

Against great odds



Although the Independent Review Commission inquiring into the 2007 elections began its work with no illusions about its task, nothing could have prepared the team for the hurdles ahead.

THE PUBLIC FATIGUE WITH COMMISSIONS OF INQUIRY WAS NOT unexpected; but the official bullying and withholding of crucial logistical support has come as a rude shock for Justice Johann Kriegler and his team.

As soon as the Ministry of Nairobi Metropolitan Development was set up in April, this year, its officials swiftly moved to the second floor of the Kenyatta International Conference Centre, squeezing the Independent Review Commission which preceded it there into a tight corner.

The commission, which had been set up on March 17 was still hiring and had to cram up to five new staff – mostly investigators and researchers – into each room.

The lone toilet on the second floor was commandeered for the sole use of a senior ministry overlord. Commission staff had to travel two floors below for their ablutions. When matters came to a head, the landlord – the KICC management – built two new toilets on the second floor for commission staff so that the pen pusher could continue to enjoy the sole use of three urinals and three toilet cubicles.

Space constraints are, however, the least of the commission's worries.

Six new vehicles ordered for the commission three months ago were diverted to other uses at various ministries and old run-down jalopies provided instead. A telling illustration of the commission's transportation difficulties were played out early last month when vice chairperson Justice Imani Aboud's vehicle broke down on its 90-kilometre journey to Murang'a where she was scheduled to hold a public hearing.

Other commissioners routinely share the available vehicles or simply hop



CIVIL SOCIETY ACTION

KPTJ has been granted leave to appear as *amicus curiae* (friend of the court) at the **Commission on Post-Election Violence**, chaired by Justice Philip Waki. Its lawyer can call witnesses and lead them, as well as cross-examine witnesses at the commission. KPTJ member organisations Kenya Human Rights Commission, Independent medico-Legal Unit and the Women's Coalition have given evidence at the Commission. Additionally, KPTJ has applied for leave to appear as *amicus curiae* at the **Independent Review Commission**, chaired by Justice Johann Kriegler. For more information on participation, contact Lillian Abishai. (lillianabishai@africog.org)

Africa Centre for Open Governance launched its report, *Postponing the Truth: How Commissions of Inquiry Are Used to Circumvent Justice*, at a public forum to discuss the efficacy and use of commissions as well as make an assessment of ongoing inquiries.

The Multi-Sectoral Task-Force on the Truth, Justice and Reconciliation has critiqued the proposed Truth, Justice and Reconciliation Commission Bill and made presentations to the parliamentary departmental committee on Legal Affairs and the Administration of Justice. It has also held three public forums and a contact meeting with the Kenya Editors Guild. More public events are scheduled soon. For more information, contact Ndung'u Wainaina (wainainagn@yahoo.co.uk)

Direct Action Training Workshops, which had taken a break, have resumed. They aim to create a group of skilled and informed KPTJ activists who can strategize, plan and implement direct advocacy and campaign actions to further KPTJ positions. The training offers tools and a framework of thinking that empowers participants to organize and mobilize as individuals and groups around local and national issues as they arise. Training materials and resources continue to be generated and made available for use by all members of KPTJ. Performance poetry artist Shailja Patel has been coordinating the workshops and gladly accepts help from volunteers. Contact Shailja Patel (shailjapatel@gmail.com)

into taxis when they have to make a journey. It is a mark of cost-saving that usually turns painfully inconvenient when commissioners are pursuing assignments in different directions.

When the commission was set up, responsibility for it was split three ways. The Government of Kenya would provide security, office facilities and transport while the United Nations Development Programme would pay salaries and allowances under the general supervision of the Panel of Eminent African Personalities. The bureaucracy created is enormous and decisions slower than they should be.

After battling with public apathy and dismissive attitudes, the commission has concluded its first phase of public hearings and was scheduled to hold technical workshops in early August on the electoral reforms Kenya must undertake. Behind the scenes, investigators are piecing together the evidence to be tried during public hearings scheduled to begin on August 15.

