

7

PUBLIC HEARINGS AND SECRET ENVELOPES: THE WAKI COMMISSION AS A CASE STUDY OF ACCOUNTABILITY IN KENYA

*Anyango Yvonne Oyieke**

1 Introduction

This chapter focuses on the Commission of Inquiry on Post-Election Violence (CIPEV), established in Kenya in 2008 as part of a mediated settlement to end the political crisis that had engulfed the country after the 2007 election. The mandate of this Commission was to investigate the causes of the post-election violence and to ascertain the culpability of the alleged parties to the violence, including the state security agencies. The CIPEV was an interesting commission for several reasons, most notably the unusual circumstances surrounding its genesis and its eventual link with prosecutions at the International Criminal Court (ICC). These peculiarities have had an effect on the eventual perception of the Commission's impact and legacy, which both remain notable notwithstanding the fact that certain of its recommendations remain unimplemented.

CIPEV was unique among other commissions in Kenya because it drew its mandate directly from the National Dialogue and Reconciliation Agreement adopted in early 2008. This imbued the Commission with a responsibility to report to the international mediation team that had negotiated the settlement. This international element ensured that the Commission was independent and impartial and further ensured that the government of Kenya was answerable to an institution outside of itself with respect to the findings of the Commission and the implementation of its recommendations.

* This chapter is based upon research interviews and focus groups conducted in Nairobi and Naivasha in February and March 2016 and interviews outside of Kenya conducted in June 2016. Along with Kelly-Jo Bluen and Thomas Probert, the author interviewed a former commissioner along with several other individuals who had directly worked for the Commission of Inquiry into Post-Election Violence, a representative of the Ministry of Justice, as well as lawyers, journalists and human rights defenders.

This international element was also a key factor in the eventual proceedings at the ICC against Uhuru Kenyatta and William Ruto (by then President and Deputy-President), which have been linked to a ‘secret envelope’ containing a list of names of those the Commission deemed most culpable for the election violence. This confidential list was sent both to the Kenyan government and to the international mediators at the same time as the final report. Although the cases were eventually dropped, the controversy surrounding these matters and the challenges of pursuing accountability against individuals wielding massive political power were apparent throughout the workings of this Commission.

This chapter details other elements of the Commission that had an eventual impact on that pursuit of accountability for violations of the right to life. It also considers the role of CIPEV in creating a forum for dialogue as an important element of accountability where citizen-on-citizen violence has occurred. Ultimately, through the work of this Commission, the various elements of accountability are at least partially revealed, affirming the notion that accountability is a process or series of processes towards an ideal, rather than a particular event or outcome.

2 Background to the Commission

The Kenyan election of December 2007 was the first since 2002, which had seen President Mwai Kibaki sweep to power with an agenda of widespread reform, ending four decades of one-party rule. Five years on, the frustrations of failing to implement much of that agenda had begun to tell, especially after a divisive referendum on a revised Constitution in 2005. Kibaki, now running for re-election, faced a challenge from a former member of his own cabinet (and one who had been part of the successful ‘no’ campaign during the referendum), Raila Odinga. The campaigning period was marred by acts of violence along ethnic lines, with election monitors reporting hundreds of incidents.¹

The day of the polling itself was peaceful, with turnout at record levels. The results of the parliamentary elections were quickly announced, with the ruling party sustaining heavy losses (as opinion polling had predicted), but the tally of the presidential vote was not announced. The delay was caused by the results from Central Province – Kibaki’s fiercely loyal Kikuyu heartlands. This, combined with a number of other irregularities in the counting procedure, was enough to precipitate widespread distrust

1 Human Rights Watch *Ballots to Bullets: Organised Political Violence and Kenya’s Crisis of Governance* (March 2008) p.4.

of the final result when it was ultimately announced as victory for Kibaki and the ruling party.

On the afternoon of 30 December the head of the Electoral Commission announced Mr Kibaki President and he was quickly sworn in during a hurried 'twilight' ceremony.² However, soon after the results were declared, thousands of opposition supporters took to the streets in protest.³ Odinga called for a million-strong rally in Nairobi for 3 January (in which the police intervened to prevent it from taking place). In Nairobi and elsewhere law and order soon broke down resulting in several deaths and scores of people injured, alongside extensive destruction of property. It is estimated that as a result of the violence across the country over the two months following the election, more than 1 000 people were killed, and more than 500 000 were displaced from their homes, creating a humanitarian emergency.⁴ Mobilised opposition supporters attacked those they assumed had voted for Kibaki, especially in the largely Kikuyu regions of the Rift Valley and the slums of Nairobi. This assigned an ethnic dimension to the violence, against which the Kikuyu then fought back.⁵

Meanwhile, the police were responding to demonstrations against the elections with what observers quickly characterised as excessive use of force. Moreover, although there were some instances of the police intervening in the inter-ethnic violence to save lives, in many other situations the police seemed to have neither the will nor the capacity to protect people from each other.⁶

2.1 The negotiated peace

On 22 January 2008 an African Union (AU)-sponsored Panel of Eminent African Personalities, headed by former United Nations (UN) Secretary-General Kofi Annan, convened a mediation process to end the violence.⁷ This intervention would ultimately facilitate a peace agreement that saw

2 'Twilight Robbery, Daylight Murder' *Economist* (3 January 2008) available at: <http://www.economist.com/node/10438473>.

3 'Odinga Rejects Kenya Poll Result' *BBC News* (31 December 2007) available at: <http://news.bbc.co.uk/1/hi/world/africa/7165406.stm>.

4 UN [OCHA] Country Team 'Kenya Humanitarian Update' vol.7 (23-27 February 2008) available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/0CB8C9AC60F3D66C492573FE00264339-full-report.pdf>.

5 Human Rights Watch, *Ballots to Bullets* p.4.

6 *Ibid.*, p.5.

7 See Kofi Annan *Interventions: A Life in War and Peace* (London: Allen Lane, 2012) pp.184–205. Also see Office of the AU Panel of Eminent African Personalities *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya* (African Union, 2014).

the establishment of a government of national unity between the two main political parties, with an agreement that ‘given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process.’⁸

However, before that point was reached, the mediation proceeded along a clear four-point agenda of (i) stopping the violence; (ii) addressing the humanitarian crisis and promoting reconciliation; (iii) overcoming the political crisis resulting from the disputed election; and (iv) tackling longer-term issues. Importantly, even at this early stage in the mediation, both parties agreed, under agenda item (ii), to adopt immediate measures aimed at ‘ensuring the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice’.⁹

Over the course of the next month the mediation resulted in three different commissions of inquiry being established. The Commission established to investigate the violence, the CIPEV – which will be the focus here – was accompanied by two other commissions, namely, the Independent Review Committee (IREC) which was the first agreed upon, to examine the failures of the electoral system (under agenda item (iii)), and a Truth Justice and Reconciliation Commission (TJRC) that was established to investigate the longer-term injustices seen as underlying the crisis (and under agenda item (iv)).

The IREC was constituted first and was sworn in on 20 March 2008, under the chairmanship of Johann Kriegler, a retired justice of the South African Constitutional Court and former Chairperson of South Africa’s Independent Electoral Commission. The IREC thus ran partly in parallel to CIPEV, submitting its report on 17 September 2008. Its mandate was to analyse the constitutional and legal framework regulating and managing elections in Kenya, to identify the weaknesses and inconsistencies

8 KenyanNationalDialogueandReconciliation ‘AgreementonthePrinciplesofPartnership of the Coalition Government’ (28 February 2008) available at: http://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080228_Acting%20Together%20for%20KenyaAgreement%20on%20the%20Principles%20of%20Partnership%20of%20the%20Coalition%20Government.pdf.

9 Kenyan National Dialogue and Reconciliation ‘Annotated Agenda and Timetable’ (1 February 2008) available at: http://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080101_Annotated%20Agenda%20for%20the%20Kenya%20Dialogue%20and%20Reconciliation.pdf.

and to offer recommendations on how the electoral system could be strengthened.¹⁰

The TJRC was the last of the three mechanisms to be constituted, in 2009, the year after the previous commissions had completed their work. This was because the TJRC was to receive recommendations from both the CIPEV and IREC. The objectives of the TJRC were to pursue truth by establishing an accurate, complete and historical record of human rights violations and historical injustices and to educate the public about this record.¹¹ It was to pursue criminal, restorative and social justice through recommendations for prosecution, amnesty and reparations, aimed at achieving national unity, healing and reconciliation that would restore the dignity of both victims and perpetrators.¹² According to the Act establishing the Commission, the basis for its creation was grounded in the need to confront the root causes of election-related violence, with a view to ensuring that such an episode as experienced in 2007 is never repeated.¹³ While their mandates overlapped, the TRJC thus was a truth and reconciliation commission, while the CIPEV was a commission of inquiry in the classical sense, and a sense that was very familiar to observers of Kenyan history. The TJRC began operations in August 2009 and issued its final report in May 2013. It then had a further three months to wind down and closed in August 2013.

The National Dialogue and Reconciliation Accord grounded the establishment of CIPEV in the express commitment to address issues of transparency and accountability through the identification and prosecution of perpetrators of violence, including state security agents. Alongside investigating the facts and surrounding circumstances related to acts of election-related violence, the Commission was also mandated to investigate the actions or omissions of state security agencies, and to make recommendations as necessary. This specific requirement clearly reflects the broader commitment discussed above: to ensure that those deemed culpable were held to book. This was rooted in a realisation of the deep-seated challenges that faced the security sector in Kenya and the need for reform.

