Intelligence.

What is most striking about the culpability of these individuals is that for many of them, the actions they took directly contradicted advice they had been given by either their subordinates, or by their counterparts in other departments or institutions. For example, the reluctance of Arthur Buluma, Chief Parliamentary Counsel; the advice of Njeru Kirira at the Treasury; the caution of Prof. Ryan in the Planning Department. Given that these individuals (on the face of it) had the formal qualifications to be in the positions they occupied, the reason for their failure to perform as per expectation was related much more to the political context within which they operated. It could not have been on account of a lack of technical expertise. In part, this explains the rapid turnover of Permanent Secretaries at the Treasury. It is reflected in the many testimonies to the effect that the civil servants were simply “following orders.” Finally, it was also reflected in the actual removal of several officials who resisted the trend of events, or were perceived to be an obstacle to the effective implementation of the Affair, among them, Njeru Kirira and David Munyakei from CBK. Those who went against the grain saw themselves rolled over by the steamroller that Kamlesh Pattni and Goldenberg had become.

#### **7.4 CONFLICT-OF-INTEREST QUESTIONS**

The Goldenberg scheme elicited numerous situations in which not only Civil Service Standing Orders and political ethics were compromised, but also basic questions of good judgment were sacrificed. This was manifest particularly in the involvement of Public Officers, such as head of intelligence Mr. James Kanyotu in business transactions between

themselves (or companies with which they were associated) and the state/public that they had a fiduciary relationship with. Many other top government officials were involved in business, thus placing themselves at odds with their obligation to avoid finding themselves in compromising positions and unable to make fair and personal interest-free decisions.

That conflict of interest could be said to have started with the President, and extended to other notable State functionaries, such as Hon. Nicholas Biwott – then a powerful member of the Moi cabinet. Some of the conflict of course operated to compromise even those who did not have a particular financial interest in the matter, but knew that there were powerful actors who did.

## 7.5 BUSINESS CHARADES

It is clear that the main government officials failed and/or refused to conduct a sufficient audit of the capacity of GIL to conduct the scheme in which they were involved. In other words, they failed and/or refused to ask a number of critical and logical questions: *What was GIL's trading and manufacturing history? How much capital did the company have? Was GIL actually equipped to conduct the kind of business that it claimed it could?* Obviously, asking such questions would have elicited answers that would have led to some hesitation, and indeed several Government officials felt that these are the questions that should be asked. There was a feeling that something was not quite right with Goldenberg from the beginning, which meant that although the question was asked, the answer given was basically an evasive one.

A number of points need to be emphasized in this regard, including the following:

- (i) There was no serious money initially invested in GIL. The company was started by Kamlesh Pattni when he was only 25 years of age, and with no large investment at the time. The estate he inherited from his parents was also minimal. It is quite clear that the main money recouped to boost the company came from CBK in form of pre-shipment finance and export compensation;

- (ii) Even a cursory examination of the scheme would have revealed that not only was it not feasible to realize the kind of returns that GIL promised, but the initial question of where the minerals were being secured from needed to be addressed. It was a classic case of the old adage: “all that glitters is not gold.” Indeed, one of the primary questions that should have been asked would have been what had GIL discovered that nobody else had been able to before them, especially given that the export-compensation scheme had been in existence for several years before the point at which GIL sought to utilize it;
  
- (iii) From the preceding facts, it is quite obvious that the alleged export of finished jewellery never took place and that the alleged minerals (or rather the paper-work supporting their existence) were continuously recycled. The fact that expert evidence demonstrated that there were no diamonds in Kenya should at a minimum have alerted the authorities to the presence of some degree of creativity in the scheme. With respect to the issue of gold, the fact that there were actually some deposits in the country could provide the excuse for believing that the scheme could actually pass muster. However, the amounts involved were so astronomical as to force even the most believing to question the basis of their belief. This fact alone should have alerted the authorities as to the certitude that some kind of doctoring was taking place.
  
- (iv) The conclusion that one comes to is that (at best) the alleged minerals were all smuggled into Kenya, over-valued and claimed to be exported in order to earn export compensation. Moreover, the alleged minerals were also of questionable quality, as one of the witnesses who received a piece of “gold” was later to prove that it was not genuine. At worst (and more seriously) there were in fact not even any smuggled minerals since the evidence does not demonstrate that any person with the responsibility for ascertaining what was being exported, actually had the opportunity to verify the claim. The incident at Wilson Airport in which Kamlesh Pattni raised a ruckus over being searched is a classic example of a smokescreen being erected to conceal the real intent of the Affair. Likewise, the fact that Kamlesh Pattni refused Custom officials to fully check the golden bars he claimed to have in

his possession points to the same creation of an illusion that belied the true events that were taking place.