With less than two months to the expiry of its term, the commission seems far from concluding its most important task – finding out who really won the 2007 presidential election. Matters are not helped by the fact that the Commission of Inquiry into the Post-Election Violence, also set up under the mediation process, appears to be stealing attention from the Kriegler team. CIPEV has got off to a cracking start with riveting tales at its public hearings.

The first phase of IREC public hearings were mooted to tease out possible witnesses for the grand hearings as the commission winds down. At the midpoint of the commission's life, it had held 26 public hearings across the country.

Low public enthusiasm was quickly replaced by polarized partisan presentations. Monitors sent to the hearings by members of the Kenyans for Peace with Truth and Justice coalition report that the sessions often degenerated into free-for-alls, and that there seemed to have been little control over them.

Particularly disturbing, however, were claims of attempts by some senior civil servants to have statements they had prepared representing certain party positions presented to the commission as spontaneous public views.

Although commission sources say they are aware of these attempts and are taking appropriate cautionary action, the summoning of so-called international experts to push unproven theories is still a cause for concern. Contrary to expectations that the commission would hear polarized views on the conduct of the 2007 elections, there is consensus from the public hearings in both Orange Democratic Movement strongholds and Party of National Unity ones that the exercise was less than stellar. The public hearings have achieved two things: One, there is a realization of the near unanimity in public opinion that the 2007 elections were not conducted

KRIEGLER COMMISSION Mid-term Review

properly, and that there is need to fix problems that the exercise exposed. Sec, the commission has closed ranks. The initial dichotomy produced by the two protagonists – PNU and ODM -- nominating its own set of commissioners appeared to have healed until experts came to the commission. The questioning appeared to pursue very partisan lines. The schisms have not disappeared even as the commissioners focus on the bigger duty of investigating crimes that may have been committed.

While there is no gainsaying the need to harness public views on the kind of electoral reforms the commission will ultimately recommend, the most pressing duty before the commissioners is to restore public confidence in the vote by conducting a forensic investigation to determine who won the election.

Although the commission is expected to point out weaknesses and inconsistencies in Kenya's electoral laws, assess the independence, capacity and functioning of the Electoral Commission, as well as examine the 2007 electoral environment, its most important duty is to investigate the vote counting and tallying to assess the integrity of the results.

The perceived lack of integrity of the presidential election results is at the heart of the crisis that gripped Kenya and resulted in the deaths of over 1,500 people, the displacement of over 300,000 others and the destruction of billions of shillings in property.

No single observer mission, local or international, that monitored the elections said the result was credible or a representation of the will of the people.

In setting up the commission, the negotiators had hoped to prove the legitimacy of their claim to power. That purpose will no longer be served by the findings of the Kriegler Commission as the two parties have settled into the coalition government.

The dispute over the 2007 election shook public confidence in the integrity of the ballot and the value of the vote so severely that restoring that confidence

in the elections system is at the core of IREC's tasks. Kenyans for Peace with Truth and Justice compiled an observers' log that details the shocking irregularities that attended the last 30 hours before the Electoral Commission of Kenya announced the presidential results. KPTJ's analysis revealed violations that occurred in at least 48 constituencies. A forensic analysis of the election results revealed irregularities between the parliamentary vote and the presidential one. The difference between the voter participation in the two elections -- over 300,000 votes -- is the highest ever and is sufficient to alter the outcome of the presidential election.

The reason that a recount or re tally was avoided was not because no one wanted to know the truth. Rather, it was because there were real fears that the votes might have been tampered with so extensively that a recount or retallying would not have proved anything. A forensic investigation should lay bare the trail of actions that took place from before the vote, to after, with a view to laying bare the truth.

The team of investigators hired to conduct a forensic audit of the elections has been at work for the past two months, but it does not have a leader. It relies on an international lawyer without the benefit of the Kenyan experience to direct its inquiries. Their task involves interviewing the silent witnesses in this sad affair – the documents – with a view to finding the people behind what happened.

When their work comes to light through the public hearings, there will still be concerns about witness safety and low public trust in the commission of inquiry system, given that past recommendations have not been implemented.

In spite of the powerful forces ranged against the search for the truth, the public need for it is overwhelming. This need must encourage all witnesses to come forward and the commission to be steadfast in ensuring that the full truth is known.



