

YET ANOTHER COMMISSION OF INQUIRY?

**ANALYZING THE COMMISSION OF INQUIRY INTO THE 2007 POST-
ELECTION VIOLENCE IN KENYA:WAKI COMMISSION**

By

Cinderella Omondi

Submitted to

Central European University

Department of Sociology and Social Anthropology

In partial fulfillment of the requirements for the degree of Master of *Arts*

Supervisors: Prof. Dan Rabinowitz

Prof. Don Kalb

Budapest, Hungary

2009

Abstract

Countries that have experienced ethnic conflicts often set up Commissions of Inquiry as part of an internal reconciliation process. A distinction is made between the social logic that propels Commissions of Inquiry and the sensibilities behind Truth and Reconciliation Commissions. While Truth and Reconciliation Commissions tend to function as collective, performative therapeutic processes, Commissions of Inquiry tend to operate as a mix between judicial processes that seek to bring perpetrators to justice, and a management enhancement exercise that reviews performance of responsible office holders. Most theoretical debates on Transitional Justice highlight Truth Commissions, while analysis of the potential use of Commissions of Inquiry as a Transitional Justice tool is scarce. Acknowledging the importance of Transitional Justice for a more durable stability in ethnically divided societies, this research takes the Commission of Inquiry into the 2007 Post-Election Violence in Kenya, (CIPEV), popularly known as the “Waki Commission”, as a case study. In the light of the report, I examine the extent to which modifications in the structure and operation of Commissions of Inquiry designed to involve more public participation could turn them into a more effective tool for administering Transitional Justice.

Acknowledgements

Accomplishing this task has been made possible through the consistent academic support of my supervisors, of whom I am deeply grateful: Prof. Dan Rabinowitz for his advice, diligent guidance and follow-up throughout the writing process; Prof. Don Kalb, for his support, advice and insight. My appreciation also goes to Prof. Andreas Dafinger and Prof. Thomas Rooney for their instruction and support in the writing process. My gratitude further goes to the Sociology and Social Anthropology Department Professors and staff, whose knowledge and wisdom equipped me for this task. Special thanks to the Head of Department, Prof. Prem Kumar together with Kriztina Bradeanu and Ildiko Chikan for their concern and diligent support. Most of all, I am grateful to CEU, whose sponsorship enabled me to pursue this course.

I also greatly appreciate my husband, Tom, for his support and encouragement throughout the course. Special thanks to our 6 yr old daughter, Gabrielle, who promised to “help me write my thesis when she is 11 years old”! I give my deepest gratitude to family and friends for their prayers and encouragement.

Dedication

To Papa Maurison Misiko and Mama Leonida Misiko whose love and sacrifice gave me a chance in life to pursue primary, secondary and university education.

Table of Contents

Abstract	i
Acknowledgements	ii
Dedication	iii
List of Abbreviations and Acronyms.....	v
Introduction	1
Thesis Structure	5
Chapter 1. Literature Review	6
1.1 The Legality and Administration of Commissions of Inquiry.....	6
1.2 Transitional Justice in Truth and Reconciliation Commissions.....	11
Chapter 2: Kenyan Elections and the Ethnic Factor	18
2.1 Kenyans go to the polls	18
2.2 The Coalition Government and the Waki Commission	22
Chapter 3: A Reflection on The Waki Commission.....	23
3.1.The Waki Commission.....	24
3.1.1 Waki Commission: Set up and Findings.....	25
3.1.2 Waki Commission: Operation	28
3.1.3 Involving “Civil Society”	30
Chapter 4: Commissions of Inquiry and Transitional Justice	33
Looking Ahead	45
References	47

List of Abbreviations and Acronyms

CIPEV	Commission of Inquiry into Post Election Violence
CoI's	Commissions of Inquiry
ECK	Electoral Commission of Kenya
FIDA	Federation of Women Lawyers
GSU	General Service Unit
ICJ – K	Kenya Section of the International Commission of Jurists
IREC	Independent Review Commission
KANU	Kenya African National Union
KNCHR	Kenya National Commission on Human Rights
KPTJ	Kenyans for Peace with Truth and Justice
MoU	Memorandum of Understanding
NARC	National Rainbow Coalition
ODM	Orange Democratic Movement
OHCHR	Office of the United Nations High Commissioner for Human Rights
PEV	Post Election Violence
PNU	Party of National Unity
TRC's	Truth and Reconciliation Commissions
UN	United Nation

KHRC	Kenya Human Rights Commission
KNDR	Kenya National Dialogue and Reconciliation team
TJRC	Truth Justice and Reconciliation Commission

Introduction

Ethnicity for most authors is not primordial but an attribute to label conflicts and political relations. (See Blanton et al 2001; Gurr and Harff 1994; Rothchild 1997; Chabal and Daloz 1999; Eller 2001; Mamdani 2001; Chua 2004; Klopp 2001). Over the past decades, there has been an increase in political unrest, violence and numerous deaths across ethnic lines, especially in Africa. Most of these conflicts are influenced by the politicization of ethnicity, or as a result of a colonial legacy, as argued by many authors. Countries that have experienced ethnic conflicts often set up Commissions of Inquiry (CoI's) as part of an internal reconciliation process. A distinction is made between the social logic that propels CoI's and the sensibilities behind Truth and Reconciliation Commissions (TRC's). While TRC's tend to function as a collective, performative therapeutic process, (OHCHR Report 2006, Kritz 1995, Crocker 2000), CoI's tend to operate as a mix between judicial processes, (e.g. Seeking justice by identifying the perpetrators of ethnic violence and making them legally accountable) and a management enhancement exercise whereby success and failure of responsible office holders is reviewed. (Mackay and McQueen 2003; Kritz 1997). To examine how these processes are achieved, we need to consider the place of Transitional Justice in conflict-ridden societies.

Transitional Justice can be very useful in helping groups involved with ethnic strife to come to terms with the past, deal with the emotional and spiritual wounds, and better their chances to come to an agreement on tangible things such as power sharing, distributions of public goods and cooperation. However, theoretical debates on Transitional Justice have generally focused on TRC's. (See Kritz 1995; Teitel 2000). CoI's have not often been analyzed as tools for administering Transitional Justice. In fact, CoI's have their roots in the

managerial approach in implementation of public policy, essentially developed by the British system to facilitate administrative work. (Royal Commission 1966; Gosnell 1934) However, this approach needs to be reconsidered and broadened.

Acknowledging the importance of Transitional Justice for a more durable stability in ethnically divided societies, this research takes the Commission of Inquiry into the 2007 Post-Election Violence in Kenya, (CIPEV, popularly known as the “Waki Report”), as a case study. I will assess the extent to which CoI’s could also make a contribution to Transitional Justice. By examining some of the elements in the structure and operation of this Commission, it will be shown that a rethinking and a reform in the structure and operation of Commissions of Inquiry might be necessary to enable it to be an effective tool in administering Transitional Justice. Using Case Study methodology to analyze this Commission, as Lijphardt (1971) says, would provide a much in-depth analysis. Lijphardt further says that concentrating on one case enables profound examination even when resources concerning the subject of study are scarce.

I will examine some of the existing arguments on TRC’s and CoI’s to establish a framework for analyzing this case. I will rely mainly on library texts, journals and newspaper articles for relevant information. The Waki Commission is very important in this sense because it is an international commission with possibilities of its relevance reaching beyond Kenyan borders. Being a recent document, not much scholarly work has been written or published on it, and whatever has been written is often partisan or politically biased. I seek to analyze this Commission from a sociological perspective. To provide a broader base for discussion, I will also refer to one TRC and one CoI: the South African Truth and Reconciliation Commission. This was established by Nelson Mandela after the abolition of

apartheid; the Orr Report, established in Israel to examine the October 2000 riots, in which police killed 12 Israeli-Arabs and 1 Israeli-Jew.

In seeking to provide a paradigm for Transitional Justice, Teitel writes: “Whether trials, constitutions, reparations, administrative tests, bans, or historical inquiries, the legal measures pursued in periods of political transition are emblematic of normative change, for all are operative acts that aim at proclaiming the establishment of a new political order” (2000:223). However, the question of Transitional Justice is often problematic in itself as Stacey (2004) points out. Stacey explores the difficulties encountered in the process of Transitional Justice, showing how hard it is to implement it when those who previously held power have a capacity to cause harm if attempts are made to bring them to justice. Stacey uses John Locke’s (1994) approach to Transitional Justice which states that punishment should be meted out to human rights abusers without affecting the social stability, while in the same note claims that some human right abusers should be treated as beasts who should be denied natural rights, and that it is unnecessary to take accounts of victims of such abusers. Kritz (1995) also points out the controversies in acknowledging the past and dealing with repressive regimes, as the old regimes may still have those protecting them and deny the atrocities charged against them as having ever occurred, shift blame or seek to justify their actions. Seeing the complexities that confront efforts to promote truth, justice and reconciliation, I believe it is expedient to examine the efficiency of both commissions and seek to develop a better framework for administering Transitional Justice.

Commissions of Inquiry investigate a specific event or issues at a particular time. They have their origin in the British legal system and are part of the British parliamentary system. Royal Commissions are appointed and answerable to the throne, and usually address more important and national issues. A Commission of Inquiry is restricted in its terms of

practice to the topics stipulated under the Commission of Inquiry Act. (Royal Commission 1966, Gosnell 1934). Commissions of Inquiry may vary in form (Royal Commissions, Executive Commissions, public inquiries) but they all share some basic characteristics. (Manson and Mullan 2003; Bradley 2003) On the other hand, Truth and Reconciliation Commissions are temporal bodies officially appointed by the state and in some cases the armed opposition pursuing a peace accord. They are usually non-judicial and created at a point of political transition either from war to peace or authoritarian rule to democracy. (Quinn and Freeman 2003).

While there has been extensive research and literature on both types of commissions, many writers on CoI's have mostly laid down strategies for better formulation and policy implementation or examined historically and geographically the nature of these commissions. Manson and Mullan (2003) investigate into the nature and efficacy of CoI's in various countries. Other writers have focused on comparative discourses on policy implementation. Writers on TRC have mainly focused on historical and geographical occurrences of these commissions and assessing their effectiveness in administering Transitional Justice. Quinn and Freeman (2003) examine the practical lessons that can be learnt from Truth Commissions, while some other writers have engaged in comparative analysis. Literature on use of Truth Commissions as a tool for Transitional Justice has been on the increase in the past decade, but little has been written in the light of using Commissions of Inquiry too. In this research, I explore the extent to which Commissions of Inquiry could also act as an effective tool for administering Transitional Justice. To achieve this however, I suggest a reform in the structure and operation of Commissions of Inquiry.