10 *Report of the Independent Review Commission on the General Elections held in Kenya 27 December 2007* (September 2008) available at: <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Independent-Review-Commission-on-the-General-Elections-held-in-Kenya-on-27th-December-2007.pdf>.

11 *Report of the Truth, Justice and Reconciliation Commission* (May 2013) available at: <https://www.kenyamoja.com/tjrc-report/>.

12 *Ibid.*

13 *Ibid.*

The Commission's mandate would be to investigate the facts surrounding the post-election violence, including the actions of state security officials during that period in order to address the issues of accountability and transparency to which the parties to the Agreement had committed.¹⁴ The Commission was further mandated to offer recommendations on how to prevent future violence contributing towards the broader goal of the National Accord that included the promotion of peace and reconciliation. These recommendations would take the form of both legal and political measures alongside various administrative measures targeted at certain arms of government.¹⁵

The history of commissions of inquiry in Kenya

Kenya has a long-standing history of using commissions of inquiry, with several commissions having been constituted since independence focusing on issues such as corruption, tribal clashes, extrajudicial killings and land disputes. These include, to name only a few, the JM Kariuki inquiry concerning the assassination of the charismatic Nyandarua North MP; the Akiwumi Judicial Commission of Inquiry on Tribal Clashes; the Judicial Commission of Inquiry into the Goldenberg Affair; and the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land.¹⁶

Several of these commissions were dogged with controversy including, most notably, allegations of political interference.¹⁷ One such case was the Judicial Commission of Inquiry on Tribal Clashes chaired by Justice Akiwumi in which a witness statement was expunged from the record because it levelled accusations against then President Daniel Arap Moi.¹⁸ Further, the witness who gave this statement was later found dead and it is alleged that the two events were directly linked.¹⁹ The Commission's

14 Kenya National Dialogue and Reconciliation 'Commission of Inquiry on Post-Election Violence' (4 March 2008) (Agreement on the CIPEV (4 March 2008)) available at: http://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080118_Agreement%20Commission%20on%20Post%20Election%20Violence.pdf.

15 *Ibid.*

16 *Ibid.*

17 P.K. Mbote & M. Akech *Kenya: Justice Sector and the Rule of Law* (2011) p.3; see also L. Moffet *Justice for Victims before the International Criminal Court* (2014) p.258; and E.C. Simiyu 'An Inquiry into Commissions of Inquiry: A Case Study of the Bosire Commissions of Inquiry in Kenya' LLM dissertation, Central European University, Budapest, Hungary, 2008.

18 Human Rights Watch *Playing with Fire: Weapons Proliferation, Political Violence and Human Rights in Kenya* (2002) p.53.

19 'American Priest Dies in Kenya, and Authorities Suspect Murder' *New York Times* (26 August 2000) available at: <http://www.nytimes.com/2000/08/26/world/american-priest-dies-in-kenya-and-authorities-suspect-murder.html>.

credibility was also affected by the delayed official release of the report, several months after the completion of the Commission's work, and even then only a small section of the report was made public.²⁰ Another challenging dimension of this Commission was the rejection of several sections of the report by the government, made clear through the filing of a counter report, which was tabled and accepted in parliament.²¹ This is only one example, but it is reflective of the general nature of commission of inquiry proceedings in Kenya. They have often been subjected to political influence and where their reports do not conform to the will of those in power they may face several obstacles to release or adoption in parliament.²²

2.2 The 'baby' commission: The Waki Commission

Despite the poor record of commissions of inquiry in Kenya, and the non-implementation of so many of their accumulated recommendations, the importance placed on truth seeking as part of the negotiated settlement required an accountability mechanism that could facilitate this.²³ It was necessary to pause and reflect on the gravity of the situation and to chart a peaceful and sustainable way forward and thus pressure was exerted both internally and externally for the constitution of a mechanism or series of mechanisms that would deliver on the above.

At the time there was little confidence in the judiciary due to its failure to hold the perpetrators of various violations to account, contributing to a perception of rampant impunity therein.²⁴ A culture of corruption, abuse of human rights and formalistic legal reasoning had ensured that justice through the courts had in the past proved ineffective. This led to a perceived lack of independence and objectivity and for this reason it was deemed necessary to institute an investigative step prior to the formal justice mechanisms, one that would then offer an unobjectionable basis upon which further action could be taken.²⁵ Any tribunal would function

20 *Report of the Commission of Inquiry into the Post-Election Violence* p.447.

21 *Ibid.*, p.448.

22 Africa Centre for Open Governance (AfriCOG), 'A study of Commissions of Inquiries in Kenya' (2007) available at: <https://www.africog.org/reports/Commissionsofinquiryreport.pdf>.

23 Kenyan National Dialogue and Reconciliation 'Agreement on the Principles of Partnership of the Coalition Government' (28 February 2008) available at: http://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080228_Acting%20Together%20for%20KenyaAgreement%20on%20the%20Principles%20of%20Partnership%20of%20the%20Coalition%20Government.pdf.

24 *Report of the Commission of Inquiry into the Post-Election Violence* p.443.

25 Interview with the author, March 2016. See also *Report of the Commission of Inquiry into*

better once there was evidence to consider and the Commission was envisioned as the means through which such evidence could be made available.²⁶ It was thus considered the most suitable mechanism at the time accepting that it would serve a complementary role to the various other accountability mechanisms available in Kenya at the time.

Although, as a former commissioner later recalled, it was referred to dismissively as the ‘baby’ Commission, because of its comparative size and scope of work relative to the other two Commissions established,²⁷ the CIPEV nonetheless was an unprecedented step in the history of accountability mechanisms in Kenya. This Commission derived its mandate directly from the National Dialogue and Reconciliation Accord, but still had to comply with domestic law in terms of procedure and was thus constituted in accordance with the Commissions of Inquiry Act as discussed further below. The agreement to establish the Commission was signed between the parties to the National Dialogue and Reconciliation Accord and the Panel of Eminent African Personalities, meaning that the government of national unity, established through this negotiation process, was accountable to an external body for the effective realisation of the outcomes of the Commission. This element of external accountability played a central role in the eventual impact of CIPEV.

CIPEV was established on 23 May 2008, two months after the last days of the violence.²⁸ The National Accord had established that the Commission was to be chaired by a Kenyan with two other international commissioners. An overriding factor for their selection was the need to ensure independence of the CIPEV. The Chairperson, Justice Philip Waki, was a judge of the Court of Appeal of Kenya. The two international commissioners were chosen through a competitive process led by the AU-sponsored Panel, for confirmation by the government of Kenya. The rationale for their inclusion was to ensure that the members of the Commission would be fully independent and not subject to the influence of tribal politics or government officials.²⁹ Gavin McFadyen was a former police assistant commissioner from New Zealand and was selected for his intimate knowledge of policing practices having served in the New Zealand police service for over 32 years with a specific focus on the conduct of criminal investigations.³⁰ Pascale Kambale was a lawyer

the Post-Election Violence p.443.

26 Interview with the author, March 2016.

27 Interview with the author, June 2016.

28 Gazette Notice 4473 (22 May 2008) *Kenya Gazette* vol.CX no.41 p.1249.

29 Office of the AU Panel of Eminent African Personalities, *Back from the Brink*, p.101.

30 Paul J. Zwier *Principled Negotiation and Mediation in the International Arena: Talking with*

from the Democratic Republic of the Congo (DRC) who was working with the Open Society Institute, but who had extensive experience in both international criminal law and international human rights litigation.³¹ Two Kenyans were appointed to prominent positions within the Commission's secretariat, with (now) Justice David Majanja serving as counsel assisting the Commission and George Kegoro appointed as Commission secretary.³²

The commissioners took the oath of office as required on 3 June 2008 and had three months from the date of the Gazette notice to complete their work. The Commission was to prepare and submit a final report containing its findings and recommendations, of a legal, political or administrative nature. This was to include measures to prevent, control and eradicate the occurrence of similar deeds in the future and measures to eradicate impunity and promote national reconciliation in Kenya. They were also required, where necessary, to make recommendations to the TJRC.³³ This is as far as the Commission's mandate went with respect to offering remedies and reparations for the victims of the violence. The agreement on the CIPEV had further provided that the Commission would, after completion of its work, submit its report both to the President and to the Panel. The main findings of the report were to be made public within 14 days of submission, although it was noted that certain aspects of the report or annexes might be kept confidential so as to protect the identity of witnesses or persons accused.³⁴ The Commission released its report on 16 October 2008 after four months of investigations. The Commission had requested a 60-day extension but was granted only an additional 30 days as was initially provided for in the Accord.³⁵

One of the main findings of the Commission was that the violence had been spontaneous in some areas while also having been planned or organised in others, often with the involvement of politicians and business leaders.³⁶ The Commission also noted another form of violence present during this post-election period, namely, police and state-directed violence, in which the police engaged in premeditated acts of violence before, during

Evil (Cambridge: Cambridge University Press, 2013) p.321.

31 *Ibid.*

32 International Centre for Transitional Justice 'The Kenyan Commission of Inquiry into Post-Election Violence' (2008) available at: <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf> (accessed 2 September 2017).