IREC TERMS OF REFERENCE

1. Analyse the constitution and legal framework within which the 2007 elections were conducted and point out weaknesses and inconsistencies in the electoral laws.
2. Examine the Electoral Commission of Kenya to assess its independence, capacity and function during the 2007 elections.
3. Examine the electoral environment in 2007 together with the role and conduct of political parties, the media, civil society and observers and how they affected public participation in the elections.
4. Investigate how the 2007 election was organized and conducted.
5. Investigate the vote counting and tallying for the entire election with special attention to the presidential poll to assess the integrity of the results.
6. Assess the functional efficiency of the ECK and its capacity to discharge its mandate.
7. Propose electoral reforms and accountability mechanisms for ECK commissioners and staff to improve future electoral processes.

LET SLEEPING DOGS LIE: Should the Kriegler Commission find that Kibaki lost the election, he would have to resign; likewise for Raila. Both scenarios do not support a peaceful and stable Kenya

FEW PEOPLE DISPUTE THE FACT THAT THE Electoral Commission of Kenya delivered highly credible civic and parliamentary elections in 2007. Only the results of the presidential election are in dispute.

ECK chairman Samuel Kivuitu (pictured) has been unfairly turned into a scapegoat for the violence that rocked Kenya following his announcement that Mr Mwai Kibaki had been re-elected President. Whether that dispute over Mr Kibaki's re-election is genuine or just political brinkmanship is now a moot point after the compromise deal that allowed the three top contenders for the presidency to share power. After the needless loss of lives, the displacement of hundreds of thousands of people and the indefensible destruction of property following the 2007 elections, Kenya needs a break from the negative politics of victory and defeat.

It needs to put its traumatic history behind it and to forge ahead -- because nothing can be gained from dredging up painful memories and reopening wounds well on their way to healing. Revisiting the results of the presidential election would, in this regard, do more harm than good.

The dispute around the 2007 election results has caused many Kenyans to vow never to vote again if the exercise of their democratic right spawns such death, displacement and destruction. No electoral victory is worth a life, none justification for the loss of home, and none sufficient reason for the destruction of livelihoods and life savings.

Those who disputed the presidential election result have since passed up every legitimate opportunity to pursue their grievances in a civil manner. It cannot be that the Independent Review Commission was set up to humour them by making a finding outside the established legal process. They are not above the law and must not be treated as such.

From the mediation process and subsequent dialogue, it has emerged that what was at issue in Kenya was not the dispute over the presidential election results. The election was merely an excuse for people to vent pent-up anger. Security intelligence services and human rights groups concur that whatever the outcome of the election, the sad events that put a blot on Kenya's history early this year would still have occurred.

That reality should give pause to those agitating for the pursuit of so-called electoral truth and turning the Electoral Commission of Kenya into a sacrificial lamb for the failings of citizens in their various roles -- from

the political parties to the media and civil society.

Kenya should be focused on defining the roles political parties, civil society, the media and individual politicians should be allowed to play in future so that the events of December 2007 and the crisis that followed do not ever recur.

The reckless pursuit of the so-called electoral truth has the potential to scatter the fragile peace that has been secured from the mediation process. No finding by IREC -- whether in favour of Mwai Kibaki nor of Raila Odinga -- will serve this country. Instead, it will force questions about the legitimacy of the Grand Coalition

government and could provoke another wave of unrest. It is a lose-lose situation for Raila, Kibaki and the Kenyan people. Under the circumstances, Kenyans are better off not knowing the truth. What you do not know will not hurt them.

With the passions that characterized the dispute over the presidential election now calmed, there is no compelling need to rouse that demon again. Rather than condemnation and calumny, ECK deserves empathy and commendation for inspiring unprecedented voter turnout and managing a sensitive election in a highly charged atmosphere of hate campaigns and polarizing rhetoric. It needs to be strengthened through legal and constitution reforms. Setting up a commission to investigate the election was a face-saving exit for both parties. It was also an admission that the truth was impossible to find and could not do anyone good.