Thesis Structure

In Chapter one, I examine some of the existing arguments underpinning Commissions of Inquiry and Truth and Reconciliation Commissions. I make a distinction between the two and explore the notion of Transitional Justice in this context. I also discuss its complexities in the bid to attain truth, justice and reconciliation. I show that both Commissions of Inquiry and Truth Commissions are used widely but much literature on Transitional Justice is focused on TRC's. I propose a need to consider CoI's too as a tool for administering Transitional Justice. In Chapter two, I lay a background of the ethnic issues in relation to Kenyan elections by describing the main events that led to the 2007 post-election violence and the subsequent formation of a coalition government under a power-sharing deal, which led to the formation of the Waki Commission.

Moving on to Chapter 3, I do a case study analysis of the Waki Commission with special emphasis on its structure and operation. Finally in Chapter 4, I evaluate the effectiveness of the Waki Commission and CoI's in general. To provide a broader paradigm for discussion, I also refer to the South African Truth and Reconciliation Commission and Israel's Orr Report. I discuss the possibilities of modification in CoI's in terms of structure and operation to enable it to be an effective tool for administering Transitional Justice. I offer some suggestions on reform in the structure and operation of CoI's and finally point the way ahead in dealing with ethnic conflicts through means of Commissions of Inquiry. I conclude that both Commissions of Inquiry and Truth and Reconciliation Commissions are complimentary tools for administering Transitional Justice.

Chapter 1. Literature Review

To understand the need for setting up CoI's and TRC's, ethnicity and ethnic conflicts would have to be interpreted *not* from a primordial perspective, but from a constructivist approach. Primordial accounts hinge on the biological and geographical nature of ethnicity; hence ethnic conflicts would be seen as a natural and an inevitable outcome of the differences in ethnicity. Leaning on the constructivist approach, ethnicity as a construction enables the understanding of the need to find ways to resolve and avoid ethnic conflicts, and bring to justice those who utilize ethnicity as a tool for political and social manipulation. (See Blanton et al 2001, Gurr and Harff 1994, Rothchild 1997, Chabal and Daloz 1999, Eller 2001, Mamdani 2001). Seeing ethnicity and ethnic conflicts as constructs broadens the understanding of use of Commissions of Inquiry and Truth and Reconciliation Commissions as means to resolve and avoid future conflicts, and exercise justice upon the perpetrators of ethnic violence.

1.1 The Legality and Administration of Commissions of Inquiry

Commissions of Inquiry differ from Truth Commission in that they deal with specific events, limited to a specific time, location and individuals involved. Some of the countries that have established Commissions of Inquiry include: Bolivia, Brazil, Burundi, Cote d'voire, East Timor, Ethiopia, Israel, Kenya, Honduras, Paraguay, Peru, Rwanda, Somalia, South Africa, and Uganda.(United States Institute of Peace 2005; Kritz 1995). While TRC's focus on the past by investigating trends of abuses and specific violations (extrajudicial killings, genocide, disappearance, rape, torture and severe ill treatment and other gross

violations of human rights) over a period of time,(Crocker 2000; Quinn and Freeman 2003), Commissions of Inquiry investigate a specific event or issues at a particular time.

Commissions of Inquiry originated in the British legal system and are part of the British parliamentary system. Royal Commissions are appointed and answerable to the throne, and usually address more important and national issues. A Commission of Inquiry is restricted in its terms of practice to the topics stipulated under the Commission of Inquiry Act. (Royal Commission 1966; Gosnell 1934). According to the Royal Commission in 1966, tribunals of inquiry should be appointed only in cases of great concern to the public. Topics may cover a wide range of subject matters unlike TRCs; hence a CoI may vary in form: (Royal Commissions, Executive Commissions or public inquiries). While acknowledging these variations, Manson and Mullan (2003) say this of a Commission of Inquiry:

It is appointed by the government with a precise mandate as an *ad-hoc* response to some public event or issue with powers as provided by a previously legislated statute, usually an Inquiries Act; it may be federal or provincial and may refer to itself as “Royal Commission” or not and it culminates in a report to the Executive complete with recommendations that is almost always released to the public. (p.3).

Manson and Mullan (2003) further claim that in order to draw up a more comprehensive detail on the subject, it should be considered to expand the category to include other investigative tools that inquire into specific events or issues but lack the characteristics above. According to Moore (1913), Executive Commissions acquire their legality from their strength to offer a convincing testimony. With reference to the Australian and New Zealand structure, what Moore questions is the power of the Executive government to carry out investigations involving the examination of witnesses with the aim of exercising further action from the resulting investigation. He links it historically on attacks on the liberty of the subject by questioning the relations of the Executive and the Judiciary. Manson and Mullan (2003) investigate the question of whether the inquiry is to be a tool in the development of public policy by unveiling facts and designing recommendations. According

to them, inquiries are an essential instrument of the Executive Branch, but they point out that ironically, its composition is drawn from the Judicial Branch. They question the use of judges, arguing that it is an improper compromise of the principles of separation of the powers of the independence of the Judiciary and the Executive. Bradley (2003) claims that although Commissions of Inquiry have grown extensively, British literature about them is insufficient, and somewhat obsolete. Bradley further says that an Inquiry may point to the ill conduct occurring within the government's department but fail to establish the immediate cause of such and who it directly points to. According to him, the inquiries may not also explain the workings of the previous system and further still lack the power to execute judgment, for example call for resignation for those responsible.

Concerning the corruption of police force in Queensland, Hamer (2004) claims that parliaments are often ineffective in investigating grave allegations of government misconduct. However, when faced with serious allegations, a government may have to set up a Commission of Inquiry. Hamer however warns that setting up a CoI could be an embarrassment to the government when in the process; it is unable to control the outcome of the Commission, citing the old adage that a commission should never be set up unless the answer is known. He claims that a government may find it difficult to deny the Commission once set up, a request for extension of time, and widening terms of reference. He points out to the difficulties in setting and running a commission, explaining that it took 2 years for the Fitzgerald Commission to complete its findings. Hamer claims the Fitzgerald Commission revealed rampant corruption within the police force and the government which forced the resignation of the Premier, jailing of 3 ministers as well as the Commissioner of Police. We can see that this is a great example of a commission that was effective in bringing culprits to justice and improvement in management of government institutions. However, the Fitzgerald

Commission also points out another problem with Col's, apart from government embarrassment and costly operation as its effect on the judiciary. Furthermore, (Hamer 2004) argues against the use of a judge to preside over a commission, citing the need to separate powers of the Executive and the Judiciary and claiming that Col's could still be effective without judges. He also points out that commissions investigate into government operations and their consequences, which the parliament responsible should address, but which mostly are left unattended. I also believe this is a critical position in which Commissions of Inquiry need redress to be more effective.

On the other hand, Walter (2007) points to the need learn from the lessons of the Fitzgerald Commission, citing that the problem of police corruption is neither new, nor confined to the Victorian government. He claims that prior to the 2006 state elections, the Victorian government entered into a secret written deal with the Police Association to secure their electoral support. This act, he argues is a compromise that goes against the Fitzgerald Commission, warning of a need to separate the government and the Police Association's operations. He claims the deal empowered the Police Association at the expense of the Police Commissioner. Walter (2007) also warns about misuse of media by police force and other public officials to further their own interests and attack opponents. The problem of compromise of government and police forces as will be discussed in chapter 4, plays a major role in exacerbating violence and weakening the effect of Commissions of Inquiry.

One of the major concerns in Commissions of Inquiry in seeking to administer Transitional Justice is the question of accountability. Mackay and McQueen (2003) examine the concept of blaming as they explore the notion of accountability. They claim that it proves to be problematic in CoI's, if the government or one of its representatives is likely to receive blame or required to be accountable. Blaming in this case is often justified by the argument

that everything be unraveled before appropriate action is taken. Mackay and McQueen (2003) further argue that once names of the people involved have been released, the public quickly loses interest as curiosity dies down and there isn't much pressure placed on politicians to implement an Inquiry's recommendation. To increase accountability, Centa and Macklem (2003) argue that Commissions of Inquiry should be totally independent of government involvement, as they claim; government authorization of these Commissions usually has vested interests and is highly politically driven. They suggest that governments should be barred from either preventing the establishment of CoI's or close them down before they complete their mission. They propose a reorganization and empowerment of Law Commissions in Canada to establish inquiries into federal matters covering incidents that appear to involve government misconduct, a disaster, systemic problems or some other public crisis. It is noteworthy that this crippling tendency in Commissions of Inquiry's effectiveness requires a re-examination into its structure and operation.

Following the suggestion by Manson and Mullan (2003) to broaden the category of Commissions of Inquiry, I think this is an important consideration because the lack of power in Commissions of Inquiry has been largely due to their inflexible, bureaucratic nature. Broadening the category would allow CoI's more access and power to explore more in-depth issues that in their present form are unable to accomplish. Given that Commissions of Inquiry could cover a wide range of topics, in this research, I focus on only Commissions of Inquiry into ethnic conflicts, seeking to show that like TRC, this tool could be used to administer Transitional Justice. Sriram (2004) points out the difficulties of achieving justice and peace in transitional times but he argues that it is possible for consolidating democracies to pursue both peace and justice. He further says that in order to achieve justice and peace, these emerging democracies can choose selective prosecution, purges and even Commissions of

Inquiry that expose the past. He further argues that these methods may not ensure total justice, but asserts that they may be the best option. He further claims that wise leaders need to know that there is a delicate balance between truth and justice and hence these should be pursued cautiously. I believe both peace and justice can be pursued in transition times as Sriram claims. However, I see the need to find ways of improving CoI's to empower them as an effective means of administering Transitional Justice. There is a lot of literature and research on TRC and Transitional Justice, but little on Commissions of Inquiry and Transitional Justice. It is in my view that further research into use of Commissions of inquiry as tools for administering Transitional Justice is not only desirable but potentially profitable in seeking to resolve ethnic conflicts; hence my exploration in this research.

1.2 Transitional Justice in Truth and Reconciliation Commissions

Truth and Reconciliation Commissions are created to research and report on human rights abuses over a certain period of time in particular country or in connection to a particular conflict. They exist for a given period of time with a specific mandate and are organized through a number of processes and procedures with the aim of delivering a comprehensive report, with conclusions and recommendations. These are directed towards accountability for past abuses of authority, enhance national reconciliation and/ or create a new political order or legalize new policies.

Some of the countries that have established Truth Commissions are Argentina, Bolivia, Chad, East Timor, Ecuador, El Salvador, Germany, Ghana, Guatemala, Haiti, Nepal, Nigeria, Panama, Peru, Philippines, Serbia and Montenegro(former Yugoslavia), Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, Uruguay and Zimbabwe. (United States Institute of Peace 2005; Kritz 1995). Truth and Reconciliation Commissions are usually non-judicial

bodies, sanctioned, authorized or empowered by the state and in some cases the armed opposition as well in a peace accord. They are created at a point of political transition either from war to peace or authoritarian rule to democracy. They focus on the past by investigating trends of abuses and specific violations over a period of time and submit a final report with conclusions and recommendations (Quinn and Freeman 2003).