33 Agreement on the CIPEV (4 March 2008).

34 *Ibid.*

35 Gazette Notice 7288 (12 August 2008) *Kenya Gazette* vol.CX no.67 p.2083.

36 *Report of the Commission of Inquiry into the Post-Election Violence*, p.viii.

and after the election under the control of the government.³⁷ Some areas witnessed all forms of such violence. The report concluded that the post-election violence was a systematic assault on and between citizens based on ethnic lines along which political leanings had been largely galvanised. Victims in this context were attacked not because of what they had done but because of the ethnic group to which they belonged and on account of assumptions about their political leanings.³⁸ The Commission also found that the criminal justice system was generally weak, especially with respect to its investigative function. This was found to have had an impact on the rule of law and to have further entrenched impunity in Kenya.³⁹

3 Effectiveness of the Commission as an investigative mechanism

CIPEV may generally be described as an effective investigative mechanism to the extent that it was able to carry out the investigations asked of it during a tense political period. The Commission was also able to deliver targeted and far-reaching recommendations, reflected in a report that is largely accessible online. More details are offered in the sections that follow which critically consider the various elements of the Commission's effectiveness.

3.1 Independence and impartiality

CIPEV can largely be described as having operated independently. This has been linked to several factors including its strong leadership under the Chairperson, Justice Waki, alongside a contingent of reliable Commission staff. The Panel of Eminent African Personalities in consultation with the two sides of the National Coalition Government chose the commissioners. The Annex establishing the Commission expressly indicated that there were to be three commissioners, two of whom were to be international.⁴⁰ The presence of the international commissioners was important to ensure that there was no risk of influence or interference by interested parties. The two international commissioners also brought vast experience in their respective fields. Meanwhile, Justice Waki was widely viewed as fair and above reproach, an estimation based on the manner in which he had conducted himself on the bench and the fact that he was not linked to any

37 *Ibid.*, p.374.

38 *Ibid.*, p.viii.

39 *Ibid.*, p.469.

40 Agreement on the CIPEV (4 March 2008).

major scandals. Furthermore, he was not from any of the dominant tribes that were at the heart of the various violent outbreaks in the country.⁴¹

The Commission also appears to have been impartial, both in scope and conduct. In the first instance, the terms of reference were worded broadly enough to ensure that any investigations that followed were not skewed to favour or disfavour any party to the conflict. This helped to secure a sense of impartiality. In the second instance, the Commission seemed to conduct its affairs in a manner aimed at confirming its impartiality. This was buttressed in our interviews, with participants noting that in discussions related to tribal tensions, proceedings were led by the two international commissioners and not by Justice Waki who recused himself to ensure that there would never be allegations of partisan influence based on ethnic or tribal affiliations.⁴² The composition of the Commission secretariat was also indicative of an attempt to secure the independence and impartiality of the Commission. According to a participant closely involved with the Commission, there was a deliberate attempt to ensure that all the Commission staff members hired were from communities that had not been directly affected by the violence.⁴³

Finally, there was also an attempt to ensure that there was impartiality in the representation of the narratives collected during the Commission's public hearings around the country. Efforts were made to be as representative across the regional divide and to be accommodating of as many narratives as possible. The Commission therefore visited several towns across the country, setting up hearings in all these areas. This was not explicitly provided for in the mandate of the Commission. However, the report notes that they took up the initiative, as it was deemed necessary to effectively carry out their mandate.⁴⁴ The Commission travelled widely around the country, attempting to reach even those areas that were remote (reportedly conducting hearings, for example, in areas that were only accessible via helicopter).⁴⁵

3.2 Resourcing and logistics

According to several members or staff of the Commission there were adequate resources available to allow them to comprehensively conduct their investigations. This included both financial and human resources. The

41 Interviews with the author, March 2016.

42 Interview with the author, March 2016.

43 *Ibid.*

44 *Report of the Commission of Inquiry into the Post-Election Violence* p.1.

45 *Ibid.*, p.1.

Commission's financial resources were provided partly by the government of Kenya and partly by the multi-donor Trust Fund for National Dialogue and Reconciliation managed by the United Nations Development Program (UNDP). Accounts of CIPEV's budget vary, but the government later reported that its total expenditure was approximately Kshs.25 million (equivalent at the time to about \$360 000).⁴⁶ There were adequate human resources to enable the effective fulfilment of duties, including a team of investigators who were able to precede the Commission's sittings around the country.⁴⁷ Although the financing was sufficient for the Commission to hold hearings and complete its report, it would have benefited from the availability of additional funds that could have been used to employ more investigators so as to hold hearings in further, different parts of the country.⁴⁸

The only challenge in this respect was with the delay in setting up the Commission, reportedly due to a struggle to find office space. This complicated the logistical requirements for effectively running the Commission. However, after three weeks of negotiations with various government officials they were able to receive the logistical support necessary to move forward, including the allocation of office space and the release of funds.⁴⁹

3.3 Timing

Timing was an aspect that had a particular impact on this Commission of Inquiry and its ability to effectively operate as an investigative mechanism. Timing was important in four aspects: the amount of time that lapsed between the event and the establishment of the Commission; the duration of the Commission; the temporal mandate of the Commission; and, finally, the timing of the release of the report.

The Commission was established on 23 May 2008, two months after the end of the violence. The fact that CIPEV was constituted shortly after the events in question was important. The short interval between the event and the establishment of the Commission may have helped to ensure that there was little interference with its work, thus entrenching its independence. This is especially relevant because of the history of political interference in commissions of inquiry, such as the Akiwumi Commission as discussed above. In fact, according to a member of the

46 *Kenya National Assembly Official Record (Hansard)* (4 June 2009) p.17.

47 Interview with the author, March 2016.

48 *Ibid.*

49 *Report of the Commission of Inquiry into the Post-Election Violence* p.1.

Commission, there was little faith in what the Commission would be able to achieve and by the time those in power realised the possible impact of the Commission and the robust nature of its investigations it was too late for them to neuter it.⁵⁰ The short timeframe also ensured that the findings and recommendations released in the final report were published while still relevant.

CIPEV had approximately three months to complete their work, and only received a one-month extension to recover the time taken in setting up. They received a further extension of two weeks in which to complete the writing of the report and, therefore, worked within the time frame of five months. This was a short time frame in which to work, especially when compared to the amount of time allocated to the other two commissions operating alongside CIPEV. The Kriegler Commission had six months and the TJRC operated over a four-year period from 2009 to 2013.

There may be several reasons for this limited time frame. It may have been a ploy by the government of Kenya to ensure that the atrocities of the post-election period were not fully investigated. Alternatively, it may simply have been attributed to the scope of the Commission's mandate, which was confined to the post-election violence period, as opposed to the other two commissions that had to investigate facts arising over a longer period of time. Perhaps this limited temporal mandate was also indicative of a lack of faith in this Commission's ability to offer a contribution different from those of commissions before it. Described as the 'Cinderella commission' CIPEV seemed doomed to a certain fate before it began its work.⁵¹

However, the short time frame may in fact have been beneficial for the Commission as it forced the members to be deliberate and targeted in the focus of their investigation.⁵² The specifically narrow focus of the report meant that its findings and recommendations were particularly targeted and had the potential to be impactful if adopted in good faith.

The Commission released its report on 18 October 2008, approximately five months after it had begun its work and seven months after the end of the election violence. This meant that the report was released when the election violence was still fresh in the minds of the population, making the findings and recommendations timely and current. There were also greater possibilities for adoption of the recommendations within a broader

50 Interview with the author, March 2016.

51 *Ibid.*

52 *Ibid.*

reform agenda as delineated by the National Peace Agreement. This point was reiterated by a member of the Commission, who stated that ‘[t]iming was key. There was a certain sense of urgency in ensuring the results came out quickly and clearly. The Commission was under duress to make sure that people understood what happened. They had a lot of pressure to deliver.’⁵³

3.4 Investigative powers

The powers of the Commission were provided for in the Commissions of Inquiry Act of 1963.⁵⁴ Section 9 provides that a commission may determine its own procedural rules insofar as they are not inconsistent with the Act. This includes rules for the conduct and management of the proceedings of the inquiry, and specification of the hours, times and places for sittings. According to section 10 of the Act, a commission shall have the powers of the High Court to summon witnesses and may subpoena documents for and witnesses for presentation before the courts.⁵⁵ According to section 11 all persons summoned to appear before a commission shall be entitled to the same reimbursement as they would have had if they appeared before the High Court for a criminal trial (subject to the discretion of the commissioners who may decide otherwise).

The Waki Commission adopted a mix of adversarial and inquisitorial methods, which were reflected in the rules and procedures it published as a Gazette Notice in June 2008.⁵⁶ Paragraph (b) reflects the inquisitorial methods adopted by the Commission and it provides that the Commission shall conduct its business through, among others, meetings of the Commission; a review of documents – including official reports of previous investigations – relating to the subject of the inquiry, investigations, hearings in Nairobi and other such places as the Commission shall determine; research and analysis into relevant aspects relating to the subject of the inquiry.⁵⁷ The Gazette Notice also contains a comprehensive section on hearings, which relates directly to the adversarial method also adopted by the Commission. This includes for example the provisions relating to

53 *Ibid.*

54 Commissions of Inquiry Act (Cap.102) (1963).

55 Sec. 10(1). The summons for the subpoena and witnesses or documents shall be processed through the prescribed form and shall be duly signed and administered by oath; see sec. 10(2).

