
National Commissions of Inquiry into Electoral Violence
A Study of Practices and Outcomes
Working Paper
Explaining and Mitigating Electoral Violence Project
Jeff Fischer
Creative Associates International
June 2017

Introduction

Over the last decade, there have been cases of countries which have experienced electoral violence on a level of orchestration and intensity that special national commissions of inquiry were established to provide focused investigations into these atrocities. Special commissions of inquiry in countries of Kenya (2008), Nigeria (2011), and Zambia (2016-2017) are cases in point and represent national initiatives, as distinguished from investigations by the International Criminal Court (ICC) or those of United Nations (UN) Special Rapporteurs. International institutions possess protocols and standards in their investigations. However, given the situational nature of the national initiatives, each investigation is conducted according its own set of rules without a common set of organizational and investigative standards. Such national initiatives have gained more pertinence recently with the withdrawal of several countries from the Treaty of Rome and the threatened African Union (AU)-supported mass withdrawal of Sub-Saharan African countries from the ICC.¹ Such actions limit the reach of the ICC as a mechanism for transitional justice in the cases of widespread electoral violence and drive the need for alternative mechanisms. This Working Paper examines the commissions of inquiry appointed for the three cases cited above and puts forward a comparative evaluation of the organizational and investigative practices which were employed.

In Kenya, the Commission of Inquiry into Post-Election Violence (CIPEV) was established to investigate the post-election violence in 2007 and 2008. CIPEV was mandated to investigate the violence and make recommendations, including those to bring justice to perpetrators. Its principal recommendation was that a special Kenyan tribunal be established to prosecute the perpetrators of violence. The special tribunal was rejected by the National Assembly, and, as a result, CIPEV had the names of the suspects forwarded to the ICC for prosecution. However, most of the cases pursued by the ICC collapsed for reasons of witness intimidation and loss of evidence.

In Nigeria, the Investigation Panel on Election Violence and Civil Disturbances (Lemu Panel) was mandated to quantify the death and destruction from the 2011 election and to identify the names perpetrators. However, while the Lemu Commission was not a judicial panel, its investigative findings were used by the Kaduna state government to charge 45 people with crimes of violence.

¹ <http://www.bbc.com/news/world-africa-38826073>

And, in Zambia, the Commission of Inquiry into Violence and Tribal Voting (also called the Commission of Inquiry into Voting Patterns and Electoral Violence) was established in 2016 to investigate violence in elections earlier that year. At this writing, the Commission's 120-day mandate has been extended by the President until November 30, 2017 and its investigation continues. As a result, in this case study, the structure of this commission will be examined for comparative purposes.

Case 1 - Kenya - Commission of Inquiry into Post-Election Violence 2008 (CIPEV) December 27, 2007

Description of the Violence

In its Case Information Sheet, the ICC describes the violence in the following terms:

Immediately after the announcements of the results of the presidential election and specifically from 30 December 2007 until 16 January 2008, an attack was carried out – following a unified, concerted and pre-determined strategy – by different groups of Kalenjin people, in locations including Turbo town, the greater Eldoret area (encompassing Huruna, Kiambaa, Kimumu, Langas, and Yamunbi), Kapsabet town and Nandi Hills, in the town, in the Uasin Gishu and Nandi Districts, the Republic of Kenya. The attack allegedly targeted the civilian population, namely the Kikuyu, Kamba and Kisii ethnic groups, which were perceived as Party of National Unity (PNU) supporters.²

As a report from the Department for International Development describes it, “First, there was spontaneous looting by youths in the slums of Nairobi and Kisumu of government buildings and of the shops and houses of Kikuyu families and PNU supporters after the announcement of the election results. Second, violence organized in part before the election by opposition and tribal leaders as a response in the event of Kibaki’s winning the election. Third, reprisal attacks were organized by government supporters and Kikuyu militias that mainly targeted migrant workers thought to be opposition supporters in parts of the Rift Valley Province, Central Province, and Nairobi slums. The police also were responsible for much of the violence, either by using excessive force to deal with protesters or choosing not to prevent violence.”³

Commission Mandate and Structure

The violence continued until the power-sharing agreement was signed between the President Mwai Kibaki and Prime Minister Raila Odinga. This led to the establishment of the Commission of Inquiry into Post-Election Violence 2008 (CIPEV). The commission was led by Kenyan Judge Philip Waki and was also called the “Waki Commission”, after its chair. CIPEV was mandated “to investigate the facts and circumstances surrounding the violence, the conduct of

² ICC-PIDS-CIS-KEN-01-012/13_Eng Updated 18 September 2013, Case Information Sheet, page 2

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67654/elections-ke-2007.pdf.

state security agencies in their handling of it, and to make recommendations concerning these and other matters.⁴

Inquiry Process

CIPEV formally began with an announcement posted in the Kenyan Gazette Notice on May 23, 2007. CIPEV activities were funded by the Government of Kenya and the multi-donor Trust Fund for National Dialogue and Reconciliation, managed by the United Nations Development Programme (UNDP) as well as local authorities and several religious organizations. As in the case of Zambia, the parameters for the rules and procedures for the Commission are authorized in the Commission of Inquiry Act.