Due to their non-judicial nature, many authors question the notion of justice, truth and reconciliation. They are concerned whether just pardoning the guilty by confession can prevent future violations and bring healing to victims and their families. This problem of justice is often taken up especially by researchers that see a need to involve other forms of justice, including tribunals and courts of law. (Roht-Arriaza and Marriezcurrena 2006; Hayner 2001; Kritz 1995; Stacey 2004, Crocker 2000, Teitel 2000). And as Avruch and Vejarano (2000) point out, Truth and Reconciliation Commissions cannot, due to their nature, render the kind of justice demanded by judicial processes. What is contested in most of these arguments is whether forgiveness should be exercised without retributive justice, or the contingency of truth and justice. I will examine some of the arguments raised concerning the efficiency of Truth and Reconciliation Commissions.

Quinn and Freeman (2004) claim that TRC's though not applicable in every context have the capacity to:

help establish the truth about the past; foster accountability for perpetrators of human rights violations; cultivate reconciliation; recommend victim reparations and necessary legal and institutional reforms; provide a public platform for victims; inform and catalyze public debate; help to consolidate a democratic transition; and serve as a safeguard against revisionism. (p.1120).

Notwithstanding these noble goals, Quinn and Freeman are quick to point to the obstacles that may hinder some or all the above goals, and these include inadequate terms of reference, a weak civil society, political upheaval, victims' security, and comprised administration of

justice. Revisiting the points above through the arguments raised by other researchers and scholars, I seek to explore the complexities and limitations of using Truth and Reconciliation Commissions as a tool to resolve ethnic conflict, and in focusing on my central argument, as means to administer Transitional Justice.

Transitional Justice may be referred to as a conception of justice, a “transitioning” from repressive rule or armed conflict with past atrocities. It is characterized by legal responses to confront the wrong doings of repressive former regimes in order to overcome social divisions or seek reconciliation. (Roht-Arriaza and Mariezcurrena 2006; Call 2004). Roht-Arriaza and Mariezcurrena question the very notion of Transitional Justice, if the government that participated in the atrocities is the one setting up the Truth Commissions. However, they claim that non-judicial methods are better at revealing truth which wouldn’t be spoken at a brutal judicial cross-examination, and deal with many issues that are blurred as it is typical in most conflicts.

On the other hand, Call (2004) sees the enormous influence that instruments of Transitional Justice have had on state sovereignty and hope for global justice. However, he argues that a closer scrutiny of Transitional Justice reveals deep flaws. He proposes the need for a more honest acknowledgement of the unfairness and flaws of the current transitional justice tools, by working extensively at ending their imbalanced application. He identifies Truth Commissions as tools that offer unusual contributions that judicial trials cannot, and asserts that they have enabled a redress of inherent individualistic bias of human rights by bringing social processes and consequences into light. He sees hope in Truth Commissions as second-best alternative to judicial punishment but points out to the serious problems inherent in Truth Commissions. Call cites the possibility for truth-telling bodies to suppress trials for lesser suspects and crimes, and that apart from South Africa that offered conditional amnesty

for perpetrators who fully confessed, most TRCs are unable to obtain detailed accounts from perpetrators due to their policies and actions. The possibility of amnesty however, also is part of the complexities in dealing with Truth Commissions as instruments of Transitional Justice.

In seeking to advance the cause of Transitional Justice, Teitel (2000) regards trials; constitutions; reparations; administrative tests; bans; and historical inquiries, which are all legal measures pursued in political transition as symbolic of normative change. She asserts that they all work towards the creation of a new political system. In spite of the essential goals of establishing a new political order, signifying normative change, the challenges of progressing into a smooth transition using the tools such as TRC's are evident as argued by many authors.

Stacey (2004) explores the obstacles encountered in the process of Transitional Justice, showing how hard it is to implement it when those who previously held power have a capacity to cause harm if attempts are made to bring them to justice. Stacey uses John Locke's (1994) approach to Transitional Justice, which states that punishment should be meted out to human rights abusers while maintaining social solidarity, but in the same note claims that some human right abusers should be treated as beasts who should be denied natural rights, and that it is unnecessary to take accounts of victims of such abusers. In so doing, Stacey presents a dilemma locked in Transitional Justice: in attempting to punish human rights abusers, whether the rights of the abusers will also be violated..

Transitional Justice poses both a controversy and a necessity to act as Kritz (1995) points out. Kritz claims that acknowledging the past and attempting to deal with repressive regimes may be difficult if those charged with the atrocities deny the occurrence. He further says that some may still have those protecting them, shift blame or seek to justify their actions. However, he sees the need for a comprehensive official accounting of the past as a

means of creating a successful democratic transition, citing “truth commissions” as one way of dealing with this. Kritz (1995) argues that both victims and perpetrators of past abuses need to deal with the facts and consequences of their past. He also claims that societies ruined by the perpetrators of the violence should formulate strategies to confront their “demons.” (1997: 2). However, he acknowledges the pain and sensitivity of dealing with this past, but asserts its necessity. He argues that although many countries that use TRC’s already knew relatively much that had occurred, the acknowledgment of past abuses by a legal and impartial, locally and internationally recognized body is paramount; hence there is a need for TRC’s. However, Kritz recognizes the limitations of TRCs use as a substitute for prosecution and outlines similar setbacks raised by Quinn and Freeman (2004).

In spite of the challenges, Kritz maintains that TRC’s could prove to be more beneficial practically as compared to setting up of tribunals, or a compromised local justice system, citing the case of former Yugoslavia and Rwanda. With a realistic limit on mandates on TRC’s, Kritz sees them as very vital tools in dealing with past abuses by acknowledging the truth and bringing about reconciliation. But truth and reconciliation as shall be seen, are other hurdles in dealing with the past; as elusive as justice. The very notion of truth is often contested as being relative. This is bound to create a lot of obstacles in establishing the “real truth” of what actually happened, as Avruch and Vejarano (2000) point out.

This notion of multiplicity of truths is taken up by Crocker (2000) who highlights the need to reveal truth about past atrocities by identifying “forensic truths” as the hard facts on moral and legal right to identify the victim, perpetrator, what occurred together with the location and time. He also identifies “emotional truth”, as the psychological and physical impact on victims and their loved ones. This kind of “truth” is however very difficult to establish as it is impossible to empirically quantify or verify. Crocker further emphasizes that

it is not sufficient to discern truth, but that that truth should be released to the public, more so if it would facilitate public deliberation. Roht-Arriaza and Mariezcurrena (2006) also recognize the problem of truth as they say the problem with Truth Commissions is the assumption that there is a single “truth”. This according to them makes TRC’s produce factual information but not necessarily a common understanding. And is seeking to reveal truth, they argue that victims could be retraumatized and left with open wounds with no clear direction of the resulting outcome.

Hayner (2001) argues from a different angle, claiming that some TRC’s are restricted to looking at only a portion of abuses, for example the disappearances of Argentina, Uruguay and Sri Lanka, and this restriction limits the truth told. Hayner claims that a Commissions interpretation of “truth” will be determined by personality and personal priorities of its leadership. On the question of truth versus justice, Hayner argues against truth replacing justice, and instead sees TRC’s, neither as non-judicial replacements for prosecution, nor as second-best alternative as some human rights advocates and authors have suggested. On the contrary, she insists that TRC’s can, and most likely will be used extensively as positive contributions to justice and prosecution. She claims they should execute judicial-like decisions and serve as a compliment to a very weak judicial system. Hayner further argues against blanket amnesty, as this offer of non-prosecution does not necessarily mean that truth will be established and would heighten future atrocities as there is no proof that forgiveness and reconciliation has actually happened. Amnesty has been used as a mechanism to solicit for truth and encourage reconciliation, but the notion of reconciliation is also another problem of TRC’s.

Crocker (2000) addresses this problem of reconciliation by suggesting that reconciliation is necessary for enemies to coexist without further violence by adhering to the

state's rule, but as he points out, this mere coexistence does not mean forgiveness has actually taken place and that it is a guarantee for prevention of future violence. He instead suggests that the avenue of reconciliation through TRC may be possible in societies with a religious inclination to forgive. Crocker however argues against implementing this forgiveness without justice, as he sees this being a compromise to victims and perpetrators moral autonomy and encourage pretentious confessions or guilt and remorse. Achieving Transitional Justice through TRC's may seem elusive when we consider the setbacks. However considering Commissions of Inquiry too as tools for administering Transitional Justice may help reduce or eliminate some of these problems. Elster (2004) claims that in case of political transition, violation of some of the principles may be inevitable, desirable, understandable and forgivable. The use of TRC in administering Transitional Justice is generally considered an appropriate alternative means of restorative justice, against retributive justice in courts of law. However, the complexities in accomplishing a true justice in transition are still a contested field. This calls for a need to explore other possibilities, and in this research, I suggest a reflection on the use of Commissions of Inquiry too to administer Transitional Justice.

Overall in this chapter, I would like to reinforce that TRC's have been used extensively to administer Transitional Justice with considerable success in some countries than others. Most authors have questioned the legality of justice in achieving reconciliation by questioning the very notions of truth, justice and reconciliation. Many have concluded that TRC's are the best alternative form of restorative justice as opposed to retributive justice in the courts of law, especially in cases where there is a weak or compromised judicial system. The notions of truth, justice and reconciliation still remain a contested ground. Commissions of Inquiry on the other hand are widely used in a range of subjects. In this research, I focus

on Commissions of Inquiry into ethnic conflicts, showing that they could also make a contribution to Transitional Justice. Even though Commissions of Inquiry have been widely in many countries, they lack power in implementation of their recommendations hence they are lightly treated by the public and governments as discussed by most authors. A reform in the structure and operation of these tools might be necessary so that they too could be used as effective tools for administering Transitional Justice. While there has been a lot of research and Literature on TRC and Transitional Justice, more research needs to be done with regards to Commissions of Inquiry and Transitional Justice; hence the exploration of this research. I seek to explore this area and open up a discussion of the possibility of more literature and research in the use of Commissions of Inquiry too, as a tool for administering Transitional Justice.

Chapter 2: Kenyan Elections and the Ethnic Factor

2.1 Kenyans go to the polls

On December 27, 2007, a majority of Kenyans exercised their democratic right by voting in the country's fourth multi-party elections. There was great anticipation among many people of strengthening the institutions of democracy, primarily in bringing about change. Prior to the elections, a number of polls had indicated that the incumbent President Mwai Kibaki of the Party of National Unity (PNU) trailed behind opposition candidate Raila Odinga, of the Orange Democratic Movement, (ODM). This may have been largely due to the outcome of the vote on the referendum of the proposed new constitution in 2005, in which the ODM movement, which voted "no", won against the incumbent's party which

voted “yes”.¹ After the resounding defeat, the President sacked all the ministers opposed to his proposition, including Raila Odinga. This act however strengthened ODM’s popularity with common citizens. An estimated 14.2 million (82% of the total eligible voters) Kenyans were registered to vote, while 2,547 Parliamentary candidates were qualified to run in 210 constituencies, according to the Electoral Commission of Kenya (ECK). Early election results showed Raila Odinga ahead of President Mwai Kibaki. (Dagne 2008). However the final results were withheld, creating tension and suspicion of vote rigging. The mounting tension gave way to protests and violence, with opposition supporters demanding the announcement of the election results. The call went unheard, and the opposition took matters into their own hands. The ODM party declared themselves winners based on the tallying of votes that had already streamed in. There was mixed reaction: excitement, fear, joy, and anxiety. Some took to the streets, looting shops, causing damages and blocking traffic. Since there was no official announcement of who had won election, confusion reigned. (Thompkins 2007).