56 *Report of the Commission of Inquiry into the Post-Election Violence* p.8.

57 Gazette Notice 4923 (13 June 2008) The Commissions of Inquiry Act, Cap. 102, Commission of Inquiry Rules and Procedure p.1441.

the Commission's power to subpoena witnesses and documents and the provisions on standing reflected in paragraph (u) of the Notice.⁵⁸

A great deal of work was put into trying to find witnesses. Investigators knew that there needed to be a cross-section of people from different backgrounds to provide the Commission with a representation of the range of violations. The hearings were both public and private, and the Commission made every attempt to ensure that the privacy of witnesses to testify *in camera* was secured. However, there was no witness protection programme in place at the time due to a weak legal and institutional framework. This would have been more helpful in instilling confidence in the Commission and may have enhanced more participation especially for those who feared reprisals or were too traumatised to come forward.⁵⁹ Despite the constraints, including those of time, the Commission tried to ensure that as many people who were willing to participate were accommodated, in some cases holding extended hearings late into the night.⁶⁰ The commissioners also held *in camera*, off-the-record late night meetings with some of those who had also been interviewed formally during the public sessions, which is where some of the most sensitive information was often discussed – it seems likely that much of the material enclosed in the infamous 'secret envelope' emerged during these off-the-record exchanges, which took place even without the knowledge of many members of the Commission's staff.⁶¹

The investigative unit travelled a few days ahead of the Commission's secretariat to prepare for the public hearings. There were six investigators, one international and one dedicated to infusing gender sensitivity into the investigations. There was also sensitivity to tribal affiliations to ensure that impartiality was maintained.⁶²

The Commission undertook field visits for inspections *in loco*. According to their report, they visited several relevant sites, including the Kiambaa church where approximately 30 individuals had been burned alive, and the Moi Teaching Referral Hospital that treated many victims of the violence.⁶³

58 *Ibid.*

59 Interview with the author, March 2016.

60 *Report of the Commission of Inquiry into the Post-Election Violence* p.9.

61 Interview with the author, June 2016.

62 Interview with the author, March 2016.

63 *Report of the Commission of Inquiry into the Post-Election Violence* p.10.

In addition to the two other official commissions of inquiry mandated under the National Accord, there was also a parallel investigation into the post-election violence run by the Kenya National Commission on Human Rights (KNCHR). This investigation focused specifically on the nature and extent of human rights violations that occurred during that time and had three aims: to assess violations of Kenya's treaty-based human rights obligations as well as the abuses of various non-state actors whose actions or omissions contributed to the violations; to analyse the criminal responsibility of alleged perpetrators within the frameworks of international criminal law and domestic law; and to make other general recommendations on governance issues that would enable Kenya to undertake an effective truth, justice and reconciliation process.⁶⁴

CIPEV drew from this report in several instances and reached the same conclusions including, for example, that the violence was widespread and subject to an ideology and infrastructure that pre-dated the 2007 general elections. The KNCHR also found that the violence had been organised and methodical and characterised by ethnically-targeted killings and other forms of violence.⁶⁵ They further found that the government's response to the violence was slow and further that in several instances Kenya's security agencies used excessive and lethal force in their response to the violence. Ultimately the KNCHR contended that the state failed in its duty towards its citizens with respect to several human rights including the right to life. The KNCHR therefore recommended that investigations should commence to determine the culpability of the alleged perpetrators whose names were annexed to the report, including those allegedly committed by members of security forces.⁶⁶

The CIPEV report acknowledged the contributions by several human rights actors and institutions, including the KNCHR, who assisted not only through the useful report but also by providing access to its resources, including staff and other documentation collated during their own investigations.⁶⁷ The Commission was also cognisant of the work of previous commissions that existed prior to its constitution and, for example, specifically references the Akiwumi Commission, which had a very similar mandate aimed at establishing the root cause of tribal clashes

64 Kenya National Commission on Human Rights (KNCHR) *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-Election Violence* (August 2008).

65 *Ibid.*, p.7.

66 *Ibid.*, p.10.

67 *Report of the Commission of Inquiry into the Post-Election Violence* p.6.

in Kenya, characteristic but not limited to violence during most election periods.

3.5 Participation

The hearings elicited an overwhelming response by members of the public who came to participate. In some cases the premises where the Commission held its hearings were packed to capacity and others sometimes ran out of space.⁶⁸ Initially, the Commission was criticised for relying too heavily on the testimony of public officials in the hearings.⁶⁹ Yet for the Commission it was important for these officials to account for their actions and for Kenyans to be able to see and hear them answer questions about their involvement in a public forum.⁷⁰ Interestingly, it was only after the Commission had held these hearings that members of the public came forward to the investigators seeking to testify.

Overall, the Commission may be described as having operated in an open and accessible manner.⁷¹ The list of those who participated in the Commission through testimony and the submission of documents is vast and included certain government departments such as the Kenya Police Service, the Administration Police, the Provincial Administration, the Electoral Commission of Kenya, the National Security Intelligence Service, the Kenya Prisons Service and the Armed Forces.⁷² There were also groups of citizens and civil society organisations that applied to participate in the proceedings. These included victims' representatives, expert witnesses on the phenomenon of violence, including sexual violence, in Kenya and various organisations that were actively involved in addressing the post-election violence itself. The Commission granted legal standing to the Federation of Women Lawyers (FIDA) and the Centre for the Advancement of Women and Children, both of which represented the interests of women in the context of the post-election violence. The Kenyans for Peace with Truth and Justice, the Rift Valley Internally Displaced Persons Association, the Centre for Justice and Crimes against Humanity, and the Tegla Lorupe Foundation were also granted standing as interveners. Outside Nairobi, the Commission granted certain regional

68 Interview with the author, March 2016. See also 'Waki Went the Extra Mile to Collect Testimonies' *Daily Nation* (18 October 2008) available at: <http://www.nation.co.ke/news/1056-481746-knax55z/index.html>.

69 *Report of the Commission of Inquiry into the Post-Election Violence* p.9.

70 *Ibid.*, p.9.

71 Interview with the author, March 2016.

72 *Report of the Commission of Inquiry into the Post-Election Violence* p.6.

law societies standing in its proceedings.⁷³ These included the Rift Valley Law Society in Nakuru, the North Rift Law Society in Eldoret, and the West Kenya Law Society in Kisumu.

It must, however, be noted that the groups of citizens referenced above are not necessarily representative of the broad Kenyan context due to their proximity and interaction with civil society and non-governmental organisations (NGOs). The data therefore collected during this process, while useful and still indicative of certain dominant trends noted during election periods in Kenya, may not necessarily represent the situation experienced by the majority of Kenyans. This ultimately had an impact on what narrative made it into the final report, and explains the silences noted within the same.

The Commission declined requests for standing by Kenya's two main political parties, the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) as it did not deem their participation necessary. However, each of them contributed to proceedings through the testimonies of their Secretaries-General.⁷⁴ As the two main parties to the events that unfolded during that post-election period their participation was expected. There was therefore some criticism of the Commission's decision to decline requests for participation by these parties.⁷⁵ However, tension remained high between the incumbent and leading opposition parties and their supporters, so the Commission sought to ensure that their proceedings were not overshadowed by politics. For the Commission it was important to allow more time for the testimony of ordinary citizens who would not normally have had the opportunity to be heard.⁷⁶

The choice to decline the requests of certain 'high-level' participants to the proceedings of the Commission may have had the unintended outcome of alienating them. This may also have impacted the effectiveness of the Commission by depriving it of the requisite support to deliver its mandate. This was notable, for example, in the lack of information when requested from certain public offices and officials as described by a source close to the Commission.⁷⁷

73 *Ibid.*, p.7.

74 *Ibid.*, p.9.

75 'Ruto: Waki Commission Failed in its Mandate' *Daily Nation* (21 October 2008) available at: <http://www.nation.co.ke/news/1056-482630-kna9mhz/index.html>.

76 *Report of the Commission of Inquiry into the Post-Election Violence* p.10.

77 Interview with the author, March 2016.

The Commission worked closely with Kenyan civil society organisations, often seeking assistance with information, contacts and expertise. Civil society participation made life immeasurably easier by allowing the Commission to plug into the existing networks and it is also credited with mainstreaming gender sensitivity in the proceedings.⁷⁸ The civil society organisations that participated in the Commission allowed access to their records, which included statements from witnesses interviewed. This, for example, assisted in the mapping out of geographic locations that had been ‘hot spots’ and would thus be the focus of the Commission’s investigations. Civil society organisations also assisted with access and contact with community members where they had already established trust and were thus deemed credible.⁷⁹ Moreover, they provided emotional and psychological support to those who appeared before the Commission alongside other forms of support necessary for participation in the proceedings.⁸⁰ However, this support came late, likely as a consequence of the negative perception of commissions of inquiry in Kenya. The Commission had to prove itself before it received the full attention and support of civil society and the public at large.⁸¹

3.6 Finalisation and publication of the report

Due to a history of non-implementation of recommendations offered by previous commissions of inquiry in Kenya, the CIPEV commissioners were tactical in the nature of recommendations they adopted.⁸² They specifically state in the report:

Throughout the hearings and in written submissions, the Commission received a wide array of recommendations covering a whole range of issues, within and outside of the Commission’s mandate ... Many expressed scepticism that whatever recommendations the Commission makes would never be implemented and as such this commission was a waste of time and public resources.⁸³

Based on the above, the Commission relied on several factors to determine the relevance and importance of recommendations. The recommendations in the first instance were deliberately specific to ensure that there was clarity on the duty to implement. The report specifically

78 *Ibid.*

79 *Report of the Commission of Inquiry into the Post-Election Violence* p.6.