With IREC firmly focusing on the future, it can create a spanking new system with all the things Kenyans have always wanted in their electoral system. **;**

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TRUTH WILL SET US FREE: Kriegler's most important job is to establish who won the 2007 election to restore the integrity of the ballot and ensure the right to vote is never taken for granted again

JOSTLING FOR the 2012 elections is already in high gear a mere seven months after Kenya's most hotly disputed election. It only goes to prove that political leaders are not too keen on holistic reforms and would not be averse to employing the flawed systems in place to their advantage if they favoured them. Yet, those who were bereaved, displaced or lost property because of the dispute over the 2007 elections deserve to find closure over the disruptions introduced into their lives. Some good must come out of the hurt and injury Kenyans endured, and that can only happen if the truth about what happened to their

election is laid bare.

It is no longer in dispute that the 2007 elections were poorly managed – if not deliberately and criminally so. The public hearings by the Independent Review Commission so far bear this out. There is a consensus across party lines that the 2007 elections were an unmitigated fiasco and the Electoral Commission of Kenya was culpable for many of the shortcomings in that exercise.

KPTJ members have outlined a pattern of offences and violations that were committed by commissioners and staff before the announcement of the presidential vote result. Expert forensic analysis shows statistical differences between presidential and parliamentary vote counts that are difficult to rationalise. Looked at in totality, the elections fiasco is such a convoluted and confusing issue that it must be brought to light to restore public confidence in the electoral process. Few believe that the ECK was independent, and even fewer that it acted impartially. Of all the missions that monitored and observed the

elections, not a single one – local or foreign – found a shred of credibility or integrity in the final presidential result released by the ECK. Little wonder that there was an explosion of violence of such a scale and magnitude that Kenya teetered on the brink of civil war.

The nation must seek the truth about what happened with regard to the elections for several reasons.

The first and most important is that public confidence in the ballot has been severely shaken. Even if there is an agreement that the result should have no consequence on the way Kenya is governed until the next election, the people need to know what happened to their vote. They need to know if it was wrongly or correctly counted, they need to know if the totals were presented factually or fictionalised. And they need to know that their power to choose their leaders and to send them out of office is still supreme. Whatever is found – whether Mr Mwai Kibaki was rightfully sworn in as President or not – it will underscore the need to have credible institutions arbitrating in political contests.

The truth-seeking process with regard to the election is doubly important because it will be a precursor to the dicier Truth, Justice and Reconciliation Commission. If the country buries its head in the sand for fear of what will happen should the truth about the elections be known, Kenya would have lost an opportunity to launch the TJRC process and lay to rest the numerous claims about human rights abuses and historical injustices that fed the conflicts of early 2008.

Finding the truth about the elections will also expose those individuals and public officials who acted illegally or broke the law, for there is overwhelming evidence of it. Public demands for the ECK commissioners to leave office have been met with stonewalling, excuses and statements that seem calculated to excuse their culpability in the mismanagement of the elections and its attendant consequences.

The culture of impunity that has attended every election must end and confidence in the people's right to vote restored. For every offence that is exposed through the Kriegler Commission, there must be commensurate punishment.

IREC's most important task is not to create a new electoral system. It is to find electoral truth. It is that truth that must be the foundation upon which a new electoral system for Kenya is constructed. If the reforms are built on lies and self-deceit, they shall be as a house whose foundation is on quicksand. **;**



OPPORTUNITIES: An overhaul of the electoral system in Kenya is long overdue and the Krieglert Commission presents a unique historical moment for the country to take the plunge

THE DISPUTE OVER THE 2007 ELECTION triggered misunderstanding and conflicts at the social, political and personal level. The grievances that characterized that election must be given vent as a first step towards finding closure.

Besides delivering electoral truth and justice, the IREC can settle the outstanding contests about the kind of voting system Kenya needs.

Numerous proposals to strengthen the constitutional, legal and institutional system remain unimplemented. The few that have made it onto the statute books or put into use have not been sufficient to secure the ballot.

In the dying minutes of the Ninth Parliament, for example, a last ditch effort to snatch concessions on appointing an independent Electoral Commission of Kenya, increasing the number of parliamentary constituencies, establishing special seats for women and creating a 50 per cent threshold for the election of a President failed.