Finally after much coaxing, the Chairman of the Electoral Commission declared President Kibaki, the winner. Immediately after this announcement, the violence escalated along ethnic lines. President Kibaki, of the Kikuyu ethnic group was hurriedly and secretly sworn in as President in a private ceremony, despite concerns from local and international observers that the election process and results were deeply flawed. When interviewed later about the outcome of the election, the Chairman of the ECK, Mr. Kivuitu, who claimed he

¹ On 21st of Nov 2005, a referendum on a proposed new constitution was held in Kenya with two referendum camps: Bananas led by President Kibaki, which voted “yes” and Oranges, led by Raila Odinga which voted “no”. The proposed new constitution was rejected by 57% against 43%. The rivalry was rooted in the failure of the President to create the post of an executive Prime Minister, which Raila was to fill, as agreed in the Momerundum of Understanding (MoU) prior to the 2002 elections in which Raila joined Kibaki in defeating the former President Moi’s choice candidate, Uhuru Kenyatta. For more on this (See Andreason and Tostensen 2006:13 “Of Oranges and Bananas: The 2005 Kenya Referendum of the Constitution.” Working Paper No.13. Chr. Michelsen Institute. (www.cmi.no/publications))

had acted under pressure from some powerful politicians, revealed this: "I do not know whether Kibaki won the election". He further claimed that some people threatened to collect the election results certificate, while he alone was mandated by law to do so. He claimed that he arrived at State House to take the certificate and found the Chief Justice there, ready to swear-in Kibaki. (Ongiri, 2008)

Ethnic tensions have often marked Kenyan elections as parties are generally constituted along ethnic lines from the major ethnic groups. The 1992 elections, after multi-party politics resurfaced in Kenya, was marked by election violence over land, between Kikuyu, Kalenjin, Luhya and Luo, in which approximately 1,500 people died, and 300,000 displaced within a period of two years. Klopp (2001) claims that the timing the “clashes”, the compromising behavior of many actors in the Kenyan government, together with many witnesses all strongly suggest that violence was strategically set to counter the onset of political liberalization in Kenya. However, she points out that many transition theorists do not deal with the rise of these “clashes” in their accounts of Kenya’s process of political change. The 1997 elections were also equally marred by violence, only it was mainly attacks by indigenous coastal communities against “foreigners” such as Kikuyu, Luyha and Luo. The Akiwumi Report was later set up to investigate into the land clashes, but its recommendations were never implemented. Had they been, the violence that was experienced in the 2007 elections might have been avoided or lessened. Both the 1992 and 1997 election violence took place within the campaign period, and the then KANU government was implicated for inciting the violence. (Matheson 2008)

However, the 2007 election violence was unprecedented; killings, burnings, maiming, raping and other horrendous crimes took place. The Ministry of Health reported before the Waki Commission a death toll of 1,020. (Omanga 2008). These figures were however

obtained only from public hospitals and private mortuaries; hence the death toll is estimated at 1,500 by some Human Rights groups. The 2007 PEV also saw a displacement of about 300,000. When the violence broke out, the Kikuyus, who have dominated Kenya's economy since independence, and perceived to be the chief backers of President Kibaki, experienced violence from especially Kalenjins in the Rift Valley who mobilized and attacked them, torching houses and killing people, in a bid to reclaim their ancestral land. The Kisii also experienced violence from the Kalenjin who demanded they go back to their original lands. Kisumu town and its environs, a stronghold of the ODM was in chaos with protesters who could not accept another President but their "own" Raila Odinga. They faced fierce combat from police forces. A large number died from bullet wounds. In the Nairobi's Kibera slums, there was direct affront, mainly between the Kikuyu and Luo. The Luo and some Luhya, who had hoped an election of the then opposition leader would improve their conditions, were outraged by the election results. They went on a rampage, pulling out the railway trucks, causing mayhem, forcing either group to flee for refuge. The violence was considered primarily ethnically based, but ironically, the highest deaths that occurred were from gunshots by police, with majority of those shot being protesting ODM backers, mainly from the Luo ethnic group. (Talbot 2008).

It must however be seen that the violence did not just involve these tribes. The Kikuyu in Nakuru, in Rift valley for example attacked and burned houses of the indigenous Ogiek hunter-gatherer community, pushing them away from their land. Officially, the Kenyan state recognizes 42 ethnic groups, although it is estimated over 70 distinct communities in Kenya, if minority indigenous groups such are the Ogiek – probably the largest hunter-gatherer community – are included. (Matheson 2008). The Kikuyu, who constitute the largest single ethnic group in Kenya, live for the most part north of Nairobi and have played a major role in the nation's political and social development. The estimated

proportions of the major groups are Kikuyu 22%, Luhya 14%, Luo 13%, Kalenjin 12%, Kamba 11%, Kisii 6%, and Meru 6%. Other Africans constitute 15% of the total population. Non-Africans (Arabs, Asians, and Europeans) account for no more than 1% of the population. (Encyclopedia of the Nations: Kenya-Ethnic Groups)

2.2 The Coalition Government and the Waki Commission

The violence across ethnic lines persisted for weeks, with both parties claiming victory. ODM supporters insisted on the resignation of the incumbent President, while the PNU supporters and sympathizers maintained that they won the elections fair and square. Upon being sworn in, President Kibaki called on the Nation to unite, put aside differences and seek national healing and reconciliation. He called for the opposition to accept the election results and join the government for the sake of unity. However, the ODM, led by Raila Odinga, declined vehemently but later insisted on a coalition government, sharing power according to majority strength in parliament. This was objected to by PNU and after much deliberation; a power-sharing deal was struck, brokered by the former UN Secretary General, Dr. Koffi Annan. The coalition government was finally installed with the creation of the Prime Minister post, for the then opposition leader, Raila Odinga, a post he currently holds. (Wachira 2008).

This deal brought tentative calm in the country, with many hoping the coalition government will seek to resolve the problems that precipitated the post-election violence; some grievances dated back to the time Kenya attained its independence. Seeking to resolve the tensions within the government, Dr. Annan called for the formation of an Independent Commission of Inquiry into the Post-election Violence, (CIPEV). It was chaired by Judge Philip Waki, hence the “Waki Commission.” The Commission handed its findings and recommendations to President Mwai Kibaki on 15 October 2008, and it was released to the public immediately, although the names of the perpetrators were withheld pending action

further action to be taken by the government in implementing the recommendations.

(Onyango-Obbo 2008)

This report came out after another similar report, the Kriegler Commission, which was set up to investigate into the performance of the Electoral Commission that led to the disputed election results.(Barno 2008). Commenting on the establishment of the Waki Commission, Prunier (2009) writes that the post-election violence in Kenya in January 2008 has left a bitter legacy but the official inquiry into the turmoil is an opportunity for civil society to demand for justice and accountability.

Chapter 3: A Reflection on The Waki Commission

Apart from the Waki Commission, the Kenya National Dialogue and Reconciliation team (KNDR) created the Truth, Justice and Reconciliation Commission (TJRC) in 2008 to investigate historical gross human rights violation dating back since Kenya got its independence. The findings of this commission are still underway and its operation under discussion. According to Wainana (2009), civil participation is crucial in the efficiency of TJRC. Civil participation he argues will ensure the TJRC process is executed in a way that benefits all citizens. Wainana further claims that TJRC should have “sharp teeth” like the Waki Commission, but instead he claims that it is deeply flawed; owned and run by the state, similar to an amnesty commission. He also says that this commission was ratified by the President with little public consultation, notwithstanding protests from civil society. However, what Wainana does not address is that some of the flaws he points out in the TJRC are in fact the very flaws that are a hindrance to the Waki Commission’s operation. In my opinion, a reform might be necessary to make it a more effective tool. The Waki Commission perhaps needs to have “sharper teeth” than what Wainaina (2009) claims it does. In this chapter, I will examine the Waki Commission with the aim of suggesting ways in which it

could be reformed in structure and operation to be a more effective tool for administering Transitional Justice.

3.1.The Waki Commission

A general look at the Waki Commission gives the impression of a comprehensive accomplishment. However, a closer look shows that a lot more could have been revealed and it would have had more potential to accomplish greater goals, if as in my central argument, there is a rethinking and reform of its structure and operation. Using this Commission as a case analysis, I intend to show how Commissions of Inquiry could be improved to act more effectively as a tool for administering Transitional Justice.

The release of the findings of the Commission to the public immediately after completion of the report, notwithstanding the implications of some state actors in orchestrating the violence, was a bold step, especially if one considers the trend with past Commissions of inquiry. Many ordinary Kenyans were skeptical about the outcome and eventual implementation of the proposition made by this commission. For instance, after the 1992 clashes, the Akiwumi Report was set up. (See Government of Kenya, the Akiwumi Report 1999), its recommendations still wait to be implemented. Then there was the Kriegler Report, (See Government of Kenya, The Kriegler Report 2008) which was set up to investigate into the operation of the Electoral Commission of Kenya. The validity of it was very much in question and its findings were disputed. It is upon these premises and insistence on formation of another, totally independent Commission that the Commission of Inquiry into the post-election violence (CIPEV), popularly known as the “Waki Report” was set up.

3.1.1 Waki Commission: Set up and Findings

The Waki Commission was ratified in Kenya Gazette Notice Nos.4473 and 4474 of 2008 on May 23, 2008 under the Commission of Inquiry Act (Cap, 102 Laws of Kenya) by the President, Mwai Kibaki in exercise of the powers conferred by section 3 of the Commissions of Act. CIPEV's terms of reference published by the President, Mwai Kibaki, in the Kenya Gazette were as follows:

- a) Investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 presidential election;
- b) Investigate the actions or omissions of State security agencies during the course of violence, and make recommendations as necessary;
- c) Perform any other tasks that the Commission may deem necessary in fulfilling the foregoing terms of references
- d) Recommend-
 - i. Measures to be taken to prevent, control or eradicate the occurrence of similar deeds in future;
 - ii. Measures with regard to bringing to justice those persons responsible for criminal acts;
 - iii. Measures to eradicate impunity and promote national reconciliation in Kenya;
 - iv. Such other legal, political or administrative measures as the Commission may deem necessary;
- e) Make such recommendations to the Truth, Justice and Reconciliation Commission as the Commission may deem appropriate, and to report its findings and recommendations within three months. (Kenya Gazette 2008)

According to CIPEV, the Commission comprised of: Phillip Waki (Chair, Judge of Appeal, Kenya), Gavin McFadyen (Member, New Zealand) and Pascal Kambale, (Member, Democratic Republic of Congo). The secretary to the Commission was George Kegoro (Kenya) and CIPEV'S Counsel Assistant, David Shikomera Majanja, all sworn in by the Chief Justice of Kenya on 3 June 2008. The chair was proposed by the National Dialogue and Reconciliation negotiation team, while the two international members were identified by the Panel of Eminent African Personalities following consultations with the Kenya Dialogue and Reconciliation negotiation team. The Panel consulted with various international organizations whose areas of expertise covered the issues dealt with by the Commission. The National Dialogue and Reconciliation team also formed the Independent Review Commission (IREC),

which primarily dealt with all aspects of the 2007 elections, while CIPEV focused on the electoral violence.