80 *Ibid.*

81 Interview with the author, March 2016.

82 *Ibid.*

83 *Report of the Commission of Inquiry into the Post-Election Violence* p.18.

recalls that the Commission decided that its ‘recommendations should be deliberately specific to allow no scope for avoidance of responsibility in implementation’.⁸⁴ The Commission opted to render few recommendations to ensure that they were easier to implement and less burdensome on those tasked with the implementation. It was important for the Commission to provide both long and short-term recommendations alongside timeframes for their implementation. The Commission further directed its recommendations towards the support of ongoing reform processes with the aim of empowering Kenyan institutions to effect change. Finally, the Commission aimed to clearly set out a monitoring and evaluation plan to ensure that there would be accountability for a failure to implement the recommendations.⁸⁵

The report was finalised and handed over to the government of Kenya and the Panel of Eminent African Personalities on 18 October 2008. There is no specific requirement in the Commissions of Inquiry Act for the government to publish the findings and recommendations of an inquiry and, as discussed above, there have been several cases of it not happening. Importantly, one of the unusual features of CIPEV was that its founding document, entrenched in the negotiated peace settlement, stipulated that its report should be published.⁸⁶ Further, to ensure that this mandate was realised, the Commission had printed copies of the report on its own account, rather than relying on government printers, so as to avoid the possibility of any delay or interference.⁸⁷

The main text of the report is easily accessible to those with access to the internet as several organisations have made it available on their websites. However, accessibility beyond the internet remains difficult, as physical copies of the report are hard to come by. It is largely available only in English, which excludes certain members of society. There are also no summaries or abridged versions of the report dissecting the various components in order to make it more accessible to the general public. Annexes to the report are not as easily accessible, which is problematic and perhaps raises the question what else may have been excluded from public consideration.

The report has been described as an honest, reflective document that tried to be as balanced and impartial as possible.⁸⁸ An interesting feature

84 *Ibid.*

85 *Ibid.*, p.19.

86 Agreement on the CIPEV (4 March 2008).

87 Interview with the author, March 2016.

88 *Ibid.*

in the drafting of the final report is the deference given to the report of the Akiwumi Commission, especially in the description of the historical context of violence and ethnic conflict in Kenya. This highlighted the deeply-entrenched nature of impunity for violent acts in Kenya, describing how there were never any sanctions for those perpetrators whose names were adversely mentioned in these reports.⁸⁹ CIPEV relied on this analysis of the root cause of the 2008 post-election violence, before offering its own conclusions, actually contending that had the recommendations of the Akiwumi and other commission reports on the same issue been heeded, the violence would not have occurred, as the underlying grievances remain unaddressed.⁹⁰

It was within the mandate of the Commission to allow certain parts of the report to remain secret for the safety of those implicated. Based on this, the Commission compiled a list of names that according to their findings warranted further investigation for possible prosecution. These names were contained in a secret envelope attached to the Commission report and were to be investigated by a special tribunal that was to be set up, failing which the names were to be handed over to the International Criminal Court for further action on a date specified in the envelope.⁹¹ The Special Tribunal for Kenya was to function as a court to seek accountability of those deemed to be most culpable for the various crimes perpetuated during the post-election period.⁹² The Commission also recommended the fast tracking of the International Crimes Bill 2008 for enactment by parliament, to facilitate investigation and prosecution of crimes against humanity.⁹³ The decision to keep secret the names of the perpetrators deemed most culpable has been a point of criticism.⁹⁴ The Commission's decision instead to list those names in a secret annex may have made it possible for those listed to escape accountability. This criticism is based on the premise that in order to hold certain people accountable their identities must be known. Given the history of commissions of inquiry in Kenya and the ability of the powerful elite to escape liability, the public naming

89 *Report of the Commission of Inquiry into the Post-Election Violence* p.26. It should be noted that the report of the Akiwumi Commission was finalised in 1999, but only made partially publicly available in 2002.

90 *Ibid.*, p.82.

91 Annan, *Interventions* p.203f.

92 *Ibid.*, p.472.

93 *Ibid.*, p.476.

94 'Waki: Why I Didn't Give List of 2008 Violence Suspects to President' *Standard* (7 June 2011) available at: <https://www.standardmedia.co.ke/business/article/2000036696/waki-why-i-didn-t-give-list-of-2008-violence-suspects-to-president>; see also 'MPs demand Waki's secret envelope,' *Daily Nation* (31 October 2008), available at: <http://www.nation.co.ke/news/1056-485984-kn8472z/index.html>.

of those responsible may have put pressure on the government to respond adequately.

3.7 Reception of the report by the public

There had been public anxiety around what the contents of the report would be, but the report was largely well received.⁹⁵ Much was expected of the Commission's role in offering an accurate reflection of what occurred during the post-election violence period and further with respect to holding accountable those responsible.⁹⁶ It was hoped that through the findings of the Commission there would in the first instance be investigations and prosecutions of those who were deemed to be most culpable. There was also an expectation that the findings of the report would provide a basis on which reparations and/or compensation for survivors of the various violations that occurred during that period would be based.⁹⁷

The report was generally perceived to be a fair reflection of what occurred during that period. This was particularly significant in terms of its revelation of the full extent of police violence and its reporting that the majority of those who were shot during the violence had been shot in the back, surmising that it therefore was unlikely that they were shot in self-defence, as had been alleged by the police.⁹⁸

4 Impact of the Commission: The government's response

In December 2008, just before the expiry of the deadline given by CIPEV, the two principals of the coalition government signed an agreement that would lead to the establishment of the recommended special court to try post-election violence suspects. However, this agreement was subject to the adoption of enabling legislation. What followed thereafter was a series of failed attempts by the legislature to adopt such legislation, including the rejection in February 2009 of the Constitution of Kenya (Amendment) Bill that had been designed to pave way for the special tribunal; a legislative defeat that popularised the slogan 'Don't be vague, ask for The Hague!'

95 'Waki Likely to Call for Police Shake Up' *Daily Nation* (14 October 2008) available at: <http://www.nation.co.ke/news/1056-480522-knbo34z/index.html>.

96 Amnesty International *Crying for Justice: Victims' Perspectives on Justice for Post-Election Violence in Kenya* (2014) available at: <https://www.amnesty.org/download/Documents/4000/afr320012014en.pdf>.

97 *Ibid.*, p.9.

98 Biketi Kikechi & Dedan Okanga 'Victims of Police Brutality Speak' *Standard* (15 May 2010) available at: <https://www.standardmedia.co.ke/business/article/2000009548/victims-of-police-brutality-speak>.

One of the proponents of this movement was Deputy President William Ruto, who at the time was serving as Minister of Agriculture (and who later came to be named as one of the 'Ocampo 6') who was quoted on 20 February 2009 as saying that the infamous secret envelope should be handed over to the International Criminal Court in The Hague for proper investigations to begin.⁹⁹

In July 2009, after several failed attempts at the establishment of the local tribunal, Kofi Annan on behalf of the Panel of Eminent African Personalities passed the list of names in the sealed envelope to Luis Moreno Ocampo, the Chief Prosecutor of the ICC for further action.¹⁰⁰ After having received the names, Ocampo offered the Kenyan government a further three months in which they were to provide clear indications on the establishment of the special tribunal, failing which investigations would be initiated on the post-election violence of 2008. This formed the basis of the eventual investigations against six Kenyans, the so-called 'Ocampo 6', charged by the ICC with inciting violence during the post-election period in Kenya. This case was placed before the Pre-Trial Chamber in November 2009 after further failed attempts to set in motion the setting up of the special tribunal.¹⁰¹ Among these six were Uhuru Kenyatta and William Ruto, who eventually were elected as President and Deputy President of the Republic of Kenya in the 2013 general elections. Clearly, a hot button had been pressed – a sitting African head of state and his deputy, the opposing parties on the election-related violence, but now the key figures in a government of national unity were being charged by the international court.

There was much controversy surrounding these very high-profile cases, with attempts made by both the government of Kenya and the National Assembly to stop their progress. The ICC Office of the Prosecutor alleged that the government of Kenya had interfered in the investigations, refusing to cooperate and intimidating several witnesses to the point that they were not able to proceed with any of the cases based on a lack of evidence. The cases against the 'Ocampo 6' were eventually all dropped, with the matter against Deputy President William Ruto the last to be dropped in April 2015.¹⁰²

99 'How Kenya Handled Local Tribunal Process' *Daily Nation* (17 September 2013) available at: <http://www.nation.co.ke/news/politics/How-Kenya-handled-local-tribunal-process-/1064-1997172-p5vb2y/index.html>.

100 Annan, *Interventions* p.204.

101 'How Kenya Handled Local Tribunal Process' *Daily Nation* (17 September 2013), available at: <http://www.nation.co.ke/news/politics/How-Kenya-handled-local-tribunal-process-/1064-1997172-p5vb2y/index.html>.