It is widely acknowledged that since Kenya reverted to multiparty politics in 1991, the electoral playing field has not been even. Many piecemeal electoral reforms have progressively improved political competition, but they have not satisfied public and opposition desire for a clean and even electoral contest.

An overhaul of the ECK has been pending since the Inter-Parties Parliamentary Group reforms 11 years ago. The opportunity to dismantle the ECK and in its place create a new independent organ – staffed by a professional secretariat and headed by fewer commissioners – has presented itself. As Kenya prepares for the

next election, it has the time and space to avoid the glaring injustices that have defined polling this far. The preparations for that vote must include reviewing constituency boundaries, registration that nets the majority of the population



qualified to vote and the passage of laws that enable efficient and effective management of elections. Kenya's ambition to establish a working democracy is reflected in the numerous documents on electoral reform authored over time – from the draft constitution published in 2002 by Prof Yash Pal Ghai to the document produced by the review process at the Bomas of Kenya to the Draft Constitution that was rejected in the 2005 referendum.

The experience of the 2007 elections has underscored the importance of safeguarding the integrity of the ballot and securing public confidence in the democratic process. Certain key areas have been neglected – such as civic elections – yet they are the basic units of representation. The fact that they have failed might explain why the presidency holds such a high premium in the psychology of voters.

The commission can, through its recommendations, draw a line in the sand on impunity and disregard for the law with respect to elections. It can punish wrongdoing and deliver justice for those who put their faith in the electoral system but received only disappointment. The opportunity beckons for Kenya to establish an electoral system that can run a credible democratic contest and resolve disputes to the satisfaction of all concerned parties.

Although many Kenyans' faith in the ballot was shaken by the events following the 2007 election (pictured), the flaws in the electoral process were already beginning to generate their own share of voter apathy and disinterest in public affairs. A review provides an opportunity to restore confidence in the vote and underline the importance of civic participation.

In the past, electoral laws have been flouted with impunity, with the agencies charged with enforcement pleading powerlessness. This commission represents the opportunity to send a powerful message to those that flout electoral law that crime in any form attracts punishment.

KRIEGLER COMMISSION Mid-term Review

OBSTACLES: Powerful forces are ranged against electoral truth and reform, starting from the fact that the appointing authority is a likely key subject of the current investigation



PUBLIC SKEPTICISM AND CYNICISM ARISING out of the failure to implement reports by previous commissions of inquiry has forced IREC to start its work from a point of disadvantage. The commission's first days were low-energy, low profile affairs that attracted presentations of a general and sometimes unhelpful nature. Few incentives exist to compel witnesses to come forward to testify about what they did and saw during the 2007 elections. IREC's inability to guarantee physical and job security for witnesses at risk does not help matters.

The commission will rely, therefore, in large part on deep-seated political rivalries to motivate various actors to present the strongest case, so the commissioners can arbitrate on the truth. Damning testimony can only be generated if there is a prize for the side that emerges as being more sinned against than sinning, as well as retribution for offenders. IREC, too, has a very broad mandate, to be delivered in a short time. It must fix the electoral system while conducting a forensic investigation into the 2007 election, with all the claims of forged documents, possible criminal acts as well as misconduct and abuse of office allegations. The logistical difficulties that IREC has faced in its first months of work leave it with less than a month to listen to testimony and write a report. Public hearings do, however, present the difficulty of giving people who are adversely mentioned an opportunity to respond or defend themselves, which stretches the time needed for examination and cross-examination.

While the possibility of extending the commission's mandate appears enticing, the presence of a high number of international experts with time-bound commitments outside the country makes that moot. Commission secretary Jorgen Elklit returns to his teaching job in Denmark in September as does

Commissioner Horacio Bonee of Argentina. Vice chairperson Judge Imani Aboud is expected back on court duty in Tanzania while Judge Kriegler has work waiting for him in South Africa.

The pressure on time only compounds the lukewarm commitment of the parties that set up the commission to get to the bottom of the 2007 elections fiasco. The strange bedfellows in the three-month old Grand Coalition government appear to be getting comfortable with one another and could have a mind to survive the union until 2012. There appears to be little desire to know the truth about the election, especially as evidence continues to emerge that neither the Party of National Unity nor the Orange Democratic Movement will emerge the saint. It is not unexpected that the parties could whip up public fears about the possible recurrence of violence if the electoral truth is exposed.