The mandate of the Waki Commission was to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters.⁽²⁾Commission 2008:vii). It was reported that the post-election violence (PEV) was similar to the ethnic clashes in the 1990s, a trend that revealed institutionalized violence in Kenya over the years. This was exacerbated by the armed militias, who according to the report were mainly bred in the previous ethnic clashes, addressed in the Akiwumi Report. The Waki Commission concluded that failure to disarm these militias in the past provided an avenue for their utilization by political and business leaders. A central issue discussed was the immense power invested in the Presidency, which remains to be a catalyst for election related violence with each group seeking to benefit from the presidency by electing one of their own. (P.28)

Among its findings was the widespread inequalities and economic marginalization, often running across ethnic lines; a major cause of slum based violence in areas such as Kibera, Nairobi. A significant finding of the Commission was the pattern of the violence: spontaneous in some areas, while well planned and organized in others in some geographic areas. (P.66). A sobering finding was the fact that some of the violence was organized or funded by some politicians and businessmen. (P.Viii). The Commission concluded finally that the violence was systematic: attacks were based on ethnicity and political affiliation as some perpetrators travelled long distances to carry out the violence. Concerning the conduct of the state forces, it was reported that a lack of preparedness and poor coordination among the state security agents contributed largely to the escalation of the violence. It was claimed

² I will hence refer to all quotes and references from the Waki Commission by page only.

that the efficiency of the Kenya Police and Administration Police was negatively affected by the absence of clear policing procedures and political manipulation. The Commission reported a total of 1,333 deaths. Out of the total, 405 according to this report were the result of gunshot by police, representing 35.7%, thus making gunshots the highest single cause of death in the PEV. It was also reported that 3,561 people suffered various types of injuries. A total of 117,216 private properties and 491 government owned property were destroyed. (P.311). The Commission also received reports of horrendous sexual violence, in form of gang and individual rapes and mutilation of sexual organs of both women and men and children. It was reported that the gang rapes were not only done by ordinary citizens but a significant number of security forces (GSU) and regular Administration Police, who according to the report, people looked to for help but instead they fell culprit. (pp 237-267)

These allegations of human rights abuse by police and the military were further investigated by a UN Special Rapporteur on extra-judicial killings, Prof. Alston, who confirmed most of the allegations. Nevertheless, he claimed that he experienced among other obstacles, a lack of cooperation from the Police Commissioner. The Commissioner claimed that such allegations should only be investigated if the relevant information meets the standards necessary for conviction in a court of law. (See Leftie and Mathenge 2009; Kilner 2009). The Justice Minister, Mutula Kilonzo claims that the Alston Report was highly exaggerated and argued against its recommendations. Speaking in the presence of Justice Waki, the Chairman of the Waki Commission, the Minister claimed that in the past the government carried out a “judicial surgery” which ended up killing both the “patient” and the “surgeon.” He further asserted that only institutional reforms will be done without targeting the people holding the key offices. The Minister now seeks to defend the Government’s position on extra-judicial killings before the UN Security Council. (Omanga 2009). However,

what the Minister does not say is when this “surgery” took place, and who the “patient” and “surgeon” were. This goes further to prove that political influence seeks to diminish the power in Commissions of Inquiry, hence my suggestion to redress their nature and operation.

As it was reported, the victims of the sexual violence did not receive immediate help as authorities in general were totally unprepared to record or investigate into the criminal complaints of sexual violence. (P.350). The Commission has since then received sharp criticism from human rights bodies, and gender organizations for ignoring much of gender based violence. An official of the Kenyans for Peace with Truth and Justice (KPTJ), one of the civil organizations, Ms. Mbaru said “These failures by the Waki Commission will leave deep scars on the victims, particularly children for many years to come and therefore should have been documented and acted upon as part of a broader perspective of the Gender Based Violence” (Gender and Governance Programme in Kenya 2009). The report issued recommendations which included strategies to improve performance and accountability of state security agencies and coordination within the state security mechanism. The culture of impunity was a central point of the Commission which recommended the creation of a local tribunal, with the mandate of prosecuting crimes resulting from PEV. The tribunal was set to have an international component by recruiting international staff on the senior investigations and prosecution.

3.1.2 Waki Commission: Operation

The Waki Commission embarked on its 3-month mission on 23 May 2008 as stipulated in its mandate in the Kenya Gazette. Due to the brevity of the time allocated, the Commission cited difficulties in carrying out its duty by being unable to visit some of the areas and conduct interviews with witnesses. Key areas it could not visit were Western Province, Central Province, and some parts of the Rift Valley. The Commission was careful

to acknowledge this limitation and even requested for a 60 day extension period but was only granted a 30 day extension. (P.3) The Commission claims it strove to work transparently by developing a reciprocal relationship with the media. To ensure accessibility of information, it established a website (www.cipev.org) on which public hearing was recorded verbatim, and a secure email address, (info@cipev.org) for receiving confidential communication. They also conducted occasional media briefings to keep the public abreast of their operation. According to their terms of reference, the Commission established rules which were aimed at creating partnerships between it and as many interest groups as possible. The Commission also consulted with officials and departments of the government whose functions fell in the scope of the investigations, which according to the Commission enabled the building of trust with the institutions in order to facilitate the inquiries. Furthermore, it also sought audience with the political leadership and claimed to manage an interview with the Vice President, the Prime Minister and one Deputy Prime Minister but was unable to meet with the President, while the former President declined to a meeting.

Failure to visit some key areas that were affected by the PEV due to, as it is claimed, the time constraints, meant that only partial information was received. One of the problems the Waki Commission addressed was its lack of support from the National Dialogue and Reconciliation team, especially with regards to the extension of the deadline. (P.3). Wainaina (2009) proposes that the TJRC should proceed from where the Waki Commission recommendations stop. However, I am of the opinion for these two commissions to be more effective, they should not be regarded as separate and seemingly competing entities, but instead work as complimentary tools in seeking justice, truth and reconciliation. The question of time limit is often a problematic issue in setting up CoI's and that is why I

propose a re-thinking and restructuring of CoI's, if they are to be used as effective tools for administering Transitional Justice. I will explore this further in the next Chapter.

3.1.3 Involving “Civil Society”

The Commission also claims that it deliberately decided to work closely with the Kenyan civil society organizations, which assisted it with information, contacts, and expertise in issues related to post-election violence. Accordingly, a number of these organizations attended the Commission's hearings through lawyers who represented the victims and communities. These organizations included Kenyans for Peace with Truth and Justice (KPTJ), the Inter-Religious Forum, The Kenya Section of the International Commission of Jurists, (ICJ-K), the Kenya Human Rights Commission (KHRC), the Kenya National Commission of Human Rights (KNCHR), different chapters of the Catholic Peace and Justice Commission, and various religious and faith based organizations. According to the Commission, these organizations assisted in: offering historical background materials; reports of trends in human rights violations; access to their records often with statements from witnesses they had interviewed; helping in the logistics of the operation by providing contacts of local community leaders, individual victims and other key contacts in communities where they had built trust and credibility. The organizations, it is claimed, provided the victims that were interviewed by the Commission emotional support depending on the relationship created. They also offered assistance in medical services, counseling and other community support. (P.5). Inasmuch as the Commission claims it worked closely with the Kenyan civil society organizations, the report does not show how representative these “civil society” organizations were. This needs to be examined in the context of the complex ethnic structure in Kenya and the scope of operation of the Waki Commission. I will explore this notion of representativeness further in Chapter 4.

The legal standing provided for in the Commission's mandate allowed certain government departments to participate in the hearings. These were: the Kenya Police Service; the Administration Police; the Provincial Administration; the Electoral Commission of Kenya; the National Security Intelligence Service; the Kenya Prisons and the Armed Forces. The Commission also claims that groups of citizens and the civil society organizations also applied to participate in the proceedings. They comprised of the victims' representatives, experts on specific aspects of the Commission's proceedings and organizations that had been involved in addressing the post-election violence itself. To ensure the quality of the proceedings, the Commission claims it allowed as many interest groups as possible to participate. Those given legal standing eventually were the Federation of Women Lawyers (FIDA) and the Centre for the Advancement of Women and Children. These were allowed to represent the interests of women in the context of PEV. Other groups allowed legal standing included 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 as interveners. All these organizations are based in Nairobi. Outside Nairobi, the Commission gave regional law society standing to Rift Valley Law Society in Nakuru, the North Rift Law Society in Eldoret, and the West Kenya Law Society in Kisumu, and the Law Society of Kenya (South Rift Branch).

All groups participating were required to submit lists of their witnesses and statements from the witnesses. The Commission claims that a considerable number of witnesses who testified before it were identified and processed by lawyers acting on behalf of various civil society organizations. To maintain control and ensure relevant and credible evidence was presented, the Commission claims the witnesses had to be processed with the full participation of Counsel Assisting the Commission. The Commission further claims

allowing participation of diverse interest groups, and especially the lawyer, who often had sharp conflicting views enabled it to enrich the quality and objectivity of the inquiry.

According to the Commission, public investigative inquiries are not courts of law, but are influenced by Kenya's common law tradition. (P.8). Abiding by this understanding according to the Commission, determined their choice of methods of inquiry. Therefore, the Commission adopted a mix of both adversarial and inquisitorial methods reflected in the rules and procedures. The Commission also claims this was the best way to uncover the truth concerning the PEV and impunity in Kenya. It is also claimed that the Commission ensured all witnesses were treated fairly and it established rules to shield them from unfair accusations. It also used other materials provided by various organizations to complement its findings, after testing and evaluating them independently. According to the terms of reference, the Commission held both public and private hearings, with public officials mostly testifying publicly, which a number of victims who for fear of reprisal or out of trauma testified in private. The Commission claims it protected the privacy of the witnesses, who testified under camera. However, a major setback faced by the Commission was the lack of a reliable witness protection program and this meant some of the witnesses who would have otherwise come forward with information failed to do so.

In the end, the Commission admits that in the final analysis, only a tiny fraction of the actual magnitude of the (avoidable) post-election violence was brought to light. (P.11-12). This adds further to the problem of representation – central in my argument – for a rethinking and reform of the structure of Commissions of Inquiry. Examining the range of witnesses and organizations represented, it is no wonder that the Commission drew criticism for drawing a large sample of its witnesses from public officials. The Commission, however, defended itself by referring to its terms of reference to hold public officials accountable.