## **7.6 THE PHENOMENON OF ‘POLITICAL BANKING’**

Perhaps the most spectacular element of the Goldenberg scheme was the emergence of the *quasi*-economic phenomenon of political banking. We use the term ‘quasi’ deliberately, because although on the face of it these institutions were ostensibly established with economic objectives, their actual operation can only be described as political. Such banks were those owned and operated by prominent politicians and politically-connected businesspeople. These banks were used to transact dubious deals, advance loans to politicians without security, and to use them to claim pre-shipment finance and export compensation from CBK.

Prominent among these were Exchange Bank Limited (EBL) owned by GIL, PAB, Trans-National Bank, Delphis Bank and Post Bank Credit limited. Unsurprisingly it is these banks which had overdrawn their accounts with CBK, engaged in dubious transactions, cheque-kiting, overnight lending and other manifestly illegal banking business. It is also not surprising that these banks were either prime beneficiaries or conduits of the siphoned monies, and were also unable to withstand critical scrutiny. That in the first instance they were allowed to come into operation and indeed that they remained afloat even in the face of an obvious deviation from what was ostensibly their primary function, demonstrates the degree to which activities of a primarily economic nature, had been infiltrated and taken over by essentially political forces. A number of them remained open and continued to transact banking business even after being declared “in liquidation”.

## **7.7 OUTRIGHT BRIBERY AND NEPOTISM**

It would appear that a good number of those who were involved in the scheme were at one time or another entangled in either giving or receiving financial inducements. Kamlesh Pattni claims to have been told by Kanyotu that “you cannot go to *Mzee* (meaning President Moi) empty-handed.” While there may have been some exaggeration in this statement, it is

nevertheless clear that Kamlesh Pattni had extraordinary access to the powers-that-were, and such access must have been based on something more tangible than hot air.

Since Pattni had no political influence that was apparent on the face of it, the conclusion that must be arrived at is that he had the financial wherewithal to secure that kind of access. Secondly, the activities of several of the officers who were involved in the scheme points to a degree of dereliction of duty that resulted either from significant intimidation and harassment, from financial inducement, or from political linkages. It is also clear from the testimony provided to the Commission, that the Moi government had degenerated into a family fiefdom. The President surrounded himself with family, friends, in-laws, sycophants and praise-singers, rather than honest advisors. Whether or not they occupied influential positions of state, they had a much more important commodity to trade in: access to *Mzee*. Thereafter the sky was the limit and Kamlesh Pattni's success at the implementation of the fraud is vivid testimony to this.

## **7.8 MALFUNCTIONING INSTITUTIONS OF THE STATE**

The Goldenberg Affair demonstrated that at some point in time the main institutions of State simply ceased to function in the manner they were originally designed to. Moreover, the failure is only partly explicable in terms of the lack of capacity of those who were designated with the running of the State. In other words, it is a little difficult to conclude that the problem was of a lack of competent and qualified persons charged with oversight responsibilities over State institutions. Right from the Vice President and Minister for Finance to the persons in the Department of Mines and Geology, to those in the Central Bank of Kenya, there was, as a matter of fact, an abundance of technical competence.

But what is clear is that even where qualified persons existed and occupied the central positions of responsibility in the State, they were not allowed to execute their rightful roles without political interference. Officers used to receive instructions and implement them without questioning whether they were right or wrong. An example is Prof. Philip Mbithi, the then Head of the Civil Service who used to transfer civil servants on the orders of the President without question. As Treasury Permanent Secretary, Dr. Wilfred Koinange

ordered the payment of KShs. 5.8 billion to GIL without query. As if to compound the impunity, Mr. Elijah Kipng'eno arap Bii, the then General Manager of the Kenya Commercial Bank (KCB) accepted this order without question, an act that can only be described as that of one who was either very incompetent, or very afraid. The Department of Customs and Excise could not do its duties of ascertaining the level of gold imports into Kenya, even though many of the officers who testified about their involvement in the affair clearly had misgivings about the failure of things to add up. The Income Tax Department and Customs and Excise Department could not effectively fulfil their role of revenue collection. The CBK completely abdicated its role as overseer of monetary and fiscal policy and stability in the country and actually became the source of both instability and uncertainty.