102 Musau Nzau 'ICC Regrets Collapse of Kenyan Cases, Hopes They Will be

Given the failure to adopt a local tribunal, much hope rested in the ICC and the potential for justice and accountability at that level. Amnesty International carried out research investigating the challenges faced by victims of post-election violence in accessing justice. The report also includes a snapshot of their views on the ICC's investigations and cases. According to the report, several participants felt that the cases before the ICC did not cover the crimes that they experienced and they felt excluded from the ICC process and were calling for the ICC to deliver justice for them and their respective communities.¹⁰³ The eventual failure of the ICC proceedings marked the fate of CIPEV, which now, in the eyes of the public, perhaps is deemed to have been a failure, due to the hope that was vested in it through its link to the ICC.¹⁰⁴

A petition has been filed in the Constitutional and Human Rights Division of the High Court of Kenya by a group of individuals and civil society organisations seeking to compel the government of Kenya to address the sexual and gender-based violence that occurred during the post-election period.¹⁰⁵ The petition was filed on the basis of the findings of CIPEV as they related sexual and gender-based violence. After an 11-year wait, the matter is yet to be concluded. One of the petitioners' claims is that the government of Kenya failed to act with due diligence towards its citizens to prevent, protect and promote their rights to be free from (sexual and gender-based) violence.¹⁰⁶

Alongside the measures above which were aimed at holding specific persons accountable, CIPEV also made recommendations aimed at broad sector reforms including reform to the Kenya Police Force and the Administration Police. The Commission considered the police an important actor in the justice sector and thus deemed it necessary to make recommendations specifically geared at entrenching accountability within the force, as one facet of justice.¹⁰⁷ There were several recommendations made in this respect, including that the Kenya Police Force and the Administrative Police needed to be streamlined to function as one police service. There was a further recommendation for the establishment of

Revived' *Standard* (11 June 2017) available at: <https://www.standardmedia.co.ke/article/2001243072/icc-regrets-collapse-of-kenyan-cases-hopes-they-will-be-revived>.

103 Amnesty International, *Crying for Justice*, p.9.

104 Kikechi & Okanga, 'Victims of Police Brutality Speak'.

105 Open Society Justice Initiative (OSJI) 'Briefing Paper: SGBV Victims Seek Justice for Post-Election Violence' (February 2013) available at: <https://www.opensocietyfoundations.org/sites/default/files/sgbv-kenya-20130219.pdf>.

106 *Ibid.*

107 *Report of the Commission of Inquiry into Post-Election Violence* p.478.

an independent police conduct authority with legislative powers and authority to investigate police conduct and provide civilian oversight.¹⁰⁸

The report recognises that a reform programme had already commenced and against that backdrop identified a number of key areas for immediate action.¹⁰⁹ These reforms were those already captured under Agenda item (iv) of the National Dialogue and Reconciliation Agreement, alongside those encompassed within the Kenya 2030 plan.¹¹⁰ The Commission therefore recommended the institution of a specialised and independent Police Reform Group, comprised of international and national policing experts. This group was to serve as a reform catalyst to support the work that had already begun as part of the negotiated peace settlement.¹¹¹ The Commission was of the view that successful policing was based on a number of broad principles, which should guide the work of the recommended reform group.¹¹² The Commission also recommended the integration of the Kenya Police Service and Administration Police to provide accountability for resourcing and service delivery. It was further recommended that the existing Police Act be reformed in order to confirm and strengthen police governance, accountability and organisational

108 *Ibid.*, p.479.

109 *Ibid.*, p.429.

110 Key among these is the Statement of Principles on Long-Term Issues and Solutions (28 February 2008) developed through the Kenya National Dialogue and Reconciliation process. Specifically identified as issues for the police (in agenda item 4 under Constitutional and Institutional Reform) were constitutional review to establish an independent police commission (12 months); review and definition of the role of the administration police (6 months); review laws and issues related to security and policing (including the independent complaints commission, citizen oversight of police services, enhanced information disclosures, human resource management and capacity building) to make them consistent with modern democratic norms (6 months); finalisation and roll-out of the national security policy to enable the relevant sectors to develop their sectoral policies; and recruit and train more police officers to raise the police – to population ratio to UN standard (by 2012). All of these processes were informed by the constitutional reform that had the draft Constitution, later adopted in 2010, as its base. See *Report of the Commission of Inquiry into the Post-Election Violence* pp.430–431.

111 *Report of the Commission of Inquiry into the Post-Election Violence* p.432.

112 These were the principles of *representivity* – which called on the reform group to be mindful of ethnic representation of officers at all levels of police; *impartiality* – in all aspects of their work, stressing the need for equal treatment of all Kenyans; *decentralisation of services* – through a single integrated command model based on community policing elements; *respect for human rights* – ensuring the equal treatment of all and an assessment of the heavy-handed approach police have adopted with respect to managing unrest; and *legal and political accountability* – through the development and application of accountability mechanisms especially a police service commission and an Independent Police Complaints Authority to deal with complaints against police conduct. See *Report of the Commission of Inquiry into the Post-Election Violence* p.433.

arrangements in line with current international trends and to improve police effectiveness through the establishment of a clear framework for the exercise of policing powers.¹¹³

The Commission was also mandated to investigate the root causes of election violence in Kenya and in its report offered a detailed description of the history of such violence and an exposition of the root causes thereof. The Commission reiterated the fact that this history is rooted in the advent of multi-partyism and the galvanisation of the voting populace along ethnic lines. For the first time in Kenya's history the Commission classified the nature of post-election violence as varied combinations of three types of violence, spontaneous, planned and police and state-directed violence.¹¹⁴ Planned violence in this context refers to those acts of violence that were specifically targeted against and by certain communities against each other funded and fuelled by politicians and local businesses that sought to benefit in one way or another from the chaos during that time.¹¹⁵ Spontaneous violence refers to those unplanned or non-premeditated acts of violence that erupted across the country in response to the announcement of the election results.¹¹⁶ Police and state-directed violence refers to the violence carried out by state agents, mainly the Kenya Police, the Administrative Police and the General Service Unit.¹¹⁷ This was an important distinction as prior to this articulation by the Commission, electoral violence was generally described to be spontaneous in origin, meaning that it was often assumed that the violence sparked up as an immediate reaction to less than favourable results, and was then exacerbated by certain forces, usually influential politicians for their own gain. This had an impact on the potential for criminal investigation and prosecution as there was no identifiable perpetrator. It had not previously been the public narrative that certain forces such as police and other public officials sparked the violence in the way that was noted in the report.

The Commission, however, found that alongside these spontaneous bursts of violence were concerted, well-planned and executed acts of violence meted out against ordinary citizens on the basis of an ethnic

113 *Report of the Commission of Inquiry into the Post-Election Violence* p.436.

114 *Ibid.*, p.118.

115 *Ibid.*, pp.118, 221; see also Godwin R. Murunga 'Spontaneous or Premeditated? Post-Election Violence in Kenya' Discussion Paper 57 (Uppsala: Nordiska Afrikainstitutet, 2011) p.30.

116 *Report of the Commission of Inquiry into the Post-Election Violence* pp.225–6; see also Murunga, 'Spontaneous or premeditated?' p.24.

117 See *Report of the Commission of Inquiry into the Post-Election Violence* pp.407–12; see also Murunga, 'Spontaneous or premeditated?' p.40.

bias.¹¹⁸ It therefore was not enough to claim spontaneity as a reason for lack of further accountability measures on the part of the state as it was clear that in several instances the violence noted was actually curated.

4.1 Impact of recommendations

Although the government never formally debated the findings of this Commission, some of the recommendations have in fact been implemented. This was possible because of the tactful adoption of recommendations that would fit into the reform agenda already in place since 2005. The Commission therefore acted as a reform catalyst with several of its recommendations included in several sections of the Constitution of the Republic of Kenya, 2010. This includes, for example, the recommendations on police reform highlighted above.

The recommendation on the setting up of a special tribunal for Kenya has received the most attention at a global and domestic level due to the link with the eventual ICC proceedings. There is no indication as to the actual names that were in the envelope and whether those that were eventually indicted before the ICC were those that were found to be most culpable for the violations that occurred during that time. According to a well-placed participant, the envelope was an act of novel ingenuity for commissions in Kenya that was largely possible due to the involvement of a trusted independent actor in the establishment of the Commission, the Panel of Eminent African Personalities.¹¹⁹ This was used as a means of ensuring that there was some sort of accountability especially because of the history of commissions of inquiry in Kenya and the non-implementation of recommendations. Indeed, it is against that history that the partial implementation of some of the CIPEV's recommendations, especially those that related to reform of the justice sector including the police and the judiciary, ought to be judged.

In the first instance, a notable impact of CIPEV relates to the extent to which it was able to foster accountability for the human rights violations that occurred during the post-election period. As has been discussed elsewhere in this volume, accountability is a broad concept that manifests in several ways. In this case one significant impact of the Commission appears to have been the extent that high-level politicians and public officials participated in the proceedings and were forced to answer for their role in the violence during that time. This conveyed the message that

118 See Murunga, 'Spontaneous or premeditated?' p.24.

119 Interview with the author, June 2016.

it is possible to hold people to account, regardless of whether prosecutions follow.¹²⁰

Although the Commission had called for the establishment of a special tribunal for Kenya, to ensure that those who were identified as culpable would eventually be held responsible, these measures did not materialise in that manner and several years after conclusion of CIPEV there have been very few prosecutions for the post-election violence. These files remain open and have been returned to the police for further investigations and the status thereof is still unknown. However, the impact of the Commission was felt through the subsequent interactions with the ICC and the proceedings that were instituted against the 'Ocampo 6'. In this case, the failure to implement this specific recommendation did not negate the impact of the Commission with respect to its attempts to hold perpetrators for the violence during that time accountable.