However, the validity of the evidence produced by relying heavily on public officials is questionable. Ironically, the political parties pivotal to the political divide that led to the establishment of the Commission of Inquiry were dissatisfied with being given only one afternoon to present their views. The Commission asserts that it had to balance their desire for an open-ended forum, which according to the Commission, the politicians already have in parliament, with ordinary citizens who according to the Commission had much less chances to be heard. This argument however is still contested as the ordinary citizens it claimed to defend were very much under-represented.

The Waki Commission tried in its capacity, given its terms of reference and mandate to achieve its goals within the time stipulated. However, as we shall see, there was a lot more that could have been done to enable this and other Commissions to function adequately. Building on the problem of time constraints, composition of the Commission's body, representativeness of "civil society" and methodology, I will show in chapter 4 that these need to be redressed, to empower Commissions of Inquiry as an effective tool for administering Transitional Justice.

Chapter 4: Commissions of Inquiry and Transitional Justice

To provide a broader paradigm for discussion with regards to Transitional Justice, I will not only assess the Waki Commission, but I will also briefly examine one TRC- the South Africa Truth and Reconciliation Commission and one CoI- the Orr Report. I will highlight ways in which Commissions of Inquiry could be modified to enable it to be a better tool for Transitional Justice.

Crocker (2000) claims that the term Transitional Justice could be used to refer solely to penal justice and even retributive interpretation of trials and punishment. However, he broadens the term to include compensatory, distributive, and restorative justice. It is with this broader approach that I use the term to discuss the possibility of using CoI's as an effective tool for administering Transitional Justice. As discussed earlier, TRC's have been widely used in many countries as a tool for administering Transitional Justice. Authors such as Kritz (1995; 1997), (Teitel 2000) and (Stacey 2004) view TRC's as the best alternative to bringing about reconciliation in conflict laden countries than retributive means through courts of law. However, as discussed earlier, many are concerned with the question of justice, truth and reconciliation as the total outcome. This is largely reflected in the South African Truth and Reconciliation Commission.

The South African Truth and Reconciliation Commission (the Commission) was formed under the legal instruments that emerged from the political negotiations that were initiated in 1990 after the defeat of apartheid rule and the release of Nelson Mandela. He later became the first Black African President in South Africa. The TRC was formed according to the constitution of the Republic of South Africa Act No. 200 of 1993 with the terms of reference of National Unity and Reconciliation. This was to provide a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and peaceful co-existence and development opportunities for all South Africans irrespective of color, race, class, belief or sex. The provisions were preserved in Schedule 6, section 22 of the Constitution of the Republic of South Africa Act No. 108 of 1996.

The Commission represented a new South Africa, as hailed by Bishop Desmond Tutu, calling it the culmination of a remarkable effort by extraordinary people to bring healing. Bishop Tutu said they had been privileged to heal a wounded people even though they were

also wounded. (South Africa TRC Report 2003). The TRC was granted powers when the Parliament passed by the Promotion of National Unity and Reconciliation Act. The Act enabled TRC to grant individual amnesty, search and seizure powers, subpoena powers and witness protection powers. It began with a 18 million dollar budget per year but this was reduced for the last 3 yrs. TRC is regarded as one of the most successful commission and has received international acclaim in spite of criticism of its failure maximize its use of the subpoena powers (Quinn and Freeman 2003). Quinn and Freeman claim that sometimes the failure was based on its concerns about sabotaging national reconciliation, but as they argue, the unwillingness to use these powers contradicts the nature and terms of reference of the Commission. We see here that the issue of reconciliation and the operation of Commissions are very much contested.

Avruch and Verajano (2000) claim that Bishop Tutu regards restorative justice as an essential and adorable virtue of healing and building social relationships, given at the expense of retaliation; nothing less than a quality of humane sociality: *ubuntu*. It can be seen therefore, in order to achieve truth, justice and reconciliation; a sacrifice had to be made. Nevertheless, I am of the view that this compromise is not inevitable, and that with a reform in the structure of CoI's, there is hope for achieving truth, justice and reconciliation. It may be assumed for example that reconciliation has taken place in South Africa, but feelings of resentment still remain in either camp, and worse still, there is conflict among the blacks themselves, indicating that these qualities are not necessarily achieved just because a TRC or Col has been set up and recommendations given.

Commissions of Inquiry by their very nature and operation have often been regarded with cynicism. It is therefore in my view that a modification might be necessary to enable

them to function effectively. To illustrate this further I will briefly discuss the Orr Report. Like the 2007 election violence in Kenya, the October 2000 uprising among Arab-Israeli was unprecedented. Thousands in different places took to the streets simultaneously. Jews were attacked for being Jewish and their property destroyed. The main cause of the violence as it is claimed was the failure of the State of Israel and its generations to address the serious problems that were created by the existence of a large Arab minority inside the Jewish State. The Arab-Israelis claimed that the State was negligent of their plight and discriminatory. In the course of the violence, 12 Arab-Israeli and 1 Jewish-Israeli were killed by police. Like the Kenyan 2007 PEV, the Security Forces were accused of using excessive and unnecessary force on the Arabs. The Orr Commission was set up to investigate into this violence and its findings were released in 2003. (Official Summation of Orr Report 2003)

Unlike the Waki Report, the Orr Report had the following recommendations: a government authority for promoting minority sectors; budget allocation to address inequality; empowering Arab-Israeli local government; master plans and local outline schemes for the planned expansion of Arab Israeli towns; the allocations of land for this expansion; industrial development and employment schemes; proper representation in government and public services; improving education and improving the circumstances of the Bedouin (Official Summation of Orr Commission 2003). Among the recommendations in Orr Commission Report was the accelerating of Arabs into civil service, but according to Sedan (2004), things were getting worse as statistics showed a very small percentage of Arab Israeli worked in civil service. Out of a new survey, the government hired only 193 Arab workers out of a total of 4531 new civil servants. According to this report, Ehud Barak, then Prime Minister allocated almost 1 Billion dollars to raise the living standards of Israeli-Arabs to those of the country's Jews but the money was misappropriated. Similar to the Waki Commission, the

causes of the October violence still remain. In fact, some critics said that Ehud Barak only set up the Orr Commission in order to get Arab-Israeli vote, which he desperately needed to win. Therefore, they claim, he criticized the government rather than examining what changes were necessary from the Arab side as well. (Sedan 2004). Like the Waki Report, the Orr report blamed the police, though the police claimed that they were under orders from a higher power. Consequentially, the findings would generally appease the public but not deal with the issues at hand.

Taking into consideration the purposes of commissions and their ultimate outcome, I am of the view that it is imperative to reconsider the nature and operation of CoI's if desired or fruitful results are to be achieved. I believe that overlooking representative civil participation has played a great role in weakening the outcome of TRC and CoI's in particular, to administer Transitional Justice. However, improving this tool to serve its goals could prove to be very beneficial in dealing with future conflicts. Citing the Orr Report and the eventual outcome, we can see just how elusive the promises of change offered in CoI's can be. The recommendations set up in this Commission were not implemented fully, and to this day, the problems raised still remain a thorny issue in Israeli-Arab Politics. (The Yom Kippur Acre riots 2008).

The Waki Commission also leaves a lot of questions unanswered and issues unresolved: the issue of representativeness, the allegations of sexual violence that was ignored or unrecorded and many other areas in which it could be improved. For the purposes of this research, I mainly focus on the representativeness civil society, in terms of public participation. Given the capacity in its terms of reference and mandate, the Commission exerted its strength to achieve its best. As it claims, a lot of issues that were not dealt with were due to the time constraints. If such crucial matters were not adequately handled, or

neglected due to adherence to the stipulated mandate, there is a need for a rethinking. I believe there is need of bettering this tool in order for it to gain higher credibility and minimize, if not eliminate the cynicism and the skepticism with which Commissions of Inquiry have been viewed.

Building on the notions of truth, justice and reconciliation as many authors argued, Transitional Justice is often problematic to achieve because of the previous or existing regimes that have power to influence decisions. The goal in TRC's as has been already discussed, is reconciliation: Mercy not Judgment, seems to be the underlying foundation for forgiveness. Amnesty is even provided, as the case with South Africa, so that truth can be spoken. As Crocker (2000) pointed out, forgiveness is more easily exercised in religious societies. This may be the case, but even with forgiveness granted, there is always a price that has to be paid, or has already been paid. Whether reconciliation can take place without justice is still debatable.

Commenting on the Waki Commission, Shikwati (2008) argues that Kenyans should be given the opportunity to deal with the cause and motivation of the PEV instead suppressing them through "forgive and forget the past" slogan, a legacy from the founding President, Jomo Kenyatta. He regards the Waki Commission as "scarecrow" for its treatment of the perpetrators of PEV. Shikwati calls for the need for a legitimate social contract and urges Kenyans to go beyond the "scarecrow" and learn from the weaknesses of the South African strategy of Truth and Reconciliation. He claims that reconciliation may take place on the top level but leave the bottom level reeling in pain. Shikwati asserts that forgiving the past –without justice– is likely to strengthen the status quo, while keeping the majority at the bottom in a cycle of fighting wars they don't understand. He suggests for Kenya to consider incorporating traditional and modern peace-making means. Acknowledging Shikwati (2008)

concerns, I suggest that achieving justice and reconciliation could be done best on a grass-root level, by engaging the public directly through individual, representative, voluntary participation; not a blanket form of reconciliation because the government has set up a Commission of Inquiry and expects the citizens to simply accept the findings, forgive the past and reconcile.

On the issue of justice, as (Kritz1997), (Teitel 2000), (Call 2004), (Arriaza and Mariezcurrena 2006) and (Hayner 2001) point out, it is paramount to find means of bringing the perpetrators into accountability. Hayner (2001) also argues that offering amnesty does not automatically guarantee truth speaking. For justice to be done therefore, it is not just sufficient for a pardon through public confession, but as she suggests, there is a need for expansion of TRC's *and I may add* CoI's to make judicial-like decisions. Looking at Chapter 13 in the Waki Commission, which deals with the recommendations, it is clearly stated that setting up a special tribunal would be necessary to “seek accountability against persons bearing the greatest responsibility.” (P.472). However, seeking to prosecute only persons with the greatest responsibility implies that those with “great” and “lesser than great” responsibility are not brought to accountability. From various witnesses’ accounts as recorded in the Commission, most of ethnic violence was done by the neighbors of the victims, or people they were familiar with. However, these were not necessarily the people with the “greatest responsibility” as the Commission claims. This is because from the findings, a lot of them, especially the youth, were funded by some politicians and other influential businessmen. Working with the recommendation as it is, it may be understood that the tribunal would be required to prosecute only the funders and organizers of the violence, while the ones who actually carried it out are free to stay in an eye’s reach with the victims who may interact with them daily in the process of reconciliation. But this does little justice to the

victims whose families were killed and property destroyed. Even if the said politicians are tried, found guilty and punished, the victims will have to deal with the trauma on a local level. That is why, in my assessment, restricting Commissions of Inquiry to dealing with the matter on a national level only does not reflect the clear picture on a local level. There shouldn't be trials just for those with greatest responsibility. A crime should be defined as it is, and glossing over facts actually equips those with "lesser responsibility" with more power to do further, or worse harm in future.