## **7.9 THE FAILURE IN THE SYSTEM OF ADMINISTRATION OF JUSTICE**

The Goldenberg Affair gives bold attestation to what can only be described as a collapse of the Kenyan system for the administration of justice. From 1994, when the Goldenberg scandal was revealed up to the time of the establishment of the Commission in 2003 (a period of nine years), none of the accused persons had ever been fully tried, convicted or acquitted on the issues arising from the affair.

In particular, the excruciating reluctance of the Attorney General at the time the scandal broke Mr. Amos Wako, and who continues in the same office today, must at a minimum raise questions as to the forces at play in influencing the nonchalance of the approach of this office to the issue.

At the same time, there can be little doubt that no other issue in the history of public accountability in post-colonial Kenya has seen as much attention drawn to it, including the parliamentary inquiry which canvassed many of the same terms of investigation as the Judicial Commission. But despite these developments, justice remains unfulfilled. That fact alone necessitates critical reflection.

## **7.10 GOOD GOVERNANCE, HUMAN RIGHTS AND DEMOCRATIC ACCOUNTABILITY**

The Goldenberg Affair most obviously raised issues of good governance, public accountability and the transparency of governmental transactions. At base these appear to be matters of the degree to which civil and political rights are given due respect and enforcement. Here, we need to think of rights such as *the right to participate in national affairs*; the freedom of *information*, and access to and the accountability of government institutions. At the same time, Goldenberg raises in bold relief the other side of the human rights coin, a side which is not very often viewed favourably in human rights terms. This is the aspect relating to the protection of rights of an economic and social nature. It is of particular relevance to the obligation of a government to *progressively realize* that the policies it designs, the interventions it makes, and the institutions it supports do not diminish the struggle to fully achieve this category of human rights. From the economic impact of the Affair, it is fairly clear that the Kenyan government of the time was in gross dereliction of its duties under the two International Covenants on Human Rights of 1966. Again, of those two legal instruments, the dereliction is more prominent with regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR), than it is with respect to the International Covenant on Civil and Political Rights (ICCPR).

The implications of this neglect reflect the need for the institutions of financial governance to link up with other governmental bodies in order to ensure that the imperatives of financial expedience do not override every other consideration. It is quite clear that the Treasury was entrapped by the short-term problems of balancing its books, versus a more measured approach to the resolution of balance-of-payments problems. What this points to is the need for more attention to be paid to policy-oriented research and analysis so as to approach economic issues on an informed basis, rather than in *ad hoc* manner.

In the final analysis there is a need to improve the institutions of State that have a primary role in ensuring political and technocratic accountability, and this would in the first instance entail a greater insulation from manifestly political influences. These would include in the first instance the Central Bank of Kenya, as well as the Kenya Commercial Bank (KCB).

The independence of the CBK was violated in a particularly crass manner. PAC needs to develop its oversight function in such a manner as to ensure that it can intervene in a timely and effective manner, which also implies that agencies such as the Comptroller and Auditor General should be up to speed on the review of government accounts. An audit coming up four or so years after expenditure is useless and cannot be said to assist in the control of government expenditure of State funds. Sanctions of a more punitive character need to be put in place for the abuse of office and for the flouting of established rules, procedures and mechanisms of fiscal and monetary governance.

### **VIII. GENERAL CONCLUSIONS**

From the above we can safely come to the following conclusions:

1. There is no doubt in our minds that the Republic of Kenya lost billions of shillings through the execution of various financial schemes under the Goldenberg Affair.
2. Persons holding offices of influence in Kenya right from the Head of State downwards connived and assisted in the looting of the country.
3. Technocrats and other persons with scientific knowledge sacrificed their professional integrity to serve short-term personal, economic and political interests.
4. Officials entrusted with protection of the economy through enforcement of the law closed their eyes as shrewd politicians and businesspersons violated the law in their presence and/or with their knowledge.