Another impact of CIPEV may also be noted in the reforms that have taken place within the justice system including to the judiciary and the police service. In line with the recommendations of the Commission, the government of Kenya set up the National Task Force on Police Reforms, chaired by retired Judge Philip Ransley. This task force compiled a comprehensive report including a list of over 200 recommendations on police reform, which were to be implemented by a Police Reform Implementation Committee. The recommendations of this Task Force served as the basis for police reforms in Kenya and were eventually adopted in the final Constitution of Kenya in 2010. With the promulgation of the Constitution came significant policy, legislative and institutional reforms, including the establishment of a national police service, merging the Kenya Police Force and the Administration Police under one command, and the creation of an Office of the Inspector-General.¹²¹ The Constitution also created the National Police Service Commission (NPSC) which is tasked with the development of training policies, offering advice on salaries and remuneration of members of the service, oversight, recruitment and discipline of members of the service alongside vetting members, and establishing a public complaints system.¹²²

To give effect to the constitutional provisions above there have been several legislative enactments adopted as part of the police reform programme. These include the National Police Service Act and the National Police Service Commission Act, which established a civilian

120 Interview with the author, March 2016.

121 Constitution of the Republic of Kenya (2010) secs.243, 245.

122 *Ibid.*, sec.246.

board to oversee recruitment and appointment of officers, and to review standards and qualifications of existing members.¹²³ They are also mandated to receive complaints from the public about the police service and refer them to the Independent Police Oversight Authority (IPOA) or any other government entity for investigation and possible prosecution where there is compelling evidence to do so.¹²⁴ Finally, the National Police Oversight Authority Act has also been enacted establishing the Independent Policing Oversight Authority (IPOA) to act as a civil oversight mechanism for the review of police actions.¹²⁵ This body is mandated to handle cases of police misconduct and recommend disciplinary action to the National Police Service Commission.

The Kenya National Commission on Human Rights conducted an audit of the status of police reforms in Kenya in 2015.¹²⁶ This audit made several findings including, for example, that there has been a considerable degree of legislative and policy reform alongside the establishment of several institutions at different levels towards operationalisation.¹²⁷ However, certain changes are yet to be fully effected, such as the merger between the Kenya Police and Administrative Police, which continue to function as two separate bodies.¹²⁸ The audit further found that the IPOA is operational but too short-staffed to be effective, with only one office in Nairobi (at the time of the audit) affecting its influence at a national level.¹²⁹ However, according to a more recent IPOA performance report, 99 investigations were conducted during the first six months of 2018.

123 National Police Service Commission Act 30 (2011) sec.10.

124 *Ibid.*

125 *Ibid.*

126 Kenya National Commission on Human Rights and Centre for Human Rights and Peace 'Audit of the Status of Police Reforms in Kenya' (2015) available at: <http://www.knchr.org/Portals/0/AllOtherReports/FINAL%20EDITED%20POLICE%20REFORMS%20REPORT.pdf>.

127 *Ibid.*, p.9.

128 During the launch of a policy framework and strategy for reorganising the national police service on 13 September 2018, President Kenyatta announced the merging of the Kenya police service and the administration police (AP) into general duty police officers under the command of the Inspector-General of Police, in a move aimed at eliminating waste, duplication and the overlap of duties. These plans took effect in July 2019 when more than 20 000 AP officers joined regular service as general duty officers under the Deputy Inspector-General of Police (Kenya Police). See Wangui Ngechu 'AP Merged with Kenya Police, President Kenyatta Says' *Citizen Digital* (30 September 2018) available at: <https://citizentv.co.ke/news/ap-merged-with-kenya-police-to-form-general-duty-police-president-kenyatta-211969/>; see also Cyrus Ombati 'Analysis: What Do New Changes Portend for the Administration Police Service?' *Standard Digital* (12 July 2019) available at: <https://www.standardmedia.co.ke/article/2001333595/what-do-new-changes-portend-for-aps>.

129 *Ibid.*

Fifteen of those cases were forwarded to the Office of the Director of Public Prosecutions for further action and 41 were closed with no further action. Two of those cases have been referred to the Directorate of Criminal Investigations for further investigation, while the remaining 41 are under review.¹³⁰

More broadly, corruption and a lack of political will pose a continual challenge to the full implementation of the envisioned reforms. Kempe argues that in Kenya, police corruption poses a serious security challenge, due to its persistent and systemic nature rooted in the government's failure to observe ethical and integrity standards as set in the Constitution 2010.¹³¹ Research conducted by Transparency International in 2014 found that the police service was the most corrupt-prone public institution in the country with an 81 per cent corruption score.¹³² Not much has changed, with a 2017 report indicating that the police service in Kenya remained the highest bribery-prone institution.¹³³

There have also been certain amendments to security sector laws, which have had an impact on checks and balances in the service and increased government control over security agencies. These include, for example, limiting the powers of the NPSC with respect to its vetting powers and allowing the direct appointment of the Inspector-General of the police without open recruitment.¹³⁴ Members of the police service have also registered complaints that politicians still interfere in policing issues with one officer noting that '[p]olitical interference and the old guards who are still in the police service are the ones derailing the reforms process because they know they will be the first to be rooted out if they embrace reforms'.¹³⁵

The impact of CIPEV may also be felt within the judiciary and the reforms that have taken place in that sector. The Commission found that one of the factors that exacerbated the levels of violence during that post-election period was a sense of desperation by the aggrieved

130 Independent Policing Oversight Authority 'Performance report: January–June 2018' (2019) available at: <http://www.ipoa.go.ke/wp-content/uploads/2019/05/IPOA-Performance-Report-Jan-Jun-2018.pdf>.

131 Ronald Hope Kempe 'Police Corruption and the Security Challenge in Kenya' *African Security* 11 (2018) pp.84–108.

132 Transparency International *East African Bribery Index Trends Analysis (2010-2014)* (2015).

133 Transparency International *East African Bribery Index 2017* (2017).

134 Annie Mageka 'Police Reform in Kenya: Challenges and Opportunities' Centre for Security Governance (9 October 2015) available at: <http://secgovcentre.org/2015/10/police-reform-in-kenya-challenges-and-opportunities/>.

135 *Ibid.*

parties, because they did not feel that they could approach the courts for a resolution of their disputes.¹³⁶ The Commission identified impunity as the root of the systemic and institutional deficiencies, corruption and entrenched negative socio-political culture that led to the breakdown in 2008.¹³⁷ The courts were not believed to be independent or impartial and for that reason many did not think it would be possible to have a fair dispute hearing through the courts. The report acknowledges the reforms that were already in place at the time of the proceedings, but noted that they were highly administrative in nature and reiterated the importance of the hearing and adjudication of post-election violence cases which were sure to pose a challenge to the judiciary.

In order adequately to address the reforms to the judiciary, a Judiciary Transformation Framework was adopted in May 2012 under the leadership of former Chief Justice Willy Mutunga.¹³⁸ The overriding objective of the framework was to ensure access to and expeditious delivery of justice to all; a statement that is reflective of the indictment against the judiciary as contained in the findings of CIPEV. The framework made it clear that the post-election violence had been a watershed moment for the Kenyan public's confidence in the judiciary. Certain of the goals listed in the framework may be imputed to the findings of the Commission including, for example, Goal (C) on reordering the judiciary's processes in order to deliver enhanced services through better access to speedy justice for the marginalised and traditionally underserved.¹³⁹

5 Creating a forum for local dialogue

As part of this project, researchers sought to explore the extent to which commissions have provided a forum in which any local moral resource could come to the fore. Within the Kenyan case, for example, was there an overarching set of values implicit in the work of CIPEV that reflected a particularly Kenyan approach to solving conflicts that may have enhanced or weakened this Commission. While there was no specifically-identifiable 'moral resource' operating within the Kenyan context that manifested in the same way that *ubuntu* has done in Southern Africa, for example, several respondents mentioned the values of unity and collectivity that are reflected across various communities and which

136 *Ibid.*, p.443.

137 *Ibid.*, ch.12. The Commission dedicated an entire chapter to the subject of impunity.

138 *Judiciary Transformation Framework 2012–2016* (2012) available at: <http://www.judiciary.go.ke/portal/portal/assets/downloads/reports/Judiciary's%20Transformation%20Framework-fv.pdf>.

139 *Ibid.*, pp.9, 11.

manifest in several ways. This is a feature present within communities but not necessarily between communities, especially when in conflict. It was not enough for a commission to focus only on high-level perpetrators in seeking accountability; attention also needed to be paid to the breakdown of everyday relationships between communities as a result of conflict.¹⁴⁰ This was to be mitigated through the interaction of CIPEV with the TJRC whose mandate, as previously mentioned, was to explore violations from independence to the post-election violence period with a view to seeking justice and reconciliation.