Furthermore, one of the Waki Commission's requirements was the establishment of an agreement signed by representative parties with regards to setting up the special tribunal. The commencement of its functioning was to be determined by the President with the consultation of the Prime Minister, Chief Justice and Minister for Justice, National Cohesion and Constitutional Affairs and the Attorney General, within 30 days of the release of the Report. (Commission P.472). If as described in the findings of PEV, politicians are implicated, the creation of a special tribunal determined by those in power could result in compromise of its operation. It is this designating of immense power in the Presidency that often determines the outcome of decisions. With regards to setting up CoI's, this weakens their operation. It is in my opinion therefore that a reflection of representative public participation in certain crucial decisions could accelerate the processes that would otherwise be delayed or prevented all together due to political manipulation.

Commissions of Inquiry also could explore more subject matters, hence, in the pursuit of peace and reconciliation after conflict, a reform in the structure could be useful. This could be possible if not just one Commission of Inquiry is set up on national level for the conflict, but several sub-Commissions focused on smaller areas to allow coverage of depth and representativeness. This lack of representativeness hampered the Waki Commission: although

it set out with noble goals of reaching out to all the regions affected by the violence, it eventually failed to do so, under the time constraints. Had there been sub-Commissions within the Commission of Inquiry, each concentrating on a specified area, I believe more would have been achieved and the sample obtained representative. Moreover, only a total of 156 witnesses, exhibits included, were presented at the proceedings. Majority of these were senior public officials. (CIPEV 2008). This is a miniature fraction of the sample of the total population and the magnitude of the PEV. However, if the Commission were reformed, to operate on sub-levels, for example province by province, the result would be more representative. This of course means more funds to finance the operation, but if the goal is to achieve justice and reconciliation, then all sides need to be heard. Still on the issue of representation, it is not just enough to have a large sample, but understanding the multiplicity of ethnicity in Kenya for instance, the 156 witness sample does not reflect ethnic or regional balance. Furthermore, relying on senior public officials without getting the voice of ordinary citizen, which the Commission ignored and blanketed them under “civil society” organization, does not solve the puzzle. These organizations in deed serve the common people, but each has its own mandate and mode of operation, therefore, it should not be assumed that they automatically represent “civil society”, a contested term among many scholars

By dividing up the investigation to involve local levels, a bottom-up approach, the issue of time constraint could be solved due to more diversification of responsibility. Besides creating sub- Commissions of Inquiry, representative civil participation would be realized if the citizens are given the chance to air their views within the given areas in some forums, which are part of the Commissions of Inquiry mandate. By way of discussion, a lot could be revealed as the citizens feel they have been valued because their voice counts through being

sought in dialogue. In these forums, the various ethnic groups involved in the PEV would be encouraged to plan activities together, such as simple discussions, plays or any other form of dramatized genre that allows emotions to be released, and at the same time involve other investigative methods in the forums such as informal interviews. These can elicit vital information (both “forensic” and “emotional truth”) as Crocker defines. Doing this could obtain more information than would be received at a witness stand. In this way, the people gradually learn to be comfortable with one another, knowing they are backed by the government.

To illustrate further, there used to be a comedy/ political satire on the local TV station that imitated and involved people from diverse ethnic groups. This was a source of entertainment but also educational. Majority of the people learned to laugh *with* each other, not *at* each other, as they watched the diversity of ethnicity and political drama in Kenya. After the PEV, this laughter can hardly be hailed. Through a modified Commission of Inquiry that involves public participation, Kenyans, could learn to laugh with one another once again, and in the process, bring some form of healing and reconciliation. This is not an easy task, bearing in mind that some communities were heavily affected, and the very notion of getting together may be unpalatable. Kritz (1995) however says that inasmuch as reconciliation could be painful, it doubtless is necessary. So in looking at the Kenyan Waki Commission as an example through which reform could be realized, how then can Commissions of Inquiry be modified to act an effective tool for administering Transitional Justice?

Crocker writes: “a nation’s civil society is often indispensable to the success of truth commissions and reckoning with past wrongs.” (2000:1). Although Crocker writes this in relation to TRC, this very logic would be useful in understanding the reform that might be necessary in the structure and operation of Commissions of Inquiry. While Commissions of

Inquiry have well established procedures and elaborate data findings, they are usually highly bureaucratic and in this way fail to explore with adequate representations, the real issues at hand as felt by the victims of the conflict. By raising the role of civil society, Crocker gives leading guidelines. The place of civil society needs to be addressed but in my opinion, civil society as “representative civil participants”. I seek to specify this because the notion of civil society is a contested phenomenon. Therefore, in seeking to show how CoI’s could be reformed in structure and operation, I suggest 5 steps to be taken:

First, Commissions of Inquiry should be re-structured by re-defining the term to enable it to be flexible, not a rigid bureaucratic tool as per the by the definition of Commissions of Inquiry. (Royal Commission 1966; Manson and Mullan 2003) This fixed term of practice should be loosened and broadened. This is because in the course of the investigation, new discoveries may be made, that were not initially stipulated under the terms of reference, but they could be very useful to the investigations. Restricting for example to just one topic may not allow seeing the total picture.

Secondly, under the Commission of Inquiry Act, a specified time is stipulated upon which the investigation should be completed, as was the case with the Waki Commission. However, a lot of issues need to be considered before setting up a specific period: the nature of topic under investigation and the scope, both geographically and physically and logistically. This does not mean setting up endless investigations, but the time allocated needs to be realistic; not politically motivated or bureaucratic. Thirdly, Commissions of Inquiry are usually appointed by the government, headed by a judge, and usually the rest of the body comprises of government officials and influential individuals. I suggest that this needs to be changed. Under the Commission of Inquiry Act, the President appoints the Commission as with the case of the Waki Commission. This may be helpful to give the Commission legal

standing, but in the place where the government is implicated as the one called to be accountable, issues of compromise might arise. As Centa and Macklem (2003) argue, in relation to the Law Commission in Canada, CoI's should be totally independent of government involvement, as they claim government authorization of these commissions would more than likely compromise the process of investigation and the eventual outcome.

Furthermore, I believe that Commissions of Inquiry into ethnic conflicts need to be empowered with semi-judicial and subpoena powers to be able to exercise a form of trial for prosecution, which leads to accountability and reconciliation. These should be recognized both locally and internationally and once the powers are issued, there should be no compromise. Restitution and Reconciliation are invaluable; they come with a price tag. Lastly, but most importantly in dealing with ethnic conflict, I suggest a multiplicity of Inquiries as sub-Commissions, answerable to the main Commission. These need to be done regionally or locally, to allow as much representative public participation as possible. Commissions that are set up on a grand level, headed and operated by only influential people seek to address the key issues at the heart of people, but they fail to grasp the hearts of the people with the key issues.

I believe that TRC's and CoI are complimentary, *not* competing tools in administering Transitional Justice. However, I am of the view that Commissions of Inquiry may prove to be potentially more effective because they deal with the issues at hand, or recent events. This gives them a greater chance to confront perpetrators of the violence, as it is more likely that the perpetrators are within reach or more accessible. On the other hand, TRC focus on the past, sometimes dating back decades ago. As a result, some of the perpetrators of the violence would be already dead, or in exile, therefore they cannot be contacted or accessed in order to be called into accountability for a true reconciliation. In the

light of this, there is a need for the exploration of CoI's potential in bringing about truth, justice and reconciliation. It is therefore in my opinion that a reform in the structure and operation of Commissions of Inquiry to involve representative public participation is expedient for them to act as a more effective tool for administering Transitional Justice.

Looking Ahead

Politicization of ethnicity as discussed by many authors has largely contributed to ethnic conflicts in the past decades, especially in Africa. Despite the destruction ethnic conflicts have brought to many nations, it is clear that at the heart of most countries, is the desire to resolve conflict, reconcile and live in peace. Efforts at achieving this have been pursued in different ways, and more recently, the setting up Commissions of Inquiry. These investigate into the crisis with the aim giving recommendations that call upon the perpetrators of the violence to accountability and justice, and also devise ways in which governments and institutions can be managed effectively to avoid future conflict. Truth and Reconciliation Commissions on the other hand have been widely used to acknowledge past wrongs, with the aim of bringing about a restorative justice as a form of Transitional Justice. While there has been a lot of literature on Truth and Reconciliation Commissions and Transitional Justice, more research needs to be done with regards to using Commissions of Inquiry also as tool for administering Transitional Justice. This research has examined the possibility of reforming the structure and operation of Commissions of Inquiry to involve representative public participation, to enable it to be effective tools in administering Transitional Justice. By using the Waki Commission, which was established to inquire into the 2007 post-election violence in Kenya as a case study, I have endeavored to show the potential in Commissions of Inquiry to be effective means in exposing truth, seeking justice and finding reconciliation.

By analyzing the structure and operation of the Waki Commission and Commissions of Inquiry at large, it has been shown that CoI's could also be used as vehicles to exercise Transitional Justice if there is a modification in their structure and operation, to involve representative public participation. It can be argued that Commissions of Inquiry could prove to be very effective in countries that are, or have recently experienced ethnic conflict and if well designed and implemented, there might be even less formation of Truth and Reconciliation Commissions. The Waki Commission could be an example to show that if it carried out its duties successfully under suggested the framework, it might not be very necessary to set up the Truth, Justice and Reconciliation Commission (TJRC) that is underway, or it would be a chief complimentary tool to it. Countries like Sri Lanka and others that are emerging from a dilapidating civil war could seek to form Commissions of Inquiry that involve representative public participation. This could accelerate the process of dealing with the trauma of the past and help bring about justice and reconciliation. The quest for peace is real. Even in the most ardent rebel, if involved meaningfully and in a representative way, it could prove that in the midst of turmoil, war or revenge, is a genuine desire to be heard and represented. A different form of approach is needed for these volatile times, hence among other means of seeking justice and peace in nations; I propose a reform the structure and operation of Commissions of Inquiry, to empower them to facilitate Transitional Justice. Both Truth and Reconciliation Commissions and Commissions of Inquiry are gradually being adapted as means to finding reconciliation in ethnically divided societies. These two should be regarded as complimentary tools, functioning in "restorative-retributive" ways as forms of Transitional Justice.