The lead actor in the 2007 polls drama, the Electoral Commission of Kenya, has been working round the clock to evade blame. Initial internal ECK reports point to an institutional keenness to protect positions than reform the system and learn from past mistakes. So far, the commission has maintained that its commissioners and staff were blameless and could go to great lengths to conceal evidence to the contrary.

Yet, the greatest obstacle to the success of the commission is, potentially, its appointing authority. Set up by presidential fiat under the Commissions of inquiry Act, 1962, IREC can make recommendations with little assurance that they will be implemented. The systematic weakening of the mediation process (see *T&J Digest* Vol 1), under which the Panel of Eminent African Personalities shares responsibility for IREC, will only cast a further pall of doubt over follow-through on the commission's recommendations. And there is always the possibility that recommendations could be challenged in court.

Next Issue -- August 2008

FLASHPOINT: Government attempts to downgrade the issue of internally displaced persons are not succeeding as its complexities continue to emerge



OFFICIAL ENTHUSIASM TO CLOSE CAMPS that held internally displaced persons has been fever pitch since the formation of the Grand Coalition government. The return of some 300,000 IDPs displaced from their homes following the dispute over the 2007 elections under 'Operation Rudi Nyumbani' (return home) has been executed in spite of complaints from the affected as well as human rights groups. Although the Government claims that all but some 40,000 people have returned to their homes, the UN Office for Humanitarian Assistance says that in fact 75,000 people are still in the camps. Further, some 95,000 of those that have returned home have not been resettled but are instead in transit camps where there is no assistance. The hurried resettlement of IDPs has been complicated by residual grudges over the arrest of suspected perpetrators of violence in the period after the elections.

Official statistics attempt to play down the IDP numbers but in February, it was estimated that some 600,000 people had been forced out of their homes, work places and investment destinations. The United Nations and Kenyan civil society organisations estimate

that this number joined another 380,000 people who had remained internally displaced since the clashes of 1990 and 1997.

The IDPs issue is intractable and goes back many years. It also has many dimensions as those affected are in their situation as result of many causes, among them politically instigated ethnic violence, conflicts over land-based resources as well as insecurity and impunity arising from the operations of private militias and state security agents.

Natural disasters such as famine, drought and floods have contributed their share to the IDPs numbers, as have spontaneous evictions because of development-induced programmes such as environmental conservation, mining and construction of public facilities. Others are displacement occasioned by haphazard resettlement and relocation programmes. Wherever IDPs go, they are pursued by human rights violations that sometimes target special interests groups such as women, single parents, children, orphans, the injured, persons with disability, the elderly, persons living with HIV/ Aids, minorities, traders, farmers, and pastoralists among others. The next issue of *T&J Digest* examines this issue in depth.

TRUTH & JUSTICE DIGEST. A publication of the **KENYANS FOR PEACE WITH TRUTH & JUSTICE (KPTJ)** a coalition of citizens and organizations working in the human rights, governance and legal areas that came together after the crisis over the disputed results of the 2007 presidential election and the violence that followed it. Members include: Centre for the Development of Marginalised Communities (CEDMAC), Centre for Law and Research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The Cradle-the Children's Foundation, Constitution and Reform Education Consortium (CRECO), East African Law Society (EALS), Fahamu, Foster National Cohesion (FONACON), Gay And Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unit (IMLU), Innovative Lawyering, Institute for Education in Democracy (IED), International Commission of Jurists (ICJ-Kenya), International Centre for Policy and Conflict, Kenya Human Rights Commission (KHRC), Kenya Leadership Institute (KLI), Kenya National Commission on Human Rights (KNCHR), Kituo cha Sheria, Law Society of Kenya (LSK), Mazingira Institute, MARS Group Kenya, Muslim Human Rights Forum, The National Civil Society Congress, National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The 4 Cs, Urgent Action Fund (UAF)-Africa, Youth Agenda.

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