### **IX. SPECIFIC AND GENERAL RECOMMENDATIONS**

From our general observations and conclusions we humbly make the following recommendations of specific and general nature:

1. Criminal charges should be instituted against those found to have engaged themselves in activities that led to the loss of money belonging to the Government of Kenya during the Goldenberg Affair. This should include those who were aware that such transactions were illegal and went ahead to execute them and those who by virtue of their positions conspired to defraud the Treasury.
2. Those individuals who, by virtue of their positions, failed to stop the Affair and thereby caused financial loss to the government of Kenya, if still in office, should be relieved of their duties. They should also be barred from occupying any public office in future.
3. Individuals and companies found to have benefited from this affair should be made to refund to the State what they received illegally. The moneys recouped in this fashion should be directed to the alleviation of the adverse social and economic conditions in which the people of Kenya are currently enmeshed. In this regard civil society actors in Kenya and in the wider Eastern Africa region have an obligation to increase their vigilance of the processes that follow publication of the Bosire Commission's report, and also to monitor compliance of government officials with the report's recommendations, plus ensuring that even where government fails to take action, alternative civic, non-state actions are pursued instead.
4. A thorough investigation should be carried out into the wealth of public officials linked to the Goldenberg Affair with a view to confiscating their ill-gotten wealth. This should not only cover those who directly seem to have benefited from the Goldenberg Affair. Those who fail to account or who acquired their wealth through dubious, unscrupulous or unaccountable means should be made to surrender it to the State. Such action should also extend to bank accounts and estates within the country and abroad. Indeed, we gather that mechanisms are now in place for all public officials to report and account for their wealth in periodic fashion. Those who fail to account or who acquired their wealth through dubious, unscrupulous or unaccountable means should be made to surrender it to the State. Such action

should be open to public scrutiny and should also extend to bank accounts and estates within the country and abroad.

5. Commercial Banks found to have facilitated the Goldenberg Affair should have their licenses withdrawn (if any remain that are still in operation) taking into account the interests of customers beforehand. This should be to stop them from participating in affairs of this nature in future, punish them for professional misconduct and economic sabotage and deter those that might have plans of doing the same from venturing in a similar direction. The same should be applied to business companies. Indeed, both the regulatory and monitoring capacities of those organs of the State that have the responsibility to oversee the operation of these bodies need to be greatly strengthened.
6. The independence and autonomy of the Central Bank of Kenya needs to be guaranteed in law and in practice, and strengthened in order to enable it perform its statutory functions optimally and without any interference. In particular, the management of the CBK should comprise of people of the highest moral integrity, competence and transparency.
7. Parliament should be strengthened so as to effectively carry out its watchdog function, and particularly to impose *political* and *technocratic* accountability. Thus, Parliament should be strong enough to exercise its powers of impeachment, whether of the President and/or members of his/her Cabinet, and at a minimum to secure some degree of accountability.
8. Members of Parliament, members of the Cabinet and other public leaders who participated and benefited from the Goldenberg Affair should be brought to account. They should be forced to vacate public office and barred from ever taking any public office in future both in Kenya or abroad with support of the Government of Kenya.

9. There is a need of establishing and/or strengthening the institutions that fight corruption in order to enable them perform their statutory functions optimally and without any interference.
10. Legislation on privatisation, investment, import and exports should be tightened and loopholes eliminated in order to protect the wider interest of the country and their application should be uniform to all. There should be no preferential treatment given to any entity, individual, company or institution.
11. Conflict of Interest Laws need to be reviewed, strengthened and operationalised in order to ensure that the bar on public officials engaging in private business while still in service and particularly where that engagement may clash with their public role, is effectively imposed. The essential objective of such laws should be to stop them from engaging in business that compromises their positions of public trust and which may also result in divided loyalties between serving public and serving self.
12. Employment to any public office should be based purely on the basis of merit rather than on political loyalty or blood relations. This should go hand in hand with improved remuneration and conditions of service so as to minimise the temptations to abuse office due to economic hardship and reasons of survival.
13. The justice system should be improved and streamlined in order to ensure speedy trial of those accused of any wrong doing.
14. Companies and individuals found to have evaded taxes and other dues to the State should be made to pay that amount with appropriate fines. The Kenya Revenue Authority should be further empowered to enforce the collection of revenue from any eligible taxpayer and should be availed necessary information where needed.
15. There were patriotic Kenyans—particularly technocrats—who saw a fraudulent scheme being hatched to loot their country and spoke out against it. As a result, they suffered in various ways including stagnation in career, unwarranted transfers

affecting them and their families or being sacked from their jobs for not being “co-operative”. These should be carefully identified and compensated for gallantly standing on the side of justice for their country at its hour of need.

16. It is especially important in our view that the government of the Republic of Kenya take the findings and recommendations of the Judicial Commission of Inquiry with the necessary weight and seriousness that final resolution of the Goldenberg Affair deserves.

Signed this \_\_\_\_\_ day of \_\_\_\_\_ 2005.

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Hon. Justice Samuel William Wako Wambuzi  
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