Word Count: 14,810 (Abstract and Body of Thesis)

References

- Avruch, Kevin and Beatriz Vejarano. 2002. "Truth and Reconciliation Commissions. A Review Essay and Annotated Bibliography." *Online Journal of Peace and Conflict Resolution* 4: 37-76. Retrieved April 22, 2009 (www.trinstitute.org/ojpcr/4_2recon.pdf).
- Barno, Richard. 2008. "Kenya: After Crisis, Lessons Abandoned." *African Security Review* 17:4. Retrieved May 11, 2009 (http://www.iss.co.za/dynamic/administration/file_manager/file_links/17NO4barno).
- Blanton, Robert, David Mason and Brian. Athow 2001. "Colonial Style and Post-Colonial Ethnic Conflict In Africa." *Journal of Peace Research*. 38: 473-491.
- Bradley, A.W. 2003. "Commissions of Inquiry and Governmental Accountability." Pp. 31-78 in *Commissions of Inquiry: Praise or Reappraise?*, edited by Manson, Allan and David Mullan, Toronto: Irwin Law.
- Centa, Robert and Patrick Macklem. 2003. "Securing Accountability Through Commissions of Inquiry: A Role for the Law Commission of Canada." Pp. 127-151 in *Commissions of Inquiry: Praise or Reappraise?*, edited by Manson, Allan and David Mullan. Toronto: Irwin Law.
- CIPEV. 2008. "Exhibits and Witnesses: List of Exhibits Produced by Witnesses." *CIPEV* August 20. Retrieved June 4, 2009. (http://www.cipev.org/list.asp?cat_id=10).
- Chabal, Patrick and Jean-Pascal Daloz 1999. *Africa Works: Disorder as a Political Instrument*. Bloomington and Indianapolis: Indiana University Press.
- Chua, Amy. 2003. *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability*. New York: Doubleday.
- Crocker, David. A. 2000. "Truth Commissions, Transitional Justice, and Civil Society." Pp 1-38 in *Truth v. Justice: The Moral Efficacy of Truth Commission: South Africa and Beyond*, edited by Robert.I. Rotberg and Dennis Thompson. Princeton, NJ: Princeton University Press.
- Dagne, Ted. 2008. "Kenya: The December 2007 Elections and the Challenges Ahead." *Congressional Research Services*, September 17, Retrieved May 12, 2009 (<http://www.fas.org/sgp/crs/row/RL34378.pdf>).
- Eller, Jack.D. 2002. *From Culture to Ethnicity to Conflict*. Ann Arbor: The University of Michigan Press.
- Elster, Jon. 2004. *Closing the Books: Transitional Justice in Historical Perspective*. New York: Cambridge University Press.
- Encyclopedia of the Nations. 2009. "Kenya-Ethnic Groups." Retrieved May 12, 2009 (<http://www.nationsencyclopedia.com/Africa/Kenya-ETHNIC-GROUPS.html>).
- Encyclopedia of New Zealand. 1966. *Royal Commission*. Retrieved April 22, 2009 (<http://www.TeAra.govt.nz/1966/R/RoyalCommission/en>).
- Gosnell, Harold. 1934. "British Royal Commissions of Inquiry." *Political Science Quarterly* 49:84-118.
- Gurr, Ted and Barbara Harff. 1994. *Ethnic Conflict in World Politics*. Boulder, CO: West View Press.

- Hamer, David. 2004. *Royal Commissions and Commissions of Inquiry*. Retrieved May 9, 2009 (<http://www.aph.gov.au/SENATE/pubs/hamer/chap10.htm>).
- Hayner, Priscilla. 2001. *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge.
- Horowitz, Donald. 1985. *Ethnic Groups in Conflict*. Berkely: University of California Press.
- Kilner, Derek. 2009. "UN Report Ready on Kenya Killings." *Voice of America*, May 29, Retrieved June 4, 2009. (<http://www.voanews.com/english/2009-05-29-voa71.cfm>).
- Klopp, Jacqueline. 2001. "'Ethnic Clashes' and Winning Elections: The case of Kenya's Electoral Despotism." *Canadian Journal of African Studies* 35: 473-517. Retrieved June 1, 2009 (<http://www.columbia.edu/~jk2002/publications/Klopp01.pdf>).
- KPTG. 2009. "A Huge Number of Gender Based Violence Ignored in Waki Report." *Gender and Governance Programme in Kenya*. Retrieved April 22, 2009 (<http://www.gendergovernancekenya.org/featured/166>).
- Kritz, Neil J. 1995. *Transitional Justice : How Emerging Democracies Reckon with Former Regimes*. Washington, D.C.: United States Institute of Peace Press.
- .1997. "War Crimes and Truth Commissions. Some Thoughts on Accountability Mechanisms for Mass Violations of Human Rights." Paper presented at USAID Conference on promoting Democracy, Human Rights, and Reintegration in Post-conflict Societies. 30-31 October. Retrieved May 10, 2009 (http://pdf.dec.org/pdf_docs/pnacd090.pdf).
- Leftie, Peter and Oliver Mathenge. 2009. "Death Squads: Alston's Final Report." *Daily Nation*, May 28. Retrieved June 4, 2009 (<http://www.nation.co.ke/News/-/1056/604322/-/ujpubg/-/index.html>).
- Lijphart, Arend. 1971. "Comparative Politics and the Comparative Method." *The American Political Science Review* 65:682-693.
- Mackay, Wayne and Moira Mcqueen. 2003. "Public Inquiries and the Legality of Blaming: Truth, Justice, and the Canadian Way." Pp. 247-292 in *Commissions of Inquiry: Praise or Reappraise?* Toronto: Irwin Law.
- Mamdani, Mahmoud. 2001. *When Victims Turn Killers*. New York: Columbia University Press.
- Manson, Allan and David Mullan. ed. 2003. *Commissions of Inquiry: Praise or Reappraise?* Toronto: Irwin Law pp.1-10.
- Matheson, Ishbel. 2008. "Kenya Six Months on: A new Beginning or Business as Usual?" *Minority Rights Group*, August 28, Retrieved May 11, 2009 (www.minorityrights.org).
- Moore, Harrison. 1913. "Executive Commissions of Inquiry." *Columbia Law Review* 13: 500-523.
- Omanga, Beattah. 2008. "Clashing Death Toll Accounts at Waki Probe." *The Standard*, July 26, Retrieved May 12, 2009 (<http://www.ogiek.org/news-7/news-post-08-07-39.htm>).
- .2009. "State Won't Act Entirely on Report, says Minister." *The Standard* May 30, Retrieved May 30, 2009 (<http://www.eastandard.net/InsidePage.php?id=1144015563&cid=4&>).
- Ongayo, A. Otieno. 2008. "The Post-election Violence in Kenya: An Overview of the Underlying Factors." *Pambazuka News*, February 14, Retrieved May 12, 2009 (<http://www.pambazuka.org/en/category/comment/46094>).
- Ongiri, Isaac. 2008. "Kenya: I Acted Under Pressure, Says Kivuitu" *The Standard*, January 2, Retrieved May 12, 2009 (<http://allafrica.com/stories/200801010051.html>).

- Onyango-Obbo, Charles. 2008. "Post-election Violence: Kenya Still Far from Finding Closure..." *The East African*, October 19, Retrieved June 3, 2009 (<http://www.theeastafrican.co.ke/opOrEd/comment/-/434750/481836/-/9nql8w/-/index.html>).
- Prunier Gerard. 2009. "The Kenya We Want." *openDemocracy*, February 3, Retrieved June 2, 2009 (<http://www.opendemocracy.net/article/the-kenya-we-want>).
- Quinn, Joanna and Mark Freeman. 2003. "Practical Lessons Gleaned from inside the Truth Commissions of Guatemala and South Africa." *Human Rights Quarterly* 25:1117-1149.
- Republic of Kenya. 1999. *Report of the Judicial Commission appointed to inquire into the tribal clashes in Kenya: Akiwumi Report*. Nairobi: Government Printer.
- Republic of Kenya. 2008. *The Commission of Inquiry into the Post-Election Violence: Waki Commission*. Kenya Gazette, Vol CX-No.41. Nairobi: Government Printer.
- Republic of South Africa. 2003. *Truth and Reconciliation Commission of South Africa* Vol. 6 Cape Town: Formeset.
- Roht-Arriaza, Naomi and Javier Mariezcurrena. 2006. *Transitional Justice in the Twenty-First Century : Beyond Truth versus Justice*. Cambridge: Cambridge University Press.
- Rothchild, Donald. 1997. *Managing Ethnic Conflict in Africa*. Washington D.C: Brookings Institution Press.
- Sedan, Gil. 2004. "Mutual Suspicion Still Marks ties Israeli Arabs have with their Country." *Global News Service of the Jewish People*, June 29, Retrieved June 2, 2009 (<http://www.sikkuy.org.il/english/media2004.html>).
- Shikwati, James. 2008. "The Waki Report; Going Beyond the Scare crow!" *ModernGhana*, October 22, Retrieved May 30, 2009. (<http://www.modernghana.com/news/187546/1/the-waki-report-going-beyond-the-scarecrow.html>).
- Sriram, Chandra. 2004. *Confronting past Human Rights Violations: Justice V/S Peace in Times of Transition*. New York: Frank Cass.
- Stacey Simon. 2004. "A Lockean Approach to Transitional Justice." *The Review of Politics* 66:55-81.
- Talbot, Ann. 2008. "Post Election Violence Continues." *International Committee of the Fourth International (ICFI)* January 24, Retrieved May 25, 2009 (<http://www.wsws.org/articles/2008/jan2008/keny-j24.shtml>).
- Teitel, Ruti G. 2000. *Transitional Justice*. New York: Oxford University Press.
- The East African. 2008. "Kenya: Impunity, Institutional Failure Drove Country's Violence Report." *Allafrica.com*, October 19, Retrieved May 29, 2009 (<http://allafrica.com/stories/200810201330.html>).
- The Official Summation of the Or Commission. 2003. Retrieved May 7, 2009 (<http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=335594&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y>).
- "The Yom Kippur Acre riots." 2008. *Flesh is Grass*, October 12, Retrieved May 7, 2009. (<http://fleshisgrass.wordpress.com/2008/10/12/the-yom-kippur-acre-riots-the-or-report/>).
- Thompkins, Gwen. 2007. "Riots Break out as Kenyans Await Election Results." *NPR, Associated Press*. December 29, Retrieved May 25, 2009 (<http://www.npr.org/templates/story/story.php?storyId=17696871>).
- United Nations High Commissioner for Human Rights. 2006. *OHCHR Report: Rule-of-Law Tools for Post-Conflict States: Truth Commissions*. New York.

- United States Institute of Peace. 2005. "Truth Commissions Digital Collections." Retrieved May 10, 2009. (<http://www.usip.org/library/truth.html>).
- Wachira, Patrick. 2008. "Joy as Kibaki, Raila sign Power Sharing Deal" *The Standard*, February 29, Retrieved May 26, 2009 (<http://allafrica.com/stories/200802280952.html>).
- Wainaina, Ndungu. 2009. "The Truth, Justice and Reconciliation Commission." *Pambazuka News*, January 30, Retrieved May 26, 2009 (<http://allafrica.com/stories/200901300629.html>).
- Walters, Brian. 2007. "Lessons from the Past Worth Heeding." *The Age*, November 17, Retrieved May 25, 2009. (<http://www.theage.com.au/news/opinion/lessons-from-the-past-worth-heeding/2007/11/16/1194766959461>).