CIPEV Commissioners consulted with state and non-state stakeholders about its role and objectives including the Commissioner of Police, Commissioner of Prisons, Commandant of the Administration Police, Chief of the General Staff, Attorney General, Electoral Commission of Kenya, Director General of the National Security Intelligence Service, Ministry of Justice, National Cohesion and Constitutional Affairs, and Permanent Secretary of the Office of President in charge of Internal Security and Provincial Administration. Civil society organizations played a role in providing information, documents, contacts, and their experiences to the Commission. Civil society also assisted with victims' services for many affected by the violence. Contributing organizations included, Kenyans for Truth and Justice, Inter-Religious Forum, Kenya Section of the International Commission of Jurists, Human Rights Commission, and different chapters of the Catholic Peace and Justice Commission.

Many of the state agencies listed above were invited to testify before the Commission. The Commission gave standing to a number of civil society and victims' advocate organizations to testify. However, it denied the request to participate by Kenya's two main political parties, the Orange Democratic movement (ODM) and the Party of National Unity (PNU).

The Commission states that it adopted both an adversarial and inquisitorial method of investigation. The Commission felt that this blended approach would produce the optimal result in determining the truth about the violence while at the same time treating all witnesses fairly. The Commission conducted both public and private hearings, the private hearings to provide some measure of witness protection. As a general rule, public officials testified in public whereas others could choose between public or private venues. Hearings were conducted throughout the country.

Finally, the Commission had to make a decision on whether to publish the names of the alleged perpetrators in its report. While the obvious arguments of accountability and impunity drive a decision to publish the names, the Commission reasoned that given its time constraints, it could not make these accusations "beyond a reasonable doubt" and so, the decision was made to not publish the names. Instead, the names of the accused were placed in sealed envelope and given to the Panel of Eminent African Personalities. If a special tribunal to prosecute these

⁴ <http://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipecv-final-report>

perpetrators is not established, then the Panel would have the prerogative to forward these names to the ICC.⁵

CIPEV Findings

CIPEV found that, although other elections in Kenya had experienced violence, the level and spread of the electoral violence in 2007 and 2008 was unprecedented. In its October 28, 2008 report, CIPEV identified 1,133 deaths, 3,561 injuries, and 117,216 instances of property destruction. CIPEV identified land grievances and centralized power in the presidency as the “root causes” of the violence. All but two provinces experienced violence. It was the most deadly and destructive election in Kenyan history. And, previous violence had been experienced in the pre-election phase, but in this case the violence was post-election in nature. The tactics included arsons of home, homicides, physical assaults, sexual assaults and displacement.

The violence was perpetrated along ethnic lines with systematic attacks based upon ethnicity and political affiliations motivated by the widespread belief that the president’s ethnic group benefits from holding that office. The violence was made more lethal by the fact that armed militias from the 1990’s ethnic clashes were not de-mobilized. In some areas, the violence was spontaneous, fueled by the perceptions of vote rigging. In other cases, the violence was organized and directed at specific individuals and group. Revenge attacks also resulted from both kinds of violence.

CIPEV found that state agencies institutionally failed to “anticipate, prepare for, and contain the violence.” It also found that some members of security agencies were perpetrators of violence themselves. The police appeared to be overwhelmed and lacked coordination mechanisms with other security agencies.

CIPEV recommended improved performance and accountability mechanisms for security services. It recommended merging the two police agencies – Kenya Police Service and the Administration Police and to establish an Independent Police Complaints Authority.⁶ However, its principal recommendation was that a special Kenyan tribunal be established to prosecute the perpetrators of violence. The special tribunal was rejected by the National Assembly, and, as a result, CIPEV had the names of the suspects forwarded to the ICC.⁷ However, as a result of witness homicides and intimidation and the loss of key evidence, the charges against most of the perpetrators were dropped.