This was confirmed by participants in our focus group discussions who provided that criminal prosecutions were, in fact, not ideal for peaceful coexistence within their communities. They argued that there needed to be a way to facilitate dialogue and rebuild a relationship between community members who have lived together for several years that is not necessarily available through the courts.¹⁴¹ They further reiterated that there are organic ways of resolving disputes within communities, and rather than always going to court, and those spaces need to be supported. This is rooted in the notion that there is no compensation that can redress the sort of suffering that was experienced during that time. The only comfort would be in the fact that the perpetrator has received their due. In the words of one research participant, '[t]here is nothing that can heal the pain and the loss that was experienced during the post-election violence period, save for knowing the perpetrator and why they did it'.¹⁴²

According to the Constitution of the Republic of Kenya, judicial authority is derived from the people and vests in the courts.¹⁴³ However, in the exercise of such authority, courts and tribunals shall be guided by certain principles, among them that alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, are to be promoted.¹⁴⁴ This potential for broader access to justice has been entrenched as part of the Judiciary Transformation Framework and currently there is a task force in place to investigate the extent to which these forums can be mainstreamed within the justice sector.¹⁴⁵

140 Interview with the author, March 2016.

141 Focus group discussion conducted by the author, March 2016.

142 Interview with the author, March 2016.

143 Constitution of the Republic of Kenya (2010) sec.159(1).

144 *Ibid.*, sec.159(2)(e).

145 W. Mutunga 'Remarks by the Chief Justice at the Formal Launch of the Isiolo Law Courts' Court-Annexed Alternative Justice System and Formal Launch of the Task Force on Alternative Justice System' (28 September 2015) available at: <http://>

The Commission adopted a notably participatory approach to its work, unlike any Kenyan commission of inquiry before it.¹⁴⁶ This methodology recognised the cathartic effect of narration, and telling one's truth, which perhaps is comparable with the underlying notions of *ubuntu*.¹⁴⁷ Drawing on literature on the South African Truth and Reconciliation Commission, cultural theorist Dalene Swanson has examined the importance of the recovery of 'truth' through narrative as a mechanism to restore or heal human relationships, and the extent to which such restoration is a central tenet of the notion of *ubuntu*.¹⁴⁸ To the extent that CIPEV was able to facilitate such narration, and such truth recovery through its various public hearings, it went some way in establishing roots for eventual reconciliation. This did not fall squarely within the Commission's published terms of reference but nonetheless was part of the broad goals set for it.

The research also highlighted the care with which communitarian notions such as *ubuntu* must be exercised as they sometimes may be used to suppress dissent under the umbrella of patriotism and nationalism.¹⁴⁹ The government of Kenya adopted a grand narrative of peace and reconciliation in the years after the post-election violence. However, this is not the lived reality of many Kenyans, and there are still indications of simmering tensions across the country. This narrative continues to be propagated with fear of reprimand for those that do not toe the line.¹⁵⁰ Under the guise of 'moving on', those most affected by the post-election violence were called, some almost violently, to 'forgive and forget' for the sake of peace and unity ahead of the 2013 and 2017 elections.¹⁵¹

www.judiciary.go.ke/portal/assets/filemanager_uploads/CJ%20Speeches/CJ%20Remarks%20-%20AJS%20Launch.pdf. The Isiolo Court-Annexed Alternative Justice System was one of seven pilots selected to inform the development of a comprehensive policy on alternative justice within the Kenyan justice system.

146 Interview with the author, March 2016.

147 There are various understandings of *ubuntu* such as the one offered by Swanson who describes it as an African humanist philosophy that links an individual to the collective through brotherhood or sisterhood, an expression of daily living that fosters a journey towards becoming human. See Dalene Swanson 'Ubuntu: An African Contribution to (Re)search for/with a "Humble Togetherness"' *Journal of Contemporary Issues in Education 2* (2007) p.55.

148 *Ibid.*

149 Interview with the author, March 2016.

150 *Ibid.*

151 Njoki Wamai 'The Politics of Moving On: Legitimacy and Contestation of the International Criminal Court in Kenya' University of Cambridge, Centre for African Studies Lecture Series (13 February 2017). See also 'Who Will Save Kenya from This Agony' *Business Daily* (3 August 2009) available at: <https://www.businessdailyafrica.com/Opinion-and-Analysis/539548-633684-item-0-109xaih/index.html>.

6 Conclusion

CIPEV is an interesting case study of a commission of inquiry, both in terms of the way in which the mechanism has been used in Kenya and further afield. The Commission had a number of noteworthy features, discussed above, including its unusual origins, the fact that it could report simultaneously both to the national government but also to an international mediation panel, and the creative device used to ensure the impact of its most sensitive finding (a list of names of perpetrators). Its recommendations led to reforms in the justice sector including most notably to the police legal and policy framework reconstituting it as a 'service' that ultimately is accountable to the people through the Independent Police Oversight Authority. Through this Commission, the urgency of reforms within the judiciary also became apparent with the clearest initiative relating to alternative dispute resolution as a means of accessing justice.

Furthermore, the Commission was able to articulate clearly the nature of violence during post-election periods in Kenya and to draw a distinction between planned and spontaneous violence. This was important in the first instance in offering a characterisation of the true nature of post-election violence which had hitherto been characterised as spontaneous without due regard for the targeted use of violence on the basis of ethnicity. It was also important because the Commission was able to shed light on the various parties that may be held accountable for various violations of human rights, including the right to life, during election periods. The Commission, both through its report and its public hearings, put impunity back on the agenda: highlighting its insidious nature in the Kenyan context and the far-reaching impact thereof across society but especially as it relates to the post-election period of 2008.

These successes should be set against a context of the history of commissions of inquiry in Kenya, where they were often constituted but seldom able to complete their work without political interference or to produce a publicly-accessible report.¹⁵² On the other hand, it is argued that the measure of a commission's success is to be found in the impact thereof, manifested most clearly in the adoption and implementation of its recommendations. To the extent that only some of the recommendations offered by this Commission have been implemented, some may argue that this Commission has not been successful. Despite this, the Commission had some notable impacts that have arisen despite the minimal implementation

152 See, generally, AfriCOG, 'Study of Commissions of Inquiry in Kenya'.

of its recommendations. This is especially because of the far-reaching effects of the select recommendations that have been implemented.

The most notable impact in this respect has been the controversy surrounding the special tribunal that was to be set up to investigate and prosecute those deemed to be most culpable. This recommendation was perceived as key to securing accountability for the violations of the right to life that occurred during that time, to the extent that it would put a face on the perpetrators of this violence who would be forced to answer for their involvement. The challenges with the special tribunal and the eventual interaction with the ICC have been expounded in detail above. The failure of this specific recommendation to lead to a tangible outcome of accountability, through prosecutions or investigations, has had a significant impact on the perceived success of the Commission.

This case study also demonstrates the important influence that the genesis of a commission of inquiry has on aspects of its operation. CIPEV was able to achieve certain of the outcomes that it did because it was rooted within a coalition agreement accountable to an external third party, the Panel of Eminent African Personalities. The presence of the two international commissioners alongside other international staff in key positions also helped to instil some sort of credibility in the process, as it was believed that these members were free of political influence or bias and would thus be independent and impartial.

The example of this Commission also suggests the importance of offering recommendations that are relevant and implementable. CIPEV specifically drew some of the recommendations from interventions that were already under consideration for reform and for this reason it arguably was easier for the government to follow through. It thus is not always necessary to reinvent the wheel when it comes to commissions of inquiry and perhaps the greatest impact may be achieved through a creative reconfiguration of previously-considered interventions.

CIPEV also revealed the power of silence and how it may be used as a tool of resistance.¹⁵³ Silence denotes not only the absence of a voice but is also an interactive process responding to the conduct of other human beings and is used by both dominant and subordinated groups in their interests.¹⁵⁴ Dominant groups may use silence as a subordinating force in order to maintain the *status quo*; subordinated groups, conversely, may use

153 Dorothy E. Roberts 'The Paradox of Silence: Some Questions About Silence as Resistance' *Michigan Journal of Race and Law* 5 (2000) pp.927–41.

154 *Ibid.*

silence as a tool of resistance and a challenge to the *status quo*.¹⁵⁵ These dynamics were present within CIPEV with silence being used in both ways. The government of Kenya used silence as a tool of domination, in an attempt to frustrate the proceedings of the Commission. In several instances they refused to provide information that was relevant to the proceedings and through their silence tried to exercise some sort of power over the outcomes of the Commission.¹⁵⁶ Meanwhile, some other directly-involved actors opted out of participating in the Commission and in that sense their silence was a tool of resistance drawn from a sense of apathy. One participant in the focus group discussions stated that they had heard about the sittings of the Commission but had opted out of participating, as they did not feel that adding their voice to the proceedings would make any difference given the history of commissions of inquiry in the country.¹⁵⁷

Finally, the example of this Commission also affirms the postulation of accountability as a process rather than an outcome, and one that involves several steps, including prosecutions. As previously mentioned, although the Commission fulfilled its mandate, in order for a justifiable claim of contributing towards broader accountability for rights violations, its processes had to extend beyond the political sphere.¹⁵⁸ Such processes also need to extend to restoring the relationship between citizens especially in the context of intercommunal violence. The lesson that may therefore be drawn in this respect is that there is a need to consider the far-reaching impact of the event under consideration in a commission of inquiry and to factor in mechanisms that will deal not only with immediate culpability by the state but also the fostering of accountability (in the sense of reconciliation as a form of remedy) towards and between citizens.

155 *Ibid.*

156 Interview with the author, March 2016.

157 Focus group discussion with the author, March 2016.

158 Interview with the author, March 2016.