Case 2 - Nigeria – Panel on Election Violence and Civil Disturbances (Lemu Panel) April 16, 2011

Description of the Violence

⁵ http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf

⁶ http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf

⁷ International Center for Transitional Justice, *The Kenya Commission of Inquiry into Post-Election Violence*, Fact Sheet. http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf

The Nigerian Stability and Reconciliation Programme offers the following description of the violence,

While judged by national and international observers to be among the fairest elections in Nigeria's history, the April 2011 elections were to be the bloodiest. As the results of the presidential elections trickled in on 17 April and it became clear that Buhari had lost, his supporters took to the streets in northern towns and cities to protest what they alleged to be the rigging of the results. Three days of rioting and sectarian killings followed in 12 states: Kaduna, Kano, Katsina, Sokoto and Zamfara states in the north-west zone; Bauchi, Adamawa, Gombe, Borno, Jigawa and Yobe in the north-east; and Niger State in the north-central zone. The targets were Christians and members of southern ethnic groups believed to have supported Jonathan; their churches, shops and homes were burned. Police stations, offices of the ruling party and electoral commission officers were also targeted, along with the property of members of the northern elite who were considered to have supported the ruling party. Rumours that traditional rulers had been heavily bribed to support Jonathan's candidacy fed attacks on the Emirs of Kano and Zaria. In southern Kaduna, where most of the violence and 80 per cent of the casualties were concentrated, Christians retaliated by attacking Muslim communities. It was estimated that more than 65,000 people were displaced and 350 churches burned. The violence was generally perpetrated with crude weapons such as axes, machetes, sticks and knives, suggesting a degree of spontaneity. The police were initially unable to control the violence and the army had to be called in. These security forces were later accused of excessive use of force, including unlawful killings.⁸

Panel Mandate and Structure

In May 2011, Nigeria's President Goodluck Jonathan approved establishment of the Investigation Panel on Election Violence and Civil Disturbances to identify the causes of pre- and post-election violence surrounding the 2011 election in the states of Kaduna, Adamawa and Akwa Ibom. The panel was led by Sheikh Ahmed Lemu (and thereafter commonly referred to as the "Lemu Panel"), comprised 22 members, and had the mandate of determining the number of persons killed (and where possible, evidence linked to perpetrators) as well as identifying the extent of damage, including to personal and public property. In identifying number of deaths and perpetrators, the commission was also to identify the types and sources of weapons used by these individuals as well as put forth recommendations on how to prevent the transport of weapons into Nigeria in the future.

Inquiry Process

The Panel did not have authority or jurisdiction to indict any individual or group of individuals, given that it was not established as a Judicial Commission or Tribunal of Inquiry. These instruments are constituted in law and are granted statutory authorities under the law. However, in its report, the Panel could present documents and other information that the security agencies

⁸ http://www.nsrp-nigeria.org/wp-content/uploads/2014/11/E189-NSRP-Policy-Brief-2011-Elections-in-NN_FINAL_web.pdf

could then use to follow up and prosecute individuals. The Panel issued its final report to the President five months after its appointment.

Lemu Panel Findings

The Lemu Panel released its report in October 2011. The Panel concluded that the post-election violence resulted in an estimated 938 deaths and 735 injuries over three days of unrest. The Panel identified several roots causes for the violence. First, there was a history of impunity by previous regimes on prosecutions of perpetrators guilty of fomenting widespread violence. The Panel pointed to seven other initiatives where such investigations took place and no prosecutions resulted. These initiatives included Judicial Commissions of Inquiry into civil disturbances in Bauchi, Kafanchan, Plateau, Wase and Langtang states as well as a Panel of Inquiry on National Security and an Electoral Reform Committee. Second, the violence was fueled by a general public discontent with the lack of electricity, poor roads, and rampant bribery and corruption in the country. The third factor was the financial incentives associated with holding public office. The Panel observed that elected officials “lucritised” their offices for financial gain, this creating more intense motives to win. Generally speaking, the violence was political in nature; however, ethno-religious factors were brought into it by politicians and the impact of zoning the presidency reinforces the ethno-religious dimension to politics. The Panel asserted that some violence triggered by Congress for Political Change (CPC) candidate General Mohammodu Buhari statement to his supporters to “guard their votes”. The Panel identified the names of individuals to forward to prosecutorial authorities.⁹

Case 3 - Zambia – Commission of Inquiry into Violence and Tribal Voting (also Commission of Inquiry into Voting Patterns and Electoral Violence) August 11, 2016

Description of the Violence

In early July 2016, the Electoral Commission of Zambia suspended campaigning for ten days in Lusaka and Namwala after violent clashes between campaign supporters of the ruling Patriotic Front (PF) and the opposition United Party for National Development (UPND). In one incident, police opened fire on UPND supporters after they refused to cancel a campaign meeting. One supporter was killed in the incident. Similar clashes continued to occur during the pre-election period.

Commission Mandate and Structure

Authority to form such a commission is found in Chapter 41 of the Inquiries Act which states “The President may issue a commission appointing one or more commissioners to inquire into any matter in which an inquiry would, in the opinion of the President, be for the public welfare”.

The law provides for these other requirements – specify the subject, nature, and extent of the inquiry concerned, the manner in which the commission is appointed, the chairman selected,

⁹ <http://www.nairaland.com/779226/post-election-violence-lemu-committee-submit>

what constitutes a quorum, place and time for the report, and whether the proceedings will be public or not or a combination of both. Commissioners are immune from legal actions against them for their work on the commission, individuals subject to this inquiry may choose to have representation, government represented by Attorney-General. The commission is not bound by rules of evidence or procedures as in a court and may conduct their proceedings according to their own rules. Commissioners can call people by summons, testimony by oath administered by the commission, if people refuse a summon, found guilty of an offense and fine up to one thousand and five penalty unit or six months in jail, or both.

In this case, the mandate was to inquire into Zambian voting patterns between 2006 and 2016 and to determine the root causes of these patterns. The Commission was also mandated to examine the extent to which pre-election violence influenced voting patterns in 2016. The Commission is to consider the role of political parties, traditional leaders and the media in influencing these voting patterns. It was given a 120-day mandate, however, the President extended its mandate through November 30, 2017.

The Commission members were appointed by the President on October 21, 2016. It consists of 15 members and chaired by Justice Munalulu Lisimba and includes three women (vice-chair), a priest, a chief, and a 25-year-old National Youth Coordinator for the Pillars for Peace Zambia. The Commission was sworn in by Chief Justice Ireen Mambilima on October 28, 2016. The Commission held a meeting with political parties in order to explain its mandate on December 16, three days before public hearings began on December 19.

Inquiry Process

Public hearings commenced at the Civic Centre in Lusaka on December 19, 2016. Justice Lisimba, Commission Chairman, called upon Zambians to make statements, “In particular, I call upon political parties, civil society organizations, the church, student bodies and other stakeholders, to support this process by encouraging their members and the public at large to appear before the Commission and testify.”¹⁰ The Chairman wanted to have as many public hearings as possible, starting in Lusaka and then moving throughout the country. People can submit testimony in any form where they feel safe and comfortable. The police will provide protection at hearing venues. Once the hearings are completed, the findings of the Commission will be published.

Comparative Evaluation

The first factor to be noted is that all three of these cases are from Sub-Saharan Africa, but each had their genesis for locally-driven motives. During the period surveyed, there were not any such initiatives in countries outside of that region. The emergence of such instruments in the region at a time when there is a growing concern of the ICC’s seeming focus on Sub-Saharan African prosecutions. Such a concern may be one factor in explaining the adoption of these nationally-based approaches instead of international ones. Nevertheless, the ICC was a factor in

¹⁰ <https://www.lusakatimes.com/2016/12/18/commission-inquiry-violence-starts-public-hearings-lusaka-tomorrow/>

all three elections. It was brought into the Kenya case directly. In Nigeria, there was an on-line petition to bring Buhari into the ICC for prosecution. The ICC issued a warning to Nigerian political actors about eschewing electoral violence in 2015. And, in Zambia, the opposition invited an ICC investigation into the violence.

In each case, the commissions were appointed by the president for a specific calendar term. In the Kenya and Zambia cases, an inquiry commission law provided basic structure and statutory rules of operation. The members and composition ranged with each case, starting with Kenya, where there were three members, one Kenyan, and two non-Kenyans; 15 national members on the Zambian commission, and 22 Nigerians in the Lemu Panel.

Provisions were made for both public and private testimony, private testimony in cases where witnesses did not feel safe speaking in public about their experiences. In Kenya, specific public officials and non-governmental organizations were invited to testify. If not invited, then testimony would not be permitted. However, in Zambia, the hearings were open to anyone who requested time to testify. In Kenya, the two major political parties were prohibited from testifying. In Zambia, the Commission met with political parties to describe its approach to the investigation, before the commencement of public hearings.

In Kenya, the names of the perpetrators were not published, until forwarded to the ICC for prosecution. In Nigeria, the names were made public. The tipping point to disclose or not was in the strength of the testimony and adequacy of the investigation time so assure the accusations were true beyond a reasonable doubt so that individuals are not falsely accused of committing these atrocities. The CIPEV pursued a line of investigation which focused on electoral violence against women.

And, none of these commissions possessed judicial authority but required a relationship with judicial authorities for prosecution of the crime that they uncovered. In Kenya, the rejected recommendation that a special tribunal be established, led to the entry of the ICC. In Nigeria, names were forwarded to judicial authorities for prosecution. However, in Kenya, successful prosecutions, either domestically or in the ICC have not been realized, while prosecutions have been pursued in Nigeria and compensation awarded to victims' families. The work of the Zambia commission is on-going at this writing.

Finally, the impact of these commissions on preventing future electoral violence is unclear. In Kenya, there are current fears of a return to violence in the August 2017 elections; and Nigeria continues to experience electoral violence on the national and sub-national levels. As a result, while clear prevention impact cannot be correlated with the existence of these commissions, their absence would mean impunity for perpetrators and a subsequent enhancement of incentives to employ violence.